EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-038-21

(UNFAIR LABOR PRACTICE)

OREGON STATE POLICE OFFICERS ASSOCIATION, Complainant, v. STATE OF OREGON, DEPARTMENT OF STATE POLICE, Respondent.	)	FINDINGS AND ORDER FOR REPESENTATION COSTS

On October 22, 2021, this Board issued an order holding that the State of Oregon, Department of State Police (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. The appeal period under ORS 183.482 has run without either party filing an appeal. Consequently, this Board now issues this order for representation costs. OAR 115-035-0055(2)(a).

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

1. The State is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1)(a). The prevailing party is "the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(d).

2. This case required one day of hearing, which was held on October 6, 2021.

3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case that requires one day of hearing (which need not last a full day) is $3,000. OAR 115-035-0055(1)(b)(C).

ORDER

The Oregon State Police Officers Association shall remit $3,000 to the State within 30 days of the date of this order.

DATED: January 3, 2022.

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. RC-012-21

(REPRESENTATION)

TEAMSTERS LOCAL 670, Petitioner,	)	
v.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE
CITY OF UMATILLA, Respondent.	)	

On November 12, 2021, Teamsters Local 670 (Teamsters) 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 regular and part-time employees of the City of Umatilla (City), excluding police, supervisors, managers, and confidential employees. Upon review of the City's furnished list of employees in the proposed bargaining unit, ERB determined that Teamsters did not have a sufficient showing of interest to support the petition.

On November 23, 2021, Teamsters was apprised of ERB's determination that the showing of interest was insufficient. On November 30, 2021, Teamsters filed an amended petition to certify a new bargaining unit of all regular and part-time employees currently employed by the City, excluding police, city hall, the library, supervisors, managers, department heads, and confidential employees. This description effectively sought to represent all regular and part-time employees in the City's Public Works Department, excluding supervisors, managers, department heads, and confidential employees. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating Teamsters as the exclusive representative of the proposed bargaining unit.

On December 3, 2021, the Board's Election Coordinator caused a notice of the amended 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 December 22, 2021).

On December 22, 2021, the City filed objections. The City agreed that an appropriate bargaining unit would be comprised of "non exempt workers in the Public Works Department." However, the City stated that the petition included two positions outside of the Public Works Department—specifically, office clerks in the Finance & Administrative Services Department who perform work at the golf course and marina/RV park. The City also asserted that two employees who may have signed authorization cards were no longer employed with the City, and therefore the showing of interest to support the petition may not be sufficient.

Based on the objections to the appropriateness of the petitioned-for unit, the case was transferred to Administrative Law Judge B. Carlton Grew to conduct a hearing.[1] Subsequently, the Petitioner agreed to exclude the disputed office clerk positions and to modify the proposed bargaining unit to the description agreed to by the City. Therefore, there is no outstanding objection to the petition, as modified. The showing of interest has been investigated and is sufficient to certify the agreed-on bargaining unit.[2]

ORDER

Accordingly, it is certified that Teamsters Local 670 is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> All regular and part-time employees in the City of Umatilla Public Works Department, excluding supervisors, managers, department heads, and confidential employees.[3]

DATED: January 5, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

This Order may be appealed pursuant to ORS 183.482.

[1]A hearing would not be warranted based on the objection regarding the sufficiency of the showing of interest. The showing of interest is treated confidentially and is not furnished to the non-filing party. OAR 115-025-0021(6)(a). Therefore, any objection based on who may or may not have signed authorization cards is speculative. Additionally, the sufficiency of the showing of interest "is an administrative matter not subject to attack." OAR 115-025-0051(1).

[2]The showing is sufficient even accepting the City's representation that two particular employees are no longer employed with the City.

[3]As set forth above, this description excludes office clerks in the Finance & Administrative Services Department who perform work related to the golf course and marina/RV park.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-036-17

(UNFAIR LABOR PRACTICE)

PORTLAND FIRE FIGHTERS' ASSOCIATION, LOCAL 43, IAFF,	)	
Complainant,	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS
v.	)	
CITY OF PORTLAND,	)	
Respondent.	)	

On October 27, 2021, this Board issued an order holding that the City of Portland (City) violated its duty to bargain in good faith under ORS 243.672(1)(e) by refusing to bargain over the impacts of the elimination of the Dive Team. 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. Portland Fire Fighters' Association, Local 43, IAFF (Association) is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1)(a). The prevailing party is "the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(d).

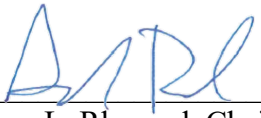
2. This case required one day of hearing, which occurred on April 15, 2021.

3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case that requires one day of hearing (which need not last a full day) is $3,000. OAR 115-035-0055(1)(b)(C).

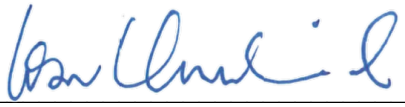
ORDER

The City shall remit $3,000 to the Association within 30 days of the date of this order.

DATED: January 5, 2022.



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-018-21

(AMENDMENT OF RECOGNITION)

CITY OF DALLAS PROFESSIONAL PARAMEDICS AND FIREFIGHTERS, IAFF LOCAL 5359, Petitioner, v. CITY OF DALLAS, and POLK COUNTY PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF LOCAL 4196, Respondents.	)	ORDER AMENDING RECOGNITION OF EXCLUSIVE BARGAINING REPRESENTATIVE

On December 16, 2021, City of Dallas Professional Paramedics and Firefighters, IAFF Local 5359 (IAFF 5359) filed a petition under OAR 115-025-0050(11) to amend the recognition of the exclusive representative of Polk County Professional Firefighters Association, IAFF Local 4196 (IAFF 4196) at City of Dallas (City). Specifically, the petition requested that the recognition be amended to reflect a name/affiliation change to City of Dallas Professional Paramedics and Firefighters, IAFF Local 5359.

With its petition, IAFF 5359 established that the 15 represented employees in the Paramedic Unit and the FF/EMT Unit at the City have been assigned a new name and local number by the IAFF: City of Dallas Professional Paramedics and Firefighters Local 5359. Local 5359 will be the recognized exclusive representative under the existing collective bargaining agreement (CBA) with the City. A memorandum of understanding has been signed with the City reflecting the name change in the CBA. All then IAFF 4196 members signed membership cards to reflect support for the name/affiliation change from IAFF 4196 to IAFF 5359.

On December 21, 2021, the Board's Election Coordinator provided the City with the petition and caused a notice of petition for amendment of recognition to be posted. That posting provided that IAFF 5359 would be recognized as exclusive bargaining representative for the Paramedic Unit and FF/EMT Unit, as defined by the parties' current collective bargaining agreement. Pursuant to the terms of the notice posting, objections to the petition were due by January 11, 2022. No objections were filed.

We conclude that the name/affiliation change was conducted in compliance with at least minimal due process requirements and that a majority of affected bargaining unit employees supported the name/affiliation change to IAFF 5359. *See* OAR 115-025-0050(11).

ORDER

The petition is granted and Polk County Professional Firefighters Association, IAFF Local 4196's recognition is amended to reflect, for the Paramedic Unit and FF/EMT unit, the name/affiliation change to City of Dallas Professional Paramedics and Firefighters, IAFF Local 5359.

DATED: January 12, 2022.

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-008-21

(UNIT CLARIFICATION)

OHSU POLICE ASSOCIATION, Petitioner, v. OREGON HEALTH & SCIENCE UNIVERSITY (OHSU), Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Daryl S. Garrettson, Attorney at Law, Fenrich & Gallagher, P.C., Lafayette, Oregon, represented the Petitioner.

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

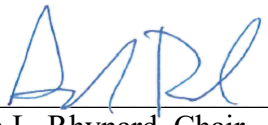
On December 28, 2021, Administrative Law Judge Martin Kehoe issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in 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.

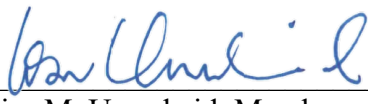
ORDER

The petition is dismissed.

DATED: January 18, 2022.



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-008-21

(UNIT CLARIFICATION PETITION)

OHSU POLICE ASSOCIATION, Petitioner, v. OREGON HEALTH AND SCIENCE UNIVERISTY, Respondent.	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on July 27, 2021. The record closed on September 17, 2021, upon receipt of the parties' post-hearing briefs.

Daryl S. Garrettson, Attorney at Law, Fenrich & Gallagher, P.C., Lafayette, Oregon, represented the Petitioner, the OHSU Police Association.

Adam Collier, Attorney at Law, CDR Labor Law, Portland, Oregon, represented the Respondent, Oregon Health & Science University.

On April 29, 2021, the Petitioner, the OHSU Police Association (Association), filed a unit clarification petition with the Employment Relations Board (Board) under ORS 243.682(2) and OAR 115-025-0050(4). The petition seeks to add all the unrepresented Sergeants employed by the Respondent, Oregon Health and Science University (OHSU), in OHSU's Department of Public Safety (Department) to the Association's existing bargaining unit of Police Officers. The petition was supported by a sufficient showing of interest. On May 19, 2021, OHSU filed timely objections. The issue in this case is whether the petitioned-for Sergeants are "supervisory employees" as defined by ORS 243.650(23)(a). As set forth below, we conclude that the Sergeants are "supervisory employees" and thus cannot be added to the Association's unit. Therefore, we dismiss the petition.

RULINGS

All rulings by the ALJ were reviewed and are correct.

FINDINGS OF FACT

Background

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

2. OHSU has two campuses in Portland, Oregon. OHSU's main campus is the Marquam Hill campus. The other, smaller campus is the South Waterfront campus. The two campuses are connected by a tram.

3. The Department is OHSU's law enforcement agency, and is also known as OHSU Police and University Police. (Exh. R-2 at 1, Exh. R-5 at 1.)[1]. It is responsible for both of OHSU's campuses and is always in operation. It currently has about 40 or more employees, including 6 Sergeants, 19 (sworn) Police Officers, and 2 (non-sworn) Community Service Officers. (9:12-9:14 a.m., 9:22-9:23 a.m., Exh. R-10.)

4. The Association is a "labor organization" within the meaning of ORS 243.650(13).

5. Since 2014 or 2015, the Association has been "the sole and exclusive bargaining agent for all regular part-time and full-time employees in the classification of Police Officer within the Department of Public Safety, specifically excluding supervisors, managerial employees and confidential employees." (9:26-9:27 a.m., Exh. R-1 at 4.) The Association's bargaining unit has always excluded Sergeants.

6. OHSU and the Association are parties to a collective bargaining agreement (CBA) that runs from July 1, 2021 to June 30, 2024. (Exh. R-1 at 1.) The Sergeants work under separate annual contracts with OHSU. (1:40-1:40 p.m.)

7. The American Federation of State, County and Municipal Employees (AFSCME) represents a bargaining unit that includes most of OHSU's other employees. (9:27 a.m.)

8. The Department follows a traditional chain of command. The head of the Department is Director of Public Safety Heath Kula. The Director of Public Safety is also known as the Chief of Police or the Chief Executive Officer. (10:29 p.m., Exh. R-8 at 7.) Administrative Lieutenant Maury Mudrick, Operations Lieutenant Sam Habibi, and Training Lieutenant Tom Forsyth report directly to Director Kula.

9. Five Operations Sergeants report directly to Operations Lieutenant Habibi: Kelly VanBlokland, Mychal Gresham, Zachary Gaylor, Jennifer Sullivan, and Troy Grundmeyer. (Exh. R-10.) Sergeants VanBlokland, Gresham, Gaylor, and Grundmeyer directly oversee a shift and

[1]All of OHSU's exhibits were admitted without objection. The Association did not submit any exhibits of its own. (9:07-9:08 a.m.)

each has a "team" of four or five Police Officers specifically assigned to him or her. Sergeants Gaylor and Grundmeyer also have a Community Service Officer assigned to each of their teams. (9:17-9:19 a.m., 12:54 p.m., 1:44 p.m., Exh. R-10.)

10. Sergeant Sullivan used to be in charge of a shift and have Police Officers and, on certain days, a Community Service Officer assigned to her. However, Sullivan's shift was taken over by Sergeant Grundmeyer, and currently Sullivan has no subordinates. (9:16-9:17 a.m., 9:22-9:23 a.m., 12:08-12:10 p.m., 1:29 p.m., 1:43 p.m., 2:11 p.m.) As of the hearing, Sullivan assists the other Sergeants as needed, and assists Lieutenants with investigations by assigning investigations to Police Officers and then overseeing those investigations. (12:09-12:11 p.m., 1:28-1:29 p.m., 1:42 p.m.) Sullivan is also in charge of the Department's property room, which generally involves administrative or ministerial tasks. (9:20 a.m., 9:25 p.m., 12:09-12:10 p.m.) When needed, Sergeant Sullivan can temporarily oversee other Sergeants' subordinates. (9:19-9:20 a.m.)

11. As of the hearing, a sixth Sergeant, Operations Sergeant Stephen Buchtel, reported directly to Director Kula and also had no subordinates. However, Sergeant Buchtel was expected to retire the week of the hearing, and there were no plans to replace him at that time. (9:16 a.m., 12:46 p.m., Exh. R-10.) As of the hearing, Buchtel was in charge of the Department's fleet and vehicle maintenance, conducted background checks for OHSU (including for the hiring of positions outside of the Department), and performed other administrative and clerical tasks as assigned. (9:23-9:24 a.m., 12:07-12:08 p.m.)

12. The order of command authority in the absence or unavailability of the Director, in descending order, is Operations Lieutenant, then Training Lieutenant, then Administration Lieutenant, then Sergeant. (10:33 a.m., Exh. R-3 at 29.)

13. The Department also employs 10 Campus Dispatchers who work in the Department's Dispatch Center (Dispatch), which operates 24 hours a day, 7 days a week. They are represented by AFSCME and do not report to Sergeants. (9:13 a.m., 9:35 a.m., Exh. R-10.)

14. The Department closely follows a detailed Policy Manual. (10:25-10:26 p.m., 2:47-2:48 p.m., Exh. R-3.) Within that Policy Manual, whenever the term "supervisor" is used, it can refer to a Sergeant. (10:26-10:27 a.m.) The definitions section of the Policy Manual also provides, in part, "When there is only one department member on-duty, that person may also be the supervisor, except when circumstances reasonably require the notification or involvement of the member's off-duty supervisor or an on-call supervisor." (Exh. R-3 at 12-13.)

15. Policy 102.1 defines a "First Level Supervisor" as:

> "Occupying a position between the operational level and the middle manager position who is primarily responsible for the direct supervision of subordinates. A first level supervisor position does not include a position with limited or acting supervisory responsibilities. Sergeants are considered First Level Supervisors."

(3:01 p.m., Exh. R-13 at 16.)

Within the Policy Manual, the term "middle manager" refers to a Lieutenant. (10:29 p.m.)

16. When someone becomes a Sergeant, that person must attend 80 hours of supervisory training at either (1) the Oregon Department of Public Safety Standards and Training's (DPSST's) police academy or (2) the regional sergeants academy that occurs in the Portland metro area. In addition, every year, the Department conducts a one-day "supervisory in-service" training. (10:12-10:13 a.m., 2:53 p.m.) Policy 102.3 provides, in part, "First Level Supervisors are required to attend the DPSST Supervisors School, or its equivalent, within one year of appointment or as required by DPSST." (Exh. R-3 at 16.) It also provides, "In addition to basic certification, First Level Supervisors * * * are expected to meet the qualifications for supervisory * * * level certification * * * within five years of each appointment or as required by DPSST." (Exh. R-3 at 16.)

17. On April 12, 2021 Lieutenant Habibi sent an email to the Sergeants (except for Sergeant Buchtel). The email's subject line is "Operation Changes." (9:58-10:01 a.m., Exh. R-4.) The email states, in relevant part,

> "Now that we are fully staffed, I am going to take a step back and have you be in charge of daily operations. My expectations are that you work closely together, to help each other and communicate effectively with one another. I expect you to make decisions on things that normally you would defer to me. At the same time, I will also be pushing things down to you to handle/resolve."

(Exh. R-4.)

The email subsequently states, "I am very excited to watch your leadership grow in the department and I am here to support you. I will still be available to answer questions and provide guidance if needed." (Exh. R-4.)

18. Lieutenant Habibi sent the foregoing email before the Association filed its April 29, 2021 unit clarification petition. When Habibi sent the email, he was unaware that the Sergeants had been speaking with the Association about petitioning for inclusion in its bargaining unit. (9:59 a.m., 12:20-12:23 p.m., 3:02 p.m.)

Scheduling

19. The Operations Lieutenant initially determines how many Police Officers are assigned to each shift and determines the start and stop times for the shifts. (3:04 p.m.) Typically, Police Officers work one of the Department's two 12-hour shifts (day or night) and are assigned to one of two teams affiliated with each of those shifts (for a total of four teams). (9:17 a.m., 3:05 p.m.) Police Officers' basic schedules have not changed during the COVID-19 pandemic. Further, unlike their superiors, Police Officers never work from home. (9:22 a.m.)

20. The day shift runs from 6 a.m. to 6 p.m., while the night shift runs from 6 p.m. to 6 a.m. (9:17 a.m.) For the day shift, one team works every Sunday, Monday, and Tuesday, and every other Wednesday. The other day shift team works every Thursday, Friday, and Saturday, and every other Wednesday. One night shift team works every Sunday, Monday, and Tuesday, and every other Saturday. The other night shift team works every Wednesday, Thursday, and Friday, and every other Saturday. (9:18 a.m.)

21. Each of the Sergeants who oversees a shift works the same hours as the Police Officers assigned to them. (9:19 a.m.) Despite a Sergeant being assigned to every shift, "[t]he Department is routinely required to operate without a [S]ergeant on duty." (Exh. R-3 at 32.) Sergeant Sullivan (who, as noted, has no subordinates) generally works day shift hours every Wednesday through Friday and every other Saturday. (9:19-9:20 a.m.)

22. The three Lieutenants currently work every Monday through Friday during the day shift. (9:21 a.m., 10:33 a.m.) Due to the COVID-19 pandemic, the Lieutenants currently primarily work from home, and work in person just once or twice a week. (9:21-9:22 a.m., 12:41 p.m., 1:55 p.m.) Before the pandemic, the Lieutenants worked 10-hour days, Monday through Thursday, in person. (9:21-9:22 a.m.)

23. Director Kula officially works during day shift hours, Monday through Friday. However, in practice, he works almost every day. Due to the COVID-19 pandemic, Kula currently works from home on occasion. (9:20 a.m., 9:22 a.m.)

24. Pursuant to the CBA, each year, Police Officers "bid for the following year's schedule based on seniority." (12:14-12:15 p.m., 1:35 p.m., 2:56 p.m., 3:04 p.m., Exh. R-1 at 14.) Subsequently, Police Officers "may trade regularly scheduled shifts within the same pay period with the consent of their [Sergeant], provided that no overtime or premium pay will result from the trade." (11:14 a.m., Exh. R-1 at 16.)

25. Sergeant Gaylor is generally in charge of the Department's annual scheduling. (9:24-9:25 a.m., 2:41 p.m., 2:56 p.m.) Among other things, Gaylor ensures that all the Department's shifts are covered. (2:56 p.m.) Gaylor also approves or denies annual vacation requests. When deciding whether to approve or deny an annual vacation request, Gaylor uses a seniority list and considers the Department's minimum staffing levels (which are addressed below). (2:56-2:57 p.m.)

26. Police Officers and Community Service Officers submit their other time off requests to their Sergeants, and subsequently those Sergeants either approve/grant or deny those requests. (10:11 a.m., 1:35 p.m., 2:16 p.m., 2:41 p.m.) When deciding whether to approve or deny a time off request, Sergeants consider whether minimum staffing levels would be met, the "timeliness of the request," whether a "special event" is occurring, and other factors. (Exh. R-3 at 387.) However, sergeants can approve a time off request even if granting the request would put the Department below minimum staffing, and may choose to offer other subordinates overtime work to offset an approved absence (as detailed below). Sergeants can also deny a request if staffing would be above the minimums despite the requested absence (*e.g.*, if the Sergeant knew of a significant planned event such as a protest), though that is not the norm. Furthermore,

Sergeants normally do not need to get a Lieutenant's approval when approving or denying a time off request. (10:11-10:12 a.m., 11:13-11:14 a.m., 1:35-1:36 p.m., 1:45-1:47 p.m., 2:42 p.m.) Nevertheless, a Lieutenant may issue a directive banning the use of vacation time during a particular period, the CBA and applicable letters of agreement must always be followed, and Sergeants "shall not authorize time off requests if the employee does not have enough time on the books to honor the request." (1:56-1:57 p.m., Exh. R-3 at 387.)

27. If needed, an "Acting Sergeant" can approve or deny a time off request as well. (1:56 p.m.) As explained below, an Acting Sergeant is a Police Officer that has been selected to temporarily replace a Sergeant while the Sergeant is off duty.

28. Sergeants can make their subordinates work overtime when the Department is not meeting its minimum staffing levels, and/or when a Sergeant has decided that additional help is needed (regardless of minimum staffing levels). When that happens, a Sergeant can choose to seek out volunteers, hold someone over beyond the end of a shift, or call someone in to work early. The Sergeant does not need permission from a Lieutenant or the Director to mandate overtime. (9:38-9:39 a.m., 10:07 a.m., 10:37 a.m., 12:43-12:44 p.m., 1:46 p.m., 2:17 p.m., 2:58 p.m.) When a Sergeant holds a subordinate over beyond the end of his or her normal shift, the Sergeant will select a person in accordance with the CBA, a seniority list, and the Sergeant's discretion. (1:34-1:35 p.m., 2:58 p.m., 3:05 p.m., Exh. R-3 at 387.)

29. Alternatively, a Police Officer can ask a Sergeant for authorization or permission to work beyond the end of a shift, and subsequently the Sergeant can either approve or deny that overtime request. (10:07 a.m., 11:14 a.m., 1:44-1:45 p.m., 2:16-2:17 p.m., 2:57-2:58 p.m.) A Police Officer cannot work beyond the end of a shift without getting a Sergeant's permission first. (10:07 a.m., 2:57 p.m.) That said, according to policy, certain types of reports (*e.g.*, arrest or use of force reports) generally need to be completed before a Police Officer leaves work, while other types of reports can be completed during the Police Officer's next shift. (2:57-2:58 p.m., 3:05 p.m.)

30. An Acting Sergeant can also grant or deny an overtime request or call someone in for overtime work (*e.g.*, if the Department is short of its minimum staffing levels) without a superior's approval. However, Acting Sergeants generally ask for guidance or assistance from a Lieutenant when considering overtime. (12:47-12:49 p.m., 1:56 p.m.)

31. Article 9.2 provides, in part, that Police Officers are "compensated at the rate of one and one-half (1½) times their regular rate of pay for overtime worked." (Exh. R-1 at 20.)

32. Article 9.4.1 of the CBA, titled "Voluntary Overtime," provides,

> "Where the overtime is not directly related to activities begun by an officer during the officer's regular shift, overtime opportunities will be offered in order of seniority. The Employer shall provide and post a seniority list providing the opportunity for officers to indicate their willingness to work overtime. The list will span the pay period and at least two pay periods will be posted. Once each eligible officer has had the opportunity to work shift overtime in a pay period, officers may once again use their seniority to work shift overtime as described above, and the

seniority list shall rotate in the same fashion thereafter for the balance of the pay period. This section does not apply to overtime with less than 24 hours' notice."

(Exh. R-1 at 20-21.)

33. Article 9.4.2 of the CBA, titled "Mandatory Overtime," provides, in part,

"If an overtime assignment is not filled with a volunteer from the overtime sign-up list described in Section 9.4.1 above, the eligible officer with the least amount of overtime hours worked (voluntary and mandatory) shall be ordered to work. A list indicating the total amount of overtime worked to date shall be kept by the department."

(Exh. R-1 at 20.)

34. Article 9.4.3 of the CBA, titled "Continuation of Activities," provides, in part,

"When the need arises for an officer's shift to be extended beyond their scheduled ending time by activities begun during the shift, the officer will notify the [Sergeant]. The [Sergeant] may approve or deny the overtime."

(Exh. R-1 at 20.)

35. Article 9.4.4 of the CBA, titled "Emergency Overtime," provides, "In all cases of emergency, the Employer may assign overtime to any employee as operating needs require." (Exh. R-1 at 20.)

Assignment and Direction

36. As stated in the Sergeants' position description, a Sergeant "[a]ssigns duties and responsibilities to subordinate personnel and ensures that assignments are carried out in an appropriate and responsible manner." (9:35 a.m., 1:51 p.m., 2:51 p.m., Exh. R-2 at 1-2.)[2]

37. At the beginning of each shift (*i.e.*, during rollcall or a briefing), Sergeants frequently assign their Police Officers to one of three physical locations/posts: (1) the Marquam Hill campus, (2) the South Waterfront campus, or (3) the emergency room. (9:32-9:34 a.m., 10:08 a.m., 2:02 p.m.) A Sergeant can also choose to let their Police Officers decide where they are assigned for themselves, which happens the "vast majority" of the time. In practice, Police Officers usually choose to rotate where they are assigned each day. (9:33-9:34 a.m., 10:05 a.m., 12:19-12:20 p.m., 1:32 p.m., 1:43-1:44 p.m., 2:02-2:03 p.m., 2:12 p.m., 2:34 p.m.) However, a Sergeant can also take a different approach or choose to assign himself or herself to a post. Additionally, a Sergeant can always give a more specific assignment or reassign someone to a different area or an incident during a shift. (9:34 a.m., 10:08 a.m., 12:18 p.m., 1:44 p.m., 2:52-2:53 p.m.) When

[2]The position description (Exh. R-2) indicates that Sergeants spend 60% of their time on "Leadership and Supervisory Duties." Currently, that percentage is too high. (1:37-1:38 p.m., 2:02 p.m., 2:35-2:36 p.m.)

deciding where to assign their Police Officers, a Sergeant can use his or her own discretion. (10:08 a.m., 12:19 p.m.)

38. As indicated above, Sergeants are generally responsible for making sure that the Department's minimum staffing levels are met. (9:30 a.m., 9:37 a.m.) However, Sergeants generally have the authority to let the Department fall below those minimums if they determine that doing so is appropriate. (10:37 a.m.)

39. Policy 208.2 provides,

> "Minimum staffing levels should result in the scheduling of at least two regular officers (one may be the Sergeant or [A]cting Sergeant) on duty for the Marquam Hill Campus whenever possible after officers have been assigned to the South Waterfront area and Emergency Department. Sergeants will ensure that an Acting Sergeant is assigned during each shift that a Sergeant is not on duty. South Waterfront and Marquam Hill officers may respond between areas, and may be temporarily re-assigned as necessary, but officers should be returned to original assignment as soon as possible."

(Exh. R-3 at 45.)

40. Under current staffing levels, typically, two Police Officers are assigned to the Marquam Hill campus, one Police Officer is assigned to the South Waterfront, and one Police Officer is assigned to the emergency room. If more Police Officers were hired, the Department would also have two Police Officers at the South Waterfront campus. The minimums may also change depending on whether the shift is day or night shift, whether a Sergeant is available to cover a post, and other circumstances. In general, the Police Officer assigned to the emergency room is not supposed to leave that post unless there is an emergency or some other significant event. (10:08 a.m., 10:36 a.m., 12:15-12:18 p.m., 1:32 p.m., 2:04-2:05 p.m., 2:53 p.m.)

41. Police Officers also regularly respond to calls. Most of those calls come from Dispatch. Moreover, if a call involves something in a particular area (*e.g.*, the South Waterfront), the call is usually assigned to the Police Officer already assigned to that area. (10:09 a.m., 1:34 p.m., 2:04 p.m.) Nevertheless, a Sergeant can also assign a Police Officer a call, ask Dispatch to assign a call to an available Police Officer, or redirect a Police Officer away from a Dispatch-initiated call to a different call or location. (9:35 a.m., 10:08-10:09 a.m., 12:13 p.m., 1:34 p.m., 2:03 p.m.) A Sergeant can also choose to respond to calls. (12:13 a.m., 1:33 p.m.)

42. As indicated above, Sergeants are responsible for selecting a Police Officer to temporarily serve as an Acting Sergeant while the Sergeant is off work (*e.g.*, on vacation or out sick). A Sergeant does not need to select the most senior Police Officer for this role. (12:37 p.m.) Additionally, a Sergeant can exercise discretion and does not need a Lieutenant's approval when selecting. (10:01-10:03 a.m., 12:37 p.m., 1:49 p.m., 2:17 p.m., 2:59 p.m.) That said, a Lieutenant may suggest that a particular Police Officer not be chosen if that Police Officer has performance issues. (1:49 p.m.) Further, in practice, a Sergeant will not select a new Police Officer to be Acting

Sergeant. (10:02 a.m.) Police Officers "receive a five percent (5%) differential when assigned as the Acting Sergeant." (10:02 a.m., 10:36 a.m., 1:49 p.m., Exh. R-1 at 24.)

43. Policy 202.2 states, in part, "A member may be assigned as an Acting Sergeant by a [Sergeant] or the most senior [P]olice [O]fficer on the shift may designate themselves or another member the Acting Sergeant." (11:27 a.m., Exh. R-3 at 32.) Nevertheless, the most senior Police Officer will only appoint himself or herself or another Police Officer to be Acting Sergeant when there is no Sergeant on duty and the Sergeant who was supposed to select an Acting Sergeant failed to do so. (12:37 p.m.) A Lieutenant or the Director may also appoint an Acting Sergeant. (11:27 a.m.)

44. Administrative Lieutenant Mudrick is generally in charge of investigations, and can assign investigations to specific Police Officers. However, Sergeants can also assign investigations to Police Officers (*e.g.*, fraud, sexual assault, threat assessment investigations). (9:15 a.m., 9:33-9:37 a.m., 2:07 p.m., 2:06-2:07 p.m., 2:51 p.m.) When deciding which Police Officer to assign an investigation, a Sergeant can consider the particulars of the investigation and the Police Officers' experience and skills. (10:05-10:06 a.m.) A Sergeant can use his or her own judgment and discretion when assigning investigations, and does not need to consult with a Lieutenant or the Director about it. (10:06 a.m.)

45. As detailed in Policy 315, Sergeants decide whether to approve or deny another jurisdiction or law enforcement agency's request for assistance from the Department's Police Officers. One factor that a Sergeant considers in that context is whether granting the request for assistance will lead to a Department Police Officer being called to testify, which could affect the Department's staffing. (10:48-10:50 a.m., Exh. R-3 at 124.)

46. As detailed in Policy 319, Sergeants determine when citizen "ride-alongs" will occur and who will be given that assignment. However, currently, due to the COVID-19 pandemic, those assignments are limited. (10:50-10:51 a.m., Exh. R-3 at 132.)

47. Sergeants are responsible for holding their subordinates accountable, keeping their subordinates "on track," and making sure that the subordinates fulfil their duties, meet OHSU's expectations of them, and follow the Department's various policies. (9:30 a.m., 1:42 p.m., 2:44-2:45 p.m., Exh. R-2 at 1.) Among other things, that can involve Sergeants sharing their opinions with subordinates and giving them advice, counsel, guidance, and instruction. (11:17 a.m., 1:42 p.m., 1:51 p.m.)

48. Sergeants make sure that Police Officers respond to calls appropriately and assist Police Officers with scene or "incident management." (9:30 a.m., 9:39 a.m., 10:13 a.m., 1:51 p.m., 2:55 p.m., Exh. R-2 at 2.) If a Sergeant sees a Police Officer doing something wrong during a call, the Sergeant may have a conversation with the Police Officer and "redirect" that Police Officer. (2:13 p.m.) Sergeants can also take command of a scene and, while doing so, tell Police Officers what to do. (9:39-9:40 a.m., 2:40 p.m.)

49. The Department's Field Training Officers (FTOs) are responsible for training and directing new employees. Currently, all the Department's FTOs are Police Officers. (3:06 p.m.)

However, Sergeants are also responsible for coaching and providing ongoing training their employees. (2:45-2:47 p.m., 2:50 p.m., Exh. R-2 at 1-2.) In addition, a Sergeant may serve as an FTO "when assigned." (Exh. R-2 at 1-2.) Under the organizational chart, a vacant Sergeant position directly reports to the Training Lieutenant (as do five vacant Police Officer positions). (Exh. R-10.)

50. Policy 100.7 of the Policy Manual states, in part, "Each Sergeant will ensure that members under his/her command are aware of any Policy Manual revision." (Exh. R-13 at 13, 10:27 a.m.) Policy 100.7 further states, "All department members suggesting revision of the contents of the Policy Manual shall forward their written suggestions to their Sergeants, who will consider the recommendations and forward them to the command staff as appropriate." (Exh. R-3 at 13.)

51. Sergeants regularly monitor (*e.g.*, over the radio), observe, and formally evaluate the performance of their subordinate Police Officers and Community Service Officers. (2:47-2:49 p.m., Exh. R-2 at 1.) OHSU's current version of a performance evaluation is called a "GROW Conversation." The acronym GROW stands for Goals, Results, On-Track/Off-Track, and Way Forward. (Exh. R-11 at 3-4.) A Sergeant completes a GROW Conversation every six months for each subordinate. Previously, OHSU used more traditional performance evaluations that rated an employee's performance over the course of a year. (10:09-10:10 a.m., 2:48-2:49 p.m., Exh. R-12.)

52. In sum, each GROW Conversation results in a written document that includes an employee's goals and a rating schedule, and a Sergeant determines whether the employee is "on-track" or "off-track" to meet each of those goals and provides relevant comments. Being deemed on-track signals that the employee "is meeting job responsibilities, behavioral expectations, and achieving results." It also signals that the employee "is progressing in [his or her] role as expected." Being deemed "off-track" signals the employee "is not meeting job responsibilities, behavioral expectations, and/or is not achieving results as expected." If an employee is deemed off-track, "[a]ction planning and immediate improvement are required." (Exh. R-11 at 3 and 12.) The ratings a Sergeant selects "will determine the employee's merit pay, if an annual merit budget is available." (Exh. R-12 at 2.) Further, "any merit pay considerations must follow the applicable contract." (Exh. R-12 at 2.)

53. Lieutenants generally do not work directly with Police Officers or Community Service Officers. As a result, a Lieutenant may not know whether a Police Officer or a Community Service Officer is meeting performance standards unless the Sergeant tells the Lieutenant about it. (10:03-10:04 a.m., 10:57-10:58 a.m., 12:38-12:39 p.m.) In practice, Lieutenants rarely respond to scenes or incidents, but it does occur. (12:38 p.m., 12:40-12:42 p.m.) Lieutenants also do not patrol campus. (10:03-10:04 a.m.)

54. Policy 300 addresses the use of force. (Exh. R-3 at 47.) Policy 300.7 provides, in part, "A [Sergeant] should respond to a reported application of force resulting in visible injury, if reasonably available." (Exh. R-3 at 52.) It also provides, among other things, that a Sergeant should "[o]btain the basic facts from the involved officers," and "[e]valuate the circumstances surrounding the incident and initiate an administrative investigation if there is a question of policy noncompliance or if for any reason further investigation may be appropriate." (10:37-10:39 a.m.,

Exh. R-3 at 52.) Subsequently, all uses of force are independently reviewed by Lieutenants and the Director/Chief. (11:28-11:35 a.m.) Policy 302.7 provides, in part, "A Use of Force Review Workgroup, comprised of members designated by the Chief of Police or designees, may convene quarterly." (11:30 a.m., Exh. R-3 at 60.)

55. Policy 305 addresses the usage of Tasers. (Exh. R-3 at 73.) Policy 305.9 provides, in part, "When possible, [Sergeants] should respond to calls when they reasonably believe there is a likelihood the Taser may be used. A [Sergeant] should respond to all incidents where the Taser was activated." It also provides, "A [Sergeant] should review each incident where a person has been exposed to an activation of the Taser." (10:38-10:39 a.m., 11:34 a.m., Exh. R-3 at 77.)

56. Policy 306 addresses critical and traumatic incident response. (Exh. R-3 at 78.) Policy 306.5 provides, in part, that when a Sergeant receives notification of a critical or traumatic incident, the Sergeant shall "[r]espond to the scene as soon as possible." If needed, a Sergeant can also take over for the responding Police Officer, direct Police Officers at the scene, call additional Police Officers to the scene, or direct Police Officers away from the scene. (10:40-10:41 a.m., 11:38 a.m.) Relatedly, Sergeants are expected to oversee situations in which someone is threatening suicide. When that happens, a Sergeant may decide whether a Police Officer should approach the individual or should back away. (10:41-10:42 a.m.) "If the incident is reported by a [P]olice [O]fficer, [C]ommunity [S]ervice [O]fficer or [D]ispatcher to have been a traumatic incident, the [Sergeant] will assess the employee's ability to continue to work and make service referral and staffing adjustments as necessary." (10:42 a.m., Exh. R-3 at 79.)

57. Policy 307 addresses officer-involved shootings and deaths. (10:43 a.m., 11:36 a.m., Exh. R-3 at 81.) Policy 307.5.1 provides, in part, "Upon learning of an officer-involved shooting or death, the Sergeant shall be responsible for coordinating all aspects of the incident until he/she is relieved by the Chief of Police or a[n] Operations Lieutenant." (Exh. R-3 at 82.) Policy 307.5.3 provides, in part, that the first uninvolved Sergeant shall "[t]ake command of and secure the indecent scene with additional members until properly relieved by another [Sergeant] or other assigned personnel or investigator." (10:43 a.m., Exh. R-3 at 83.)

58. Policy 309 addresses missing persons investigations, which could involve a missing patient, for example. (Exh. R-3 at 97.) In part, Policy 309.12.1 provides that, during a missing person investigation, a Sergeant is responsible for "[e]nsuring resources are deployed as appropriate," "[i]nitiating a command post as needed," and facilitating the transfer of a case if it falls within the jurisdiction of another agency. (10:43-10:45 a.m., Exh. R-3 at 104.)

59. Policy 405 "provides guidelines for interacting with those who may be experiencing a mental health or emotional crisis." (10:58-10:59 a.m., Exh. R-3 at 162.) Policy 405.8 provides that a Sergeant "should respond to the scene of any interaction with a person in crisis," and should consider "strategic disengagement," which could include "removing or reducing law enforcement resources." (Exh. R-3 at 164.)

60. Policy 406.5.3 provides that a Sergeant should respond to the area where a foot pursuit is occurring and take command. That responsibility includes terminating the foot pursuit "when the danger of pursuing officers or the public appears to unreasonably outweigh the objective

of immediate apprehension of the subject." (10:59-11:00 a.m., Exh. R-3 at 170.) The Sergeant can also assign other Police Officers to assist. (11:00 a.m.)

61. Policy 409.4 provides that a Sergeant will take control over a vehicle pursuit and determine how many units are needed. (Exh. R-3 at 182-83.) A Sergeant exercises his or her own judgment when making that decision, and will "continuously assess the situation and risk factors associated with the pursuit." (11:01-11:02 a.m., Exh. R-3 at 182.) Some of those factors include where the pursuit is and where it is headed, for example. (11:02 a.m.) A Sergeant can also determine that a vehicle pursuit should be terminated "if, in his/her judgment, it is unjustified to continue the pursuit * * *." (Exh. R-3 at 182.)

62. Police Officers submit their written reports to a Sergeant. (10:46 a.m.) Sergeants review the reports and can "make recommendations for sentence structure, spelling, grammar, completeness of information and investigation, including the elements of the crime in arrest reports." (9:31 a.m., 10:46 a.m., 11:41 a.m., Exh. R-2 at 3, Exh. R-3 at 113.) Additionally, a Sergeant can either approve a report and submit it to a Lieutenant for further review, or return the report to the Police Officer for the Police Officer to make corrections. Policy 311.4 provides, in part, "[Sergeants] shall review reports for content and accuracy. If a correction is necessary, the reviewing [Sergeant] should notify the author stating the reasons for rejection." (10:46-10:47 a.m., Exh. R-2 at 113.) If a Police Officer wants to change or alter a completed report, the Police Officer needs the Sergeant's permission to do so. (10:47 a.m.) Acting Sergeants also review Police Officer reports. (11:41 a.m.)

63. After a Lieutenant reviews a Police Officer's report, the Lieutenant can approve the report, return the report to the Police Officer for the Police Officer to make corrections, or have the Police Officer make a supplemental report. (10:46 a.m., 11:41-11:44 a.m.)

64. Policy 321 addresses off-duty law enforcement actions. Policy 321.5 provides, in part, "Any off-duty officer who engages in any law enforcement activity, regardless of jurisdiction, shall notify the Sergeant as soon as practicable. The Sergeant shall determine whether a report should be filed by the employee." (10:50-10:51 a.m., Exh. R-3 at 139.)

65. Policy 414 addresses hostage and barricade incidents. (Exh. R-3 at 202.) Policy 414.5 provides, in part, "Upon being notified that a hostage or barricade situation exists, the [Sergeant] should immediately respond to the scene, asses the risk level of the situation, establish a proper chain of command and assume the role of Incident Commander until properly relieved." At that point, a Sergeant has the authority and discretion to "[r]equest crisis negotiators, specialized units, additional personnel, resources or equipment as appropriate," and "[d]esignate assistants who can help with intelligence information and documentation of the incident." (11:03-11:04 a.m., 11:51-11:53 a.m., Exh. R-3 at 205.)

66. Policy 421 addresses "First Amendment assemblies." (Exh. R-3 at 229.) Policy 421.5 provides that, after a Police Officer responds to an unplanned or spontaneous public gathering, a Sergeant should be requested by Dispatch. After that, the Sergeant "shall assume command of the incident until command is expressly assumed by another, and the assumption of command is communicated to the involved members." (11:05-11:06 a.m., Exh. R-3 at 230.)

67. Policy 803 addresses the usage of personal communication devices (PCDs). Policy 803.7 addresses a Sergeant's responsibilities related to that subject, which include, among other things, providing "appropriate training," taking "prompt corrective action if a member is observed or reported to be improperly using a PCD," and monitoring and investigating PCD usage in the workplace. (11:07 a.m., Exh. R-3 at 316-317.)

68. In addition to a Sergeant's unique duties, a Sergeant "also performs the full scope of Officer responsibilities." (2:01 p.m., Exh. R-2 at 1.) As noted, Sergeants can choose to respond to calls from Dispatch. (2:01 p.m., 2:12-2:13 p.m.) That is more likely to occur when the Department is understaffed. (1:33 p.m., 2:37 p.m.) Furthermore, Sergeants commonly act as "cover officers" at a scene. While a cover officer, a Sergeant provides backup for and can take direction from the "primary" or "first responding" Police Officer. (11:39-11:41 a.m., 12:39 p.m., 1:33-1:34 p.m., 2:01 p.m., 2:38-2:39 p.m.) However, a Sergeant can also choose to take over the call or scene from the primary Police Officer. (12:39 p.m., 2:40 p.m.) Sergeants may also patrol campus, which can be done with Police Officers. (9:30-9:31 a.m., 12:13 p.m.)

69. Sergeants are generally "responsible" for what their subordinates do. (9:30 a.m., 2:13-2:15 p.m., 2:45 p.m.) Policy 1301.8 provides that a Sergeant may be disciplined for (1) failure to take appropriate action to ensure that their subordinates adhere to the Department's policies and procedures and the law, (2) failure to timely report subordinates' misconduct to a superior or document such misconduct properly, or (3) exercising the Sergeant's authority unequally or disparately for a malicious or other improper purpose. (11:08-11:10 a.m., Exh. R-3 at 367.) Additionally, Policy 200.4 provides, "[Sergeants] and managers shall be accountable for the performance of the members under their immediate control." (10:34 a.m., Exh. R-3 at 30.)

70. Despite the above-referenced policies, both of which are currently in effect, no Sergeants have been disciplined because of their subordinates' mistakes or poor performance. (11:26 a.m., 11:56 a.m., 12:43 p.m., 12:48-12:50 p.m.) In February or March 2021, Sergeant Buchtel was removed from the standard Operations assignment of overseeing a shift. However, that removal was generally the result of issues with how Buchtel performed that assignment (*e.g.*, Buchtel not knowing what his team was doing) rather than issues with his subordinates' performance (though Lieutenant Habibi also believed that Buchtel's team's performance was unacceptable at the time). (9:23 a.m., 10:34-10:35 a.m., 11:25-11:26 a.m., 12:45 p.m.)

Discipline and Suspend

71. When Sergeants deem it appropriate, Sergeants can give a "coaching and counseling" to a subordinate without getting approval from a superior. For more serious discipline, which includes verbal warnings, written warnings, suspensions, and discharges, Sergeants can make a recommendation to a Lieutenant and/or the Director when the Sergeants deem it appropriate. In practice, if a Sergeant wants to issue discipline that is more severe than a couching and counseling, the Sergeant will check with a Lieutenant about it first. (9:40 a.m., 9:43 a.m., 9:54 a.m., 12:44-12:45 p.m., 1:29-1:31 p.m., 1:52-1:53 p.m., 2:56 p.m.) The Department does not consider a coaching and counseling to be "formal discipline," but a verbal warning and more serious forms of discipline are considered formal discipline. (9:41-9:42 a.m., 9:54 a.m.)

72. Lieutenant Habibi and Director Kula generally follow the Sergeants' discipline recommendations. (12:45 p.m.) Broadly speaking, the Director is the final decision-maker for all discipline unless the Director delegates that authority in a particular instance. (11:54-11:55 a.m.)

73. Sergeants "[i]nitiate and manage investigatory processes for policy violations, up to and including coaching and counseling, verbal warnings and written warnings." (Exh. R-2 at 2, 9:40 a.m.) Sergeants also personally conduct internal disciplinary investigations (*i.e.*, Internal Affairs investigations). (2:17 p.m.) A Sergeant can be assigned such an investigation, initiate an investigation based on a personnel complaint (*i.e.*, a complaint from someone who is not employed by the Department), or initiate his or her own disciplinary investigation. (Exh. R-3 at 155, 390.)

74. While conducting a disciplinary investigation, a Sergeant may conduct investigatory interviews. (Exh. R-6 at 1, 9:46 a.m.) In some but not all cases, a Lieutenant, an OHSU Human Resources Business Partner, an OHSU Equal Opportunity Officer (from OHSU's Affirmative Action and Equal Opportunity Department), an Association representative, and/or an Association attorney may also attend and participate in a Sergeant's investigatory interview of a Police Officer. (Exh. R-6 at 1, Exh. R-7 at 1, Exh. R-8 at 2, Exh. R-9 at 1.) The Association's attorney attends every investigatory interview of a Police Officer. (1:48-1:49 p.m.)

75. Once a Sergeant completes a disciplinary investigation, the Sergeant writes an investigatory report that is sent to a Lieutenant. (Exh. R-3 at 367.) That investigatory report can state whether the Sergeant found a policy violation and can include the Sergeant's discipline recommendation, which can potentially be a recommendation that no discipline is appropriate. (9:50-9:51 a.m.) The Lieutenant can either accept or reject a Sergeant's discipline recommendation. In practice, the Lieutenant "typically" accepts it. (9:51 a.m.) After a Lieutenant approves a report, it is submitted to the Director for additional review. (11:54-11:55 a.m., Exh. R-3 at 367.)

76. Policy 1301.10 provides, in part,

> "Upon receipt of an investigatory report, the Chief of Police shall review the recommendation and all accompanying materials.
>
> "The Chief of Police may modify any recommendations and/or may return the file to [the] investigating supervisor for further investigation or action.
>
> "Once the Chief of Police is satisfied that no further investigation or action is required by staff, the Chief of Police shall determine the amount of discipline, if any, to be imposed."

(Exh. R-3 at 367.)

77. OHSU's Human Resources Department can give the Department assistance and guidance regarding discipline if the Department asks for it. (11:55-11:56 a.m., 12:47 p.m.)

78. Article 21 of the CBA addresses discipline and discharge. Article 21.1 of the CBA provides,

> "The principles of progressive discipline shall be used except when the nature of the problem requires more serious discipline or immediate action. Progressive discipline includes the following steps: (1) documented verbal warning; (2) written warning; (3) suspension without pay and/or final written warning; and (4) discharge."

(Exh. R-1 at 49.)

The CBA does not specifically list coaching and counseling as a form of progressive discipline. (9:41-9:42 a.m.) Article 21.2 of the CBA provides, "An employee may be disciplined or discharged for just cause." (Exh. R-1 at 49.)[3]

79. Policy 1317 addresses the reporting, investigation, and disposition of personnel complaints. In essence, all personnel complaints are routed to or initiated by Sergeants, who make an initial determination regarding (1) whether the complaint has merit or (2) a formal investigation is necessary. Further, whenever a complaint is received, a Sergeant must eventually fill out a "Complaint Tracking Form." (11:14-11:16 a.m., 1:29-1:30 p.m., Exh. R-3 at 390-91.)

80. All personnel complaints and their Complaint Tracking Forms are forwarded to the Operations Lieutenant, who subsequently reviews them. At that point, the Lieutenant uses his or her discretion and determines if the appropriate action was taken. If the Lieutenant approves of the action, the complaint and the Complaint Tracking Form are forwarded to the Director. If the Operations Lieutenant decides that the action chosen (*i.e.*, dismissal or investigation) was inappropriate, the Operations Lieutenant will ask another Lieutenant for his or her opinion on the matter, or will consult with the Sergeant to about it. (11:58 a.m.-12:04 p.m., 1:30-1:31 p.m., Exh. R-3 at 392.)

81. Ultimately, if an investigation into a personnel complaint is deemed necessary, a Sergeant is assigned the investigation. At the end of that investigation, the Sergeant will write a report with a recommendation regarding what should be done about the matter, if anything. Later, the report is carefully reviewed by the Operations Lieutenant and the Director. The Director may accept or modify any recommendation or return the matter to the Operations Lieutenant for further investigation or action. (12:03-12:04 p.m., Exh. R-3 at 397-98.)

82. On November 17, 2016, Sergeant Arnie Belton (who does not appear on the provided organizational chart), issued a "Written Warning letter for Performance" to a Police Officer because of the Police Officer's subpar investigation. (Exh. R-6 at 1.) The letter notes the Police Officer's prior discipline (which was a "Verbal Warning letter for Conduct" issued by a Lieutenant), described Sergeant Belton' investigatory interviews of the Police Officer, and includes Sergeant Belton's conclusions that certain Department and OHSU policies had been violated. The letter also notes that the Police Officer's "supervisor" would be meeting with the

[3]Policy 1301 also addresses discipline. Policy 1301.2 addresses the usage of progressive discipline. Policy 1301.3 lists some of the causes of disciplinary action.

Police Officer on a regular basis using a work plan. After that, the letter states, "*Please be aware that any further violations of a similar nature will result in progressive discipline up to and including dismissal from employment.*" (Exh. R-6 at 2, emphasis in original.) The end of the letter includes a signature line for Sergeant Belton and does not include a signature line for a Lieutenant. (9:45-9:47 a.m.) This particular disciplinary investigation was assigned to Sergeant Belton by Lieutenant Habibi after another Sergeant raised concerns. Further, either Lieutenant Habibi or Director Kula authorized Sergeant Belton to issue this warning letter. (9:46 a.m., 12:25-12:27 p.m.)

83. On January 1, 2017, Sergeant Buchtel sent Director Kula a memorandum concerning a disciplinary investigation of a Police Officer. The memorandum notes that Sergeant Buchtel was directed to investigate the Police Officer, describes Sergeant Buchtel's investigatory interview of the Police Officer and Sergeant Buchtel's findings, and includes Sergeant Buchtel's recommendation that the Police Officer should receive coaching and counseling. (The record does not reveal whether the recommendation was followed.) (9:55-9:56 a.m.,12:33-12:36 a.m., Exh. R-9.)

84. On March 13, 2017, Sergeant Belton sent a memorandum to Lieutenant Habibi regarding Sergeant Belton's investigation of two Police Officers. (Exh. R-8.) The memorandum details Sergeant Belton's findings, describes a number of Sergeant Belton's investigatory interviews, and includes Sergeant Belton's recommendation that the Police Officers' actions did not justify any discipline. Lieutenant Habibi oversaw this disciplinary investigation but did not directly participate in it. Ultimately, neither Police Officer was disciplined. Either Lieutenant Habibi or Director Kula made the initial decision to investigate in this instance, and Habibi told Sergeant Belton to conduct these interviews. (9:51-9:54 a.m., 12:31-12:32 p.m.) The same memorandum otherwise notes that a different Sergeant previously gave a coaching and counseling to one of the Police Officers involved in this investigation for not taking enforcement action on someone suspected of trespassing. (Exh. R-8 at 7.)

85. In 2020, Sergeant Sullivan wrote an investigatory report concerning her investigation of two Police Officers suspected of being biased while responding to a call. (9:47-9:48 a.m., Exh. R-7 at 1.) The report includes a summary of Sullivan's investigation, details Sullivan's multiple interviews, provides Sullivan's conclusions and her recommendation that it be found that the Police Officers did not violate any Department policies. In this instance, Sullivan conducted the investigation and authored the investigatory report as assigned, but Lieutenant Mudrick oversaw the investigation and actively participated in the interviews. In the end, Lieutenant Mudrick agreed with Sullivan's recommendation and neither Police Officer was disciplined. (9:48-9:50 a.m., 12:28-12:30 p.m., Exh R-7.)

86. On December 1, 2020, Sergeant Buchtel wrote and presented a "Verbal Warning letter for Substandard Performance" to a Police Officer because of the Police Officer's substandard report writing. (Exh. R-5 at 1.) The letter describes Sergeant Buchtel's investigatory interview of the Police Officer, what is expected of the Police Officer, and Sergeant's Buchtel's finding that the Police Officer had violated Department and OHSU policies. The end of the letter states, "Please be aware that any further violations of a similar nature will result in progressive discipline up to and including dismissal from employment." (Exh. R-5 at 2.) The letter also includes a signature line for Lieutenant Habibi but has no line for Sergeant Buchtel. Furthermore, in this instance,

Lieutenant Habibi actually issued the discipline. Before Habibi did so, he consulted with Director Kula, who agreed with Habibi. Habibi also spoke with Lieutenant Mudrick about the matter before issuing the discipline, and Mudrick similarly approved the level of discipline used. (9:43-9:44 a.m., 12:23-12:27 p.m., 12:46-12:47 p.m.)

87. A Sergeant can send a Police Officer home if the Sergeant believes that the Police Officer is unfit for duty. (10:06 a.m.)

CONCLUSIONS OF LAW

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

2. Sergeants are "supervisory employees" as defined by ORS 243.650(23)(a) and cannot be added to the Association's bargaining unit.

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 statutory supervisor: (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 has authority 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, 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 OHSU's objections, OHSU specifically asserted that that petitioned-for Sergeants "possess the authority to exercise one or more of the supervisory duties listed in ORS 243.650(23)(a), including the authority to assign and responsibly direct employees." At the outset of the hearing, OHSU specifically asserted that the sergeants assign, responsibly direct, and discipline, and stipulated that the Sergeants could not reward. (9:01-9:04 a.m.) In OHSU's post-hearing brief, OHSU reiterates its assertions from the hearing, but for the first time also asserts that the Sergeants reward and suspend. Meanwhile, the Association contends that the Sergeants have no supervisory authority, and that their work resembles that of a lead worker. (9:06 a.m.) (Given the stipulations made during the hearing, the Association's post-hearing brief naturally focuses on the previously asserted authority to assign, responsibly direct, and discipline.) The "in

the interest of management" factor is not specifically in dispute. Below, we conclude that the Sergeants assign and direct with independent judgment in the interest of management.

Discussion

Assign

The statutory 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 following reasons, we conclude that the petitioned-for Sergeants "assign" with independent judgment in the interest of management.

Sergeants do not assign their subordinates to their regularly scheduled shifts or approve or deny annual vacation requests using independent judgment. Sergeants also do not decide when shifts normally start and stop. However, Police Officers do need a Sergeant's approval to trade their basic shifts with other Police Officers. In addition, Sergeants approve or deny their subordinates' other time off requests. As noted, when deciding whether to approve or deny a time off request, Sergeants consider whether minimum staffing levels would be met, the timeliness of the request, whether a special event is occurring, and other factors. Moreover, Sergeants can approve a time off request even if granting it would put the Department below minimum staff, choose to offer other subordinates overtime work to offset an approved absence, and deny a request even if staffing would be above the minimums despite the requested absence. Sergeants also generally do not need to get a superior's approval when approving or denying a time off request.

Separately, Sergeants assign subordinates overtime and approve or deny subordinates' overtime requests without a superior's approval. Further, when Sergeants do so, it is not simply a routine or clerical matter, and goes beyond making sure minimum staffing levels are met. Sergeants can decide whether to seek out volunteers, hold someone over, or call someone in to work. As outlined above, certain aspects of overtime are strictly defined by the CBA. But a significant amount of discretion remains, and Sergeants (rather than the CBA) generally decide when or whether overtime is needed. We also note that Police Officers earn one and one-half times their regular payrate for overtime worked. *See The Dalles Police Association v. City of The Dalles*, Case No. UC-07-08 at 15, 22 PECBR 995, 1009 (2009); *Teamsters Local 206 v. City of Reedsport*, Case No. UC-46-98 at 9, 18 PECBR 189, 197 (1999).

In addition to the foregoing, Sergeants regularly assign Police Officers to specific locations and posts. We recognize that Police Officers usually decide among themselves to rotate these assignments. But Sergeants do not have to handle assignments that way and can always reassign their subordinates during a shift or choose to assign themselves to a location. As noted, Sergeants can use their own discretion when assigning subordinates to posts, and are not strictly limited by minimum manning levels. *See Klamath County v. Teamsters Local 223*, Case No. UC-003-20 at 19-20, _ PECBR _, _ (2021); *City of Portland*, UC-017-13 at 26, 25 PECBR at 1021.

Most of the calls that Police Officers respond to come from Dispatch and many calls go to the Police Officer already assigned to the call's location. Nevertheless, Sergeants can assign Police Officers to calls as well, ask Dispatch to call an available Police Officer, or redirect a Police Officer away from another call. Significantly, Sergeants also have full, independent authority to select Police Officers to serve as Acting Sergeants in their absence, for which Police Officers receive a 5 percent pay differential. *See Hillsboro Sergeant's Association v. City of Hillsboro, Oregon*, Case No. CC-009-14 at 5-6, 26 PECBR 491, 495-96 (2015). Sergeants separately assign Police Officers investigations, and when doing so can consider the particulars of the investigation and the Police Officers' experience and skills. Further, Sergeants can use their own judgment and do not need to consult with a superior when assigning investigations. Sergeants likewise can assign Police Officers to work with another jurisdiction or law enforcement agency or conduct a citizen ride-along.

Responsibly to Direct

The statutory term "direct" can refer to deciding what job shall be undertaken next or who shall do it. Moreover, the person "responsibly" 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). For the following reasons, we also conclude that the Sergeants "direct" with independent judgment in the interest of management.

As detailed above, Sergeants make sure that Police Officers respond to calls appropriately, which often can involve giving instruction to and "redirecting" the Police Officers. It might also involve responding in person and/or taking full command over a scene and reassigning subordinates as the Sergeant deems appropriate. While managing a scene, a Sergeant may be required to continually assess the situation and adjust and instruct accordingly. Importantly, Lieutenants normally do not respond to scenes. On top of that, Lieutenants generally do not work during weekends, and currently mostly work remotely. Likewise, the Director officially only works during the workweek, and currently works from home on occasion. Separately, Sergeants review Police Officers' reports and make recommendations and corrections to them (though we do note that many reports require additional review from a Sergeant's superiors). Sergeants also train and formally evaluate their subordinates on their own. Additionally, Sergeants clearly coach and counsel their subordinates.

Regarding whether the Sergeants "responsibly" direct, we recognize that no Sergeant has actually been disciplined for a subordinate's poor performance. However, the mere absence of a Sergeant being so disciplined is not dispositive. Ultimately, the standard is whether there is a *prospect* of adverse consequences for the putative supervisor if the supervisor does not take action to correct subordinates' work performance issues. *City of Keizer*, UC-004-18 at 22, _ PECBR at _ (citing *City of Portland*, UC-017-13 at 27, 25 PECBR at 1022). Here, Sergeants are generally

responsible for holding their subordinates accountable. Moreover, Policies 1301.8 and 200.4 formally make Sergeants accountable for their subordinates' performance.

Reward

Once again, Sergeants can select Police Officers to temporarily serve as Acting Sergeant, which can result in a pay differential. However, in this case, that selection is much more akin to an assignment than a reward. *See City of Portland*, UC-017-13 at 31, 25 PECBR at 1026. There is likewise no evidence that overtime is ever given out as a reward. One of OHSU's exhibits provides some indication that a Sergeant's positive GROW Conversation may affect an employee's merit pay. Yet that aspect of the evaluations was not addressed in detail during the hearing. Furthermore, as noted above, OHSU stipulated that the Sergeants could not "reward." Under these circumstances, there is insufficient evidence to conclude that Sergeants "reward" within the meaning of ORS 243.650(23)(a).

Discipline

This Board considers five elements of the discipline process to decide supervisory status: (1) how the process is initiated, (2) who investigates the conduct in question, (3) who defines and determines culpability, (4) how and by whom the type and severity of discipline is determine, and (5) who imposes the discipline and in what manner. We have also said that the authority to reprimand alone is insufficient to establish supervisory status. *City of Reedsport*, UC-46-98 at 8-9, 18 PECBR at 196-97 (citing *Department of Administrative Services*, UC-35-95 at 18, 16 PECBR at 863; *Tualatin Police Officers Association v. City of Tualatin*, Case No. UC-61-89 at 11, 12 PECBR 413, 423 n 7 (1990)). In this case, we conclude that Sergeants do not "discipline" within the meaning of ORS 243.650(23)(a).

Sergeants can give coaching and counseling without getting approval from a superior, and coaching and counseling may be noted during later disciplinary investigations. On the other hand, coaching and counseling is not considered formal discipline within the Department or under the parties' CBA. Sergeants also can initiate the disciplinary process by starting the investigations of subordinates, manage those investigations, and even recommend more severe discipline to their superiors. Moreover, those superiors generally follow Sergeants' disciplinary recommendations. However, importantly, the overall record indicates that Lieutenants and the Director carefully reevaluate every disciplinary recommendation. The record does contain a number of examples of discipline. But after careful review, we conclude that none of those examples plainly demonstrate that Sergeants are effective, independent voices in issuing or recommending discipline. Limited testimony (*e.g.*, 9:53-9:54 a.m., 12:44-12:55 p.m.) suggests that Sergeants can issue warnings without a Lieutenant's approval under certain, unspecified circumstances. Nevertheless, that testimony generally conflicts with the rest of the record and lacks the level of detail needed here. We therefore conclude that there is insufficient evidence to establish that the Sergeants "discipline."

Suspend

As noted above, a Sergeant can send a Police Officer home if the Sergeant believes that the Police Officer is unfit for duty. Further, a suspension is listed as a type of discipline in the CBA and the Policy Manual. However, the record does not reveal whether a suspension has occurred, or whether sending someone home necessarily affects the Police Officer's pay. It also does not explain how a Sergeant makes this decision. Accordingly, independent judgment has not been shown. We otherwise note that OHSU did not specifically assert that Sergeants can suspend until after the hearing had concluded. For these reasons, the record does not demonstrate that Sergeants "suspend" within the meaning of ORS 243.650(23)(a).

Conclusion

The Sergeants employed by OHSU in the Department of Public Safety can "assign" and "direct" with independent judgment in the interest of management. Accordingly, the Sergeants are "supervisory employees" as defined by ORS 243.650(23)(a) and cannot be added to the Association's bargaining unit.

PROPOSED ORDER

The petition is dismissed.

SIGNED AND ISSUED on December 28, 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@erb.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-013-21

(REPRESENTATION)

CORVALLIS EMPLOYEE ASSOCIATION, Petitioner, v. CITY OF CORVALLIS, and OREGON AFSCME COUNCIL 75, LOCAL 2975, Respondents.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE (ELECTION RESULTS)

On November 12, 2021, Corvallis Employee Association (Association) filed a petition under ORS 243.682(1) and OAR 115-025-0035 to change the exclusive representative for certain City of Corvallis (City) employees (described below) from Oregon AFSCME Council 75, Local 2975 (AFSCME) to the Association. Because the parties were unable to agree on the terms of a consent election, a hearing was held on December 20, 2021 by Administrative Law Judge (ALJ) B. Carlton Grew, for the purpose of determining the date of the election and related deadlines. On December 20, 2021, ALJ Grew issued a decision directing an election to be held, with the Board's Election Coordinator mailing ballots on December 30, 2021, and all ballots being returned by 5 p.m. on January 20, 2022.

As directed, on December 30, 2021, the Board's Election Coordinator sent ballots to eligible voters. 189 valid ballots were returned by the deadline of January 20, 2022, which constitutes the date of the election. *See* OAR 115-025-0072(1)(b)(A). A tally of ballots was held on January 21, 2022, and the majority of valid votes counted were cast for AFSCME. The tally of ballots was provided to the parties on January 21, 2022.

Objections to the conduct of the election, or conduct affecting the results of the election, were due within 10 days of furnishing the ballot tally to the parties (*i.e.*, by January 31, 2022). *See* OAR 115-025-0075. No objections were filed. Accordingly, it is certified that:

OREGON AFSCME COUNCIL 75, LOCAL 2975

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

> All regular full-time and regular part-time employees and Seasonal employees in the Parks and Recreation Department (Park Seasonals) scheduled to work at least 1,040 hours per year from their most recent dates of hire without interruption. Persons employed in supervisory, managerial, confidential, temporary/casual employees, police CPOA members, dispatch CRCCA members, and fire IAFF members, or interns hired through established educational internship programs are excluded from the bargaining unit.

DATED: February 1, 2022.

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. UP-021-18

(UNFAIR LABOR PRACTICE)

UNITED ACADEMICS OF OREGON STATE UNIVERSITY, Complainant, v. OREGON STATE UNIVERSITY, Respondent.	)	FINDINGS AND ORDER FOR ATTORNEY FEES ON APPEAL

On May 4, 2020, this Board issued an order holding that Oregon State University (University) used public funds to support actions to "assist, promote or deter union organizing" in violation of ORS 243.670(2)(a), and thus ORS 243.672(1)(i), as alleged by United Academics of Oregon State University (Union). The University petitioned the Oregon Court of Appeals for review. On October 27, 2021, the court issued an order affirming the Board's order. *See United Academics of Oregon State University v. Oregon State University*, 315 Or App 348 (2021). The appellate judgment was entered on December 15, 2021.

On December 8, 2021, the Union timely filed a petition for attorney fees.[1] Under OAR 115-035-0057(2), the University had 14 days from the date of service of the petition to file any objection. No objections were filed.

[1]Under the Board's rules, a petition for attorney fees on appeal must be "filed with the Board within 21 days of the date of the appellate judgment." OAR 115-035-0057(1). The Union filed its petition after the court of appeals issued its decision, but before it issued an appellate judgment. The Board has not dismissed as premature petitions for attorney fees on appeal filed before the appellate judgment "so long as the opposing party suffers no prejudice and the other provisions of the rule are met." *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06 at 2 n 2, 24 PECBR 726, 727 n 2 (2012) (Attorney Fees Order) (citing *Beaverton Police Association v. City of Beaverton*, Case No. UP-10-01 at 2 n 2, 21 PECBR 186, 187 n 2 (2005) (Attorney Fees Order)); *Springfield Police Association v. City of Springfield*, Case No. UP-28-96 at 1 n 1 (1997) (Attorney Fees Order) (a "premature" petition filed before the appellate judgment is issued "will not be considered untimely if the other party's rights are not prejudiced and the remainder of the rule is followed"). Here, because it did not file objections to the petition, there is no prejudice to the University. The petition complies with the remainder of OAR 115-035-0057. We therefore accept the petition as timely.

Pursuant to ORS 243.676(2)(e) and OAR 115-035-0057, this Board finds that:

1. The Union is the prevailing party, as it was designated as such in the appellate judgment. OAR 115-035-0057(3).

2. The Union requests $13,682.75 in attorney fees. An award of attorney fees on appeal shall not exceed $5,000, unless a civil penalty is awarded in the Board proceeding and not reversed by the court. OAR 115-035-0057(4). The Public Employee Collective Bargaining Act (PECBA) requires that when the Board finds that a public employer violated ORS 243.670(2), the Board "shall impose a civil penalty equal to triple the amount of funds the public employer expended to assist, promote or deter union organizing." ORS 243.676(4)(b). Here, the parties stipulated that the University spent $1 of public funds in preparing, distributing, or posting the emails and FAQs at issue in this case. In accordance with the parties' stipulation, and as required by ORS 243.676(4)(b), we awarded the Union a civil penalty of $3. Consequently, the $5,000 cap on attorney fees on appeal does not apply.

3. In support of its request, the Union submitted a statement of hours worked and fees charged. That statement demonstrates that 68.25 hours were spent on the appeal. An associate in the Union's law firm worked for 9 hours at a rate of $175 per hour, and the Union's lead counsel worked for 59.25 hours at billing rates of $195 per hour (before April 1, 2021) and $205 per hour (beginning on April 1, 2021).

4. The University did not object to the hours or the billing rates as excessive. OAR 115-035-0057(2). Based on the Union's unrebutted fee statement, we find that the amount of hours and billing rates were reasonable.

5. Because a civil penalty pursuant to ORS 243.676(4)(b) was awarded, and there is no objection to the Union's petition, we order an award of attorney fees on appeal to the Union in the amount of $13,682.75. *See AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06 at 3, 24 PECBR 726, 728 (2012) (Attorney Fee Order) (in cases "where we award a civil penalty, we will generally award the full amount of attorney fees reasonably incurred on appeal").[2]

[2]The Union petitioned separately for representation costs for work performed before this Board. ORS 243.676(2)(d); OAR 115-035-0055. We address that petition in a separate order issued on this date.

ORDER

The University shall remit $13,682.75 to the Union within 30 days of the date of this Order.

February 2, 2022.

Adam L. Rhynard, Chair

*Lisa M. Umscheid, Member

This Order may be appealed pursuant to ORS 183.482.

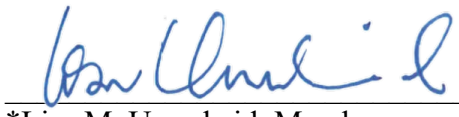
*Member Umscheid, Concurring:

For the same reasons that I concurred in our representation costs order in this case issued today, I also concur in the attorney fees award. There was no objection to the Union's attorneys' hours or billing rates, which is required to challenge the reasonableness of hours and rates. There also was no objection asserting that an award of full attorney fees was unreasonable or inappropriate on any other basis. Consequently, I join in the decision to award all the attorney fees sought.

In my view, the Board should develop, through rulemaking or the Board's case adjudication, guidelines about how to assess mitigating circumstances when we designate the amount of attorney fees on appeal in an ORS 243.670(2) case. A civil penalty removes the $5,000 cap on attorney fees on appeal, just as it removes the $5,000 cap on representation costs. *See* OAR 115-035-0057(4) (an award of attorney fees on appeal "shall not exceed $5,000, unless a civil penalty is awarded in the Board proceeding and not reversed by the court"); OAR 115-035-0055(1)(b)(E) (Board shall order the "full amount of reasonable representation costs if a civil penalty is awarded"). Both the representation costs and attorney fees rules were amended, effective February 1, 2017, to remove the required consideration of mitigating factors in designating the amount of costs and fees awarded. *See former* OAR 115-035-0057(3) (December 1, 1995) (requiring consideration of mitigating factors in determining amount of attorney fees award); *former* OAR 115-035-0055(4)(a) (September 3, 2014) (requiring consideration of multiple factors, including whether the case included an issue of first impression).[3]

[3]Under the former rule, the Board awarded full attorney fees on appeal in a case in which a civil penalty was awarded, even after reducing representation costs. *See AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 24 PECBR 720 (2012) (Rep. Costs Order) (representation costs reduced from $25,894 to $23,500 where case involved several issues of first impression and the employer made a sincere effort to comply following appeal), 24 PECBR 726, 728 (2012) (Attorney Fees Order) (awarding full attorney fees on appeal, and noting that in civil penalty cases, the Board "generally" awards the "full amount of attorney fees reasonably incurred on appeal"). Nonetheless, the rule envisioned (and communicated to parties) that mitigating factors would be considered by the Board in determining the amount of attorney fees on appeal.

The reasoning I outlined in my concurring opinion in our representation costs order issued today applies equally to the determination of the amount of attorney fees on appeal in cases involving a violation of ORS 243.670(2).



*Lisa M. Umscheid, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-021-18

(UNFAIR LABOR PRACTICE)

UNITED ACADEMICS OF OREGON STATE UNIVERSITY, Complainant, v. OREGON STATE UNIVERSITY, Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On May 4, 2020, this Board issued an order holding that Oregon State University (University) used public funds to support actions to "assist, promote or deter union organizing" in violation of ORS 243.670(2)(a), and thus ORS 243.672(1)(i), as alleged by United Academics of Oregon State University (Union). The University petitioned the Oregon Court of Appeals for review. On October 27, 2021, the court issued an order affirming the Board's order. *See United Academics of Oregon State University v. Oregon State University*, 315 Or App 348 (2021). Having received the appellate judgment dated December 15, 2021, 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 Union 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 was submitted solely on stipulated facts.

3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). That schedule requires this Board to award the "full amount of reasonable representation costs if a civil penalty is awarded." OAR 115-035-0055(1)(b)(E); *AFSCME Local 2831 v. Lane County*, Case No. UP-009-18 at 2 (2019) (Rep. Costs Order) (when the prevailing party is awarded a civil penalty, that party is "entitled to '[t]he full amount of reasonable representation costs.'") (quoting OAR 115-035-0055(1)(b)(E)). The Public Employee Collective

Bargaining Act (PECBA) requires that when the Board finds that a public employer violated ORS 243.670(2), the Board "shall impose a civil penalty equal to triple the amount of funds the public employer expended to assist, promote or deter union organizing." ORS 243.676(4)(b). Here, the parties stipulated that the University spent $1 of public funds in preparing, distributing, or posting the emails and FAQs at issue in this case. Consequently, as required by ORS 243.676(4)(b), we awarded the Union a civil penalty of $3.

4. The Union seeks an award of $30,397.50 in representation costs. A party seeking more than $5,000, when a civil penalty has been awarded, must file a petition. OAR 115-035-0055(2)(b). The Union filed a petition including a statement detailing 161.5 hours of legal work on this case. The hours worked were billed at $185 per hour until June 1, 2019, and $195 per hour thereafter.

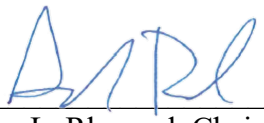
5. The University did not object to the hours or the billing rates as excessive, OAR 115-035-0055(2)(b), or otherwise object to the petition. Based on the Union's unrebutted fee statement, we find that the amount of hours and billing rates were reasonable.

6. Because we awarded a civil penalty pursuant to ORS 243.676(4)(b) and there was no objection, we order "[t]he full amount of reasonable representation costs[,]" OAR 115-035-0055(1)(E); *Lane County*, UP-009-18 at 1 (when a civil penalty is awarded, the prevailing party is entitled to the full amount of reasonable representation costs "so long as a timely petition for those costs is filed"). Therefore, we award representation costs to the Union in the amount of $30,397.50.[1]

ORDER

The University shall remit $30,397.50 to the Union within 30 days of the date of this Order.

February 2, 2022.



Adam L. Rhynard, Chair

*Lisa M. Umscheid, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Umscheid, Concurring:

I concur in the representation costs award because there was no objection to the Union's attorneys' hours or billing rates, which is required to challenge the reasonableness of hours and

[1]The Union petitioned separately for attorney fees on appeal. ORS 243.676(2)(e); OAR 115-035-0057. We address that petition in a separate order issued on this date.

rates. There also was no objection asserting that an award of full representation costs was unreasonable or inappropriate on any other basis. Consequently, I join in the decision to award all the representation costs sought.

I write separately to express my view that the Board should develop, through rulemaking or the Board's case adjudication, guidelines about how to assess mitigating circumstances when we designate the amount of representation costs in a case involving a violation of ORS 243.670(2). When the Board finds such a violation, a civil penalty is statutorily required. The calculation of the amount of that penalty is also set by statute. The penalty can be nominal—as is the case here. A nominal civil penalty can nonetheless lead to a significant representation costs award because a civil penalty automatically removes the $5,000 cap on representation costs. *See* OAR 115-035-0055(1)(b)(E). And, under our current rule, we do not generally consider mitigating factors not raised by the responding party. The significantly large representation costs award that can result in an ORS 243.670(2) case will not necessarily be consistent with the policies and purposes of PECBA in every case.

As background, for all unfair labor practice cases *other* than violations of ORS 243.670(2), a civil penalty is awarded only when there is conduct that is especially poor or undesirable. When the case includes a finding that an unfair labor practice was committed, the Board awards a civil penalty only when there has been repetitive, intentional, or egregious conduct. *See* ORS 243.676(4)(a)(A) (a civil penalty of up to $1,000 per case may be awarded only if the Board finds that the respondent committed the unfair labor practice "repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge" or the unfair labor practice was "egregious"). When an unfair labor practice complaint is dismissed, a civil penalty of up to $1,000 may be awarded, but only if "the complaint was frivolously filed, or filed with the intent to harass the other person, or both." ORS 243.676(4)(a)(B).

In contrast, when there is a violation of ORS 243.670(2), a civil penalty is automatic and its amount is determined by statute. A civil penalty of "triple the amount of funds" expended by the public employer in connection with its conduct is required. ORS 243.676(4)(b). A civil penalty for a violation of ORS 243.670(2) can be nominal, as is the case here, where we awarded a civil penalty of only $3. There is no requirement that the employer's conduct was egregious or repetitive as a prerequisite to such civil penalty; a good faith mistake can result in a penalty. And because a civil penalty, even if nominal or modest, removes the $5,000 cap on representation costs under the Board's representation costs rule, the public employer may be ordered to pay representation costs in an amount disproportionate to the blameworthiness of its conduct.

The impact of an automatic civil penalty (imposed by statute) on the calculation of representation costs (determined according to the Board's rule) did not always work this way. When the legislature enacted the Public Employer Accountability Act through House Bill 3342 (2013), the Board considered mitigating factors when designating the amount of representation costs. Those factors included whether the case involved an issue of first impression and whether the respondent committed an aggravated or pervasive unfair labor practice or repeated conduct previously found to be unlawful. *See former* OAR 115-035-0055(4)(a)(A), (B) (October 31, 1985). Under that longstanding rule, the Board was required to consider such mitigating factors when designating the amount of representation costs when a civil penalty was awarded, which would include a civil penalty awarded for a violation of ORS 243.670(2). Under the former rule, the

Board ordered less than full representation costs in civil penalty cases several times. *See Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon*, Case No. UP-32-01, 20 PECBR 650 (2004) (Rep. Costs Order) (in civil penalty case, 50 percent of costs awarded in case involving issue of first impression); *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 24 PECBR 720 (2012) (Rep. Costs Order) (in civil penalty case, representation costs reduced from $25,894 to $23,500 in case involving several issues of first impression during the compliance phase and where the employer made a sincere effort to comply following appeal); *but see Blue Mountain Faculty Association/Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, Case No. UP-22-05 at 4, 21 PECBR 853, 856 (2007) (Rep. Costs Order) (in civil penalty cases, the Board "typically award[s]" the prevailing party all of its reasonable representation costs).

The Board streamlined the representation costs rule in 2016, and for good reasons. Under the new rule, effective February 1, 2017, a party responding to a petition for representation costs can challenge the reasonableness of the hours and billing rates only by revealing its own attorneys' hours and billing rates. *See* OAR 115-035-0055(2)(d), (e). The new, streamlined representation costs rule omits, in addition to other provisions, the following requirement from the previous rule:

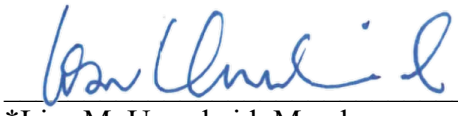
> "(4) Designating the Amount of Representation Costs. The Board shall consider the following factors in designating the amount of representation costs to be awarded:
> (a) Consistency with the policies and purposes of the PECBA, including but not limited to the following considerations:
> (A) The issue in the case was one of first impression before the Board; or
> (B) Respondent was guilty of an aggravated or pervasive unfair labor practice or the repetition of a type of conduct previously found to be unlawful; or
> (C) A complaint or a defense was frivolous or otherwise without merit; or
> (D) A party was an individual who, due to the circumstances of the case, had to rely upon his/her personal financial resources."

See former OAR 115-035-0055(4)(a) (September 3, 2014). Nothing in the new rule prevents a party from arguing that an award of full representation costs in an ORS 243.670(2) case is unreasonable for one of these reasons, but to date no party has done so. Given the fact that an automatic civil penalty in an ORS 243.670(2) case automatically removes the $5,000 cap on representation costs, these mitigating factors may be relevant in some cases.

The mismatch that can occur between a public employer's actual fault and the amount of the representation costs ordered could be ameliorated by considering the relevant mitigating factors. For example, here the University was dealing with an issue of first impression. *See former* OAR 115-035-0055(4)(a)(A) (September 3, 2014) (requiring consideration of whether "[t]he issue in the case was one of first impression before the Board"). When the University prepared and ultimately published the links to its FAQ web page, from July 2017 through June 15, 2018, neither this Board nor any Oregon court had construed ORS 243.670. The Board did not issue its first decision construing ORS 243.670 until July 18, 2018—*after* the University prepared and distributed its FAQs. *See Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-003-16 at 55-58, 27 PECBR 375, 429-32 (2018). Not only was there no guidance on the breadth of ORS 243.670(2) generally, there also was no precedent regarding the statute's specific provisions. For example, there was no precedent

regarding whether, as the University argued, ORS 243.670(3) protected an "accordion"-style web page designed to allow an employee to virtually "ask" a question of the employer by affirmatively clicking on a link to request an answer to that question. Although the Board and the court were not persuaded by the University's argument, it was a good faith one. *See United Academics of Oregon State University v. Oregon State University*, Case No. UP-021-18 at 25 n 17 (2020) ("we see no basis for finding that OSU's answer was either frivolous or filed in bad faith"). In the future, if required by an administrative rule or when asserted by a party responding to a representation costs petition in an ORS 243.670(2) case, I would consider these mitigating factors in appropriate cases.

Here, the employer, no doubt for good reasons, did not object to the petition on these or any other grounds. Consequently, I join in the representation costs award.[2]



*Lisa M. Umscheid, Member

[2]I made the same basic point in my concurring opinion in *Oregon AFSCME Council 75 v. Mid-Columbia Center for Living*, Case No. UP-025-20 (2021) (Rep. Costs Order). There, as here, the parties stipulated that the employer used public funds in connection with conduct that violated ORS 243.670(2). In *Mid-Columbia Center for Living*, in a consent order, the parties stipulated that the public employer used $1,000 in public funds. *Oregon AFSCME Council 75 v. Mid-Columbia Center for Living*, Case No. UP-025-20 at 2 (2020) (Consent Order). The parties also stipulated that the employer's conduct violated ORS 243.670(2), and they stipulated to a $3,000 civil penalty. *Id*. at 3-4. In response to the petition for representation costs in *Mid-Columbia Center for Living*, the respondent argued that the petitioner was not the prevailing party, a conclusion I could not reach given the stipulated finding that the petitioner prevailed on its claims alleging violations of ORS 243.672(1)(a), (e), and (i). The respondent also argued that the petitioner's attorney's hours were excessive, but it did not submit the statement of its own attorney's hours, as required by OAR 115-035-0055(2)(d). Lacking any argument from the respondent that the amount of representation costs was unreasonable based on the nature of the civil penalty, I concurred in the Board's decision ordering the full amount of reasonable representation costs.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-037-21

(UNFAIR LABOR PRACTICE)

SEIU LOCAL 503, OPEU,	)	
	)	
Complainant,	)	
	)	
v.	)	FINDINGS AND ORDER FOR
	)	REPRESENTATION COSTS
MARION COUNTY,	)	
	)	
Respondent.	)	
	)	

In an October 29, 2021, order, and a December 16, 2021, order on reconsideration, this Board held that Marion County (County) violated ORS 243.672(1)(e) when it unilaterally revoked its Temporary Telework Policy in July 2021, as alleged in the complaint filed by SEIU Local 503, OPEU (SEIU). 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. SEIU is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1)(a). The prevailing party is "the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(d).

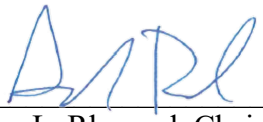
2. This case required two days of hearing.

3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case that required two days of hearing is $5,000. OAR 115-035-0055(1)(b)(D).

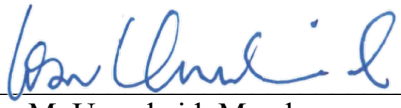
ORDER

The County shall remit $5,000 to SEIU within 30 days of the date of this order.

DATED: February 23, 2022.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

*Shirin Khosravi, Member

*Member Khosravi did not participate in the deliberations or decision in this matter.

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DC-002-21

(REPRESENTATION)

CERTAIN EMPLOYEES OF CRESCENT RURAL FIRE PROTECTION DISTRICT, Petitioner, v. LANE PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF L851, and CRESCENT RURAL FIRE PROTECTION DISTRICT, Respondents.	)	CERTIFICATION OF ELECTION RESULTS (PETITION FOR DECERTIFICATION)

On December 29, 2021, certain employees of Crescent Rural Fire Protection District (District) filed a petition under ORS 243.682(1)(b)(D) and OAR 115-025-0045 to decertify Lane Professional Firefighters Association, IAFF L851 (Union) as the exclusive representative of all regular paid Fire and EMS employees of the District. On December 30, 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 January 6, 2022. OAR 115-025-0060. Pursuant to the terms of the notice posting and OAR 115-025-0060, objections to the petition were due within 14 days of the date of the notice posting (*i.e.*, by January 20, 2022). No objections were filed.

Pursuant to the terms of a consent election agreement, the Election Coordinator sent ballots to eligible voters on February 10, 2022. Two valid ballots were returned by the deadline of March 3, 2022, which constitutes the date of the election. *See* OAR 115-025-0072(1)(b)(A). The two choices on the ballot were (1) representation by Lane Professional Firefighters Association, IAFF L851; or (2) No Representation. A tally of ballots was held on March 4, 2022, and the majority

of valid votes counted were cast for No Representation. The tally of ballots was provided to the parties on March 4, 2022.

Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by March 14, 2022). OAR 115-025-0075. No objections were filed, and the Board accordingly issues this certification of the results of the election. OAR 115-025-0076.

ORDER

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

DATED: March 15, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-006-21

(REPRESENTATION PETITION)

OREGON AFSCME COUNCIL 75, LOCAL 189, Petitioner, v. CITY OF PORTLAND, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Julie D. Reading and Jason M. Weyand, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented the Petitioner.

Lory J. Kraut, Senior Deputy City Attorney, and Mark Rodriguez, Assistant Deputy City Attorney, represented the Respondent.

On March 2, 2022, 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

MJ's A&RC III position is included in AFSCME's Auditor's Office bargaining unit.

DATED: March 31, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-006-21

(REPRESENTATION PETITION)

OREGON AFSCME COUNCIL 75 LOCAL 189, Petitioner, v. CITY OF PORTLAND, Respondent.	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on October 21 and 22, 2021. The record closed on November 23, 2021, upon receipt of the parties' post-hearing briefs.

Julie D. Reading and Jason M. Weyand, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented the Petitioner, Oregon AFSCME Council 75 Local 189.

Lory J. Kraut, Senior Deputy City Attorney, and Mark Rodriguez, Assistant Deputy City Attorney, represented the Respondent, City of Portland.

On May 5, 2021, the Petitioner, Oregon AFSCME Council 75 Local 189 (AFSCME), filed a representation petition with the Employment Relations Board (Board) under ORS 243.682(2) and OAR 115-025-0030. The petition sought to certify a new bargaining unit of specific employees of the Respondent, the City of Portland (City), in its Auditor's Office. On July 2, 2021, AFSCME amended the petition. The petition and the amended petition were supported by a sufficient showing of interest. On July 20, 2021, OHSU filed timely objections to the petition.

The City voluntarily recognized the following job classifications as being part of AFSCME's Auditor's Office bargaining unit: Auditor – Administrative Specialist II, Auditor – Analyst I, Auditor – Analyst II, Auditor – Archives & Records Coordinator I, Auditor – Archives & Records Coordinator II, Auditor – Business Systems Analyst II, Auditor – Coordinator I, Auditor – Coordinator II, Auditor – Investigator I, Auditor – Deputy Ombudsman, Auditor – Performance Auditor I, Auditor – Performance Auditor II, and Auditor – Performance Auditor III. The parties subsequently agreed to exclude Brian Johnson (an Auditor – Archives & Record

Coordinator III) and Leslie Chaires Aquirre (an Auditor – Coordinator II) from AFSCME's Auditor's Office unit, and include Irene Konev (an Auditor – Coordinator III) and Eric Berry (an Auditor – Investigator II) in the unit. (Exh. J-2, Exh. J-3, AFSCME brief at 5-6, City brief at 7 of pdf.)

The parties agree that the only remaining issue in this case is whether the "Auditor – Archives & Records Coordinator III" (A&RC III) classification that is currently occupied by "MJ" (a pseudonym used for the employee's privacy) is appropriately included in AFSCME's newly-established bargaining unit of Auditor's Office employees. The City centrally argues that MJ must be excluded from AFSCME's Auditor's Office unit because MJ does not share a sufficient "community of interest" with the other employees in the unit, and because MJ has an "administrative affinity with management." AFSCME disputes those arguments and seeks to represent MJ. As set forth below, we conclude that MJ's A&RC III position is appropriately included in AFSCME's Auditor's Office unit.

RULINGS

All rulings by the ALJ were reviewed and are correct.

FINDINGS OF FACT

Background

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

2. The City consists of a number of Offices, Bureaus, and Divisions. The Office centrally at issue in this case is the Auditor's Office.

3. AFSCME is a "labor organization" within the meaning of ORS 243.650(13). As detailed above, AFSCME is the exclusive representative of a bargaining unit that includes a number of Auditor's Office employees. As of the hearing for this case, the City and AFSCME's Auditor's Office unit had not yet negotiated a collective bargaining agreement (CBA). (10/21/21 at 11:10-11:12 a.m.)

4. AFSCME's Auditor's Office bargaining unit is not part of the District Council of Trade Unions (DCTU). The DCTU is a coalition of unions that represent City employees and bargain as a single entity with the City. The DCTU also has its own CBA with the City. One (unnamed) employee who was previously represented by the DCTU is now a part of AFSCME's new Auditor's Office unit. Apart from the new unit at issue here, AFSCME also represents a large unit of City employees who do not work in the City Auditor's Office, and that general AFSCME unit (which is not directly involved in this case) is included in the DCTU. (10/21/21 at 11:11-11:12 a.m.)

5. The Auditor's Office is led by the City Auditor. The City Auditor is an elected position with four-year terms. As stated in the City Charter, the City Auditor and the Auditor's Office "are administratively independent of the Mayor, City Council, and City [D]epartments,

[B]ureas and other administrative agencies * * *." (Exh. J.-4 at 1.)[1] The current City Auditor is Mary Hull Caballero. Caballero was first elected in 2014, then reelected in 2018. (10/21/21 at 9:27-9:29 a.m.)

6. In total, the Auditor's Office has approximately 50 full-time positions (including vacancies). Approximately 35 of those positions (again, including vacancies) are currently included in AFSCME's Auditor's Office bargaining unit. The rest of the Auditor's Office's positions (approximately 15 in total) are currently unrepresented. (10/21/21 at 10:27-10:28 a.m.)

7. The Auditor's Office has five Divisions: (1) Audit Services, (2) Independent Police Review, (3) Operations Management, (4) Ombudsman, and (5) Archives & Records Management. Outside of those Divisions, the Auditor's Office also has a General Counsel (Bridget Donegan) and a Chief Deputy (Amanda Lamb) who report directly to the City Auditor. (Exh. J-1 at 1-2.)

8. Among other things, the City Auditor is "responsible for the maintenance of all City records," and is "the custodian for all permanent records for which an agency has transferred ownership to the Auditor and for all historical records." (Exh. R-3 at 1.)

9. The Auditor's Office has its own "civil service appeals process" that is used to address appeals of disciplinary actions and classification-related decisions. As of the hearing, that appeals process applied to all Auditor's Office employees. (10/21/21 at 10:39-10:40 a.m., Exh. P-4 at 13.) The Auditor's Office also has its own "Classification and Compensation Plan" that currently applies to all its employees. (10/21/21 at 9:37 a.m., 10:24-10:27 a.m.; Exh. P-1.) Further, Auditor's Office employees follow unique Human Resources and "procurement rules," and similarly receive annual performance evaluations. (10/21/21 at 10:25-10:26 a.m., 10:34 a.m.)

10. In the Auditor's office, the term "classified service" covers represented and unrepresented employees. For example, the position of City Archivist is unrepresented but still considered part of the classified service. However, the classifications of Chief Deputy City Auditor, General Counsel, Director of Audit Services, Director of Independent Police Review, and City Ombudsman are specifically considered "outside the classified service." (10/21/21 at 10:28-10:29 a.m., 10:38-10:39 a.m., 11:27-11:28 a.m.; Exh. P-4 at 5.)

11. All Auditor's Office employees currently receive the same benefits, including health insurance, sick leave, vacation leave, and holidays, for example. But some Auditor's Office employees have different "vacation accrual rates" than others. (10/21/21 at 10:40-10:41 a.m., 11:13-11:16 a.m.)

Records Retention Regulations

12. State and federal laws and administrative rules require the City to retain certain types of records for specific periods of time. (10/21/21 at 12:44 p.m., 12:52-12:55 p.m.) Oregon's records retention laws and administrative rules are administered by State Archives, which is led by the State Archivist. (12/21/21 at 1:28-1:31 p.m., 1:35 p.m.) If a public record is requested and it has been destroyed prematurely, the City could be penalized and/or face litigation. (10/21/21 at

[1]All the parties' exhibits were admitted without objection. (10/21/21 at 9:05 a.m.)

2:16-2:20 p.m.) In general, the laws and rules governing the City's records retention are broadly worded and open to some interpretation. (10/21/21 at 12:16-12:17 p.m., 12:52-12:53 p.m., 1:31-1:33 p.m.)

13. A retention schedule "describes groups of records, provides information on their characteristics, and ultimately provides the legal justification or long-term preservation of public records and information." (Exh. P-5 at 1.) A "retention period" is "[t]he length of time a record must be kept to meet the City's administrative, fiscal, legal, or historical requirements." (Exh. P-5 at 1.) Once a record's retention period has passed, the City should discard or destroy the record (10/21/21 at 12:11 p.m., 12:21-12:22 p.m.)

14. The City is permitted to issue its own retention schedules, codes, and administrative rules as long as they do not conflict with existing state or federal records retention regulations. Individual City Bureaus can also have their own records retention rules and schedules. (10/21/21 at 12:55-12:58 p.m., 12:58-1:00 p.m., 1:44-1:45 p.m. 3:55-3:56 p.m., 4:21 p.m.) As described in greater detail below, ultimately, all the City's retention schedules must be approved by the City Auditor, the City Attorney's Office (which checks for legal compliance), and the State Archivist. (10/21/21 at 12:57 p.m., 1:42 p.m.; Exh. R-5 at 1.)

15. Once a City retention schedule is fully approved, it becomes binding City policy for all City employees and elected officials. (10/21/21 at 1:43 p.m., 2:16-2:20 p.m.) Moreover, every City employee and official is expected to be familiar with the retention schedules that apply to his or her work, and handle his or records in accordance with those schedules. (10/21/21 at 12:22-12:23 p.m.)

16. When a record need not be retained (either because the retention period has passed or because there is no "business need" for the record) it is deemed "transitory." (10/21/21 at 12:14-12:15 p.m.) Determining whether a record is transitory may require some analysis and interpretation. (10/21/21 at 12:16-12:17 p.m.) For the City, the ultimate decision-maker for that issue and many other records retention issues is generally the Archives & Records Management Division of the Auditor's Office. (10/21/21 at 12:17-12:18 p.m., 12:41-12:42 p.m.)

Archives & Records Management Division

17. Archives & Records Management is supervised and managed by the City Archivist, who reports directly to the City Auditor. The current City Archivist is Diana Banning. She has held that position for 24 years. (10/21/21 at 10:01 a.m., 1:22-1:24 p.m., 4:30 p.m.; Exh J-1 at 2.)

18. If the City Auditor assigned the City Archivist a "major policy initiative," the City Archivist would make a recommendation to the City Auditor. At that point, the City Auditor would review the City Archivist's recommendation and, subsequently, either approve or deny the recommendation. If the City Archivist's recommendation involved legal issues, it would also be reviewed and either approved or denied by the City Attorney's Office. (10/22/21 at 9:09-9:10 a.m.)

19. In addition to the City Archivist, Archives & Records Management currently consists of one Business Systems Analyst (BSA) II position (Brian Brown), two Archives &

Records Coordinator (A&RC) I positions (Gwen Amsbury and Devin Busby), one A&RC II position (which was vacant at the time of the hearing), and two A&RC III positions (one of which is MJ's, one of which was vacant at the time of the hearing). All those classifications report directly to the City Archivist. Currently, there are no BSA Is in the Division. (10/21/21 at 9:55 a.m., 2:58 p.m., 4:30-4:31 p.m.; Exh. J-1 at 2.)

20. Archives & Records Management's BSA II, A&RC I, and A&RC II classifications are currently included in AFSCME's Auditor's Office bargaining unit. A&RC III MJ is currently unrepresented. (10/21/21 at 2:59 p.m., Exh. J-2 at 3, Exh. J-3 at 1.)

21. Before the COVID-19 pandemic, the City Archivist also had "casual staff" who reported to her. Those employees generally included graduate students who were completing their master's degrees in "library science or archives." Currently, the Division has no casual staff. (10/21/21 at 9:55-9:56 a.m.)

22. All A&RC Is, A&RC IIs, A&RC IIIs, and BSA IIs submit their leave requests to the City Archivist. A&RC III MJ does not receive or approve any leave requests. (10/21/21 at 10:56 a.m. 4:31 p.m.)

23. All Archives & Records Management employees have the same standard holidays off, follow the same vacation and sick leave rules, are subject to the same Auditor's Office-specific Human Resources policies and rules, and receive the same insurance and other benefits. (10/21/21 at 9:38 a.m., 10:25 a.m., 3:01-3:02 p.m., 4:31 p.m.)

24. In general, all Archives & Records Management employees work the same schedule, Monday through Friday, from 8:00 a.m. to 5:00 p.m., for 40 hours a week. Moreover, all of them are salaried and "FLSA exempt." (10/21/21 at 10:41-10:43 a.m., 3:01 p.m., 4:31-4:32 p.m.)

25. As of the hearing, due to the COVID-19 pandemic, all Archives & Records Management employees were primarily working remotely. However, the A&RC Is occasionally must go into the Division's office to handle records requests for physical documents. Further, BSA II Brown has gone onsite during the pandemic to work on a server upgrade. (10/21/21 at 2:59-3:00, 4:32 p.m.)

26. Before the COVID-19 pandemic, all Archives & Records Management employees worked onsite in the Division's office, which consists of three separate areas of the same building. (10/21/21 at 2:59-3:00 p.m.) Those areas are: (1) a "reading room" (for people coming in to do research), (2) an office space, and (3) a processing area for interns and students. The office space includes a single office for the City Archivist and a number of cubicles that are used by the rest of the staff. (10/21/21 at 3:00-3:03 p.m.) Archives & Records Management employees normally do not work outside. (10/21/21 at 3:02-3:03 p.m.)

27. All the City Archivist's employees have "backup responsibilities," which ensures that all the Division's work gets completed. (10/21/21 at 10:54-10:55 a.m.) In addition, all of those employees frequently work with computers. (10/21/21 at 3:02-3:03 p.m.)

28. Archives & Records Management generally "sets records retention and preservation policies and guidelines, * * * serves as the City expert on records issues, and provides services to help City employees manage their electronic and physical records." (10/21/21 at 9:41-9:42 a.m., Exh. J-6 at 1, Exh. R-8 at 3.) Archives & Records Management also administers the City's main electronic records management system, "TRIM," which is used by most but not all the City's Bureaus. (10/22/21 at 9:13 a.m., 1:24-1:26 p.m.) In addition, the Division responds to public records requests (which is also true for every other Bureau). (10/21/21 at 12:45 p.m.)

29. Archives & Records Management operates the City's Archives and Records Center, which makes "City administrative and historical records accessible to the public and City employees for research and inspection in accordance with Oregon's public records laws." The Records Center facility includes a warehouse where records are stored. (10/21/21 at 9:55 a.m., 10:01-10:02 a.m.; Exh. J-6 at 1; Exh. R-8 at 3.)

BSA II

30. The current BSA II is Brian Brown. Brown generally handles Archives & Records Management's technology and software issues. (10/21/21 at 10:55 p.m.) That can involve performing server maintenance/support and installing upgrades, for example. (10/21/21 at 12:45-12:46 p.m., 2:56-2:58 p.m., 4:26-4:27 p.m.; 10/22/22 at 9:11-9:12 a.m.) Brown does not develop or interpret records retention policy, or train on that subject. (10/21/21 at 4:48 p.m.)

31. Brown acts as the system administrator for TRIM. Brown has helped Bureaus and elected officials get TRIM working on their computers. He has also helped them learn the mechanics of getting records filed. (10/21/21 at 9:57-9:58 a.m., 2:57 p.m., 4:28-4:30 p.m.; 10/22/21 at 9:10-9:12 a.m.)

32. BSA II Brown has worked with Senior Deputy City Attorney Jenifer Johnston of the City Attorney's Office on a number of projects. Johnston has also referred officials to Brown. However, Brown and Johnston do not work collaboratively, discuss policy together, or make policy decisions together. (10/21/21 at 12:29-12:30 p.m.) Johnston interacts with Brown once a month or once every other month. (10/21/21 at 12:45-12:47 p.m.)

A&RC Is

33. The two A&RC Is are responsible for maintaining the Records Center and its functions. Their duties include receiving physical records from Bureaus, putting those records away on the Records Center's shelves, filling out related forms, and entering relevant information into TRIM. (10/21/21 at 2:52-2:54 p.m., 4:03 p.m.) In addition, A&RC Is respond to requests for physical records, obtain those records from storage, and mail physical records to Bureaus upon request. They also send out physical records to be destroyed, and send out affiliated notices stating that records are ready to be destroyed. Separately, A&RC Is retrieve physical records after City employees leave their positions. (10/21/21 at 9:59 a.m., 2:52-2:54 p.m.)

34. A&RC Is provide information and reference services on occasion. Among other things, A&RC Is respond to emails sent to the Archives & Records Management's general email

address. Those emails can include questions about sending records to the Records Center, what records are available in a collection, accessing City records, or hours of operation, for example. Some of these emails are forwarded to A&RC III MJ. (10/21/21 at 4:03 p.m., 4:28-4:30 p.m., 5:24-5:25 p.m.) Additionally, one of the A&RC Is maintains a blog about City assets. (10/21/21 at 4:03 p.m.)

A&RC IIs

35. Archives & Records Management currently has one vacant A&RC II position. As of the hearing, the City was recruiting to fill that position. (10/21/21 at 9:58 a.m., 2:58 p.m.)

36. When an A&RC II position is filled, the A&RC II primarily functions as a "reference librarian" and manages Archives & Records Management's "reference room." (10/21/21 at 9:58 a.m.)

A&RC IIIs

37. Archives & Records Management currently only has one A&RC III, MJ. As of the hearing, the Auditor's Office was in the process of recruiting to fill a second A&RC III position. When this petition was filed, another A&RC III position (that was focused on the Division's archives program, and supervised the Division's casual staff) was occupied by an individual named Brian Johnson. He has since retired. (10/21/21 at 9:55-9:57 a.m., 10:02 a.m., 3:27 p.m., 1:26 p.m.) As noted above, the parties have agreed to exclude Johnson's old A&RC III position from AFSCME's Auditor's Office bargaining unit. (10/21/21 at 3:27 p.m.)

38. MJ's current job title is "Records Manager." (10/21/21 at 1:02 p.m., 5:07-5:08 p.m.) However, at least one of MJ's performance evaluations has characterized him as a "non-manager." MJ's position has no subordinates or supervisory authority (unlike Johnson's old A&RC III position). (10/21/21 at 10:56-10:58 a.m., Exh. R-2 at 18.) The A&RC III classification was previously called "Records Analyst." (10/21/21 at 1:50 p.m., 5:08 p.m.; Exh. R-5 at 3.)

39. MJ has been an A&RC III since June 2016 (although, as noted, the name of the classification has changed over time). (10/21/21 at 1:50 p.m., 1:59-2:00 p.m., 3:49-3:50 p.m.) Tim Hunt previously worked as a similar A&RC III. Hunt retired in 2017 or 2018. (10/21/21 at 2:05-2:06 p.m.)

40. MJ generally works independently and "sets much of his own workplan" and pace. (Exh. R-2 at 6.) However, the City Archivist sets annual goals and priorities for MJ with his input, regularly reviews MJ's work and provides MJ with feedback, and occasionally assigns MJ projects. MJ also regularly checks in with the City Archivist and informs her of his progress and any issues or ideas that need to be addressed. Further, much of MJ's work is performed in consultation with others beyond the City Archivist. (10/21/21 at 2:00-2:03 p.m., 2:22-2:24 p.m., 4:11-4:12 p.m.)

41. An A&RC III "is distinguished from the City Archivist in that the former is responsible for a program within the Division with a specific focus related to collecting,

preserving, and facilitating access to the City's records while the latter is responsible for the overall management of the Division and facility and Citywide leadership on archives and records management matters." (Exh. J-5 at 1.)

42. Under the "general supervision" of the City Auditor and the City Archivist, MJ "leads and develops certain citywide Archives & Records Management * * * programs or functions related to the proper management and preservation of both paper and electronic records in compliance with applicable law and industry standards." (10/21/21 at 10:53 a.m., 2:00 p.m., 4:51 p.m.; Exh. J-5 at 2; Exh. J-6 at 1.) In addition, MJ ensures that the City is complying with applicable state and federal records retention laws and minimums. (10/21/21 at 10:00 a.m., 12:55-12:57 p.m.) At a minimum, MJ reviews and considers the applicable Oregon Administrative Rules (OARs) and the Code of Federal Regulations. (10/21/21 at 3:55 p.m.)

43. MJ is responsible for developing, creating, and interpreting the City's retention schedules. (10/21/21 at 2:21 p.m., 3:50-3:51 p.m.) As detailed below, MJ drafts and writes those retention schedules in consultation with City groups (*e.g.*, Bureaus) and City employees and officials, and does so in accordance with all applicable laws and regulations. (10/21/21 at 3:50-3:51 p.m.)

44. MJ's development and maintenance of retention schedules generally requires "in-depth analysis." When MJ works with a Bureau or its designee on creating or changing a retention schedule, he tries to get a clear understanding of the Bureau's core functions, descriptions of the various kinds of records the Bureau generates, and what kinds of retention periods are needed. After that, MJ finds and reviews the applicable federal and state rules, and takes his drafts and the Bureau's recommendations through the approval process. (10/21/21 at 12:10-12:11 p.m., 4:57-5:02 p.m., 5:28-5:31; Exh. J-6 at 2.)

45. MJ generally cannot establish, publish, or modify City retention schedules, retention periods, policies, or administrative rules on his own. He also cannot unilaterally change whether a particular kind of record must be kept confidential. (10/21/21 at 10:54 a.m., 3:53-3:54 p.m., 4:00-4:02 p.m.: 5:28 p.m.) However, MJ does act as "lead advisor" when there are changes to retention schedules and policies. (10/21/21 at 10:54 a.m.) Further, MJ can unilaterally make "minor," "non-substantive," and "insubstantial" changes to the wording of record descriptions. Those particular changes are generally intended to clarify or update the language being used, and are based on a Bureau's needs and input. (10/21/21 at 3:03-3:06 p.m., 3:08-3:10 p.m., 3:28-3:29 p.m., 3:53-3:54 p.m.)

46. Before a new City retention schedule is established or an existing schedule is revised, the change must be approved by the affected Bureau(s), the City Archivist, the Director of Audit Services (the head of the Audit Services Division), and the City Attorney's Office (*i.e.*, Senior Deputy City Attorney Johnston). In addition, all "major changes" to retention schedules must be approved by the State Archivist, whose office may also have to be consulted. The City Auditor is not always directly part of this process. (10/21/21 at 10:53-10:54 a.m., 12:09 p.m.,

12:57-12:58 p.m., 3:03-3:06 p.m., 3:08-3:11 p.m., 3:52-3:53 p.m., 4:00 p.m., 5:17-5:19 p.m., 5:28-5:29 p.m.; Exh. J-6 at 4.)[2]

47. When a City retention schedule is being changed, MJ and Johnston discuss whether the modified schedule meets the state's legal minimums. MJ and Johnston also discuss any policy or legal implications affiliated with the change. (10/21/21 at 12:09-12:10 p.m., 3:55 p.m.)

48. In practice, MJ might propose a change to a retention schedule or policy after noticing an update to a state or federal administrative rule or law concerning records retention, which MJ regularly reviews. MJ might also propose a change after a Bureau informs him that it has taken on a new function, changed its business practices, or acquired a new technology or type of software that creates a new kind of record, for example. (10/21/21 at 1:33-1:34 p.m., 1:47-1:49 p.m., 3:52-3:55 p.m., 4:37-4:39 p.m., 4:54-4:55 p.m.; 10/22/21 at 9:03-9:06 a.m.) Every two years, there is a review process during which Bureaus can suggest changes to their retention schedules and identify minor issues. (10/21/21 at 3:10-3:11 p.m., 3:55 p.m.)

49. Once MJ determines that a retention schedule or policy needs to be changed, MJ will work with the relevant Bureau to modify its retention schedule in accordance with all applicable legal standards. Once MJ and the Bureau agree on a change, MJ brings their proposed change to the City Archivist. At that point, the City Archivist can review and then approve or deny the proposal. Once MJ has the City Archivist's approval, MJ seeks the approval of Audit Services, which generally ensures that old schedules/policies remain available during an audit. Once MJ has Audit Services' approval, MJ shares the proposal with Senior Deputy City Attorney Johnston for her approval. (10/21/21 at 1:57 p.m., 3:52-3:56 p.m., 5:18-5:19 p.m., 5:28-5:29 p.m.)

50. The City's Parking Enforcement Bureau once approached MJ because that Bureau had recently developed a contract for handheld license plate readers. The data that Parking Enforcement was collecting in that context using was only usable in a 6- to 12-hour period, but the Bureau was retaining the data for several years. Parking Enforcement asked MJ if they could reduce their retention schedule to something smaller and more manageable. Subsequently, MJ discussed the matter with Parking Enforcement and created a draft schedule or policy. MJ proposed retaining this information only as long as it was needed. MJ also got feedback from State Archives for the issue. Later, MJ sent that draft to the City Archivist for approval. At that point, MJ and the City Archivist discussed the matter. Eventually, the City Archivist approved the draft. This particular matter did not need to be reviewed by the Audit department, but it was also reviewed and approved by the City Attorney's Office. (10/21/21 at 4:16-4:17 p.m.) As of the hearing, MJ was still in the process of finalizing the guidance for this issue and uploading it to a website. MJ also let Parking Enforcement know that they could delete this information once it was no longer needed for issuing citations. (10/21/21 at 4:14-4:16 p.m.)

51. MJ has not been involved with revising one the City's administrative rules. Further, for a City administrative rule to change, it requires the involvement of the City Archivist and other stakeholders as well as legal review. (10/21/21 at 4:00-4:01 p.m.)

[2]MJ's position description (at Exh. J-6 at 4) details precisely who, if anyone, is required to approve some of MJ's decisions. (10/21/21 at 10:50-10:52 a.m., 5:29 p.m.)

52. MJ was once assigned to the City's "Retention Schedule Simplification Project." (10/21/21 at 1:46 p.m.; 10/22/21 at 9:06-9:07 a.m.; Exh. R-2 at 4.) The aim of the Retention Schedule Simplification Project was to reduce the number of retention schedules City employees need to use. One way of doing that was to group records broadly by topic (*e.g.*, a project record). (10/21/21 at 1:45-1:46 p.m., 4:04-4:05 p.m.) Another element was reducing the number of Bureau-specific retention schedules. In the end, the Retention Schedule Simplification Project resulted in reducing the number of retention schedules from several thousand to approximately 500. However, the Project did not override any underlying legal requirements. (10/21/21 at 2:12-2:15 p.m., 3:14-3:16 p.m., 4:05 p.m.)

53. MJ's work on the Retention Schedule Simplification Project involved reviewing federal, state, City-wide, and Bureau-specific retention schedules; looking for commonalities among those schedules; and identifying problematic schedules. It also involved creating and working with a stakeholder group that included representatives appointed by the various Bureaus' directors, listening to those representatives' input and feedback, managing the Bureaus' expectations, and trying to reach an agreement with each Bureau. (10/21/21 at 4:51 p.m., 10/22/21 at 9:08 a.m.)

54. MJ's work on the Retention Schedule Simplification Project required him to use his knowledge and experience, independent judgment, and initiative. However, all Retention Schedule Simplification Project changes needed to be approved by each affected Bureau, the City Archivist, and Senior Deputy City Attorney Johnston. (10/21/21 at 12:08-12:09 p.m., 2:12-2:16 p.m., 3:14-3:16 p.m.; 10/22/21 at 9:08-9:09 a.m.)

55. The Retention Schedule Simplification Project was started by former A&RC III Hunt before MJ joined the City in June 2016. MJ later inherited the assignment from Hunt and became its "project manager" or "project lead." (10/21/21 at 4:04-4:05 p.m., 4:40 p.m., 4:51 p.m.) After MJ took over from Hunt, A&RC I Amsbury volunteered to work on the Project, and MJ assigned Amsbury to it. (10/21/21 at 12:08-12:09 p.m., 4:03 p.m., 4:40-4:41 p.m., 4:51-4:52 p.m.) Initially, Amsbury and MJ divided the City's retention schedules in half, and each conducted his or her own independent analysis of a half. Subsequently, MJ and Amsbury discussed their work and reached an agreement on how to proceed. (10/21/21 at 4:04-4:05 p.m.)

56. After MJ and A&RC I Amsbury finished their initial portion of the project, they passed on their work to the City Archivist, who conducted three to five of her own reviews. After that, the City Archivist gave MJ feedback and suggestions (including suggesting "different OAR citations") and asked MJ questions about the project. Next, the relevant Bureaus' designees shared whether the proposed changes fit their Bureaus' needs and submitted additional changes to MJ. MJ incorporated the designees' feedback into his draft. Afterward, MJ and others conducted another review. MJ then had several meetings with Senior Deputy City Attorney Johnston about the project, and gave Johnston a chance to review the totality of the work and provide her feedback and approval. (10/21/21 at 2:14-2:16 p.m., 3:16 p.m., 4:05-4:07 p.m.) In this instance, Johnston determined whether the simplified schedules were "legally compliant," and discussed legal and policy implications with MJ. (10/21/21 at 12:08-12:09 p.m.)

57. MJ was also involved with the City's Legal Records Management Forum. (10/21/21 at 12:02-12:05 p.m.) One aim of the Legal Records Management Forum was to reduce the number of emails being retained by the City. To address that issue, each Bureau and Office was asked to send a representative with "policy-making authority" to a series of meetings that began in 2015 and ended in 2017. In 2017, before MJ joined this group, it made a recommendation to a group of stakeholders that the group would proceed with a pilot program for what it called the CORE Email Management Project. (10/21/21 at 12:23-12:27 p.m., 1:03 p.m., 4:07-4:08 p.m.) CORE is an acronym for "Capture, Organize, and Retain Email." (12/21/21 at 12:33 p.m.)

58. The CORE Email Management Project was based on a project of the U.S. National Archives and Records Administration known as "Capstone." (10/21/21 at 12:33-12:34 p.m., 2:06 p.m.) In essence, if the CORE Email Management Project's recommendations had been accepted, the City would assign employees to a "functional group" depending on the person's role in the City. For example, for elected officials and directors, all their emails would be considered permanent. Meanwhile, managers' email would only have to be kept for 10 years, and the email of "line staff" would be kept for 4 years. Put differently, the City would manage email based on a user's function rather than by the substance of the document. Currently, the City manages email by focusing on the content of email, which requires employees to interpret a variety of retention schedules. (10/21/21 at 2:06-2:07 p.m., 4:07-4:08 p.m.)

59. The Auditor's Office initially sent (1) a Deputy Director, (2) the City Archivist (Banning), and (3) former A&RC III Hunt as its representatives for the Legal Records Management Forum's meetings. At some point after MJ started working for the City in June 2016, MJ also joined the group. In 2017 or 2018, after Hunt stopped working for the City (after retiring then being temporarily rehired as a "project consultant"), MJ took over Hunt's role in the Forum and became a "project manager" and/or "project lead." (10/21/21 at 12:25-12:27 p.m., 1:00-1:01 p.m., 2:05-2:08 p.m., 3:20-3:21 p.m., 4:07-4:09 p.m., 4:41 p.m., 4:51 p.m.) However, before that, Hunt had already "drafted and finalized" the CORE Email Management Project, the related manual, and the requirements for further implementation. (10/21/21 at 4:07-4:08 p.m., 4:41-4:42 p.m.) Once Hunt's responsibilities were turned over to MJ, MJ was expected to liaise with the City's Bureau of Technology Services, which could decide whether it would adopt and implement the project. (10/21/21 at 2:08 p.m., 3:14 p.m., 4:08 p.m., 4:41-4:43 p.m.) MJ did not have the authority to implement the CORE Email Management Project on his own. (10/21/21 at 1:14 p.m., 4:09-4:11 p.m.)

60. The CORE Email Management Project recommendation was reviewed and approved by the City Archivist, Senior Deputy City Attorney Johnston, and others. It was not reviewed and approved by the City Auditor, but she was aware of it and supported it. (10/21/21 at 12:28-12:29 p.m., 1:10-1:13 p.m., 3:12-3:13 p.m., 4:10 p.m.) In the end, the CORE Email Management Project recommendation was not approved by the group's stakeholders or adopted or implemented by the City. Critically, the recommendation was not supported by the Bureau of Technology Services. There were also concerns about costs. (10/21/21 at 3:13-3:14 p.m., 4:10 p.m.)

61. MJ generally serves as a records management "expert" for the City. (10/21/21 at 9:59-10:02 a.m., 10:06-10:07 a.m., 10:55 a.m., 2:25 p.m., 2:27 p.m., 5:03-5:04 p.m.; Exh. R-2 at

21.) As part of that role, MJ provides "advice and guidance to City employees at all levels," which includes all types of City employees and elected officials. (10/21/21 at 5:04 p.m., 5:16 p.m., Exh. J-6 at 1.)

62. MJ trains City employees and officials. (Exh. J-5 at 1, Exh. J-6 at 1.) That often involves training them on records management basics, including employees' responsibilities under the law and the City's policies. MJ also trains on more specific records management issues, and is expected to train employees on the City's recently simplified retention schedules (discussed above). (10/21/21 at 10:00 a.m., 2:10 p.m., 2:29-2:30 p.m., 3:51 p.m.)

63. Whenever any City employee or official has a question about records retention or a retention schedule, he or she can generally reach out to MJ for advice and answers. Some of the more straightforward questions about records can be answered by MJ's colleagues. However, MJ answers the more complicated or difficult questions. If an employee's question has legal implications, he or she can ask Senior Deputy City Attorney Johnston that question. (10/21/21 at 12:22 p.m., 2:21-2:22 p.m., 2:27-2:28 p.m., 3:59 p.m.)

64. If MJ is on vacation and a difficult or novel records retention question comes up, the question generally goes to the City Archivist. That said, for certain issues, the City Archivist will wait for MJ to return to work and weigh in on the issue. Difficult records retention issues cannot be answered by the A&RC Is. (10/21/21 at 2:31-2:33 p.m.) If MJ is unavailable (*e.g.*, on vacation) and Senior Deputy City Attorney Johnston needs an urgent response, Johnston will consult with the City Archivist. (10/21/21 at 12:28-12:29 p.m., 12:51-12:52 p.m.)

65. MJ regularly "[c]onsults with the City Attorney's [O]ffice on complex records management questions and works to find an outcome that encompasses existing policy and takes into account the situation." (10/21/21 at 2:31-2:32 p.m., 4:56 p.m.; Exh. R-2 at 41.) That responsibility frequently requires MJ to work with Senior Deputy City Attorney Johnston in particular. (10/21/21 at 12:02-12:06 p.m., 12:43-12:44 p.m.)

66. In practice, Johnston may consult with MJ regarding how to characterize a record (*e.g.*, to determine whether a particular record is transitory), to discuss a problem with the application of a schedule, to suggest that a schedule should be changed or updated, or to discuss record searching methods. When Johnston consults with MJ, Johnston believes that MJ is "speaking for" Archives & Records Management and does not seek out further approval from the City Archivist. (10/21/21 at 10:07 a.m., 12:07-12:08 pm., 12:12-12:13 p.m., 12:16-12:21 p.m., 12:27-12:29 p.m., 12:41-12:42 p.m.) Nonetheless, depending on the issue, MJ may inform or check in with the City Archivist on his own. Further, for some matters, Johnston, MJ, and City Archivist will have a discussion. (10/21/21 at 12:27-12:29 p.m., 12:51 p.m.) Johnston also refers people to MJ for questions involving interpretation of retention schedules. (10/21/21 at 12:07-12:08 p.m.)

67. MJ spends approximately 1% of his time working with the City Attorney's Office. (10/21/21 at 10:52 a.m., 1:10 p.m., 5:20 p.m., Exh. J-6 at 2.) Furthermore, in practice, MJ communicates with Senior Deputy City Attorney Johnston, on average, once or twice a month. However, during the COVID-19 pandemic, there have been some months in which the two have

not communicated at all. (10/21/21 at 12:19-12:20 p.m., 1:07-1:09 p.m., 5:20 p.m.) Once a retention schedule is set, MJ and Johnston will only talk about it if there is a problem with the schedule's implementation or if the schedule needs to be changed. (10/21/21 at 12:20-12:21 p.m.)

68. MJ also drafts and shares "guidance documents." (10/21/21 at 2:34-2:35 p.m., 3:51 p.m.; Exh. R-2 at 44.) Moreover, MJ generally uses his own judgment to decide when and whether to create a guidance document. However, the State Archivist may suggest that a guidance document is necessary. Likewise, a Bureau may indicate confusion, which could result in MJ making a guidance document. (10/21/21 at 3:30-3:32 p.m.) MJ does not have the authority to create, publish, or share new guidance documents on his own. (10/21/21 at 3:58-4:00 p.m.)

69. When MJ is going to create a guidance document, MJ initially reviews the existing guidance documents. (10/21/21 at 3:56-3:57 p.m.) As a rule, after MJ creates a draft guidance document, he shares that draft with colleagues including the City Archivist, who reviews the draft, can ask MJ questions about it and make changes, and either approves or denies the draft. In general, the City Archivist reviews the draft for readability, user friendliness, and grammar and formatting issues. City Archivist Banning has never rejected one of MJ's draft guidance documents, and the same was true for former A&RC III Hunt. In practice, MJ also shares the draft guidance document and collaborates with Senior Deputy City Attorney Johnston, who can give feedback. Like the City Archivist, Johnston can approve or reject the draft. (10/21/21 at 12:15-12:16 p.m., 3:08 p.m., 3:21-3:23 p.m., 3:30-3:32 p.m., 3:56-4:00 p.m.; 10/22/21 at 9:15-9:18 a.m.) MJ has also collaborated with State Archives when making guidance documents (which occurred when he made the transitory data guidance document discussed below). (Exh. R-2 at 45.) MJ does not need the approval of Audit Services when drafting or sharing guidance documents (as he does when changing retention schedules). (10/21/21 at 3:57 p.m.)

70. MJ "reviewed" a guidance document for the City's elected officials. However, that particular document was created before MJ started working for the City. (10/21/21 at 3:58-3:59 p.m.; Exh. R-2 at 45; Exh. R-8.) MJ also made a social media guidance document for the whole City, and did so in consultation with BSA II Brown. MJ likewise let the City Archivist know in advance that there was an issue with social media records, shared his draft with her, got her approval, and consulted with Senior Deputy City Attorney Johnston and sought her approval. (10/21/21 at 2:50-2:51 p.m., 3:07-3:08 p.m., 3:21 p.m., 3:57 p.m.) Additionally, MJ made a guidance document concerning transitory data. When he did so, he discussed it and consulted with State Archives, and consulted with and got approval from the City Archivist and the City Attorney's Office after a review. (10/21/21 at 2:36-2:39 p.m., 3:07-3:08 p.m., 3:19-3:20 p.m., 4:13-4:14 p.m.)[3]

71. MJ communicates and liaisons with the State Archivist to make sure that the City is meeting the state's retention schedules, and to get the City's retention schedules approved. (10/21/21 at 12:55-12:56 p.m., 1:29-1:30 p.m., 1:33-1:34 p.m., 1:51 p.m., 4:12 p.m.) MJ also

[3]The social media and transitory data guidance documents alluded to herein are not formally in evidence. However, the social media document was used to refresh City Archivist Banning's memory and shown onscreen during the first day of the virtual hearing. (10/21/21 at 2:35-2:39, 2:46-2:50 p.m.) A copy of the guidance document for elected officials is found at Exh. R-8. The transitory guidance document was likely the same project as the Parking Enforcement project described above. (10/21/21 at 4:14 p.m.)

communicates with the State Archivist for guidance, and if he has a question about records retention or which OAR applies to a given situation. (10/21/21 at 4:12-4:14 p.m.) MJ once got the State Archivist's permission to permit the City to use TRIM. (10/21/21 at 4:12 p.m.) MJ is currently the City's designated "records officer" for its interactions with the State Archivist. Previously, that designation was held by former A&RC III Hunt. (10/21/21 at 1:29-1:31 p.m.)

72. MJ works with TRIM in order to find out Bureaus' wants and needs. That can involve creating and categorizing record classifications, for example. In total, MJ spends about 20% to 25% of his time working with the TRIM system. (10/21/21 at 3:51 p.m., 5:16 p.m.; 10/22/21 at 9:12-9:15 a.m.)

73. MJ represents Records & Archives Management at Bureau meetings and on certain City committees. Sometimes, MJ attends meetings instead of the City Archivist and acts as the City Archivist's proxy. For other meetings, MJ and the City Archivist both attend. For certain meetings, if MJ did not attend, the City Archivist would need to attend. (10/21/21 at 2:28-2:29 p.m., Exh. R-5 at 1.)

74. MJ is currently part of a City-wide "privacy workgroup." One subcommittee of that workgroup is concerned with issues involving facial recognition data and privacy. MJ sporadically attends meetings for the workgroup, reviews the group's meeting minutes and agenda items, answers questions and gives guidance concerning records management and records retention issues, and alerts the City Archivist of relevant updates. MJ's role in the workgroup is largely advisory. (10/21/21 at 2:42-2:44 p.m., 4:17-4:19 p.m.)

75. MJ once acted as a "facilitator" for and a participant in Records & Archives Management's five-year "strategic planning process." (Exh. R-2 at 45.) That process involved every Archives & Records Management employee, including the City Archivist, who was present for every meeting and was the final decision-maker. Likewise, MJ was not a decision-maker during the planning process. Ultimately, the process ended with the group solidifying the Division's major goals for the next five years. (10/21/21 at 2:39-2:41 p.m., 3:17-3:18 p.m.)

76. MJ works "very closely" with BSA II Brown. (10/21/21 at 10:55 a.m., 10/22/21 at 9:13 a.m.) MJ also covers for BSA II Brown when Brown is absent. (10/21/21 at 4:29-4:30 p.m., 10/22/21 at 9:12-9:15 a.m.) Likewise, when MJ is absent, and a TRIM-related issue comes up, Brown will address it. However, if a records retention-related issue comes up while MJ is absent, the City Archivist or an A&RC I will address it. (10/21/21 at 4:26-4:30 p.m.)

77. Within the Auditor's Office's Classification and Compensation Plan, the A&RC III classification currently has the same "salary grade" (57) as certain Auditor's Office classifications in AFSCME's Auditor's Office bargaining unit, including Analyst II, a BSA II, Coordinator III, Deputy Ombudsman, Investigator I, and Performance Auditor II. (10/21/21 at 10:30-10:31 a.m., Exh. J-1 at 2, Exh. P-1 at 2-3.)

78. For someone to perform A&RC III MJ's work in particular, he or she needs to be able to research and analyze concepts, be able to classify information and records, be detail oriented, and understand long-term preservation. (10/21/21 at 4:20-4:21 p.m.)

79. MJ has no supervisory authority, and has never been involved with, and has no authority over, any matters involving discipline, grievances, labor relations, or CBA negotiations. Furthermore, MJ cannot sanction someone who fails to follow the City's records retention polices, and is not involved in the enforcement of those policies. MJ's role is "purely advisory," and he generally only makes recommendations that must be approved by others. (10/21/21 at 3:24 p.m., 4:33-4:34 p.m., 5:21-5:23 p.m.)

MJ's Representation Status

80. MJ does not believe that being represented by a union would interfere with his job or stop him from being impartial or neutral. Further, in a prior role with a different public employer in Oregon, MJ performed similar work and was represented by a different AFSCME bargaining unit. (10/21/21 at 3:50 p.m., 4:33-4:35 p.m.)

81. The current City Auditor believes that MJ's position should be excluded from being represented by a union because of the unique expert and policy-making role MJ fills for the City, because MJ advises elected officials and Bureau directors, and because MJ interreacts with the City Attorney's Office. According to the City Auditor, if MJ were represented, "it would affect the way that people view him as a neutral or impartial advisor and trainer on records issues." (10/21/21 at 10:07-10:09 a.m., 11:05-11:07 a.m., 10:52 a.m.)

82. The current City Archivist is uncomfortable with MJ's position being represented because MJ develops and interprets policies that may have far-reaching impact throughout the City. (10/21/21 at 2:44-2:46 p.m., 3:23-3:24 p.m.) In addition, the City Archivist would not have given MJ the role of facilitator for Archives & Records Management's strategic planning process (discussed above) if MJ was represented by a union at the time. (10/21/21 at 2:39-2:41 p.m.)

83. Deputy City Attorney Johnston believes that, if MJ becomes represented by a union, he will no longer be "speaking for management." Moreover, Johnston would choose to collaborate more with the City Archivist "on final policy decisions" so that Johnston could make sure that she "had management's take on things." (10/21/21 at 12:31-12:32 p.m.) Relatedly, if MJ could no longer consult with Johnston on records management questions, that responsibility would fall to the City Archivist. (10/21/21 at 2:31-2:33 p.m.)

A&RC Series Comparison

84. The A&RC III classification is the highest level of three classifications within the A&RC "series." (Exh. J-5 at 1.) Put differently, an A&RC III is considered a higher-level classification than an A&RC II, and an A&RC II is considered a higher-level classification than an A&RC I.

85. By design, A&RC Is can promote to A&RC II, and A&RC IIs can promote to A&RC III. (10/21/21 at 2:59 p.m.) However, during Auditor Caballero's tenure, that has not occurred. The most natural promotion for an A&RC III is a promotion to City Archivist, which also has not occurred. (10/21/21 at 10:03 a.m., 10:05 a.m., 10:30 a.m., 10:59-11:00 a.m.; Exh. J-5 at 1.) Alternatively, an experienced outside hire (like MJ) may be hired into a higher ranked slot

in the A&RC progression, and does not necessarily need to start as an A&RC I. (10/21/21 at 10:58-10:59 a.m., 4:25 p.m.) Generally, an A&RC does not transfer into a "Auditor – Coordinator" position, which is outside of Archives & Records Management. (10/21/21 at 10:05 a.m.)

86. A&RC Is and IIIs have different duties and skill levels. Nevertheless, the two classifications have similar skillsets and some overlapping duties. For example, both classifications review OARs, answer questions from bureaus, and perform training (including basic/introductory training). Further, both classifications understand how to use TRIM and how collections are processed and managed. (10/21/21 at 10:58-10:59 a.m., 4:23-4:24 p.m., 4:44-4:47 p.m., 5:26-5:27 p.m.) MJ has also been asked to work with A&RC I Amsbury to give her more experience with certain aspects of TRIM. (10:21/21 at 4:45-4:46 p.m.)

87. The A&RC III classification is distinguished from the A&RC II classification "in that the latter has discretion over discrete functions within [Archives & Records Management], and the former provides leadership and guidance in assigned program areas." (Exh. J-5 at 1.) That said, A&RC IIs and IIIs both understand how information is typically stored, found, and searched. Both classifications also help to construct those information storage systems. (10/21/21 at 4:21-4:23 p.m.)

88. A&RC Is, IIs, and IIIs all have the same minimum level of education, which is a master's degree in library and information science or its equivalent (*e.g.*, a master's degree in history). (10/21/21 at 10:03-10:04 a.m., 10:58 a.m., 2:54-2:55 p.m., 4:23 p.m., 5:26-5:27 p.m.) In addition, all three classifications require attention to detail, must be able to use computers, and must have some training on records management and document storage. (10/21/21 at 2:55 p.m., 4:22 p.m., 5:26-5:27 p.m.) In general, an A&RC II has a higher knowledge and skill level than an A&RC I, and an A&RC III has a higher knowledge and skill level than an A&RC II. (10/21/21 at 2:54-2:57 p.m.)

89. A&RC Is, IIs, and IIIs cover for each other and perform one another's duties during absences and when one of them is on vacation or medical leave. (10/21/21 at 10:55-10:56 a.m.)

90. MJ regularly works with A&RC Is and IIs (when those positions are filled). Of those two classifications, MJ works with the A&RC Is more frequently. (10/21/21 at 4:02-4:03 p.m., 4:22 p.m.) Among other things, MJ has conducted a "co-training" with the two A&RC Is on introductory, basic records management. (10/21/21 at 4:04 p.m.)

CONCLUSIONS OF LAW

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

2. MJ's A&RC III position is appropriately included in AFSCME's Auditor's Office bargaining unit.

Standards of Decision

Under ORS 243.662, "Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and

collective bargaining with their public employer on matters concerning employment relations." 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). However, the Board has considerable discretion in determining whether a proposed unit is appropriate for bargaining, and may weigh other factors. *Portland Community College Faculty Federation v. Portland Community College*, Case No. UC-34-87 at 32-33, 10 PECBR 700, 731-32 (1988).

In reviewing whether a position lacks a community of interest with bargaining unit members because of an "administrative affinity," we have generally considered whether (1) the employee formulates management policies or has the discretion to take actions that, in effect, control and implement management policies, and (2) such policies have a substantial effect on the way in which unit members perform their jobs or on their conditions of employment. Additionally, an employee must have more policy-making discretion than that inherent in "professional" positions before we will make a finding of administrative affinity sufficient to exclude an employee from a unit in which the employee is, or otherwise would be, included. *Portland Community College v. Portland Community College Faculty Federation*, Case No. UC-14-00 at 24, 19 PECBR 146, 169 (2001); *Executive Department, State of Oregon v. Oregon Public Employees Union*, Case No. UC-7-89 at 11, 12 PECBR 59, 69 (1990).[4]

As this is a representation proceeding, which is investigatory, there is no burden of proof on any party. OAR 115-010-0070(5)(a).[5]

Discussion

Traditional Factors

MJ shares certain duties and skills with employees in AFSCME's Auditor's Office bargaining unit. For example, A&RC Is and IIIs similarly train City employees and officials, and respond to emails and questions concerning public records. Further, all Archives & Records Management employees appear to use TRIM, and must be familiar with and follow the City's records retention regulations.

[4]In its post-hearing brief, AFSCME argues that the administrative affinity exclusion has been effectively or expressly overturned by statutory changes (including Senate Bill 750) and Board decisions, and that the Board should explicitly reject the exclusion in this case. The City also addressed that argument in its brief. We find it unnecessary to address that issue directly in this Order.

[5]The parties agree that MJ is neither a "supervisory employee" nor a "confidential employee" as those terms are defined by ORS 243.650(23) and (6), respectively. (10/21/21 at 10:21 a.m.)

As noted in the City's brief, all A&RCs have the "same base knowledge" and the "same basic education." (City brief at 24 of pdf.) In addition, all the A&RCs are detail oriented, use computers and TRIM, and are trained on records management and document storage.

MJ also has the same benefits as the employees in AFSCME's bargaining unit, as all Auditor's Office employees currently have the same benefits, which include the same health insurance. Relatedly, everyone who works in Archives & Records Management has the same standard holidays off, and the same vacation and sick leave rules.

All Archives & Records Management employees share "backup responsibilities." Furthermore, MJ covers for BSA II Brown when Brown is absent and Brown occasionally covers for MJ. Likewise, all A&RCs cover for each other and perform one another's duties during absences. MJ also regularly works with the A&RC Is. Outside of that, MJ and BSA II Brown both work with Senior Deputy City Attorney Johnston. MJ also worked with BSA II Brown to create a social media guidance document.

Importantly, the A&RC III classification is firmly part of the A&RC "series," in which A&RC Is can promote to A&RC IIs and A&RC IIs can promote to A&RC III. The fact that such a promotion has not yet occurred is not dispositive. We are also unmoved by the fact that there is no classification in the bargaining unit to which MJ is expected to promote, given the rest of this record.

MJ and everyone in AFSCME's Auditor's Office bargaining unit ultimately report to the City Auditor. Additionally, everyone in Archives & Records Management reports directly to the City Archivist and submits their leave requests to her. Beyond that, all the classifications in Archives & Records Management are specific to the Auditor's Office and not part of any other unit.

Under normal circumstances, all Archives & Records Management employees work onsite in the same office, and most work side-by-side in cubicles. In addition, during the COVID-19 pandemic, those same employees have primarily worked remotely (with limited exceptions).

Every Archives & Records Management employee receives a salary and is FLSA exempt. MJ also works under the same Classification and Compensation plan as the rest of the Auditor's Office. Moreover, MJ has the same "salary grade" as certain classifications in AFSCME's Auditor's Office bargaining unit, including the Auditor's Office's Analyst II, BSA II, Coordinator III, Deputy Ombudsman, Investigator I, and Performance Auditor II classifications. (Exh. P-1 at 2.)

Separately, all Archives & Records Management employees work the exact same schedule. It is otherwise significant that MJ's position, like all the employees in AFSCME's Auditor's Office bargaining unit, is part of a distinct workgroup that is "administratively independent" from other City groups. (Exh. J-4 at 1-2.) Everyone in the Auditor's Office also currently works under the same civil service appeals process, Human Resources policies and rules, and "procurement rules," and similarly receives annual performance evaluations. As for the desires of the employees, AFSCME has presented a sufficient showing of interest for its proposed bargaining unit.

For the foregoing reasons, we conclude that MJ and the employees in AFSCME's Auditor's Office bargaining unit share a strong community of interest.

Administrative Affinity

Turning to whether MJ has "administrative affinity" with management, we initially note that MJ's policy-making authority is narrowly circumscribed. MJ has no role in the formulation of "general" or "overall" City, Auditor's Office, or Archives & Records Management policies. He also has no role in determining new directions or expansions of existing programs. In general, MJ's authority simply resembles that of a professional employee exercising discretion to achieve the objectives given to him by others.

We acknowledge that, in many ways, MJ works independently. He also has a significant and important role in creating and updating retention policies and guidance documents. However, as noted, the City Archivist regularly reviews MJ's work and gives him feedback and assignments. Further, for MJ's main areas of responsibility, his work heavily relies on his collaboration with others, and requires multiple layers of independent review and approval. In short, MJ does not formulate or implement management policy on his own. He is also not a final decision-maker for significant matters. As detailed above, MJ's major proposals generally require the assistance and approval of various Bureaus, the City Archivist, Audit Services, the City Attorney's Office and/or the State Archivist. Notably, one of MJ's major assigned projects, the CORE Email Management Project, was never fully adopted or implemented. Additionally, many laws and regulations well beyond MJ's control "provide boundaries within which this position operates." (Exh. J-4 at 4.)

The evidence does not establish that MJ's exercise of discretion has a substantial impact on bargaining unit members. As noted, MJ has no supervisory authority, and has no authority over any matters involving discipline, grievances, labor relations, or CBA negotiations. He also does not enforce records policies. Otherwise, there is no evidence that MJ has any control over his Division's budget. *See Laborers' International Union of North America, Professional Law Enforcement Officers Association, Aurora v. City of Aurora*, Case No. CC-06-10 at 13, 24 PECBR 38, 50 (2011).

To some extent, MJ does appear to implement records retention policy by following it, training on it, and responding to questions from and giving guidance to a wide variety of City employees and officials. But the same is true of other employees already included in AFSCME's Auditor's Office bargaining unit. On this record, we are also unmoved by the fact that MJ represents Archives & Records Management and/or the City Archivist during meetings and as part of a workgroup. Fundamentally, MJ's work does not significantly impact other employees' regular duties or working conditions, or significantly shift City policy.

Certainly, the fact that MJ "is a highly educated, extremely knowledgeable, and substantially compensated employee" does not influence our analysis. (City brief at 20 of pdf.) Neither does the mere fact that MJ is widely considered a records management "expert" establish that he has an administrative affinity here, as the same is generally true for MJ's entire Division. (Exh. J-6 at 1.) We give no independent weight to the personal opinions of the City Auditor, the City Archivist, and Senior Deputy City Attorney Johnston concerning whether MJ's position

should be represented. Relatedly, it does not follow that being represented would negatively affect MJ's analytical skills.

Conclusion

MJ shares a strong community of interest with employees in AFSCME's Auditor's Office bargaining unit. Moreover, MJ does not share an administrative affinity with management. Accordingly, MJ's position is appropriately included in AFSCME's Auditor's Office unit.

PROPOSED ORDER

MJ's A&RC III position is included in AFSCME's Auditor's Office bargaining unit.

SIGNED AND ISSUED on March 2, 2022.

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@ERB.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-001-21

(UNFAIR LABOR PRACTICE)

PRATKA, Complainant, v. LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 483, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Rebekah Millard, Attorney at Law, Freedom Foundation, Salem, Oregon, represented the Complainant.

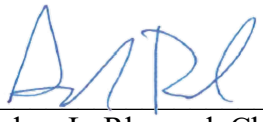
Margaret Olney, Attorney at Law, Bennett, Hartman, Morris & Kaplan LLP, Portland, Oregon, represented the Respondent.

On March 16, 2022, 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).

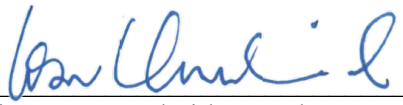
ORDER

The complaint is dismissed.

DATED: April 6, 2022.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-001-21

(UNFAIR LABOR PRACTICE)

PRATKA, Complainant, v. LABORERS INTERNATIONAL UNION OF NORTH AMERICA LOCAL 483, Respondent.	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on October 8, 2021. The record closed on December 3, 2021, upon receipt of the parties' post-hearing briefs.

Rebekah Millard, Attorney at Law, Freedom Foundation, Salem, Oregon, represented the Complainant.

Margaret Olney, Attorney at Law, Bennett, Hartman, Morris & Kaplan LLP, Portland, Oregon, represented the Respondent.

On June 3, 2021, the Complainant, Pratka, filed an unfair labor practice complaint with the Employment Relations Board (Board) against the Respondent, Laborers International Union of North America Local 483 (Union). On September 14, 2021, the Union filed a timely answer. The issue is whether the Union violated ORS 243.672(2)(a) and ORS 243.672(2)(c) when it refused to file grievances for Pratka. As set forth below, we conclude that it did not violate either statute.

RULINGS

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

FINDINGS OF FACT

Background

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

2. The Union is a "labor organization" within the meaning of ORS 243.650(13). It is the exclusive representative of a bargaining unit of certain City employees. Many of the employees in that unit, including Pratka, work for the City's Parks and Recreation Bureau.

3. Bargaining unit employees who pay dues are considered Union "members," while those who do not pay dues are considered "non-members." The Union does not have a lot of non-members.

4. The Union and the City are parties to a collective bargaining agreement (CBA). (Exh. C-1.)[1]

5. Pratka currently works for the City's Parks and Recreation Bureau as a construction equipment operator. The equipment he operates includes backhoes, excavators, a lawn mower, and two dump trucks, for example. Pratka has worked for the same Bureau in the same position since March 2005. Further, Pratka is the most senior employee of the two construction equipment operators in his shop.

6. During his time with the City, Pratka has been a Union member "for many years." At some point, Pratka stopped being a member "for a short time" then became a member again. (Tr. 13.) In July 2020, Pratka stopped being a member for the second time. Since then, he has remained a non-member. At some point, Pratka was a shop steward for the Union.

7. Eric Harrison was Pratka's supervisor from October 2017 until Harrison quit working for the City. Among Pratka's colleagues it was common knowledge that Pratka and Harrison did not get along.

8. Aaron Payment has worked for the City since 2012. He is currently a facility maintenance technician apprentice in the Parks and Recreation Bureau. Additionally, Payment has been a volunteer shop steward for the Union for approximately three years. As a shop steward, Payment is responsible for the bargaining unit employees who work in an area known as Mt. Tabor Yard, where 60 to 70 Union members report to work. Payment has also been on the Union's bargaining committee during the negotiations for at least one CBA.

9. Ben Nelson was a paid lead organizer for the Union from April 2016 until September 29, 2019. During that time, Nelson worked in the Union office and was responsible for the bargaining unit employees who worked in the Parks and Recreation Bureau. Nelson has since changed roles and now works for the Union's "District Council."

[1]All the parties' exhibits were admitted without objection.

Pratka's Seniority Issue

10. Section 12 of the CBA provides, in part,

> "In the matter of selections of jobs or opportunities to work on new jobs, processes or job locations and the selection of work shifts and vacation periods within a given classification, within a bureau, department or division thereof, the City shall prefer those employees who have permanent Civil Service status with the greatest length of service with the City within a given classification * * *."

(Exh. C-1 at 21.)

11. Section 12.1 of the CBA provides, in part, "**Shift Selection.** In multiple shift operations, employees within each classification shall have a right to select their work shift on the basis of their seniority within a bureau or division thereof and competing only with employees covered under this agreement * * *." (Exh. C-1 at 21, emphasis in original.)

12. Historically, the City and the Union have never applied Section 12 to the day-to-day assignment of duties or equipment for Parks and Recreation Bureau employees. Instead, it has been used for layoffs and in bidding for shifts, vacancies, and vacations.

13. On several occasions since Harrison started working for the City in October 2017, Pratka told Payment (1) that Harrison was following him around and "harassing" him, and (2) that under the CBA, Harrison should be letting Pratka choose operator assignments over less senior operators each day. During these exchanges, Payment consistently asked Pratka to give him (as Pratka and Payment put it) "documentation" on the assignment issue for a period of six months so that the Union could show a pattern and practice and build a strong case for Pratka and move forward with a grievance or take some other corrective action. (Tr. 20, 22, 26, 30, 64.) Specifically, Payment asked for Pratka to give him a written log with (1) relevant dates, (2) the piece of equipment Pratka operated each day, and (3) the piece of equipment Pratka believed he should have operated each day. (Tr. 64, 97.) Either Payment or Nelson also explained to Pratka that the City has "some input on job assignments." (Tr. 29.)

14. Pratka never made or gave the Union any sort of log or other written documentation as Payment requested. (Tr. 94, 96.) During at least one exchange with Payment, Pratka told Payment that the documentation Payment sought was "electronic," and that Pratka did not have "access" to those files or know how to get them. (Tr. 22, 29.) Further, instead of providing any documentation for the matter, Pratka would call Payment whenever Pratka thought that he was getting the wrong assignment. (Tr. 26.) Whenever that occurred, Payment repeated his request for Pratka to document his issue, and asked Pratka to stop simply calling him about it.

15. Payment has spent "many, many hours" trying to resolve Pratka's seniority issue. Payment has contacted employees at other City Bureaus to see how they handle the issue. He has also had "many meetings" on the subject. Likewise, Payment and Pratka have had "many discussions" about it. (Tr. 64-65, 96, 99.)

16. Pratka's issue with Harrison not giving him a choice in assignments has been a "longstanding concern" for Pratka. (Tr. 23, 30.) For some of the many occasions in which Pratka asked Payment to address his seniority issue, Pratka was still a Union member. That includes when Pratka first raised the issue with Payment. However, some of Pratka's requests involving the seniority issue were made after Pratka stopped being a member. (Tr. 21-22, 24.)

17. At some point, Pratka met with Nelson and a paid field representative of the Union named Christina Harris about Harrison harassing Pratka. That meeting took place at the Union office. At the time, Pratka was still a Union member. (Tr. 39, 45.) Subsequently, Nelson set up a meeting with Pratka, Harrison, an individual from the City's Labor Relations group, and an individual from the City's Bureau of Human Resources to resolve Pratka's issues with Harrison. Pratka was invited to the meeting. However, Pratka ultimately did not attend the meeting because it was scheduled for a day that Pratka was scheduled to be off work. Before the meeting was scheduled to take place, Pratka spoke "at length" with Nelson about Harrison. (Tr. 25.)

18. Outside of the meeting described above, Nelson also made plans for Pratka to visit the Union's office to discuss his issues with Harrison further at least two or three times. Pratka cancelled each of those scheduled visits. (Tr. 128.)

19. Theodore (Ted) Bryan worked for the Union from November 2020 until the end of August 2021. He was a representative and an organizer, and was assigned to the Parks and Recreation Bureau.

20. In December 2020 or January 2021, Bryan had a conversation with Payment about which bargaining unit employees at Mt. Tabor Yard were Union members. During that conversation, Bryan told Payment that Pratka had stopped being a Union member months before.[2] Before that point, Payment was unaware that Pratka had stopped being a member. (Tr. 73.) Payment was not upset about Bryan's update. However, Payment was very surprised and a little annoyed by it because Pratka had contacted the Union so frequently. (Tr. 89, 113.) Later in the same conversation, Bryan counseled Payment that shop stewards need to set some limits with employees.

21. At some point after Bryan and Payment's exchange (and months before Pratka's overtime issue, which is addressed below), Payment spoke with Pratka on the telephone. In that call, Payment told Pratka that Pratka was calling him too much about issues that were unrelated to a clear CBA violation. In the same call, Payment also pointed out to Pratka that Pratka was a "non-dues-paying member" and that he was not Pratka's friend. (Tr. 73, 76, 85.)

22. For a long period of time, Pratka was calling the Union (in Pratka's words) "all the time." (Tr. 29.) Further, of all the employees in the Union's bargaining unit, Pratka called Payment the most. Pratka also called Payment more than any of Payment's friends or family. At one point, the voicemail inbox of Payment's personal cellphone was completely full of messages from Pratka.

[2]During the same conversation, Bryan also told Payment that DM was not a Union member. DM's experience with the Union is discussed below.

Some of Pratka's calls occurred when Payment was off work, and some of them occurred while Payment was working. Sometimes, Pratka called Payment multiple times a day for the same issue.[3]

23. Pratka also communicated with Nelson "pretty frequently" and "pretty regularly." Many of those communications involved Pratka's concerns with Harrison and being assigned a particular piece of equipment. (Tr. 122. 126.) Additionally, Nelson had "many conversations" with Pratka while Pratka was a member as well as while Pratka was a non-member. (Tr. 133.)

Pratka's Overtime Issue

24. Section 7 of the CBA concerns "Work Schedules and Workweeks." (Exh. C-1 at 12.) Section 7.1 of the CBA provides, in part, "Forty (40) hours shall constitute a workweek eight (8) hours per day, five (5) consecutive days per week." (Exh. C-1 at 12.) Subsequently, Section 7.1 further provides, "The basic workweek for non-shift employees shall normally be Monday through Friday. However, it is recognized that City services and operations may require schedules other than Monday through Friday." (Exh. C-1 at 12.)

25. Pratka believes that, under the language of Section 7 of the CBA, he was not properly paid for seven hours of work he performed during the week of February 14-20, 2021. According to Pratka, during one two-week (80-hour) pay period, he worked 87 hours, and he is owed 7 hours of overtime pay for that work. (Tr. 13-14.) As a result, Pratka contacted Christine Castro, who works with payroll for the City (and was not called to testify in this case). During that call, Castro explained the City's position and its understanding of his work schedule, which differed from that of Pratka. (Tr. 14.)

26. Around the time that Pratka worked the hours in dispute, Pratka was working a modified schedule that was agreed to by the City and the Union, and was a result of the COVID-19 pandemic. However, at some point around the time in question, the City returned Pratka to his "non-emergency schedule." (Tr. 37, 69.)[4]

27. After Pratka communicated with Castro, on March 2, 2021, Pratka called Payment on the telephone and left him two voicemail messages. In those messages, Pratka described his overtime dispute and asked Payment to file a grievance over it. (Tr. 68, 77.) When Payment called Pratka back a short time later, Payment had Pratka forward him some related emails that Pratka

[3]Pratka testified that he talked to Payment "many times" and "repeatedly" called Payment. (Tr. 19, 23.) Payment testified that Pratka called Payment on Payment's personal telephone "very, very frequently" and/or "constantly" concerning the "many, many, many issues" Pratka had with Harrison and/or the City. (Tr. 58-59, 61, 64, 67, 81-84.) Payment also testified that Pratka called him "almost daily" about a variety of issues, and specifically called him about the seniority issue "once every two weeks." (Tr. 59, 62, 82.)

[4]Pratka testified that he has *always* worked a "flex schedule" of nine hours a day every Monday through Thursday, and eight hours every other Friday. He also testified that, during his exchange with Castro, Castro told him that, in the City's view, Pratka's workweek was Thursday through Tuesday (rather than Monday through Friday) with Saturdays and Sundays off. (Tr. 14, 33, 37-38.) However, at a different point, Pratka also testified that the City had "no response" for him at the time. (Tr. 17.) Payment testified that the City's workweek normally starts on Thursday, and also clarified that, around the time in question, the City had temporarily modified its schedule because of the COVID-19 pandemic. (Tr. 69.)

had previously exchanged with Harrison and the timekeeper for the Parks and Recreation Bureau. Subsequently, Payment reviewed Pratka's emails, reread the CBA, and researched Prakta's issue. (Tr. 69-70, 101.)

28. During a conversation that followed Payment's review of Pratka's issue, Payment explained to Pratka that, in Payment's opinion, the City had paid Pratka correctly and accordingly the issue was "not grievable." (Tr. 70-71.) Payment also told Pratka that he would only represent Pratka for disciplinary issues and other breaches of the CBA. Pratka responded that he would contact the Freedom Foundation and disputed Payment's view.

29. At some point after Pratka and Payment's telephone call described immediately above, Pratka exchanged multiple text messages with Payment. In one of those, Pratka asked Payment to explain the Union's position on the overtime issue in a text message. Payment responded that he was "old school" and preferred to have a conversation on the telephone or face to face. At the time, Payment was also concerned that Pratka had just indicated that he would call the Freedom Foundation. (Tr. 43-44, 75.)

30. Within around five days of March 2, 2021, Pratka approached Payment in person at a fueling station inside Mt. Tabor Yard, claimed that he would be calling Oregon's Bureau of Labor & Industries (BOLI), and insisted that Payment file a grievance. In response, Payment repeated his position that a grievance should not be filed, and walked away. (Tr. 71, 104.) Pratka has not filed a complaint with BOLI.

31. Pratka did not communicate with anyone in the Union office after his call with Payment.

32. Shortly after Pratka raised his concerns over the overtime issue, Harrison (Pratka's supervisor) quit working for the City.

Pratka's Other Concerns

33. Outside of the issues described above, Pratka has often shared a variety of other concerns with Payment. Some of those concerns involved "possible adverse action" and/or "theoretical grievances and things that might happen in the future" (as opposed to actual CBA violations that have already occurred). For example, Pratka once complained to Payment about possibly being disciplined for failing to attend a training that was scheduled for a Friday that Pratka had off. (Tr. 31, 67-68.) Separately, Payment has also frequently counseled Pratka about working through his issues. (Tr. 60.)

34. At some point during the COVID-19 pandemic, Payment "represented" and "defended" Pratka during disciplinary hearings concerning a written reprimand that Pratka had received. Payment also reached out to Harrison and Human Resources in order to resolve that issue. However, a grievance was not filed in that instance. (Tr. 92-93.) (It is unclear whether Pratka was a Union member at the time.)

35. Pratka once called Nelson about a safety issue involving a lawn mower. Afterward, the Union tried to support Pratka with that issue by communicating Pratka's concerns to management. (Tr. 123.) (It is unclear whether Pratka was a Union member at the time.)

DM's Experience

36. DM (a pseudonym) has worked for the City as an automotive equipment operator since around April 2018. During that time, DM has worked with Pratka in the Parks and Recreation Bureau.

37. DM became a Union member about six months after he started working for the City. He stopped being a Union member about six months later.

38. Since DM stopped being a Union member, he has occasionally felt "pressured" to become a Union member again. Moreover, Payment has repeatedly encouraged DM to do so. However, DM has never been told that he was asking the Union for too much help. (Tr. 50-52.)

39. In one telephone call, DM asked the Union to help him after the City asked DM for a doctor's note in accordance with a City COVID-19 policy after DM exhibited symptoms. At the time, DM said that he was being "discriminated against" by the City. Subsequently, Bryan spoke with DM about the issue and Payment investigated the matter. (Tr. 52, 79, 115.) In the end, the Union decided that DM's doctor's note issue did not violate the CBA or justify filing a grievance, and Bryan and/or Payment explained the Union's position to DM. During this experience, DM was not a Union member.

40. Bryan and Payment also "represented" DM in June or July 2021 in a disciplinary hearing after DM received an oral reprimand for violating the City's COVID-19 protocols and for unprofessional behavior toward the public and his coworkers. (Tr. 50-51, 77, 116; Exh. R-1 at 2.) Ultimately, the matter was "resolved" (though the details of that resolution are unclear). (Tr. 50.) DM has not interacted with the Union since that time. Further, during this experience, DM was not a Union member.

41. Before Payment represented DM in his disciplinary hearing, DM frequently called Payment about issues that were unrelated to the CBA (albeit not as much as Pratka did). Additionally, outside of the disciplinary issue, Payment has "counseled" DM "quite often." (Tr. 78.)

CONCLUSIONS OF LAW

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

2. The Union did not violate ORS 243.672(2)(a) or ORS 243.672(2)(c).

Standards of Decision

Pratka alleges, in part, that the Union 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 representation. That is 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-02-09 at 24, 24 PECBR 1, 24 (2010); *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 form of 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 574-5 (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)). In this case, Pratka specifically argues that the Union "breached its duty of fair representation because its actions were discriminatory and performed in bad faith." (Pratka brief at 5, 7.)

The Board has held that a union's decisions about whether to file or how far to pursue a grievance are 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, Sieg, and Burchfiel v. Jackson County Sheriff's Officers Association, Affiliated with Teamsters Local 223 and Jackson County*, Case Nos. C-130/131/132/133/134/135-83, 8 PECBR 6783 (1985)); *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20*, Case No. UP-15/16-92 at 20-22, 15 PECBR 85, 104-06 (citing *Stein v. Oregon State Police Officers' Association and Oregon State Department of State Police*, Case No. UP-41-92, 14 PECBR 73 (1992); *Byrne v. Oregon Public Employees Union, Taub and Woodard and Department of Human Services Adult and Family Services Division*, 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 v. OPEU*, Case No. UP-68/69-91 at 14, 14 PECBR at 422 (1993)).

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 rational and 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 104-05.

Pratka also asserts that the Union violated ORS 243.672(2)(c) and ORS 243.662 (though the latter statute was not specifically included the ALJ's framing of the issue, which neither party disputed before the hearing). ORS 243.672(2)(c) provides that "it is an unfair labor practice for a public employee or for a labor organization or its designated representative" to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.806." ORS 243.662 provides, "Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

As in any unfair labor practice case, the burden of proof is on the complainant to prove his or her 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

Pratka asserts that, after Pratka stopped being a Union member, "his steward refused to even discuss representing him in a grievance." (Pratka brief at 1.) He also asserts that the Union "refused to investigate Mr. Pratka's claims." Those assertions are unsupported by the evidence. To the contrary, the record shows that Payment *frequently* discussed Pratka's concerns with him while Pratka was a member as well as after Pratka became a non-member. There is also undisputed evidence that Payment and Nelson did investigate Pratka's concerns. Those circumstances do not evidence bad faith (or arbitrary behavior). Pratka's testimony that Payment specifically told him that Payment would only represent him in disciplinary matters because Pratka was a non-dues-paying member (Tr. 13-144, 33-36) is unsupported by the rest of the record, and accordingly has not been included in our Findings of Fact. We further note that Pratka's testimony frequently lacked significant detail, and was occasionally internally inconsistent.

Pratka's post-hearing brief also asserts that he "provided the requested documentation" to Payment. (Pratka brief at 2.) However, that is unsupported by Pratka's own testimony as well as the rest of the record.[5] In the term's ordinary usage, repeatedly calling someone on the telephone is not considered "documentation." Moreover, we have no evidence showing that Pratka gave the kind of details Payment asked for when Pratka called him. Pratka argues that he did not have access to the information Payment asked for because it was "electronic." But we see no reason why Pratka could not have simply written down basic information on a notepad, for example. Under the circumstances, Payment's request for limited assistance and additional information was a

[5]The very next sentence of Pratka's brief (at 2) notes, "Mr. Pratka testified that he could not access and did not have the ability to obtain the documentation Mr. Payment was demanding."

reasonable one and not unduly burdensome or severe. Payment did not work alongside Pratka, and acts as a shop steward for dozens of employees on a voluntary basis while also working as a City employee. We also note that Pratka failed to attend several meetings that the Union scheduled to assist him. That lack of cooperation further supports the reasonableness of the Union's decisions in this case.[6]

Pratka separately asserts that, under the CBA, his seniority "entitles him to choose work first before lower seniority workers are assigned." (Pratka brief at 2.) However, as noted, our task here is not to decide whether a potential grievance has merit. Furthermore, a labor organization can choose not to pursue even a clearly meritorious grievance without violating its duty of fair representation. *Martin v. Ashland School District #5; Morris, OSEA; Fields, Helman Elementary*, Case No. UP-030-01 at 14, 20 PEBR 164, 177 (2003). Nevertheless, in this case, the Union has consistently presented positions that, at least on the surface, were rational ones. For the nuanced seniority issue, the Union understandably needed additional details in order to build a case. We also recognize that, historically, the Union and the City have not applied Section 12 of the CBA to the daily assignment of equipment for Parks and Recreation Bureau employees. Pratka's testimony that an unnamed shop steward and "other people" who work in a different City Bureau have told Pratka differently is not compelling evidence. (Tr. 18, 25.) For the overtime issue, the Union simply has a different interpretation of its agreements with the City.

Pratka's complaint also asserts that he has continually asked Payment to file a grievance for his seniority issue since October 2018. However, Pratka's testimony did not specifically assert that he ever asked the Union to file a grievance for the seniority issue. Instead, Pratka consistently testified that he was only asking Payment to talk to Harrison and tell Harrison that there was "an issue." (Tr. 21, 24, 26.) Notably, undisputed testimony indicates that Payment and Nelson *did* speak with Harrison about Pratka's seniority issue. (Tr. 62, 125.) And in any event, as noted, an employee does not have an absolute right to have a grievance taken to arbitration. *Chan*, UP-13-05 at 13-14, 21 PECBR at 575-76.

Pratka testified that he was treated differently than other employees in his shop, and explained that he is "not given near the same amount of easy work as other employees." (Tr. 22.) However, it is unclear why the Union is directly responsible for the latter issue, and not the City. We also have no additional information about these other employees or their work to consider. Relatedly, the record likewise fails to show a meaningful difference in how the Union treated Pratka while he was a Union member and while he was not. There was no indication that the Union ever filed grievances for Pratka upon request while he was a member. Indeed, Pratka specifically testified that the Union's failure to file a grievance for his seniority issue caused him to become a non-member. (Tr. 21-22.) Significantly, there is also no evidence of the Union filing a comparable grievance for or acting differently toward a "similarly situated" Union member. At the same time, there *is* clear evidence of the Union supporting and defending DM (who Pratka called to testify)

[6]Although it is not crucial to our analysis, we note that the CBA specifically states, "Before initiating a formal written grievance at Level One, the employee shall attempt to resolve the matter by informal conference with their immediate designated supervisor outside the bargaining unit." (Exh. C-1 at 62.) It also states that "the employee or [the] Union" may file a grievance at Level One if a dispute is not resolved at the "informal level." (Exh. C-1 at 62.) Here, there is no clear evidence that Pratka tried to informally resolve his issues with Harrison or file a grievance on his own.

in a disciplinary proceeding despite the fact that, at the time, DM was also a non-member. Those circumstances do not evidence a bias or discrimination.

Pratka highlights the fact that Payment learned that Pratka had stopped being a member and subsequently opted not to pursue a grievance for the seniority issue, and focuses on the Union's efforts to get employees to become members again. However, for the reasons noted above, we are ultimately unconvinced that the Union tied its representation to Pratka paying dues as alleged. We also find nothing inherently suspicious about a shop steward finding out that a bargaining unit employee has stopped paying dues. That is particularly true in this case, where the bargaining unit had very few non-members. Further, as a general matter, there is also nothing inherently suspicious or improper about a labor organization urging the employees in its unit to become dues-paying members. It follows that reduced funding can mean reduced effectiveness and bargaining power. Finally, we find nothing unlawful about placing reasonable limits on the kinds of issues a unit employee can raise with a volunteer shop steward, especially given the number and kinds of calls that were made here.

Conclusion

For the reasons set forth above, we conclude that the Union did not violate ORS 243.672(2)(a) or ORS 243.672(2)(c).

PROPOSED ORDER

The complaint is dismissed.

SIGNED AND ISSUED on March 16, 2022.

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@erb.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-046-21

(UNFAIR LABOR PRACTICE)

AIRPORT FIRE FIGHTERS' ASSOCIATION, IAFF LOCAL 43, Complainant, v. PORT OF PORTLAND, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

Melissa Healy, Attorney at Law, Stoel Rives LLP, Portland, Oregon, represented Respondent.

On October 19, 2021, Airport Fire Fighters' Association, IAFF Local 43 (Union) filed an unfair labor practice complaint against the Port of Portland (Port). The complaint alleges that the Port violated ORS 243.672(1)(a), (e), (f), and (g) in connection with actions it took after the Oregon Health Authority (OHA) promulgated OAR 333-019-1010, which required health care workers, including firefighters, to receive the COVID-19 vaccine in order to work in health care settings. The Union requested that this Board expedite the complaint under OAR 115-035-0060. On October 25, 2021, the Port notified the Board that it did not object to the Board expediting this case. On October 25, 2021, the Board issued a letter ruling expediting the case.

On October 28, 2021, we issued a notice of hearing and prehearing order, setting a hearing on November 30 and December 1, 2021, to be conducted through the videoconferencing platform Zoom. The Port filed a timely answer on November 8, 2021. The parties filed prehearing briefs on November 24, 2021.

The Board conducted a hearing on November 30, December 1, 2, and 6, 2021. The parties made oral closing arguments on December 6, 2021.

Before the Board could reach a decision, on December 15, 2021, the United States Senate confirmed President Joseph R. Biden, Jr.'s nomination of Board Member Jennifer Sung to serve as a U.S. Circuit Judge for the U.S. Court of Appeals. On December 20, 2021, Board Chair Adam Rhynard notified the parties that the Board would place the case in abeyance until a new Board member was appointed by Governor Kate Brown and confirmed by the Oregon Senate, which the Board anticipated would occur in February 2022.

On January 7, 2022, the parties notified the Board that the parties were willing to submit post-hearing briefs if the Board would find such briefs helpful. On January 7, 2022, the two-member Board reopened the record for the limited purpose of granting the parties leave to submit post-hearing briefs. The parties submitted post-hearing briefs on February 18, 2022, at which point the record closed.

Board Member Shirin Khosravi was appointed and confirmed to the Board effective February 21, 2022. Member Khosravi has reviewed the record in this case and participated in the Board's deliberations.

As stated by the Board at the hearing, the issues in this case are:

1. Did the Port violate ORS 243.672(1)(a) by refusing to allow employees to have union representation during meetings over the vaccine exception process?

2. Did the Port violate ORS 243.672(1)(e) by making a unilateral change to a mandatory subject of bargaining regarding changes to staffing, as alleged in the complaint?

3. Did the Port violate the parties' Memorandum of Understanding (MOU) and ORS 243.672(1)(g) by refusing to provide a reasonable accommodation to employees with an accepted religious exception?

4. Did the Port violate ORS 243.672(1)(f) by failing to provide the Union with written notice of intended changes to mandatory subjects of bargaining, as required by ORS 243.698?

5. Is the Union entitled to a civil penalty, reimbursement of its filing fee, and a posting of a notice of any proven violation, including distributing the notice electronically?

For the following reasons, we conclude that the Port did not violate ORS 243.672(1)(a), (e), (f), or (g) as alleged in the complaint.[1]

RULINGS

Neither party pursued any objections to the Board's rulings.

[1]As the Board Chair explained at the hearing, because the Board is issuing this final order without a recommended order, the Board will grant any timely submitted request for reconsideration, along with oral argument. *See* OAR 115-010-0100(3)(b).

FINDINGS OF FACT

The Parties and Background

1. The Airport Fire Fighters' Association, IAFF Local 43 (Union) is a labor organization within the meaning of ORS 243.650(13).

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

3. The Union and the Port have been parties to a number of collective bargaining agreements for many years. The current collective bargaining agreement is in effect from July 1, 2021 to June 30, 2024.

4. The Port owns and operates three airports, including the Portland International Airport (PDX), as well as four marine terminals, and five industrial parks in Portland. The Port Fire Department is operated by the Port and located at PDX. The Chief Operating Officer of the Port is Dan Pippenger. The Public Safety and Security Director is Beverly Pearman. The Assistant Fire Chief and Interim Fire Chief is Robert Mathis. Mathis reports to Pearman, who reports to Pippenger.

5. The Union represents a bargaining unit of 41 employees at the Port Fire Department. The Union also represents a bargaining unit of firefighters employed by the City of Portland. David Farrell is a firefighter and water rescue coordinator employed by the Port in the Port Fire Department. Farrell serves on the Union's executive board as the Port of Portland labor representative. In that role, he handles bargaining and grievances related to the represented employees in the Port Fire Department.

6. PDX is one of 25 airports in the United States referred to by the Federal Aviation Administration (FAA) as an "Index E" airport. There are five possible FAA index classifications, from Index A (smallest) to Index E (largest). PDX is the only Index E airport in Oregon. The closest Index E airport to PDX is the Seattle-Tacoma International Airport (SEA-TAC).

7. As an Index E airport, PDX must have a fire department that is certified by the FAA in aircraft rescue and firefighting (referred to by the parties as ARFF). Index E airports must also have certain equipment, including three firefighter vehicles that together can discharge 6,000 gallons of water, as well as the ability to discharge Aqueous Film Forming Foam. This equipment is different than equipment used by municipal fire departments because an airport airfield does not have fire hydrants, so the apparatus used by firefighters must carry water onboard.

8. The Port Fire Department is certified to provide ARFF services required by the FAA. The Port Fire Department is also required by the FAA to have a marine response program because PDX is within one-quarter mile of a navigable waterway. The Port Fire Department operates a marine rescue boat to comply with this condition.

9. The Port Fire Department has primary jurisdiction to respond to incidents on the airfield. When the Port Fire Department responds to a smaller incident, such as an incident involving an F-15 jet with only one or two people onboard, the department responds using only its own Port Fire Department staff and equipment. However, in a major incident, such as an aircraft incident involving a cabin fire, the Port Fire Department responds supported by its mutual aid partners, typically the City of Portland Fire Department. The Port Fire Department is also supported by automatic mutual aid from the Portland Air National Guard (PANG) Fire Department, which has a fire station at the airport, but is staffed by State of Oregon employees.

10. The City of Portland Fire Department has primary jurisdiction to respond to incidents in the PDX terminals. The Port Fire Department assists with calls in the PDX terminals and in surrounding properties under mutual aid agreements with other fire departments. The Port Fire Department also assists other fire departments as a secondary responder to the City of Portland to incidents in the surrounding area, including nearby areas of Marine Drive, Cascade Station, Airport Way, and the buildings on the south end of PDX. The Port Fire Department also responds as a secondary responder to incidents in the section of the Columbia River between Kelley Point Park and Corbett.

11. Interim Chief Mathis has been the Assistant Chief since he joined the department in June 2018. In May 2021, he was appointed Interim Chief due to the retirement of the previous Fire Chief. The Fire Chief (currently Mathis) holds overall responsibility for the department's strategic direction and regulatory compliance. The Assistant Chief (also currently Mathis) is responsible for the day-to-day operations of the department, staffing, and supervision of the battalion chiefs. The battalion chiefs are responsible for the scheduling and operations on their shift.

12. The Port Fire Department follows a chain of command structure. The firefighters report to lieutenants, who report to captains, who report to battalion chiefs. The battalion chiefs report to the Assistant Chief (as noted above, currently Mathis, who holds the dual role of Assistant Chief and Interim Fire Chief).

13. All Port firefighters are required to have basic emergency medical technician certification. Most are also paramedics. A paramedic must work under a physician's medical license. Dr. Jon Jui serves in that role as the Medical Director for the Port Fire Department's emergency medical services (EMS) program. Since March 2021, the Port's EMS program has been overseen by Karyn Barr, the EMS Health Information Officer at the Port. Barr is a bargaining unit employee and still works as a line firefighter and paramedic when needed.

14. The Port Fire Department operates from a single fire station. The station includes a front area where the 40-hour employees in the administrative unit and the battalion chiefs work. The firefighters work from the back of the fire station. That area contains individual bunk rooms, locker rooms, exercise rooms, training rooms, conference rooms, several small offices, a boat room, a full kitchen, a dining area, and a television room.

15. The 41-employee bargaining unit is comprised of 36 firefighters in the emergency operations unit and five employees in the administrative unit, including the assistant fire marshal

and the battalion chiefs. The 36 firefighters are required to be certified in aircraft rescue and firefighting. They work on one of three shifts. Except for the period from October 18, 2021 through November 30, 2021 (described further below), the department has generally had sufficient staff to have 12 firefighters assigned per shift. Each shift consists of a minimum of a chief officer, captain, lieutenant, a paramedic, a boat operator, and firefighters.

16. Until the period in dispute in this case, the Port Fire Department operated with as few as 10 firefighters on duty per shift, which the firefighters refer to as a 10-person minimum staffing.[2] Chief approval was required to have fewer than 10 firefighters per shift, such as when an employee had a sick child or needed bereavement leave. There occasionally were fewer than 10 employees on duty on a shift, although it was not common for extended periods during a shift; rather, the Port would ask an off-duty employee to work overtime to bring the number of employees on shift back up to 10.

17. Port firefighters work a schedule of 24 hours on, 48 hours off, and receive a Kelly Day (a paid day off) every twelfth shift. Port firefighters commonly work overtime, although the record does not contain specific data about the amount or patterns of overtime hours worked.

18. When responding to a crash incident, the Port Fire Department operates three crash trucks (which carry 3,000 gallons of firefighting foam), one engine, one rescue vehicle, and a command rig.

19. The Port Fire Department has agreements, known as mutual aid agreements, with nearby municipal fire departments at the City of Vancouver, the City of Gresham, and the City of Portland. Mutual aid departments are not required to operate according to FAA standards because the FAA-certified department—here, the Port Fire Department—provides the expertise when a coordinated incident response occurs.

20. As a certified airport, PDX must comply with applicable federal regulations of the FAA of the U.S. Department of Transportation. The parties refer to the applicable regulations as "FAR 139," a reference to Title 14 of the Code of Federal Regulations Part 139 relating to certification of airports.

21. Those FAR 139 regulations do not state a minimum level of staffing expressed as a minimum number of employees. Rather, the regulations state that a certified airport must "[p]rovide sufficient and qualified personnel to comply with the requirements of its Airport Certification Manual and the requirements of this part." 14 CFR § 139.303.[3]

---

[2]As explained below, on October 18, 2021, when health care workers were required to be vaccinated against COVID-19, 14 firefighters who were not vaccinated were placed on leave status. Nine of those employees subsequently elected to receive the vaccine and returned to work beginning on November 30, 2021. Thus, for approximately six weeks, the Port Fire Department was short staffed.

[3]The Aircraft Rescue Fire Fighting Work Group of the National Transportation Safety Board has explained this requirement as follows:

(Continued . . .)

22. Title 14 CFR Section 139.317 requires an Index E airport, such as PDX, to have three vehicles consisting of one vehicle carrying extinguishing agents and two vehicles carrying an amount of water so that the total quantity of water for foam produced carried by all three vehicles is at least 6,000 gallons.

23. The record includes a report entitled, "Aircraft Rescue Fire Fighting Working Group Response to the National Transportation Safety Board. A-14-60 Recommendation" (ARFF Task Group Report) by the Aircraft Rescue Fire Fighting Working Group A-14-60 Task Group (Task Group). That report results from a review sought by the National Transportation Safety Board of minimum staffing as part of a review resulting from an accident involving a Boeing 777-200ER, operating as Asiana Airlines flight 214, that occurred in July 2013 at San Francisco International Airport. The Task Group recommended the development of a minimum aircraft rescue and firefighting staffing level that would allow exterior firefighting and rapid entry into an airplane to perform interior firefighting and rescue of passengers and crew members.

24. The ARFF Task Group Report describes a recommendation by the Task Group containing three components. The Task Group recommended that each airport develop a minimum staffing level for that airport, adjusting staffing levels based on their unique operations and taking into account a "hazard risk analysis" to determine any additional staffing needs. The three components of the staffing level are a level that allows (a) exterior firefighting, (b) rapid entry into an airplane to perform interior firefighting, and (c) rescue of passengers and crew members. For exterior firefighting, the report recommended minimum staffing of one person committed to each vehicle. The report recommended that all Index B, C, D, and E airports have an interior access vehicle (IAV) "that has sufficient reach to gain rapid entry to all aircraft with scheduled service at the airport," and that the minimum staffing for that vehicle is one person. The report also states:

> "Initial interior fire attack requires at least two firefighters on a landline per aisle. As the scene populates, additional lines should be staffed to serve as a RIT (Rapid Intervention Team) as described in OSHA 1910.134. The IAV driver/operator can join the interior firefighting team after donning full PPE/SCBA. The IAV driver/operator will not be ready to enter as fast as the initial entry team, because he/she cannot drive the IAV in full PPE."

(Continued . . .)

"The current regulation does not specify any minimum staffing, nor does it require any ability to gain rapid access to an aircraft, interior firefighting or rescue capability. The interpretation by many airports is that the regulation requires the airport to provide the number of trained and qualified personnel required to drive the number of vehicles required (based on the Index) to the mid-point of the furthest runway within the response times described in 14 CFR Part 139.319. Based on this interpretation, 'sufficient and qualified staffing' becomes synonymous with minimum staffing or required staffing. Any increase in requirements by the FAA, including increased quantities of agent, number of required vehicles, types of vehicles, or tasks, such as interior access, interior firefighting or rescue, requires a defined minimum staffing number in addition to the implied minimum of one per vehicle."

25. For rescue of passengers and crew members, the Task Group recommended minimum staffing of 13 for an Index E airport, such as PDX, to maintain exterior firefighting, while initiating interior firefighting and search and rescue of passengers and crew: minimum number of ARFF vehicles: four; minimum staffing for exterior firefighting: four; minimum number of IAV: one; minimum staffing for IAV: one; minimum staffing for initial interior firefighting: four; additional staff for initial search and rescue: 4. The report explained that the minimum number of staffing for exterior firefighting is the same as the minimum number of ARFF vehicles, but "[t]his is not meant to imply that a crew of one is sufficient staffing for an ARFF vehicle. The personnel listed [as minimum staffing for initial interior firefighting and additional staff for initial search and rescue] (in most cases) will arrive at the scene on the ARFF vehicles. This staffing is on board the ARFF vehicle(s) during the response to assist with communications, guidance around debris, and turret and HRET operations. After the initial exterior firefighting period when the fire is 'controlled' or extinguished, staffing not committed to vehicle or turret operations may be deployed for interior firefighting or rescue[.]" "A minimum of one person must remain on each ARFF vehicle to continue exterior firefighting."

26. The National Fire Protection Association (NFPA) is a trade association that sets codes, standards, recommended practices, and guides, which are developed through a consensus standards development process approved by the American National Standards Institute. The NFPA process brings together volunteers representing varied viewpoints and interests to achieve consensus on fire and other safety issues. The NFPA standards are recommended standards. They do not establish legal requirements.

27. The NFPA has issued documents including NFPA Guidance Standard 1710, "Standard for the Organization and Deployment of Fire Suppression Operations, Emergency Medical Operations, and Special Operations to the Public by Career Fire Departments." Another document, NFPA Guidance Standard 403, specifically concerns airport fire departments and is entitled "Standard for Aircraft Rescue and Fire-Fighting Services at Airports." With regard to staffing levels at airports, the NFPA standard states, "Staffing levels shall be established through a task resource analysis based on the needs and demands of the airport," and refers to a minimum number in a table based on the category of airport, minimum response times, and extinguishing agent discharge rates and quantities. Farrell testified that, based on these standards, PDX should have 12-15 staff on shift to meet the NFPA recommended standard.

28. The Port did not always meet the minimum number of employees recommended by the NFPA standard even before the vaccine mandate in OAR 333-019-1010.

The COVID-19 Pandemic and the Oregon Governor's Response

29. In March 2020, a novel coronavirus caused the onset of a pandemic and global public health emergency. The virus causes a severe acute respiratory disease known as COVID-19. Throughout 2020 and into 2021, Oregon Governor Kate Brown took a number of measures, including declaring an emergency, to attempt to control the spread of COVID-19 and mitigate the public health risks and harms caused by COVID-19.

30. On August 5, 2021, as directed by Oregon Governor Kate Brown, the Oregon Health Authority (OHA) adopted Temporary Administrative Order PH 34-2021. That order required health care workers to be vaccinated against COVID-19. The order permitted employers to test health care workers for COVID-19 in lieu of requiring vaccination against COVID-19.

31. On August 17, 2021, Dave Farrell sent Blaise Lamphier, the Port's Labor Relations Manager, a demand to bargain "the impacts of the new [OHA] rule to require all health care workers to be subject to weekly COVID testing." The same day, Lamphier acknowledged the request and told Farrell that he would contact Farrell the next day "for further discussion."

32. On August 25, 2021, OHA changed course in its approach to the vaccination requirement for health care workers. OHA eliminated the testing alternative to vaccination and adopted Temporary Administrative Order PH 38-2021. The new order required health care workers to be fully vaccinated against COVID-19 by October 18, 2021. The new order suspended and replaced the order adopted on August 5.

33. OHA's new order, PH 38-2021, adopted temporary rule OAR 333-019-1010. The order described the need for the vaccination requirement as follows, in pertinent part:

> "It is vital to this state that health care providers and health care staff be vaccinated against COVID-19 in order to protect themselves, their patients and statewide hospital capacity. * * * In August of 2021, the B.1.617.2 (Delta) variant [of the coronavirus] accounted for more than 98% of the COVID-19 infections in Oregon.
>
> "* * *Individuals cared for by health care providers are more likely than the general public to have conditions that put them at risk for complications of COVID-19. The Delta variant is causing a surge in unvaccinated cases and vaccine breakthrough cases. This rule is necessary to help control COVID-19, protect patients, and to protect the state's healthcare workforce."

34. OAR 333-019-1010 provides that after October 18, 2021, a "health care provider or healthcare staff person may not work, learn, study, assist, observe, or volunteer in a healthcare setting unless they are fully vaccinated or have provided documentation of a medical or religious exception." PH 38-2021, Section (3)(a). The order required health care providers to provide their employer by October 18, 2021, "[p]roof of vaccination showing they are fully vaccinated[,]" or "[d]ocumentation of a medical or religious exemption." PH 38-2021, Section (4)(a), (b).

35. The order also provided, "Employers of healthcare providers or healthcare staff, contractors and responsible parties who grant an exception to the vaccination requirement under section (4) of this rule must take reasonable steps to ensure that unvaccinated healthcare providers and healthcare staff are protected from contracting and spreading COVID-19." PH 38-2021, Section (5).

36. The order stated that it was not intended to prohibit employers of health care providers or health care staff from "[c]omplying with the Americans with Disabilities Act and Title VII of the Civil Rights Act, and state law equivalents, for individuals unable to be vaccinated

due to a medical condition or a sincerely held religious belief." PH 38-2021, Section (7)(a). The order requires employers to maintain vaccination documentation and documentation of medical and religious exemptions for at least two years and in accordance with applicable federal and state laws. Employers are required to provide the documentation to the OHA upon request. PH 38-2021, Section (8).

The Union's Demand to Bargain and the Port's Response

37. On August 26, 2021, Farrell emailed Lamphier "to update our demand to bargain to include Temporary Administrative Order PH 38-2021 mandatory vaccination for Healthcare workers." Farrell wrote, "I cannot stress enough the importance of this bargaining as the deadline is not October 18, 2021, it is much sooner than that based on the timeline needed to have a member be considered fully vaccinated by the Oct 18th deadline."

38. On August 31, 2021, Farrell and Lamphier discussed the vaccine requirement. Farrell stated that the Union's analysis indicated that the requirement applied to firefighters. Farrell said that he had something from the City of Portland related to the vaccine requirement. Lamphier asked Farrell to provide a copy. Farrell also offered to send Lamphier a list of issues related to the impact of the requirement.

39. The same day, Farrell emailed Lamphier a copy of an email from City of Portland Mayor Ted Wheeler and the Portland City Councilors to the City of Portland's "Citywide All Employees Distribution List." That email explained the City of Portland's requirement that all city employees be fully vaccinated by October 18, 2021. In his email to Lamphier, Farrell described the City of Portland's email as a document that gave "a starting point for these negotiations." Farrell wrote, "We are not going to get all of the questions answered before Thursday[;] if we can get members these basic outlines in the process [it] would be helpful by the Thursday meeting." The "Thursday meeting" referred to an anticipated meeting on September 2 of the bargaining unit with Port Chief Operating Officer Pippenger.

40. Also on August 31, 2021, Farrell emailed Lamphier the list of issues that Farrell had referred to in their conversation earlier that day. Farrell wrote, "As I stated before I do not think a weekly testing for exceptions for medical or religious [exceptions] are a good plan for our department. I think the cost does not outweigh the benefit." Farrell listed as discussion points possible procedures for verifying vaccination; procedures for bargaining unit members requiring religious or medical exceptions; paid time to become vaccinated; early retirement; a new classification without an EMT component; booster shot language; relocation fees for those employees who choose to leave Oregon; and layoff and recall rights for employees who refuse to get vaccinated.

41. On September 1, 2021, Pippenger emailed the Port Fire Department with the initial information about timelines associated with the vaccine requirement, as requested on August 31 by Farrell. Pippenger noted that "more details are still being worked out," and explained how employees could submit proof of vaccination or request a religious or medical exception. Pippenger explained that Human Resources (HR) had developed "a fillable form based on the OHA forms for medical and religious exceptions." He explained that, for those employees who

requested an exception, "HR and legal will review the exception requests and engage in an interactive process with the applicant to determine if reasonable accommodations can be put in place to ensure that unvaccinated staff are protected from contracting and spreading COVID-19."

42. Pippenger also explained that "if an employee submits an exemption request, but the exception review process has not been completed through no fault of the employee, and no decision has been made by October 18, 2021, then the employee will be deemed provisionally approved until the exception process has been finalized. Provisional approvals may require the employee to follow measures to reduce risk, including being fit for and wearing an N-95 mask in all common areas, regular testing, physical distancing, etc. Similar accommodations may also be required if an exception is approved."

43. On September 2, 2021, Pippenger, Acting Fire Chief Mathis, Lamphier, and Director of Public Safety and Security Pearman met with Farrell and bargaining unit members to discuss the vaccine requirement and answer questions. Some bargaining unit members asked questions about accommodations for employees who declined to get vaccinated. Pippenger responded that the Port would take into account what they were saying and that the Port would consider accommodations and "work our way through it" in the future.

44. After that meeting, on September 2, Pearman emailed a link to the medical and religious exemption form to all bargaining unit employees. Pearman thanked the employees for all their "comments and questions, particularly around how we will manage the exception and accommodation process."

45. On September 3, 2021, Farrell emailed Pearman and informed her that bargaining unit members were frustrated that they could not review and think about the questions before logging in to the online fillable form and completing it. Farrell asked Pearman if he could record the questions himself and distribute them to bargaining unit members before they logged in to complete the online form. Pearman replied the following day, attaching a Word version of the form so that bargaining unit members could review the questions and compose answers before logging in to complete the fillable form.

46. The parties planned to meet on September 5 to begin negotiating regarding the vaccine requirement. Mathis did not know how many firefighters would request exceptions from the requirement, but he thought it could be significant, meaning as few as four or five people, or possibly more.

47. The parties met for the first bargaining session on Sunday, September 5, 2021, by videoconference. Farrell served as lead negotiator for the Union. (Brandon Yu and Terry Foster were also on the Union's bargaining team, but they were not present.) The Port was represented by lead negotiator Blaise Lamphier and Mathis. Mathis had obtained a copy of an MOU between the Port of Seattle, which operates SEA-TAC, and the International Association of Firefighters, Local 1257. Mathis showed that MOU to the meeting participants by sharing his screen. Lamphier had sent Farrell a copy of the MOU. Neither side offered formal, written proposals.

48. The parties discussed a number of topics, including the time needed for employees to get fully vaccinated, how the Port would retain records, whether the Port could offer the Johnson & Johnson vaccine, whether overtime compensation would be available for employees who got vaccinated off-duty, the options for COVID-19 testing, and the term of an MOU.[4] Mathis expressed his opinion that any incentives for vaccination needed to be perceived as fair because the Port already had an all-employee vaccine incentive program in place, which granted employees eight hours of vacation leave for getting vaccinated. That program was scheduled to expire on September 22, 2021, and Mathis was concerned about the appearance of special treatment if the Port agreed to give firefighters who had not yet been vaccinated a different incentive. Farrell believed that the cost of weekly testing outweighed the benefits, and he expressed that view over the course of the parties' discussions.

49. The parties also discussed the topic of reasonable accommodations. During the session, Farrell raised the subject of accommodations. The parties discussed possible accommodations that could be offered in detail. Farrell explained the differences between KN95 masks and N95 masks. Farrell was concerned that an accommodation involving masks should not make it obvious in the workplace which employees were unvaccinated.

50. Lamphier explained that the Port would not bargain to put accommodations in the MOU because it was unknown what exceptions might be requested by employees and the basis for those exceptions; in addition, Lamphier noted that any accommodations offered could change. Lamphier raised the possibility that there could be an employee whose exception was approved but there was no reasonable accommodation available. Lamphier used accommodations under the Americans With Disabilities Act as a reference point, and explained that requests for medical exceptions from the vaccine requirement could be as varied as exceptions based on pregnancy or allergy. The Union made it clear to the Port that its key interests were a fair exception process and ensuring that the accommodations given to employees with approved exceptions were appropriate. The Port's representatives did not expressly state that the Port would accommodate every employee with an approved exception or expressly state that it would deny all requested accommodations. At one point in the discussion, Lamphier raised the subject of how to respond to an employee who could not be accommodated, and Farrell suggested the idea of providing a grace period.

51. The parties met for a second bargaining session on September 8.[5] The parties discussed a number of topics during the September 8 session. The Port indicated that it was not inclined to pay overtime for employees to get vaccinated or to pay a relocation allowance or retirement incentive for employees who did not get vaccinated. The parties discussed what should occur when an employee requested an exception, but the Port's decision on the request was delayed through no fault of the employee, such as a delay in paperwork from a health care provider.

---

[4]The parties discussed the Johnson & Johnson vaccine in particular because the Port had that vaccine in stock as a result of holding vaccine clinics for the public in cooperation with Oregon Health & Science University.

[5]The record does not reflect whether the parties met by telephone or videoconference or in person.

52. They also discussed a process for laying off employees who did not get vaccinated or failed to submit a timely exception request, and the recall rights for those employees. The parties discussed an agreement that such employees would be eligible to be recalled for a six-month period. Mathis expressed his view that the Port needed a defined (as opposed to indefinite) period for recall rights because it would eventually need to hire new employees if existing employees chose not to get vaccinated. He also thought a six-month recall period would give unvaccinated employees an opportunity to change their minds and return to work. Mathis was concerned about a lengthy recall period because it would require substantial time to replace and train laid-off Port firefighters.[6] Mathis conveyed that capping the recall rights at six months was a "hard line" for the Port. Farrell's bargaining notes stating that the 6-month time period was a "hard line" for the Port.

53. At the second bargaining session on September 8, the parties did not have much discussion about accommodations because the Port had conveyed that it had no desire to put accommodations into the MOU. The parties spent the time working on timelines and the rehire process and revising the language using the SEA-TAC MOU as model language.

54. During bargaining, Farrell was aware that there were some bargaining unit employees who potentially might leave employment as a result of the vaccine requirement. Mathis was aware that it was possible that a significant number of firefighters might request exceptions.

55. At this point, the Port was not considering denying all accommodations in the event that requests for religious or medical exceptions were submitted.

56. At some point in mid-September, Farrell learned from the president of the union representing firefighters at SEA-TAC that the Port of Seattle did not provide accommodations to unvaccinated firefighters to work at the fire department, although they were permitted to work at other divisions at the employer. The record is unclear whether Farrell learned about the Port of Seattle's decision before the Union entered the MOU with the Port of Portland.

57. On September 16, 2021, Mathis sent Farrell final MOU language for review. Later the same day, Farrell replied to Mathis, with a copy to Lamphier, notifying them that the Union had "reviewed the agreement on our side and we agree to the language in the document." Farrell provided instructions regarding the signature lines for Union representatives and asked Mathis to let him know when the MOU was ready to be signed.

58. The parties' representatives signed the MOU on September 17, 2021.

59. The MOU requires all bargaining unit employees subject to PH 38-2021 to be fully vaccinated by October 18, 2021. The MOU describes how the Port will verify vaccination status and requires the Port to store records of vaccination verification in a secure location with Port HR. It also provides, in relevant part:

> "4. Port of Portland Human Resources will evaluate and consider all Medical and/or Religious exceptions to vaccination submitted by any employee seeking

[6]At the Port of Seattle, training entry level firefighters to the Port's standards requires 39 weeks of training. A lateral firefighter can be trained in seven weeks.

a medical or religious accommodation under the Governor's Temporary Administrative Order PH 38-2021. Such accommodation request will need to be completed by September 17, 2021, on a Medical or Religious Exception electronic form provided by Port Human Resources.

"5. The only exceptions that will be evaluated and considered by Port Human Resources are those that are submitted by an employee and that are related to either Medical or Religious accommodations.

"6. If an employee submits an exception request, but the exception review process has not been completed, and no decision has been made by October 15, 2021, then the employee will be deemed provisionally approved until the exception process has been finalized. By way of an example, and not an exclusive reason for an exception review request not reaching completion by October 18, 2021, would be an employee not having received timely response from the employee's health care provider.

"* * * * *

"8. Employees who have submitted a timely medical or religious exception request but are denied at any time after September 6, 2021, and are unable to complete vaccination by October 18, 2021, will be allowed to use their sick, vacation, and holiday bank or go on unpaid leave of absence until they are fully vaccinated. Leaves of absence will only be approved through no later than November 30, 2021 unless the leave qualifies under FMLA-OFLA or an ADA leave of absence. If the employee has not reported that they are fully vaccinated by this date, a layoff notice will be issued that is effective November 30, 2021.

"9. Employees who fail to comply with the vaccination mandate or submit a timely medical or religious exception request will be laid off from Port employment effective October 19, 2021. Employees who are laid off that date for this purpose will be placed on a rehire list through April 18, 2022 and will, upon request, be allowed to apply to any open position(s) within the Port Fire Department if they have been fully vaccinated and meet the qualifications of the position. If two or more employees who are on the list express an interest for an open position within the Port Fire Department and for which they are both qualified, the employee with the most service time with the Port Fire Department will be selected for the position. Members rehired from the list will retain previously accrued seniority."

The MOU expires on April 18, 2022, unless extended by the parties.

The Medical and Religious Exception Process

60. OHA developed an exception request form for use by Oregon employers. The form bears the OHA logo. The form contains a box for the employee to affirm that "[r]eceiving the COVID-19 vaccination conflicts with my religious observances, practices or beliefs as described

below[,]" and includes a space for the employee to describe the employee's religious belief and how it affects the employee's ability to receive a COVID-19 vaccination." The form contains the following statement after the space for the employee's signature: "Please note that if your exception is approved, you may be required by your employer or other responsible party to take additional steps to protect you and others from contracting and spreading COVID-19. Workplaces are not required to provide this exception accommodation if doing so would pose a direct threat to the excepted individual or others in the workplace or would create an undue hardship." The Port made the form available to bargaining unit employees who wished to request an exception.

61. By September 17, 2021, the Port received requests from 14 bargaining unit employees for both religious and medical exemptions. The employees submitted requests by submitting the required form via the online portal. Each of the 14 employees submitted a letter to support the exemption request.

62. All the employees who requested a religious exception also included a request for an exception because of a diagnosed physical or mental condition that limited the employee's ability to receive the COVID-19 vaccine. All the letters submitted by employees contained a paragraph substantially similar to the following:

> "I am requesting medical exception because taking a vaccine that is mandated as a condition of my employment and in direct conflict with my closely held beliefs is causing me stress and anxiety. If the mandate were not in place, I would not be experiencing these medical symptoms. An exception would eliminate these conditions."

63. The online form included the following question: "Are there accommodations you suggest that will help ensure your safety and the safety of those you're in contact with in the course of your work?" Some employees suggested accommodations; some did not. The following are examples of accommodations suggested by employees:

- "I believe the measures we've been taking have been working very well."
- "I believe the accommodations that we have made during this pandemic have been sufficient in maintaining our low rates here at the fire station until now."
- "Current are sufficient."
- "I recommend that the Port continues to follow all CDC, TSA, federal, state and county guidelines for both vaccinated and unvaccinated individuals. For employees' safety, the Port has swiftly adopted all of these guidelines throughout the pandemic. The firehouse has a proven track record of success in preventing a workplace outbreak by diligently following the Port's direction. I would recommend that we continue to follow these guidelines while taking into account that adding additional layers of

regulation to a specific work group can cause division, exclusion, and inequity."

- "Measures that could be taken to improve the safety of the workplace that all members could benefit from could be beneficial. It is obvious that this virus transmits most readily indoors. We have had in our budget for years the addition of an outdoor patio cover. This project has repeatedly been pushed or postponed. This project would enable fire department personnel to eat outdoors during inclement weather, an option we currently do not have. Along those lines, because this is a virus that spreads predominantly indoors, looking at our HVAC system and making sure that it is adequate in circulating and filtering air would be another beneficial safety step for the entire department. On an individual level, I believe that the Port has been proactive in implementing the federal and state safety guidelines quickly and the fire department has a proven track record of successfully preventing workplace outbreaks over the course of the pandemic. I would recommend we continue to follow the current guidelines based on the proven success we have had. With evidence from the CDC that COVID-19 can be transmitted by both vaccinated and non-vaccinated individuals, I feel any additional restrictions or safety measures imposed on one group while excluding the other would not only go against the current science, but would also cause division, would be exclusionary, create inequality and could be viewed as discriminatory."

- "Follow Multnomah County EMS guidelines for PPE for calls, follow mask mandates as appropriate, practice social distancing when possible, practice proper hand washing, continued diligent self monitoring for symptoms."

- "Members should continue the current precautions that have been working."

- "The same precautions used during the past 18 months are sufficient."

- "Continue to follow the existing protocols of socially distancing, wearing a N95 mask and proper PPE when on calls. Making sure on a regular basis that surfaces and areas have been cleaned and disinfected."

- "Continue to follow current station accommodations and safety workplace protocols that have been in place since COVID-19 began."

64. The Port reviewed and assessed the requests through a committee comprised of three representatives from Port HR: Director of HR Operations Antoinette Gasbarre, Donna Eaves, and Tawyna Payne. These three individuals were assigned to review the requests because they were not involved in the negotiation of the MOU with the Union; the Port believed that they could therefore be impartial.

65. After reviewing the forms, the Port decided that it needed more information to make a decision on the exception requests. On September 23, 2021, the Port sent an email to the employees who submitted exception requests with the subject line, "Religious Exception request follow-up—your action required." The email required employees to complete a form attached to the email. The email stated, in part:

> "Your letter that accompanied the religious exception request form, along with letters we received from several of your coworkers, referenced medical issues, and the vast majority requested a medical exception in addition to a religious exception; however, the medical exception requests were all incomplete because they did not include the required information from a healthcare provider. As a result, medical exceptions will not be considered.
>
> "Additionally, your letter was extremely similar in both content and structure to the multiple other letters we received, suggesting that the effort to write the letters was highly coordinated and making it impossible to assess the unique and individually held religious beliefs of individual submitters. Because of the near uniformity of the letters, they are insufficient for the Port to use in its evaluation of religious exception requests."[7]

The email asked employees to submit the form by September 28, "[t]he form is intended to provide you with relevant information regarding the details surrounding a potential religious exception and to provide the Port with more information so your individual religious exception request can be better assessed."

66. The form attached to the Port's September 23 email was entitled, "COVID-19 Vaccination Religious Exception Request Follow-up." The form stated that the Port would evaluate each employee's response, "and, if your exception request is approved, the next step will be to determine whether the exception can be accommodated." The form informed employees that "[r]eligious exception requests that can be accommodated without creating an undue hardship or posing a direct threat to the health of safety of yourself and others may be granted. An undue hardship exists where it imposes more than a minimal cost or burden on operations."

67. The form required employees to answer a variety of questions about the sincerity of their religious belief, including how long the employee has practiced the belief and whether the faith followed by the employees permitted vaccines or other medical interventions. Each employee was required to certify that the employee's responses were true and accurate and "[a]ny intentional misrepresentation contained in this request may result in disciplinary action, up to and including termination."

68. In addition, each employee was required to certify that they understood that the employee's "request for exception/accommodation will not be granted if it is unreasonable, if it

[7]The email apparently referred to the fact that the letters had the same general format, the same "regarding" line, the same font, the same date (September 11, 2021), and similar content, and all contained signatures prepared by the software service Docusign.

poses a direct threat to the health and/or safety of others in the workplace and/or to me, or it creates an undue hardship."

69. Fourteen employees submitted the follow-up form.

70. After reviewing the employees' follow-up information, the Port decided that it needed additional information from some employees. The Port informed Farrell that it intended to seek additional information from some bargaining unit members because, in the Port's view, some of the employees' forms contained insufficient information for the Port to make a decision on the exception requests. On about October 5, 2021, Farrell had a meeting with Mathis and Pearman about the religious exception follow-up request that HR intended to send to employees. Farrell communicated his dissatisfaction with the Port about its handling of the exception requests and its intention to send out a request for additional information. Farrell communicated the bargaining unit employees' stress levels with the uncertainty. Farrell stated that if the Port just needed an employee's missing signature, it should simply tell the employee that.

71. On October 5, 2021, the Port's HR Department emailed 11 employees who had submitted requests and requested a meeting for the following purposes: (a) for some employees, to make corrections to the form, such as to sign and date the form, (b) for some employees, to ask additional follow-up questions, and (c) to "see if there are other questions" the employee had that the Port could answer. The Port noted, "As you know, this is an interactive process and takes time to fully work through."

72. Farrell was informed by some employees that they wanted to have a union representative with them during the follow-up meetings. On October 5, 2021, Farrell spoke with Mathis about the Union's wish to be included in the meetings. Mathis responded that HR intended to have one-one-one meetings without a union representative present. Farrell subsequently emailed Donna Eaves and informed her that all the employees wanted a union representative present during their meetings.

73. On October 5, 2021, Eaves responded by email to Dave Farrell. Eaves informed him that the Port would meet one-on-one with bargaining unit employees, and that union representatives were not typically present during such meetings. She wrote, "[i]t is the employer's opportunity to have a conversation with the employee, specific and unique to their circumstances, in order to determine if they have a qualifying exception and if so, whether or not there are reasonable accommodations that can be put in place that do not create an undue hardship for the Port." Eaves also explained that "this is not a conversation that could lead to disciplinary action."

74. On October 5, 2021, the Port approved religious exception requests for three employees, AY, TM, and SP.[8] The Port notified each of those employees by email (with a copy to Farrell and Chief Mathis) that a religious exception was approved. The email explained that the "next step is to engage in an interactive process to discuss accommodation. We will follow up and schedule a meeting with you" for the week of October 11.

[8]We use initials, rather than full names, to identify some bargaining unit employees.

75. Between October 5 and October 7, 2021, nine employees sent reply emails to HR and requested union representation during the meetings to discuss the religious exception follow-up meetings.

The Port's Meetings with Employees on October 6 and 7, Without a Union Representative Present, Regarding the Eleven Pending Exception Requests

76. On October 6 and 7, a representative from the Port's HR team met separately with each of the 11 bargaining unit employees who had a request for a religious exemption pending. At those meetings, the HR representatives followed a list of talking points to guide the meeting. The bullet points included talking "about what workplace accommodations you would be seeking if your religious exception request is approved."

77. For those employees to whom the Port did not ask follow-up questions, the HR representative informed the employee, according to the talking points, that "[w]e don't see why your exception request would not be approved, but we will let you know officially within the week. The next step will be to determine whether the request can be accommodated." For employees who provided new information, the HR representative explained that the information would be evaluated by the Port and "the next step" would be to "determine whether the request can be accommodated."

78. The talking points prepared by HR also stated, "For requests that are not approved or for requests that are approved but cannot be accommodated, we will follow language in the MOU" that provides that firefighters unable to complete vaccination by October 18, 2021, will be allowed to use paid accrued leave or go on unpaid leave through November 30, 2021, and, if not vaccinated by November 30, be laid off.

79. In each meeting, the HR representative used a blank form to document the employee's answers to the following questions: (a) Have you received vaccinations as an adult? (b) Can you explain what is different about the COVID-19 vaccine than the other vaccines you have received as an adult? The HR representative documented the employee's oral answers. The employee was asked to review the HR representative's statement of the employee's answers and initial that the responses were captured fully.

80. Eight of the 11 employees stated that they had received vaccinations as an adult. Three stated that they had not received vaccinations as an adult. Those who had received vaccinations as an adult provided answers to the question, "Can you please explain what is different about the COVID-19 vaccine than the other vaccines you have received as an adult?"

81. On October 8, the Port notified the 11 employees with pending requests for religious exceptions that the Port was approving their requests for religious exceptions. The Port did not deny any religious exception request.

82. Shortly thereafter, Mathis received multiple text messages from bargaining unit employees after they were notified by the Port that their religious exception requests were approved. Mathis testified that the employees who sent text messages thanked him, which

concerned him because he was aware that an additional step—considering whether accommodations could be granted—was required. That day or the next day, October 9, Mathis called Farrell to remind him that the approval of the religious exceptions was the first step of the process and would be followed by a second step related to accommodations.

Events Related to Determining Reasonable Accommodations

83. Pippenger asked Mathis and Pearman to analyze whether the Port could extend accommodations without undue hardship. On October 8, Mathis sent Pearman an email outlining his assessment. Mathis listed the following possible accommodations:

- Requiring all unvaccinated firefighters to wear KN95 masks at all times when not alone in a bunkroom or showering;
- Requiring all unvaccinated firefighters to eat alone;
- Prohibiting all unvaccinated firefighters from using the gym;
- Checking daily temperatures of all employees;
- Conducting weekly testing if required by the Port.

84. In describing his assessment, Mathis explained that, in his thinking, the Port's fire department was different than the City of Portland's municipal fire department because (a) 34 percent of the Port's firefighters were unvaccinated compared to approximately 10 to 12 percent of the City's firefighters; (b) the Port's fire station, unlike the City's fire department, creates the risk of a single point of failure, with backup available only from the PANG fire department, which itself "does not have the resources to support an Index E airport operation"; and (c) if the Port Fire Department were unable to operate because of a COVID-19 outbreak, "the airport would not be able to operate[,]" which would "have a significant negative impact on not just the airport but to the region."

Mathis also explained his assessment of both the benefits and the risks and costs of the possible accommodations he identified. He itemized the benefits of offering these accommodations as enabling the fire department to run fully staffed, assuming there were no outbreaks; avoiding the cost and lost productivity associated with hiring and training new employees; and avoiding additional strain to the relationship with the Union. Mathis identified the following risks and costs associated with permitting unvaccinated employees to continue to work: the risk of a business interruption in airport operations; ongoing disruption to staffing when there is a COVID-19 outbreak; risks of COVID-19 transmission to other employees and the public; the cost of time off, overtime, and testing supplies; the lack of certainty about the length of the pandemic and the circulation of additional variants of the virus; and the adverse effect on the morale of employees who voluntarily took the vaccine.[9]

[9]Over the course of the pandemic, two Port firefighters have tested positive for COVID-19. In one case, it was unclear whether the employee's exposure was on or off-duty, although ultimately it was treated as an on-duty exposure. Three employees who had contact with that firefighter were quarantined as a result of that contact; one of those employees tested negative, and the other two declined to be tested and remained out on quarantine. None of the three became symptomatic. The second COVID-19 positive employee, in

(Continued . . .)

Mathis ultimately concluded that the Port would experience staffing difficulties and damage to the fire department's morale whether or not the Port offered accommodations. Acknowledging that it was difficult to take a position different from that taken by surrounding fire departments, Mathis nonetheless concluded, "Our job is to serve the public and bring no harm. I'm not sure we can say we're not by responding to patients with unvaccinated responders." Pearman replied that Mathis's thoughts were aligned with her thoughts, and that she would share the information with Pippenger.

85. On October 8, the Port sent all 14 employees with approved religious exception requests a fillable accommodation request form entitled, "COVID-19 Vaccination Religious Exception Accommodations—Employee Request." The form stated, in part:

> "The Port of Portland has approved your request for a religious exception from receiving the COVID-19 vaccine. The next step is the interactive process to understand what specific accommodations you are requesting."
>
> "Religious exception requests that can be accommodated without creating an undue hardship or posing a direct threat to the health or safety of yourself and others may be granted. An undue hardship exists where it imposes more than a minimal cost or burden on operations. Any approved religious exceptions must be requested at least annually and may be re-evaluated periodically at the Port's discretion."

The form also included multiple questions, including the following: "As part of the interactive process, it is the Port's practice to meet with the individual seeking accommodations. Would you like to meet individually with an HR representative to discuss the accommodations you are requesting?" The question was followed by a yes or no box to check, and then continued, "If you checked yes, Human Resources will be in touch to schedule a meeting; you may still, but do not have to, respond to question 2. If you checked no, please complete the following section."

The following section contained the following question: "In the space below, please detail the specific accommodations you are requesting with as much specificity as possible (e.g., if you are requesting wearing PPE, please state what type under what circumstances, etc.)"

The form concluded with the following statement: "Note: After the meeting specified in 1. Above occurs and/or requested accommodations are submitted, the Port will contact you if follow-up questions or clarifications are needed to make a determination regarding requested accommodations."

86. On October 9, Farrell talked to Mathis about the form. Farrell asked Mathis about the place on the form where employees could either request a meeting to discuss accommodations

---

(Continued . . .)
May 2021, was determined to be a work-related exposure. That situation resulted in two unvaccinated employees going out on quarantine. There have been no cases of firefighter-to-firefighter or firefighter-to-patient COVID-19 transmission at the Port.

or, alternatively, describe on the form the accommodations they suggested. Mathis replied that everyone was welcome to request a meeting, and that, with the October 18 deadline for vaccination just nine days away, everyone should understand that meetings would result in the process being slower. Mathis did not intend to discourage meetings, and perceived that Farrell understood that Mathis was responding to the fact that the Union had been pressing the Port to act more quickly throughout the exceptions review process. Farrell recommended to bargaining unit employees that, unless they particularly wanted a meeting, they should describe their suggested accommodations on the form and then there would be an opportunity for an interactive process.

87. JC and AY requested a meeting with an HR representative. The remaining bargaining unit members did not request a meeting.

88. On October 12, Eaves left AY a voicemail asking to schedule a meeting with AY to discuss accommodations that day or on October 13. AY subsequently informed Eaves by email that she had mistakenly checked the box to request a meeting. AY believed she had submitted enough information about her proposed accommodations on her form. On her form, AY suggested the following accommodations:

> "I am currently wearing a 3 layer antimicrobial 5oz adjustable face mask at all times while on duty and social distancing as much as possible. On 911 responses, I am wearing a minimum of P100 (Fit Tested) face mask w/ replaceable respirator filters, eye protection and gloves. I am following all department procedures and have the ability to increase my level or protection equipment when necessary (i.e. Tyvek Suites, Level B Suits). Decontamination with cleaners that are rated to disinfect to the level of SARS COV2 and personal hygiene after calls is a part of that procedure. I am willing to discuss any alternative safety measures that may protect myself, co-workers and community at PDX. However, I believe the precautions we currently have in place are sufficient."

89. JC met with Eaves by telephone. No one else attended the meeting. JC asked for the meeting because of his perception of the firefighters' reactions to a decision made by the Port Fire Department in summer 2021 about unvaccinated firefighters. Specifically, the department had a wildland fire response team comprised of 20 firefighters who volunteered for the team. The team would assist with wildland firefighting efforts. In summer 2021, the Port decided that unvaccinated firefighters, who comprised most of the team, could no longer serve on the team. JC believed that the Port's decision, which it later rescinded, caused division and poor morale. JC asked Eaves to communicate to the Port leadership that, in making decisions about the process, it should balance safety with morale and inclusivity of everyone on the Port Fire Department team. On his form, JC suggested the following accommodations:

> "The most cost effective and appropriate accommodations in my opinion would be the following:
>
> 1. Follow all CDC, TSA, Federal, State, and local recommendations for protecting both vaccinated and unvaccinated members.

2. Wear a fire department uniform policy approved mask while indoors with other people and when unable to maintain a minimum safe distance between people outside.
3. Ensure proper PPE (P100 mask, N95, PAPR or SCBA when deemed appropriate by MCEMS Protocols) use on calls when in close contact with patients/traveling public. This includes following decontamination procedures after the call as needed.
4. Decontaminate the station/dorm rooms between shifts.
   While the pandemic has affected us all drastically, the fire station has an excellent record of protecting is membership by diligently following all the guidelines that have been put in place. Following these guidelines will continue to keep our members safe and allow us to get through this pandemic as a unified team."

90. As noted above, the remaining employees who were granted religious exceptions did not request meetings. Those employees submitted the form and described the accommodations that they requested. The employees generally requested accommodations such as social distancing and requiring wearing a mask such as an N95 mask on calls or an N100 mask with a suspected or confirmed COVID-19 patient. Some examples of accommodations requested by employees include:

- "I would like to request the use of N95 mask on all calls unless a higher level is needed, i.e., known covid patient, fire etc. In the station the use of cloth face mask as we have been doing, in common areas while maintaining social distance. Having a limited amount of co-workers in the workout area as we have been. Daily disinfecting of dorm rooms when shift is over and beginning[,] keeping myself safe from those who used it before me and those who will come after me. This will allow the room to be double disinfected."

- "To date, the fire department has done an outstanding job protecting its members during this pandemic. I believe the safety measures we have implemented are safe, effective, and the most cost effective methods available. These safety measures have proven to work and keep up safe during the pandemic. Keeping these safety protocols in place for all members has the ability to avoid creating division and inequity in our workplace by creating two sets of standards. I believe we should continue to utilize the safety procedures we currently have in place, which include:

1. "Following CDC, TSA, and all Federal and Local masking and social distance guidelines. Wearing a department issued cloth mask approved under our uniform policy while indoors and in situations we cannot maintain safe distance outdoors.
2. "Continue to wear proper PPE (M95, P100, SCBA, tyvek suits, etc) during medical calls or when coming in close contact with the public per our MCEMS protocols.
3. "Decontaminate the station and dorm rooms between shifts. Continue to be diligent on cleaning the station for the oncoming crews.

- "A couple other safety items that need financial support, but could be beneficial to the entire department are:

1. "A patio cover at the station. This project has been in the budget several times and pushed several times. It would allow for cooking/eating/gathering outdoors throughout the year (cover from rain in fall/winter/spring and provide shade in the summer).
2. "Look at upgrading the filtration in the station's HVAC system. Without knowing the specific details of the HVAC system it is hard to provide concrete suggestions, but coming from a background in construction this is an area that can always be improved upon."

- "Portland Airport Fire & Rescue has done an impeccable job at staying safe throughout the duration of the COVID-19 pandemic. This has been shown in the fire department's zero COVID-19 workplace infections throughout the last 19 months of precautionary measures. It is my request and desire that I be allowed to continue the CDC, Oregon Health Authority and Multnomah County Health Department's recommendations of; wearing cloth masks while indoors, wearing N95 masks while on emergency calls, social distancing from coworkers when it's feasible, and continue the thorough daily process of cleaning & sanitizing the fire station. I appreciate your time and consideration regarding this matter and look forward to hearing back from you in the near future."

- "Wearing cloth face covering indoors, practice social distancing, wash hand, utilize approve PPE on incidents."

- "I am looking to continue to wear current masks worn in the station and keep social distancing as discussed by chief officers. Looking to continue to follow Multnomah County EMS Policies and procedures issued while on EMS calls. Such as N95 mask or higher on all calls. If suspected or confirmed patient use N100 mask and tyvek type suit."

91. Two employees who received religious exceptions testified at the hearing. Both testified that they understood that, when their exceptions were approved, the Port might not be able to accommodate them, although one of them thought there was only a five percent chance that accommodations would not be offered.

The Port's Analysis of Possible Reasonable Accommodations

92. The HR representatives compiled the accommodations requested by the employees into a spreadsheet and provided the spreadsheet to Pearman and Mathis. Mathis and Pearman were not provided the individual employee forms.

93. Mathis and Pearman assessed the accommodations suggested by employees, including whether the facilities modifications suggested by employees could be possible accommodations. Employee suggestions included upgrading the fire station's HVAC system.

However, the HVAC system in the fire station was upgraded after 2018. The employee suggestions also included building a patio cover to make outdoor eating and gathering more practicable. The Port had previously considered that upgrade in pre-pandemic budgets, but the construction had never been improved. In Mathis's view, the patio cover would not reduce the risk to the public.

94. Mathis and Pearman also considered COVID testing options. At this point, SEA-TAC was requiring its employees to do self-tests if they were symptomatic. Mathis considered whether mandatory weekly testing would be a possible accommodation. Mathis was concerned about the cost of testing given that, at that point, it seemed reasonable to Mathis that testing would be required indefinitely. Mathis was also concerned that testing would be of limited usefulness in this particular workforce, where firefighters respond to multiple calls and thus could contract COVID during a call while on-shift, eliminating the usefulness of an earlier negative test result.

95. Mathis considered the costs and availability of testing supplies. He considered that the Port could do some testing in-house, but weighed the availability of testing supplies against the fact that testing, if offered as an accommodation, might also have to be done by an outside vendor. HR provided Mathis the cost estimates for testing performed by an outside vendor. Based on those considerations, Mathis concluded that testing was not a viable substitute for vaccination.[10]

96. In assessing possible accommodations, Mathis and Pearman also identified as possible accommodations the following: KN95 masks for unvaccinated employees at all times when not alone in their bunk room or showering; Port-provided cloth masks for all other employees; requirements that unvaccinated employees eat alone and not use the gym; daily temperature checks for all employees; continued daily disinfecting of common areas of the station; and continued disinfecting of bunk rooms before each shift change.

97. Mathis also considered the effect of having unvaccinated firefighters on the workforce as a whole. The Port Fire Department had already had one firefighter out on a COVID-related quarantine for 28 days. Mathis was concerned that having 14 unvaccinated firefighters would lead to firefighters having to do extra work if there was an outbreak or if an unvaccinated firefighter needed to stay home to quarantine. Mathis also noted that the risks of a COVID outbreak were particularly high on the B and C shifts, where 64 percent and 45 percent of employees were unvaccinated. Mathis and Pearman did not consult with Dr. Jon Jui, the Fire Department's Medical Director, in connection with assessing possible accommodations.

98. In Mathis's view, there was not enough work in the Port Fire Department that could be performed remotely to make telecommuting or remote work feasible. Mathis also considered whether firefighters could be transferred to jobs in other departments at the Port, and was informed by the Port that firefighters were free to apply for such jobs just as other Port employees were able to do.

[10]At the time of hearing, the Port Fire Department had approximately 80 unexpired rapid test kits already in stock. Barr uses rapid test kits when she tests Port employees for COVID-19. The Port contracts with an outside vendor for PCR tests.

99. With regard to AY, who had been on light duty due to a workers compensation claim, Mathis understood that AY had reported on August 30, 2021, that she was expecting to be returned to full duty on October 30, 2021. AY, who had been working in person 25 to 50 percent of the time, would be returning to work full-time and Mathis determined that telecommuting would not be a possible accommodation.[11]

100. When assessing what accommodations might be possible, Mathis also reached out to other fire departments throughout the state. Mathis was aware that other fire departments were providing accommodations to unvaccinated firefighters. In Mathis's view, the accommodations offered at other fire departments had little relevance to the Port's assessment because, unlike other fire departments, if the Port Fire Department had a COVID-19 outbreak, it could lead to the closure of PDX.

The Port's Decision to Deny Accommodations to the Port Firefighters

101. Based on all the above factors, Mathis and Pearman concluded that the Port was unable to offer accommodations without undue hardship. On October 14, 2021, Pearman emailed Pippenger a memorandum that summarized their recommendation. In evaluating the possible accommodations, Pearman estimated that the average monthly cost of COVID testing for unvaccinated employees would be $19,200. Pearman also cited the greater risks associated with the Delta variant of COVID-19, which, "[a]ccording to the CDC, * * * is more contagious than previous variants," and "causes more severe illness than previous variants in unvaccinated people."

102. Pearman and Mathis recommended denying accommodations because of the heightened health and safety risks posed by the Delta variant and the risk of closing the airport in the event of an outbreak. With regard to the risk of closing PDX, Pearman and Mathis considered the fact that, if there were a COVID outbreak in the fire station, there were no local substitute firefighting resources that PDX could use to keep the fire department operating and PDX open. The PANG fire department has ARFF-certified firefighters, but it does not have staff certified to FAR 139, as required, or the equipment that carries the appropriate firefighting agent. Local municipal fire departments, such as the City of Portland fire department, are not ARFF-certified. If there was a significant COVID outbreak at the Port Fire Department, the Port would have to turn to SEA-TAC for substitute staff and equipment.

103. In the October 14 email to Pippenger, Pearman described the Port's analysis as follows:

> "This situation is incredibly difficult. We do not want to lose highly skilled and valuable employees. However, the risks and undue burdens imposed on the Port, PDX, and the public outweigh the benefits of granting accommodations. We disagree that continuing with the current protocols for unvaccinated employees will be a sufficient accommodation because they do not address the heightened risk of the Delta variant as well as the high risk of the job itself, which the firefighters acknowledge each shift through the submission of a Form 2116. They also do not

[11]Mathis learned during the week of the hearing that AY was not released to full duty as of October 30, 2021.

> consider the business interruption risk detailed above if a COVID outbreak did occur in the department. Testing unvaccinated employees before each shift would at least help in preventing someone infected with COVID from coming into the department, but the cost of the tests (both the test themselves and associated labor costs) put an undue burden on the Port, especially when testing may have to be in place for an unknown period of time. PAF&R's mission is to serve the public and bring no harm. It is incredibly challenging to say we are meeting that mission by responding to patients with unvaccinated providers.
>
> "We recognize that in the worst-case scenario, if we deny the accommodations and all 14 employees are laid off, we will have staffing issues for 60 to 90 days while we backfill these positions. We also will have to operate with reduced services and with increased OT costs. However, PDX would remain open, and there would be an end in sight for business returning to normal. We therefore recommend denying the accommodation requests."

104. Also on October 14, the Port Executive Director Curtis Robinhold sent an email to Port employees with the subject, "Vaccination and ensuring the safety of our team." The email explained the process for complying with the executive order requiring vaccination for all federal contractors, which applied to all Port employees except Port Police. The email explained that the executive order required all employees to be fully vaccinated by December 8, 2021. Robinhold explained the process for seeking an approval for a religious or medical exception and the process "to determine whether there is a reasonable accommodation for you that doesn't constitute an undue hardship on the Port[,]" explaining that if an "exception or accommodation request is not approved, you must complete the vaccination process." Robinhold also wrote, "Right now, our workforce is about 80% vaccinated. And while that's good, it's just not good enough to keep our entire Port team—and our families—safe and well."

105. Pippenger agreed with Pearman and Mathis's October 14 recommendation. On behalf of the Port, Pippenger decided that the Port would not offer accommodations to unvaccinated firefighters. In reaching that decision, Pippenger considered multiple factors, including the risk that the airport operations would be interrupted in the event of an outbreak; the close proximity of firefighters to each other during their shifts; the safety of the 27 vaccinated firefighters, other airport employees, and members of the public; the fact that the Port could not practicably separate employees, such as by requiring staggered shifts; the transmissibility of the virus, especially the Delta variant; the cost of frequent testing; and the effect on the confidence of the traveling public in using the airport.

106. Pippenger also considered the fact that the Port Fire Department had not experienced an outbreak over the course of the pandemic, even though the firefighters work, eat, and spend substantial time in close proximity with one another. However, in Pippenger's view, the emergence of the Delta variant in July 2021 increased the risk of an outbreak.

107. Pippenger considered the possibility of remote work as an accommodation, but after discussing that possibility with Pearman and Mathis, Pippenger concluded that there was no

work available that 14 firefighters could perform remotely. The Port would also be required to hire substitute employees to perform the on-site work.

108. In reaching his decision, Pippenger did not consult the Port Fire Department's Medical Director Dr. Jui. However, Pippenger had talked with Dr. Jui during the pandemic and had participated in workgroups with Centers for Disease Control representatives. Pippenger believed that the medical direction was clear.

The Port's Communication of its Decision to Deny Accommodations

109. On October 15, Mathis and Pearman informed Farrell, in an in-person meeting, that the Port had decided that it could not offer accommodations without undue hardship.

110. Mathis and Pearman then informed each firefighter individually to inform the firefighters that the Port had decided that it could not offer accommodations. Farrell attended 13 of the 14 meetings. One employee informed them that he was considering getting vaccinated. Another asked whether there was an option available to transfer to another job within the Port. AY asked whether she could continue on her workers compensation light duty as an accommodation.

111. On October 15, by email, the Port notified all 14 employees in writing that it was denying their requests for reasonable accommodations. The Port wrote that it was denying the requested accommodations because "accommodating your religious exception to the COVID-19 vaccine would result in an undue hardship to the organization." The Port explained that the denial was based on the risk of closing the airport, the cost of testing as a possible accommodation, and the risk of transmission of COVID to the public or other Port employees. The email explained:

> "Because the Port has just one fire station, there is no ability to relocate you to another station should an outbreak occur, nor could the Port receive airfield responses from elsewhere.
>
> "The business interruption risk is great. If the Port Fire Department had a COVID outbreak and was unable to operate, PDX would not be able to operate, which would have a significant negative impact not only on the Port but also on the multi-state region.
>
> "The health outcomes for unvaccinated people contracting the Delta variant are statistically worse than those for vaccinated people, which creates a heightened risk that an unvaccinated employee who contracts COVID could be out on leave for an extended time. Such extended leave would result in staffing issues and unanticipated overtime costs.
>
> "For testing to be an effective means of preventing you from bringing COVID-19 to work in the event you were infected, we would need to test you before every work shift. We have researched multiple options and concluded that implementing them would put an undue burden on the Port due to the costs, logistics, and burden on other employees.

> "As a front-line healthcare worker, there is a risk, particularly with the Delta variant and future unknown variants, that as an unvaccinated employee, you could infect members of the public or other Port employees."

112. In the email, the Port informed the 14 employees that it would follow the process contained in paragraph 8 of the parties' MOU and would allow employees unable to complete vaccination by October 18, 2021, to use accrued paid sick, vacation, or holiday leave, or take an unpaid leave of absence through November 30, 2021. For those employees who did not report that they were fully vaccinated by November 30, the Port would issue a layoff notice effective November 30.

113. The Port's memorandum instructed employees not to report to work effective October 19, 2021, and not to report to work until they were fully vaccinated.

114. Separately, DW, whose religious exception had been approved, contacted Mathis. DW asked to be exempted from the vaccination requirement on the basis that he had tested positive for COVID-19 and had some level of "natural" immunity as a result, making the vaccine unnecessary. The Port considered this request and asked DW to obtain documentation from his health care provider. DW was unable to obtain the documentation. The Port also asked the Port's Medical Director about the accommodation requested by DW. The Medical Director was unable to definitively confirm that a vaccine was unnecessary in light of a previous COVID-19 illness. Pippenger denied the accommodation requested by DW because "natural" immunity is not recognized as an alternative to the vaccine by the Governor's Order and or by the Centers for Disease Control and Prevention as equivalent to the vaccine.

115. The Port did not suggest any accommodations to any of the 14 employees or ask the employees to suggest other accommodations than those the employees suggested in the forms the employees submitted. Farrell did not contact the Port to further discuss or request accommodations, other than the requested accommodation for employees who wanted to receive the Johnson & Johnson vaccine, as discussed below.

<u>The Agreed Grace Period for Firefighters With Religious Exceptions Who Received the Johnson & Johnson Vaccine on their Next Shift</u>

116. During Mathis's and Pearman's October 15 conversations with firefighters, one firefighter asked them whether the firefighter could go on administrative leave if he immediately received Johnson & Johnson dose. Pearman and Mathis conferred with Pippenger about whether the Port could offer a grace period to firefighters who were willing to immediately get vaccinated. Lamphier and Farrell were also involved in discussions about the request. The Port ultimately agreed to offer a grace period to firefighters who were willing to immediately get vaccinated.

117. On October 16, the Port agreed to offer the following accommodations for a two-week period to those unvaccinated employees who would receive the Johnson & Johnson vaccine before their next scheduled shift: (a) undergo COVID-19 testing before each shift, administered by the Port's fire department staff; (b) wear a KN95 mask at all times except when eating or

drinking or in the dorm room alone; (c) eat alone until fully vaccinated; and (d) comply with staffing assignments designed to limit contact with the public. Farrell and Mathis agreed to this arrangement by exchange of emails on October 16. Mathis testified that these accommodations were feasible because there was a foreseeable end date and the accommodations would result in the Port retaining firefighters.

118. Beginning October 18, all 14 unvaccinated firefighters were permitted to take accrued paid or unpaid leave through November 30, 2021. Any firefighter who wished to get the Johnson & Johnson vaccine could do so at the beginning of the firefighter's next scheduled shift and receive the temporary accommodations.

Events at the Fire Department After the Port Decided not to Provide Accommodations

119. With 14 firefighters out on leave beginning on October 18, the Port Fire Department had too few firefighters to schedule the same number of employees (generally 12) per shift as before October 18. Mathis instructed the battalion chiefs to attempt to schedule seven employees per shift and not to go below six employees per shift. Mathis also directed the battalion chiefs to attempt to have eight employees working on each shift by offering voluntary overtime.

120. On October 16, Battalion Chief Robert Otto, who is in charge of scheduling, sent a memo to all fire department employees regarding "several personnel transfers effective October 19th," resulting in moving Kelly days and vacation days "as close to the original dates as possible." The memo also explained that the Port planned to operate C-8, FT-85, 86, 87 and R82 "with two paramedics cross staffing SQ-81. RB-80 will be in limited service with minimum of one rescue boat operator cross staffed with either R82 or E80 deckhands. All call shifts during this staffing crisis shall be non-counting call shifts."

121. The memo also notified employees that the Port would use a "voluntary sign-up sheet" to "staff Engine 80. If we have two overtime volunteers per day, we will take R82 out of service and put Engine 80 in service."

122. The Port did not discuss this memo with the Union before sending it or negotiate with the Union about the changes that would go into effect on October 19.

123. As a result of the changes to shifts, the Port moved some employees from their typical shift in order to spread the firefighters among the three shifts.[12] From October 18 through November 30, one shift had eight firefighters regularly assigned. The other two shifts had seven firefighters regularly assigned, and the Port filled the eighth position with an employee who volunteered to work overtime to bring the shift up to eight employees. The change to shift assignments also resulted in one bargaining unit employee who worked a 40-hour schedule being assigned to a firefighter shift while the department was short-staffed. That firefighter was a training officer responsible for training-related tasks, which Farrell testified could impact safety. No firefighters missed required monthly training following the October 18 vaccine requirement.

[12]For example, one shift lost seven out of the 12 employees on that shift.

124. Battalion Chief Tyler Lyons testified that there were some employees who cancelled scheduled vacation leave during this period, and some employees who took scheduled vacation leave. The record does not include specific information about which employees changed their vacation leave or the reasons for those changes.

125. Nine of the 14 employees who were granted religious exceptions decided to get vaccinated and return to work. They returned as of November 30. The Port was then able to schedule at least10 employees for each shift.

126. For the October 18 to November 30 period, Mathis decided to take the rescue boat out of service from responding to day-to-day emergencies outside the Port's primary jurisdiction. The boat remained in service for aircraft rescues, which is within the Port's primary jurisdiction. Mathis also decided that the Port Fire Department would focus on keeping two crash trucks operational and keeping Engine 80 staffed with four firefighters. The Port continued to operate Engine 80 with four firefighters, as it had before October 18. On the shifts where there were only seven firefighters on duty, the Port did not operate the engine, and ran the crash trucks instead. There were approximately six or fewer occasions when the Port was unable to operate Engine 80 between October 18 and November 30.

127. Before October 18, firefighters regularly worked 48-hour shifts and quite often worked 72-hour shifts. There were also several occasions before October 18 when shifts were as long as 96 hours long. Beginning October 18, the Port filled one position on each shift with an employee working voluntary overtime. Generally, firefighters worked more voluntary overtime from October 18 through November 30, but the record does not indicate how many overtime hours were worked by which employees.[13] Lyons testified that there was one employee who worked "a lot" of voluntary overtime, which he attributed to what he understood to be her desire to work as many overtime hours as possible because of a planned imminent retirement.[14] He also testified that there were "a couple" of employees who worked more voluntary overtime than they usually would, although he did not identify any employee by name.

128. By November 9, each shift was staffed with a minimum of eight employees. On November 9, Battalion Chief Robert Otto emailed the entire department about changes to the voluntary overtime sign-up sheet, informing everyone that "some OT shift opportunities have been removed. By hiring back a second Officer it puts our staffing at 8 people per shift, as Chief requested."

129. There was some effect on the workload of the bargaining unit employees between October 18 and November 30 because fewer employees were on duty each shift. Lyons testified that tasks such as vacuuming and taking garbage out were performed by fewer employees on shift, rather than those tasks being spread among a larger group of employees on shift. Farrell testified that he compared the department's call volume for October 18 through November 28, 2021,

[13]As discussed above, as of November 30, nine of the 14 employees whose religious exceptions were granted decided to get vaccinated and return to work rather than be laid off.

[14]An employee's increased overtime hours worked can, in certain circumstances, increase the amount of an employee's PERS pension.

compared to 2019, and the calls in 2021 were "on par" with 2019. Farrell testified that, because fewer employees were on duty from October 18 through November 28, 2021, call volume increased by 10 to 12 percent per employee. Farrell also testified that the number of rescue boat calls decreased during that period when Mathis instructed employees to focus on calls within the Port Fire Department's primary jurisdiction.

130. On November 4, Mathis issued a memo addressed to all fire department employees regarding "Temporary Officer work up Procedures." The memo provided direction for officer "work ups" in the "absence of current promotional lists." At this time, the active captain and battalion chief lists had been left vacant by the previous fire chief. The active lieutenants list had been active, but employees had not been tested before the end of the certification period. Some of the unvaccinated employees were in these officer positions, creating the need to fill those positions after October 18.

131. Farrell, Battalion Chief Otto, and Mathis discussed how to proceed with respect to the need to fill the officer positions, and the November 4 memorandum followed their discussion. Farrell agreed to the terms in the memo. The memo indicated that all employees with at least three years of employment would be considered for officer opportunities. To be considered, employees were required to complete and turn in the officer training manual for the next rank above their current position. Employees who had not worked up to an officer position in more than five years were required to complete refresher training with their company officer. The memo explained that qualifying employees would be selected by seniority and the Port would rotate through eligible employees as equitably as possible.

132. Between October 18 and the time of hearing, the Port Fire Department responded to 100 percent of the calls it received. In situations in which the Port Fire Department was the primary responder, its response time was 21 seconds faster than its response time before October 18.

133. Neither Mathis nor Lyons were presented with any safety concerns or complaints by bargaining unit employees or others related to responses or operations beginning October 18.

134. Farrell testified that because of the reduced number of firefighters on duty on each shift, the Port Fire Department relied more often on mutual aid agencies, including the City of Portland and PANG, both of which have provided accommodations to their firefighters. Consequently, there are unvaccinated firefighters from those jurisdictions responding to incidents.

135. Farrell also testified that there was a "significant impact" on the Port Fire Department's response capabilities when the engine was not in service. The record does not reflect whether the use of apparatus other than the engine on any calls between October 18 and November 30 created any safety issues.

136. Lyons testified that because there were fewer than 10 employees working on each shift between October 18 and November 30, the Port Fire Department responded to more calls using the engine rather than a rescue truck. Lyons testified that he did not believe that change had any effect on employee safety.

137. Mathis testified that it is generally better to have more firefighters on duty rather than fewer, and that he personally supports having more firefighters working for the Port Fire Department. He testified that having more firefighters is generally safer for employees when the department is responding to calls outside its primary jurisdiction. Mathis testified that, for responses to aircraft fires, safety is generally a function of tactics, such as the type of equipment used and the approach taken to the fire, rather than the number of employees responding.

138. On October 29, 2021, Pearman sent an email to the Port police and fire departments inviting employees on duty that day to join a "friends and family" Halloween celebration with the badging office taking place that day between 3:00 and 7:00 p.m.

Return of Nine Employees to Work and Accommodations Provided to Other Port Employees

139. On November 30, the Port laid off five bargaining unit employees.[15] As of the date of hearing, one of those five was negotiating with the Port to potentially return to work.

140. Mathis and Farrell negotiated a lateral hire agreement to facilitate the hiring of lateral firefighters. Mathis appeared before the civil service board and obtained permission to conduct hiring of lateral firefighters more quickly than is typical.

141. The Port opened the hiring process for lateral firefighters on November 3, 2021, and closed the application process on November 24, 2021. The job announcement states:

> "The Port of Portland is committed to ensuring the health and safety of our employees and community. As part of this commitment, all Port employees are required to be fully vaccinated against COVID-19 or have an approved medical or religious exception and accommodation as a condition of employment. **Candidates must provide proof of vaccination or have an approved exception and accommodation prior to beginning work at the Port.**" (Emphasis in original.)

As of the date of hearing, the Port was actively recruiting new employees to fill the positions vacated as a result of the layoffs.

142. At the time of hearing, approximately 680 of the Port's 720 employees were subject to a vaccine requirement. The Port had completed the process of considering religious and medical exceptions and possible accommodations for those 680 employees. The Port approved 33 exceptions to the vaccine requirement (in addition to the 14 firefighters' exceptions). For those 33 additional Port employees, the Port determined that it could provide reasonable accommodations for 14 of those employees. It denied accommodations for 19 employees.

143. In determining that it could reasonably accommodate some employees with approved exceptions, the Port took multiple factors into account, including whether the employee primarily worked outside or alone; whether the employee worked with limited close contact with

[15] As noted above, nine of the 14 employees who were granted religious exceptions decided after they were on leave to get vaccinated and return to work. They returned as of November 30.

other employees or the public; whether the employee's absence would require work to be performed by another employee or a replacement worker; and whether an outbreak or illness involving the employee could result in interruption to the Port's operations. The Port granted accommodations that included requiring the accommodated employee to wear an N95 mask at all times unless eating or drinking or when alone in a vehicle or office with the door shut; to eat all meals alone; to be tested for COVID-19 at least weekly; to maintain at least six feet of distance from other employees and the public; and to work staggered shifts to minimize contact with others.

144. In determining that it could not accommodate 19 employees, the Port considered multiple factors, including whether the work performed by the employee's position was necessary to operate Port facilities (as with employees working in the badging office, as communications dispatchers, or as craning electricians); whether the employee had close contact with members of the public; whether the employee's work could be performed remotely; whether the employee was regularly in contact with other employees in common work areas, increasing the risk of COVID exposure and transmission; and whether a high percentage of employees in the employee's workgroup were unvaccinated, increasing the risk of COVID exposure and transmission.

Evidence Regarding Other Employers' Accommodation Decisions

145. All fire departments in Oregon other than the Port Fire Department have provided accommodations to firefighters with approved religious or medical exceptions to the vaccine requirement. For example, at the City of Portland, approximately 82 of approximately 700 firefighters requested exceptions. The City approved all the requested exceptions and accommodated all those employees. Unvaccinated employees are required to wear N95 masks during the day and isolate themselves from coworkers as much as possible.

146. As another example, Tualatin Valley Fire and Rescue, which employs 450 firefighters, granted 38 religious exceptions. It requires all firefighters with approved exceptions to wear N95 masks on medical calls where they have patient contact. It also requires all vaccinated employees to wear N95 masks on medical calls where they have patient contact.

147. Rocky Hanes, the president of IAFF Local 1660, testified that Local 1660 represents approximately 700 firefighters employed by multiple employers, including Woodburn, Sandy, Hoodland, and Forest Grove. Approximately 50 firefighters (or 6.6 percent) have approved religious exceptions. All those firefighters are continuing to work unvaccinated.

148. The State of Oregon has provided accommodations to two unvaccinated firefighters in the 18-firefighter bargaining unit at the PANG airbase. It also provided accommodations to approximately eight of the 32 bargaining members at the Oregon Air National Guard airbase at Kingsley Field in Klamath Falls. All Oregon Air National Guard firefighters, whether vaccinated or not, must wear masks. Vaccinated firefighters may wear cloth masks and may remove them when they are socially distanced from others; unvaccinated firefighters must wear an N95 mask at all times, unless in a room alone with the door closed. The letter sent to accommodated Oregon Air National Guard firefighters in both Portland and Klamath Falls states:

> **"This temporary accommodation and associated requirements are approved beginning October 18, 2021, through May 8, 2022, or as needed, at which time it will be reassessed.** Accommodations and safety requirements may be reassessed per your request or by the agency if this accommodation is no longer effective or if this accommodation becomes an undue hardship to the agency or if your unvaccinated status becomes a direct threat in connection with your job." (Emphasis in original.)

149. The State of Oregon has also accommodated many Department of Corrections employees with approved religious exceptions, typically by requiring N95 masks. The State also accommodated all employees with an accepted religious accommodation at the Oregon State Hospital and the Stabilization and Crisis Unit (SACU).

150. The Port of Seattle employs 90-union represented employees in its fire department. Approximately five of those employees requested exceptions from the vaccine requirement imposed by Washington law. The Port denied all accommodations on the basis of the safety risk to other employees and to the public if employees with direct patient care duties were permitted to work while unvaccinated.[16]

151. Karl Koenig is the President of the Oregon State Fire Fighters Council (OSFFC). OSFFC is a statewide organization that provides professional consultation to labor organizations that represent firefighters, assists with bargaining first contracts, and advocates on behalf of firefighters in the legislature. Koenig testified that, since the beginning of the COVID-19 pandemic, Oregon firefighters have filed approximately only 250-260 workers compensation claims related to possible exposure to COVID-19. During that time, firefighters responded to approximately 100,000 calls in Oregon.

152. Koenig testified that the Port of Portland is a self-insured employer for workers compensation. For its entire workforce, through November 1, 2021, the Port had only 18 disabling workers compensation claims related to COVID-19 exposure, no claims for COVID-19 disease,

[16]Washington Governor Jay Inslee's Proclamation 21-14.1 established a COVID-19 vaccination requirement for various types of workers in Washington, including health care providers. The Washington order prohibited any health care provider "from failing to be fully vaccinated against COVID-19 after October 18, 2021." The order requires health care employers to "provide any disability-related reasonable accommodations and sincerely held religious belief accommodations to the requirements of this Order that are required under the Americans with Disabilities Act of 1990 (ADA), the Rehabilitation Act of 1973 (Rehabilitation Act), Title VII of the Civil Rights Act of 1964 (Title VII), the Washington Law Against Discrimination (WLAD), and any other applicable law." The order specifies that employers "are not required to provide accommodations if they would cause undue hardship." The order requires health care employers "to the extent permitted by law, require an individual who receives an accommodation to take COVID-19 safety measures that are consistent with the recommendations of the state Department of Health for the setting in which the individual works." It also prohibits employers from providing accommodations that "they know are based on false, misleading, or dishonest grounds or information; [t]hat they know are based on the personal preference of the individual and not on an inability to get vaccinated because of a disability or a conflict with a sincerely held religious belief, practice, or observance; or [w]ithout conducting an individual assessment and determination of each individual's need and justification for an accommodation, i.e., 'rubberstamping' accommodation requests."

and no claims for COVID-19 fatalities. All the workers compensation claims were accepted. Koenig was not aware of whether the Port may have had additional accepted non-disabling workers compensation claims (those claims not involving time loss) related to COVID-19.

153. Koenig testified that he is not aware of any firefighters who have died from contracting COVID-19 at work in Oregon. He also has not heard of a single case in which a firefighter has transmitted COVID-19 to a patient.

CONCLUSIONS OF LAW

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

2. The Port did not violate ORS 243.672(1)(a) when it refused to allow bargaining unit employees to have union representation at the meetings with a representative from Port HR on October 6 and 7, 2021.

A public employee has the right under the Public Employee Collective Bargaining Act (PECBA) to have union representation at an investigatory interview that the employee reasonably believes may result in disciplinary action. *AFSCME, Local 328 v. Oregon Health Sciences University*, Case No. UP-119-87 at 7-8, 10 PECBR 922, 928-29 (1988). This right to union representation is commonly referred to as a Weingarten right. The Weingarten right applies where "1) the employee reasonably believes that disciplinary action is being contemplated or may result; 2) the employer insists on the interview; and 3) the employee requests representation." *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon,* Case No. UP-21-88 at 9, 11 PECBR 480, 488 (1989).[17] By requesting union representation in such circumstances, an employee exercises a right guaranteed to public employees by ORS 243.662, which guarantees employees the right to "participate in the activities of labor organizations * * * for the purpose of representation." This is so in part because the "defense of employees who face disciplinary action 'is at the heart of the union's function as collective bargaining representative.'" *Oregon Health Sciences University*, UP-119-87 at 7, 10 PECBR at 928 (quoting *Multnomah County Corrections Officers Association v. Multnomah County Sheriff's Office and Multnomah County*, Case No. UP-21-86 at 28, 9 PECBR 9529, 9556 (1987)). A public employer's refusal to grant the right to union representation is actionable as a violation of ORS 243.672(1)(a), which makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed by ORS 243.662."[18]

---

[17]Here, there is no dispute that the Port required the meetings and that the employees requested union representation. Rather, as discussed below the Union's claim turns on whether the employees reasonably believed that disciplinary action was being contemplated or could result from the meetings.

[18]The phrase "Weingarten right" refers to the 1975 U.S. Supreme Court decision establishing a right to union representation during investigatory interviews in the private sector. *See NLRB v. J. Weingarten, Inc*., 420 US 251, 257-58 (1975). When interpreting PECBA, the Board and Oregon courts turn for guidance to federal cases interpreting the National Labor Relations Act at the time that the legislature enacted PECBA in 1973. *See, e.g., Elvin v. OPEU*, 313 Or 165, 177-78, 832 P2d 36 (1992).
(Continued . . .)

The Weingarten right does not apply to all meetings between an employer and a union-represented employee. Rather, an employee has a right to union representation only at "*investigatory* interviews." *Tri-County Metropolitan Transportation District of Oregon*, UP-21-88 at 9, 11 PECBR at 488 (emphasis in original); *see also Oregon Health Sciences University,* UP-119-87 at 9, 10 PECBR 930 (the right to union representation "only applies to 'investigatory interviews,' in which the employer seeks to elicit 'damaging facts' to support a disciplinary action or to hear the employee's side of the story with a view toward withholding discipline") (quoting *Certified Grocers of California, Ltd*., 587 F2d 449, 100 LRRM 3029 (9th Cir 1978)); *Washington County Police Officers Association v. Washington County*, Case No. UP-15-90 at 9, 12 PECBR 693, 701, *adh'd to on reconsideration*, 12 PECBR 727 (1991) (same). The right to union representation does not arise in "conversations between a manager and an employee in which the latter is only given instructions, training," "or needed corrections of his or her work techniques." *Oregon Health Sciences University*, UP-119-87 at 8-9, 10 PECBR at 929-30. The right to representation also does not apply to "noninvestigatory counseling sessions or meetings in which an employee is simply informed of disciplinary action." *Tri-County Metropolitan Transportation District of Oregon*, UP-21-88 at 9, 11 PECBR at 488.

When determining whether employees reasonably believed that a meeting was an investigatory interview that could result in discipline, the standard "is always an objective one, from the perspective of the proverbial 'reasonable employee': would an employee, based on the facts known to the employee, reasonably conclude that discipline might result." *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections*, Case No. UP-3-00 at 13, 19 PECBR 568, 580, *recons denied*, 19 PECBR 608 (2002). When applying that standard, we consider the totality of the circumstances, "not just the announced purpose of the interview." *Id.* at 9, 19 PECBR at 576. There "is no strict formula." *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections Snake River Correctional Institution*, Case No. UP-9-01 at 16, 20 PECBR 1, 16 (2002). Rather, we consider multiple factors, such as the subject matter of the investigation; whether there is evidence of wrongdoing or misconduct by the employees and the nature of any such misconduct; the authority of the employer representative who conducts the interview, the content of communications to the employee about the interview,

---

(Continued . . .)
However, as the Board explained in *Washington County Police Officers Association v. Washington County*, Case No. UP-15-90, 12 PECBR 727 (1991) (Reconsideration Order), "reliance on *Weingarten* and its progeny—as an indicator of legislative intent—* * * would be misplaced because the PECBA was enacted in 1973 and *Weingarten* was not decided by the court until 1975." *Washington County*, UP-15-90 at 4, 12 PECBR at 730.

The Weingarten right is now well-established under PECBA. In 1988, the Board concluded, "without difficulty," that ORS 243.662 includes a right of representation in investigatory interviews. *AFSCME, Local 328 v. Oregon Health Sciences University*, Case No. UP-119-87 at 7, 10 PECBR 922, 928 (1988). The Board adopted that right because "the policies and purposes of the PECBA would be advanced by the establishment of limited employee rights to representation during a pre-grievance investigatory meeting." *Washington County*, UP-15-90 at 4, 12 PECBR at 730. The Board explained that the adoption of a right of union representation during investigatory meetings "appropriately reconciles, we believe, an employee's right to some representation with an employer's right to manage its enterprise." *Id*. at 4-5, 12 PECBR at 730-31.

and the accuracy and reliability of those communications; the knowledge of the employee about discipline imposed on others for similar alleged conduct and the conduct of employer representatives in relation to such discipline; and other circumstances attendant to the interview, such as its degree of formality, where it is held, and who is present. *Id.* at 15-17, 20 PECBR at 15-17.

Here, the dispositive issue is whether the October 6 and 7, 2021, meetings to discuss employee requests for religious exceptions to the vaccine requirement constituted investigatory meetings within the meaning of our precedent governing the Weingarten right. For the following reasons, we conclude that these meetings were not investigatory meetings, and no Weingarten right attached.

By September 17, 2021, the Port had received requests from 14 bargaining unit employees for both religious and medical exemptions. The Port decided that it needed more information to make a decision on the exception requests and, on September 23, 2021, sent an email to that effect to the employees who submitted exception requests. The email indicated that all of the medical exception requests were incomplete and that the religious exception requests were insufficient because the requests were too uniform "to assess the unique and individually held religious beliefs of individual submitters." The email included a form that the Port asked the employees to complete by September 28. The letter explained that the purpose of the form was "to provide the Port with more information so your individual religious exception request can be better assessed." All 14 employees submitted the form.

After reviewing the employees' follow-up information, the Port decided that it still needed additional information from some employees and informed Farrell that it intended to seek additional information from some of the employees. On about October 5, 2021, Farrell met with the Port's Mathis and Pearman and communicated his dissatisfaction with the Port about its handling of the exception requests and its intention to send out a request for additional information. That same day, the Port emailed 11 of the 14 employees to request individual meetings for the following purposes: (a) for some employees, to make corrections to the form, such as to sign and date the form, (b) for some employees, to ask additional follow-up questions, and (c) to "see if there are other questions" that employees had that the Port could answer. The Port added "As you know, this is an interactive process and takes time to fully work through."

Some employees told the Union that they wanted to have a union representative with them during the follow-up meetings, and Farrell spoke with Mathis on October 5 about the Union's wish to be included in the meetings. Mathis responded that the Port intended to have one-one-one meetings without a union representative present. Farrell subsequently emailed the Port's Eaves to tell her that all the employees wanted a union representative during their meetings. Eaves responded to that email the same day and reiterated that the meetings were intended to be one-on-one and that and that union representatives were not typically present during this type of meeting. Eaves further explained that the purpose of the meeting was "to have a conversation with the employee, specific and unique to their circumstances, in order to determine if they have a qualifying exception and if so, whether or not there are reasonable accommodations that can be put in place that do not create an undue hardship for the Port." Eaves also affirmed that "this is not

a conversation that could lead to disciplinary action." That same day, the Port also approved religious exception requests from three employees.

Between October 5 and October 7, 2021, nine employees replied to the Port requesting union representation during the follow-up meetings. On October 6 and 7, a representative from the Port's HR team met separately with each of the 11 bargaining unit employees who had a request for a religious exception pending. At those meetings, the HR representatives followed a list of talking points to guide the meeting. The bullet points included talking "about what workplace accommodations you would be seeking if your religious exception request is approved." For those employees to whom the Port did not ask follow-up questions, the HR representative informed the employee, according to the talking points, that "[w]e don't see why your exception request would not be approved, but we will let you know officially within the week. The next step will be to determine whether the request can be accommodated." For employees who provided new information, the HR representative explained that the information would be evaluated by the Port and "the next step" would be to "determine whether the request can be accommodated." On October 8, the Port notified all 11 employees with pending requests for religious exceptions that those requests were approved.

Based on these facts, we conclude that a reasonable employee would not believe that the October 6 and 7 meetings were investigatory interviews to determine whether the Port should discipline the employees. Rather, a reasonable employee would believe that the meetings were conducted to gather additional information to aid the Port in determining whether to grant each employee's religious exception request. In reaching that conclusion, we rely on the totality of the circumstances. To begin, the Port explicitly told employees and the Union that the subject of the meetings was whether employees qualified for a religious exception. The subject of the meeting was not for the Port to determine whether employees had engaged in conduct (such as falsifying information) that could lead to discipline. In addition, the meetings were part of an ongoing exceptions vaccine process being administered by the Port's HR staff and according to a schedule primarily driven by the October 18 vaccination deadline in OAR 333-019-1010—*i.e.*, the employees' attendance at a meeting was not demanded arbitrarily with little or no notice and was not related to the timing of any suspected misconduct by employees. Further, there were no managers from the firefighters' chain of command present at the meetings; the meetings were attended by the representatives from the same department (HR) who had administered the vaccine exceptions process from the outset. There also is no evidence that the Port had disciplined other employees for statements made in analogous interactive process-related meetings. These circumstances weigh against a conclusion that an objectively reasonable employee would believe that the October 6 and 7 meetings were for the purpose of eliciting information that could lead to discipline.

In addition, and significantly, a management representative with authority, HR Manager Eaves, explicitly told the Union before the planned October 6 and 7 meetings that they were "not a conversation that could lead to disciplinary action." Eaves was involved throughout the exceptions process and was knowledgeable about it. There was no reason for the Union or the employees to doubt the accuracy of her assurance that the meetings could not lead to discipline. This factor alone weighs heavily against a finding that the employees here could reasonably believe that the meetings would elicit information that could lead to discipline. *See Lincoln County*

Employees Association v. Lincoln County, Case No. UP-51-02 at 9, 20 PECBR 316, 324 (2003) (when a manager states that a meeting has a purpose other than an investigatory or disciplinary purpose, "no reasonable employee" would "believe[] that the meeting was investigatory, or that disciplinary action could follow from it."); *Tri-County Metropolitan Transportation District of Oregon*, UP-21-88 at 10, 11 PECBR at 489 (employee who had been told that the purpose of the meeting was to instruct him regarding company rules had no reasonable basis to conclude that discipline could result from the meeting); *cf. State of Oregon, Department of Corrections*, UP-3-00 at 9 at 12, 19 PECBR at 579 (employees were entitled to union representative even though the investigator told them they were being interviewed only as witnesses, where the interviewer did not have the authority to discipline or promise immunity).

We consider Eaves's reassurance that the meetings were not investigatory or disciplinary along with all the other relevant factors, discussed above. Considering the totality of all the circumstances, we conclude that a reasonable employee would not have understood that the October 6 and 7 meetings were investigatory interviews that could lead to discipline.

In arguing for a different result, the Union emphasizes that the initial September 23, 2021, email described the employees' initial request letters as "extremely similar in both content and structure to the multiple other letters we received, suggesting that the effort to write the letters was highly coordinated and making it impossible to assess the unique and individually held religious beliefs of individual submitters."[19] The Union also points out that the form that the employees were expected to complete included an acknowledgment that "the information [that the employee] provided in connection with my religious exception request is accurate and complete as of the date of submission" and the statement that "I understand * * * I may be subject to disciplinary action, up to and including termination of employment, if any of the information I provided in support of this exception is false." The form also included a "certification" immediately above the employee's signature, where the employee was required to certify that the employee's responses were "true and accurate" and "[a]ny intentional misrepresentation contained in this request may result in disciplinary action, up to and including termination."

To be sure, in a vacuum and without additional context, those are factors that could cause an employee to reasonably believe that an interview conducted in the aftermath of submitting those forms could lead to discipline. We also do not discount that the employees subjectively were apprehensive that discipline could result from the meetings. For the Weingarten right to attach, an employee's "apprehension of discipline is not enough." *Tri-County Metropolitan Transportation District of Oregon*, UP-21-88 at 10, 11 PECBR at 489. Rather, the right to union representation attaches when the employee reasonably believes that "the purpose of the interview is to elicit information which could result in discipline." *Id*. For the reasons explained above, we conclude that the totality of the circumstances would not cause an employee to reasonably believe that the purpose of the October 6 and 7 meetings was to investigate the employee for potential disciplinary action. Rather, the employee would reasonably understand the purpose of the meetings to be gaining additional information to aid the Port in assessing each employee's exception request.

[19]There is nothing improper about employees coordinating and seeking assistance from their exclusive representative in this context, and the Port's suggestion otherwise is troubling. However, we ultimately do not find a violation considering the remaining circumstances.

International Longshore and Warehouse Union, Local 28 v. Port of Portland, Case No. UP-35-10, 25 PECBR 285 (2012), relied on by the Union, does not warrant a different result. There, the employee and the Port had a long-running disagreement about the extent to which the employee's job duties were constrained by medical restrictions. The Port had warned the employee twice before the disputed meeting, including the day before, that his failure to follow medical restrictions could result in discipline, up to and including termination. *Id*. at 4, 25 PECBR at 288. On the day of the meeting, a Port manager asked the employee to sign a medical restriction letter. The employee refused, and the manager returned to the employee later that day and informed him that Owen, a higher-level manager, wanted to see him "immediately." *Id*. The employee reported to that meeting with a union representative. Owen was accompanied by two other Port managers, and the meeting "quickly became contentious." *Id.* The managers then ordered the union representative to leave.

The Board concluded that the employee could reasonably have believed that the meeting could lead to discipline because the employee was previously warned twice that his failure to comply with medical restrictions could lead to discipline; he knew that Owen, the manager who called the unscheduled meeting, had the authority to discipline him; and the location of the meeting in Owen's office with two other managers present "suggested a formality and degree of authority that would lead [the employee] to think that discipline might be possible." *Id*. at 10, 25 PECBR at 294.

In contrast, in the present case, the meetings were part of an ongoing process, some details of which were described in the parties' MOU; the Port notified employees before the meeting of the purpose of the meeting; and the Port explained that it was seeking information to evaluate employees' requests for exceptions to the vaccine requirement. One employee from HR met with the employee, rather than multiple managers or managers from the firefighters' chain of command. Although the Port had told employees in the September 23 communication that providing false information in connection with exception requests could lead to discipline, the purpose of the October 6 and 7 meetings was not to elicit information from employees about the accuracy of information employees had provided. Rather, as Eaves explained to Farrell, the purpose was to make corrections to forms, obtain "ministerial clarifications," or ask clarifying questions "to determine whether or not an exception should be approved." Eaves also explicitly assured Farrell that the conversations at the meetings could not lead to discipline. Thus, the October 6 and 7 meetings in this case were materially different from the meeting at issue in *Port of Portland.*

In sum, for the reasons explained above, the Port did not violate ORS 243.672(1)(a) when it declined to permit employees to have a union representative present during the meetings on October 6 and 7, 2021.[20]

[20]In its complaint, the Union also alleged that Union members were entitled to union representation at any scheduled meeting where the Port discussed reasonable accommodations for approved exception requests. In its post-hearing brief, however, the Union did not discuss that aspect of its claim. Consequently, we do not understand the Union to be asserting that the Port violated section (1)(a) with respect to that type of meeting. In any event, there was only one such meeting—a telephone call between Eaves and JC, which JC requested to discuss possible accommodations. That telephone meeting was merely offered by the Port, but not required by it. Consequently, the Weingarten right did not attach to that discussion, and therefore the Port could not have violated ORS 243.672(1)(a) with respect to it.

3. The Port did not violate ORS 243.672(1)(g) when it declined to provide reasonable accommodations to all 14 employees who obtained approved religious exceptions.

ORS 243.672(1)(g) makes it an unfair labor practice for a public employer or its designated representative to "[v]iolate the provisions of any written contract with respect to employment relations." For the reasons described below, we conclude that the Port did not violate the parties' MOU, and thus ORS 243.672(1)(g), by declining to provide reasonable accommodations to all 14 firefighters who applied for and received a religious exception to the vaccine requirement in OAR 333-019-1010.

When we interpret contracts, our goal is to discern the parties' intent. To do so, we apply the three-part analysis described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04 at 10, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). We first examine the text of the disputed contract language in the context of the contract as a whole, and if the language is clear, the analysis ends. Unambiguous contracts are enforced according to their terms. *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162 (2001), *rev den*, 334 Or 491, 52 P3d 1056 (2002). Contract language is ambiguous if it reasonably can be given more than one plausible interpretation. *Id*. If the provision is ambiguous, we examine extrinsic evidence of the parties' intent, to the extent it is available. If the provision remains ambiguous after considering the extrinsic evidence, we apply appropriate maxims of contract construction. *Yogman*, 325 Or at 364.

In this case, the Union relies on paragraph 4 of the MOU, which requires the Port to consider all medical and religious exception requests, and paragraphs 5, 6, 8, and 9, which outline aspects of the exceptions review process that the Port agreed to implement. The Union asserts that these five provisions "clearly contemplate the Port accommodating employees with approved religious or medical exceptions." In addition, the Union contends that the covenants implied in the contract preclude the Port from denying accommodations to all 14 employees. The Port responds that the MOU, by deliberate design, does not require the Port to offer reasonable accommodations because the parties did not intend to address reasonable accommodations in the MOU. The Port also denies that the covenants implied in the contract require the Port to offer accommodations when the MOU itself is silent about accommodations.

We begin by noting that we decide only the narrow issue properly before us: whether the Port violated a written contract—here, the MOU—when the Port determined that none of the 14 firefighters with approved religious exceptions could be accommodated in a way that would allow those firefighters to retain their positions.[21] We first assess the contract language relied on by the

[21]In the Notice of Expedited Hearing and Prehearing Order, the Board proposed the following issue statement: "Did the Port violate the parties' Memorandum of Understanding and ORS 243.672(1)(g) by refusing to provide a reasonable accommodation to employees with an accepted religious exception?" In its prehearing brief, the Union proposed to modify that issue statement to include the additional issue of whether the Port's lay-off of employees who had approved religious exceptions violated the MOU. In its prehearing brief, the Port suggested only minor changes to the phrasing of the issue proposed by the Board, but generally accepted the issue statement proposed by the Board. We use the issue statement proposed in

(Continued . . .)

Union. Paragraph 4 requires the Port's HR group to "evaluate and consider all Medical and/or Religious exceptions to vaccination submitted by any employee seeking a medical or religious accommodation" pursuant to OAR 333-019-1010. Paragraph 5 states that the "only exceptions that will be evaluated and considered by Port Human Resources" are those "related to either Medical or Religious accommodations."

Paragraph 6 provides that if an employee submits a request for an exception, "but the exception review process has not been completed, and no decision has been made by October 15, 2021, then the employee will be deemed provisionally approved until the exception process has been finalized." Paragraph 6 then provides as an example "an employee not having received a timely response from the employee's health care provider."

Paragraphs 8 and 9 relate to leave, layoff, and recall, and provide:

> "8. Employees who have submitted a timely medical or religious exception request but are denied at any time after September 6, 2021, and are unable to complete vaccination by October 18, 2021, will be allowed to use their sick, vacation, and holiday bank or go on an unpaid leave of absence until they are fully vaccinated. Leaves of absence will only be approved through no later than November 30, 2021 unless the leave qualifies under FMLA/OFLA or an ADA leave of absence. If the employee has not reported that they are fully vaccinated by this date, a layoff notice will be issued that is effective November 30, 2021.
>
> "9. Employees who fail to comply with the vaccination mandate or submit a timely medical or religious exception request will be laid off from Port employment effective October 19, 2021. Employees who are laid off that date for this purpose will be placed on a rehire list through April 18, 2022 and will, upon request, be allowed to apply to any open position(s) within the Port Fire Department if they have been fully vaccinated and meet the qualifications of the position. If two or more employees who are on the list express an interest for an open position within the Port Fire Department and for which they are both qualified, the employee with the most service time with the Port Fire Department will be selected for the position. Members rehired from the list will retain previously accrued seniority."

We first address the Union's argument that these provisions clearly require the Port to accommodate all employees with approved religious or medical exceptions. In other words, in the Union's view, the Port was contractually required to continue to employ the unvaccinated firefighters as firefighters. We do not find the clarity that the Union asserts. Rather, although the MOU contains detailed provisions about other topics, such as the effective date of lay off (in Paragraph 8) and the duration of rehire rights (in Paragraph 9), the MOU is conspicuously silent about any requirement that approved religious or medical exceptions would necessarily be

(Continued . . .)
the Notice of Expedited Hearing and Prehearing Order because it mostly closely tracks the claim as alleged in the complaint, where the Union alleged that the Port's "blanket denial of any accommodations for employees with an accepted religious exception" violated the MOU.

accompanied by accommodations. If the language of the MOU contains the contractual duty advocated by the Union, that duty must arise from a more nuanced interpretation of the MOU.

We understand the Union to argue that Paragraphs 4, 5, 6, 8, and 9, read together, permitted the Port to lay off *only* (a) unvaccinated employees who did not seek an approved religious exception, and (b) unvaccinated employees whose requests for medical or religious exceptions were denied. By implication, according to the Union, because the 14 unvaccinated firefighters at issue in this case obtained an *approved* exception, they were not subject to lay off—that is, the Port was contractually required to grant them accommodations so that they could continue working as firefighters.

The Port disputes this interpretation. It argues that Paragraph 8 permitted it to lay off both (a) employees who submitted timely medical or religious exception requests whose requests were denied *and* (b) employees whose requests for exceptions were approved but whose exceptions could not be accommodated without undue hardship, such as the exceptions granted to the 14 firefighters.

Considering the text and context of the disputed provisions, we find both parties' interpretations to be reasonably plausible. The Union's interpretation is plausible because the MOU could mean, as the Union contends, that the Port could lay off only (a) unvaccinated employees whose requests for exception were denied (Paragraph 8), (b) unvaccinated employees who did not submit a request for an exception (Paragraph 9), and (c) unvaccinated employees who did not timely request an exception (Paragraph 9). There is no express reference permitting the Port to lay off unvaccinated employees who submitted timely requests for an exception that the Port ultimately approved. Given this text and context, Paragraphs 8 and 9 could mean that the Port implicitly agreed to accommodate such employees, including the 14 employees at issue in this case.

The Port's interpretation is also plausible. The Port contends that the MOU necessarily assumed a two-step exception request process, in which an exception request was not fully "approved" for purposes of an unvaccinated employee's ability to continue to work pursuant to OAR 333-019-1010 until the Port *both* approved the employee's initial eligibility for the exception (such as because the employee has a sincerely held religious belief) *and* approved an accommodation for that religious belief. The Port's interpretation is plausible in light of the text and context of the MOU, which contains several provisions that acknowledge that an exception request is a request for an "accommodation." Specifically, Paragraph 4 refers to "exceptions to vaccination * * * seeking a medical or religious accommodation[.]" Similarly, Paragraph 5 provides that the Port would evaluate and consider only "exceptions * * * related to either Medical or Religious accommodations." In the context of those paragraphs, the MOU can plausibly be interpreted to mean, as the Port argues, that an employee's request for an exception was not just a request for the Port's approval of the fact the employee had a legitimate basis to be excepted from the vaccine requirement; it was also a request for an "accommodation" so that the employee could continue to work, notwithstanding the fact that the employee did not comply with the requirement to receive the COVID-19 vaccine. In other words, the Port plausibly contends that Paragraph 8 permitted the Port to lay off employees whose exception requests were approved but who could not be accommodated in a manner that would allow them to continue in their positions.

Because each party advances an interpretation of the MOU that is reasonably plausible, we turn to extrinsic evidence to determine the parties' intent. *See Yogman*, 325 Or at 364. We begin with the parties' bargaining history. It is undisputed that the Union discussed various potential accommodations at the bargaining table. Farrell explained the difference between N95 and KN95 masks, for example. It is also undisputed that the Port stated clearly that it would not bargain language about specific accommodations into the MOU. Further, Lamphier testified, without rebuttal, that he raised the possibility that an employee might have an exception request approved that the Port could not accommodate. Lamphier testified that Farrell responded that a grace period would be a possible response. Thus, the fact that employees could receive approval for their exception requests, but nonetheless not receive reasonable accommodations, was expressly mentioned at the table as a possibility. These statements by the parties are not definitive enough for us to conclude that the parties mutually intended to require the Port to accommodate all employees with approved exceptions, as alleged by the Union.

We next consider the circumstances in which the contract was entered. *See Criterion Interests v. Deschutes Club*, 136 Or App 239, 243, 902 P2d 110, *reconsideration granted, adh'd to as modified*, 137 Or App 312 903 P2d 421 (1995), *rev den*, 322 Or 489, 909 P2d 161 (1996). During the time that the parties were negotiating the MOU, the OHA had developed a mandatory form for religious exception requests. That form was reviewed and signed by multiple bargaining unit employees *before* the parties signed the MOU on September 17. The OHA form expressly states that employers *may deny accommodations* if they pose an undue hardship. This express acknowledgment that an exception may ultimately not be accommodated, along with the MOU's silence on accommodations, also warrants against concluding, as the Union argues, that the parties mutually agreed that the Port would necessarily accommodate all employees with approved exceptions.

We turn next to the extrinsic evidence of the parties' course of performance under the contract, which also reveals their intent. *See Yogman*, 325 Or at 364 ("the parties' practical construction of an agreement may hint at their intention") (citing *Tarlow v. Arntson*, 264 Or 294, 300, 505 P2d 338 (1973)); *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-019-18 at 14 (2019) (extrinsic evidence includes how the parties have (or have not) applied a contractual provision). For the reasons explained below, we conclude that this extrinsic evidence indicates that the parties did not mutually intend that the Port would grant accommodations to all employees with approved exceptions.

Specifically, during the exceptions evaluation process, the Port repeatedly informed employees and the Union that accommodations could be denied based on undue hardship. The Union did not complain that such an outcome would be inconsistent with the MOU. In particular, the form developed by the Port to request clarification of employees' religious exception requests expressly required employees to certify that they understood that their "request for exception/accommodation will not be granted if it is unreasonable, if it poses a direct threat to the health and/or safety of others in the workplace and/or to me, or if it creates an undue hardship." Moreover, Mathis testified without rebuttal that, *after* the Port approved employees' exception request, he received multiple "thank you" messages from bargaining unit employees, and in response contacted Farrell. Mathis informed Farrell that the approval of the exceptions requests

was just the first step in the process. The Port then sent each employee another form to describe their requested accommodations. That accommodation request form (as noted, after the Port had approved the exceptions) explained:

> "The Port of Portland has approved your request for a religious exception from receiving the COVID-19 vaccine. The next step is the interactive process to understand what specific accommodations you are requesting.
>
> "Religious exception requests that can be accommodated *without creating an undue hardship or posing a direct threat to the health or safety of yourself and others* may be granted. An undue hardship exists where it imposes more than a minimal cost or burden on operations. Any approved religious exceptions must be requested at least annually and may be re-evaluated periodically at the Port's discretion." (Emphasis added.)

Although the forms used by the Port do not expressly state that it was possible that an employee with an approved exception could receive no accommodation, in our view the import of this form was clear: in our view the import of this form made it known that reasonable accommodations could be denied for employees with approved exceptions if the Port determined that there was undue hardship or a direct threat. The Union did not object or inform the Port that, under the MOU, it was required to grant all 14 employees an accommodation irrespective of undue hardship or direct threat.

Finally, the extrinsic evidence also includes the Union's response when the Port notified the 14 firefighters that it was unable to provide reasonable accommodations because of undue hardship. The Union responded by asking for a grace period for those employees with approved religious exceptions who were willing to take the Johnson & Johnson vaccine. The Union did not state that the Port was required to provide accommodations to every employee who sought one or was contractually precluded from relying on undue hardship to deny accommodations.

In sum, the Port's forms and the parties' course of dealing with respect to them indicates that the parties did not mutually agree that all employees with approved exceptions would be accommodated. Considering the text and context of the MOU and all the extrinsic evidence of the parties' intent, we conclude that the Union did not meet its burden to prove that the express language of the MOU required the Port to provide accommodations to all 14 employees with an approved religious exception.

We turn next to the Union's argument that the implied covenant of good faith and fair dealing prohibited the Port from denying reasonable accommodations to the 14 employees with approved religious exceptions. Collective bargaining agreements, like other contracts, contain an implied covenant of good faith and fair dealing. *Or. Univ. Sys. v. Or. Pub. Emples. Union, Local 503,* 185 Or App 506, 60 P3d 567 (2002); *Mapleton Education Association v. Mapleton School District 32*, Case No. UP-142-93 at 17-19, 15 PECBR 476, 492-94 (1994). "[A] party may violate its duty of good faith and fair dealing without also breaching the express provisions of a contract." *Elliott v. Tektronix, Inc.,* 102 Or App 388, 396, 796 P2d 361, *rev den,* 311 Or. 13, 803 P2d 731 (1990). The covenant requires the good faith performance of a contract with "faithfulness

to an agreed common purpose and consistency with the justified expectations of the other party." *Best v. U.S. National Bank*, 303 Or 557, 562-63, 739 P2d 554 (1987) (quoting Restatement (Second) of Contracts, Section 205). The duty of good faith and fair dealing, however, "does not operate in a vacuum." *Or. Pub. Emples. Union, Local 503*, 185 Or App at 515-16. Rather, we assess the agreed common purpose and justified expectations of the parties, "both of which are intimately related to the parties' manifestations of their purposes and expectations in the express provisions of the contract." *Id*.

Given the detailed provisions in the MOU, and the absence of a requirement to accommodate all employees with an approved exception, we cannot find an agreed common purpose to require the Port to grant accommodations to all employees with approved exceptions. We cannot add a contractual duty by implying it where the Port, at the bargaining table, expressly declined to negotiate that duty into the MOU. The "implied duty of good faith and fair dealing [cannot] be construed in a way that * * * inserts terms into a contract." *Safeco Ins. Co. v. Masood*, 264 Or App 173, 178, 330 P3d 61, *rev den*, 356 Or 638, 342 P3d 1024 (2014).

We understand the Union to argue that the implied covenant requires the Port to accommodate all employees with approved exceptions because there was no point in the parties agreeing to a detailed exception process in the MOU if the Port retained the unfettered discretion to simply deny all accommodations. *See, e.g*., *Iron Horse Eng'g Co. v. NW Rubber Extruders, Inc.*, 193 Or App 402, 421, 89 P3d 1249, *rev den*, 337 Or 657, 103 P3d 640 (2004) (the implied covenant requires that "both parties will refrain from any act that would 'have the effect of destroying or injuring the right of the other party to receive the fruits of the contract[.]'") (quoting *Perkins v. Standard Oil Co*., 235 Or 7, 16, 383 P2d 107 (1963) (quoting Corbin, 3 *Contracts* § 278 (1960)). But even the Port does not contend that it had such unfettered discretion. The Port contends only that it had a contractual right to deny accommodations if they would pose a direct threat or an undue hardship. The Port applied that standard throughout its workplace.[22] We do not find that the Port's reliance on an undue hardship standard to assess possible accommodations was done in objective bad faith. *See Mapleton School District 32*, UP-142-93 at 19 n 11, at 15 PECBR at 494 n 11 (the standard of good faith is an objective one, "so the 'subjective' good faith of the [employer's] agents is not determinative.").

We also understand the Union to contend that, even if the Port had discretion to determine which accommodations would pose a direct threat or undue hardship, it was required by the implied covenant to exercise that discretion consistently with the decisions of other Oregon public employers. The Union does not cite any legal authority for the proposition that a public employer is contractually required to administer a collectively bargained contract in a manner similar to

[22]Applying the undue hardship standard, the Port did not refuse to consider accommodations under all circumstances. Across its entire workforce, the Port granted accommodations to employees who generally worked alone, outside, or in situations where social distancing was possible, and generally denied accommodations to employees who could not work in a socially distanced manner or whose jobs, if not performed, would pose an undue hardship to the Port's operations. The fact that the Port granted accommodations to some employees who, for example, worked alone and outside, is consistent with the Port's argument that it assessed the working conditions of the firefighters and decided that accommodations would pose an undue hardship.

other public employers. Each public employer had its own agreement with the exclusive representative of that public employer's workers. Those agreements are not in the record. The record does include the agreement between the Port of Seattle and the exclusive representative of the firefighters at SEA-TAC. And that employer, like the Port, declined to provide accommodations to firefighters who sought exceptions from a vaccine requirement. On this record, we do not agree with the Union that the implied covenant of good faith and fair dealing required the Port to take actions consistent with those of other Oregon public employers.[23]

For all these reasons, we do not agree that the Port breached the implied covenant of good faith and fair dealing when it denied accommodations to the 14 employees with approved religious exceptions.[24]

Finally, the Union argues that a contract that violates law or public policy may be deemed "illegal" and unenforceable and, here, OAR 333-019-1010 prohibited the Port from denying accommodations for all 14 employees with approved religious exceptions. *See Phillips v. Thorp,* 10 Or 494, 497-98 (1883). A public policy must be "overpowering" before a court will interfere with the parties' freedom to contract on public policy grounds. *See Estey v. MacKenzie Engineering Inc.,* 137 Or App 1, 6, 902 P2d 1220 (1995), *rev'd on other grounds,* 324 Or 372 (1996).

The Union's argument is based on the premise that OAR 333-019-1010 prohibits a public employer from denying accommodations to employees with approved exceptions to the vaccine requirement. Under Oregon law, an agency's interpretation of its own rule is entitled to deference. *Noble v. Dep't of Fish & Wildlife*, 355 Or 435, 448-49, 326 P3d 589, 597 (2014) (court will affirm an agency's interpretation of its own rule "if it is 'plausible,' that is, if it is not 'inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law.'") (quoting *Don't Waste Or. Comm. v. Energy Facility Siting Council*, 320 Or 132, 142, 881 P2d 119 (1994)); *Sky Lakes Med. Ctr., Inc. v. Or. Dep't of Human Servs*., 310 Or App 138, 140, 484 P3d 1107 (2021) (same).

---

[23]Further, when assessing the parties' reasonable expectations, we look to whether a party's expectations were reasonable at the time the contract was entered. *Perkins v. Standard Oil Co.*, 235 Or 7, 17, 383 P2d 107 (1963) (assessing the parties' intended results from the contract "at the time the contract was signed"). The record does not indicate that the parties knew, when they entered the MOU on September 17, 2021, what decisions other Oregon public employers had made or would make. For example, the Oregon Military Department did not notify its firefighters that they would be accommodated until October 8, 2021.

[24]We understand the dissent to argue that the covenant of good faith and fair dealing barred the Port from laying off the employees, based primarily on the parties' justified expectations regarding paragraphs 8 and 9 of the MOU. As discussed above, however, paragraphs 8 and 9 contain no such express language, and the implied duty of good faith and fair dealing may not be construed to insert terms into a contract. *Safeco Ins. Co. v. Masood*, 264 Or App 173, 178, 330 P3d 61, *rev den*, 356 Or 638, 342 P3d 1024 (2014). Moreover, the parties' course of dealing under the MOU, including the Port's repeated statements (without protest by the Union) that accommodations could be denied based on undue hardship and testimony from a firefighter acknowledging that there was a chance that accommodations would be denied, warrant against finding that the Port's layoffs violated the justified expectations of the parties.

Here, the record indicates that the OHA interpreted OAR 333-019-1010 to permit an employer to deny accommodations if they pose a direct threat or an undue hardship. Specifically, as discussed above, OHA prepared a form to implement OAR 333-019-1010. That form, which the Port distributed to employees, expressly states that if an employee's exception request is approved, the employee "may be required by [the] employer or other responsible party to take additional steps to protect you and others from contracting and spreading COVID-19. Workplaces are not required to provide this exception accommodation *if doing so would pose a direct threat to the excepted individual or others in the workplace or would create an undue hardship.*"[25] (Emphasis added.) The Port denied accommodations because, in its judgment, they would create an undue hardship. Given OHA's own interpretation of OAR 333-019-1010, we do not find an "overpowering" public policy in that rule that renders the MOU unenforceable as an unlawful agreement.[26]

In sum, for all the reasons explained above, we conclude that the Port did not violate ORS 243.672(1)(g) when it declined to accommodate the 14 firefighters with approved exceptions.

4. The Port did not unilaterally change the status quo with respect to minimum staffing in violation of ORS 243.672(1)(e).

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

[25]We also note that the OHA issued an interpretative document entitled, "Healthcare Provider and Healthcare Staff Vaccine Rule FAQs" (OHA FAQs) to provide guidance on OAR 333-019-1010. *See* https://sharedsystems.dhsoha.state.or.us/dhsforms/served/le3879.pdf (last visited April 11, 2022).That document acknowledges that employers are not required to reasonably accommodate all employees with approved exceptions. For example, the OHA FAQs state, "Under OAR 333-019-1010, if an exception to the vaccine mandate is granted in a particular situation, there will be other measures implemented as part of the reasonable accommodation process to limit transmission of COVID-19. Accordingly, religious and medical exceptions will not operate to **exempt** healthcare providers and staff in healthcare settings from the vaccine rule, but instead will be a starting place for an interactive process to determine whether an exception can be granted with other safety measures in place." *Id*. at 11 (emphasis in original). OHA's guidance also expressly acknowledges that an employer is not required to provide accommodations that pose an undue hardship. *Id.* at 9 ("Employers may be required to reasonably accommodate individuals who are unable to comply with the [vaccine requirement] for medical reasons or for sincerely held religious belief, unless the accommodation would create an undue hardship to the employer or a direct threat to the employee or others"); *id*. at 14 ("Workplaces are not required to provide an exception accommodation if doing so would pose a direct threat to the excepted individual or others in the workplace or would create an undue hardship.").

[26]Relatedly, the Union argues that OAR 333-019-1010 and ORS 433.416(3), construed together, do not permit an employer to terminate workers who obtain an approved medical or religious exception from the vaccine requirement. ORS 433.416(3) provides that a health care worker shall not be required as a condition of work to be immunized, "*unless such immunization is otherwise required by* federal or *state law, rule or regulation*." (Emphases added). OAR 333-019-1010 is, of course, a state regulation. The Union's argument presupposes that OAR 333-019-1010 does not permit employers to decline to accommodate employees. For the reasons explained above, OHA's form to implement the OAR 333-019-1010 expressly indicates that employers may decline accommodations to employees with approved exceptions if such accommodations cause a direct threat or constitute an undue hardship.

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 Or. Corr. Emples. v. State*, 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 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.

The Union's claim that the Port violated ORS 243.672(1)(e) presents a narrow issue. In its complaint, the Union alleged that the Port unilaterally changed the "minimum staffing" at the Port Fire Department in violation of ORS 243.672(1)(e). The Port contends that it did not make a change to minimum staffing levels, and that its actions to respond to the absences and eventual layoff of unvaccinated firefighters were consistent with the management rights provision in the collective bargaining agreement.

To assess the Union's claim, we first "identify the status quo and then determine if the employer changed it." *Oregon Tech American Association of University Professors v. Oregon Institute of Technology*, Case No. UP-023-20 at 24 (2020) (citing *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06 at 7, 22 PECBR 159, 165 (2007) (*AOCE*)). A working condition can become the status quo in a number of ways, including through a contract, past practice, work rule, or policy. *AOCE*, UP-33-06 at 7, 22 PECBR at 165. In this case, the parties' collective bargaining agreement does not refer to or specify a level of minimum staffing. However, the parties do not dispute that, until the vaccine requirement took effect on October 18, 2021, the Port assigned 12 firefighters to each of the department's three shifts. The actual number of firefighters on a shift would, at times, fall below 12 because employees scheduled for that shift would take vacation leave, sick leave, family leave, or similar absences from time to time. When that occurred, fewer than 12 firefighters were at work during a shift. It is also undisputed that the fire chief required battalion chiefs to obtain approval from the fire chief to have fewer than 10 firefighters per shift. Battalion chiefs sought such approval from time to time, including, for example, when an employee needed sick child leave or bereavement leave. And, before the vaccine mandate, although there were occasions when the Port had fewer than 10 firefighters on duty on a shift, that was not common; generally, there were 10

or more firefighters at work on each shift. This staffing level—at least 10 employees per shift—was referred to by witnesses for both parties as "minimum" staffing. We do not understand the parties to seriously dispute that the fire department had a practice before the vaccine mandate of having at least 10 firefighters on duty per shift. That level of staffing was the status quo.

We next assess whether there was a change by the Port to the status quo in minimum staffing. For the following reasons, we conclude that there was no change by the Port.

The relevant facts are not in dispute. As of October 18, 2021, one-third of the firefighters had been granted religious exceptions to the vaccine requirement in OAR 333-019-1010. Also by that date, the Port had decided that it could not accommodate those 14 employees without undue hardship. From October 18 through November 30 (when nine firefighters returned to work from lay-off status after deciding to get vaccinated), there were too few firefighters able to work pursuant to OAR 333-019-1010 for the Port to schedule 10 firefighters on each shift. To deal with that firefighter shortage, Mathis instructed the battalion chiefs to attempt to schedule seven employees per shift and to attempt to have eight employees on duty by allowing voluntary overtime. From October 18 through November 30, one shift had eight firefighters regularly assigned. The other two shifts had seven firefighters regularly assigned, with the eighth position filled through a firefighter working voluntary overtime.

Ultimately, nine of the 14 employees who were granted religious exceptions decided to return to work on November 30, and the Port was again able to schedule at least 10 employees per shift beginning on December 1.

In the meantime, at some point after October 18, Mathis and Farrell agreed to a lateral hiring agreement to facilitate the Port's expedited hiring of lateral firefighters so that the Port could rectify the shortfall in firefighters able to work under OAR 333-019-1010 as quickly as possible. On November 3, 2021, the Port opened a hiring process for those firefighters. That job posting closed on November 24, 2021. As of the date of hearing, the Port intended to hire enough employees to maintain the 10-employee per shift staffing level.

This record indicates that both the Port and the Union understood and intended that, as soon as practicable after October 18, the Port would schedule 12 employees (and a minimum of 10) per shift as soon as there were adequate numbers of employees available to do so. There is no evidence that the Port will not return to a 12-employee per shift staffing level, and no evidence that the Port seeks to change any staffing ratio or similar formula that would reduce the staffing level on each shift. *See, e.g., South Lane Education Association v. South Lane School District No. 45J*, Case No. C-280 at 10, 1 PECBR 459, 468 (1975), *aff'd after remand on other grounds*, 290 Or 217, 621 P2d 547 (1980) (describing proposal for specified employee-to-student ratios, such as a proposal for at least one art teacher for every 500 students, as a staffing proposal). There is no other evidence, such as evidence that the Port sought to permanently change its operating procedures or policies to reduce minimum staffing, or that the Port seeks to take advantage of the firefighter shortfall to change its staffing levels. *See Roseburg Fire Fighters Association, IAFF Local 1110 v. City of Roseburg*, Case No. UP-47-97 at 7, 17 PECBR 611, 617 (1998) (city changed its manual of operations to reflect its unilateral reduction in minimum staffing).

On this record, we do not conclude that there was a change to the status quo by the Port regarding minimum staffing. Rather, beginning on October 18, there was a temporary staffing shortage when the Port concluded that it could not accommodate the 14 firefighters with approved religious exceptions. Throughout the events at issue in this case, the Port maintained its intention to assign 12 firefighters to each shift and to have at least 10 firefighters on duty when it had a sufficient workforce to provide that level of staffing. And it took the steps necessary to be able to continue to do so, including negotiating with the Union to expedite lateral firefighter hiring.

The Union avers that there was a change in this case because, beginning October 18, Chief Mathis instructed his battalion chiefs to schedule seven or eight employees per shift, and that instruction deviated from the previous 12-employee per shift staffing level. Although it is accurate that Mathis did give that directive, that directive, in and of itself, was not the cause of the reduction in the number of firefighters available to work. Rather, the reduction in the number of firefighters available to work resulted from the convergence of the multiple factors described above. Further, the Port did not want to have (and in fact sought to avoid having) fewer than 12 employees on duty per shift. This record indicates that the Port wanted to maintain the status quo and worked with the Union to expedite lateral firefighter hiring in order to do so. The temporary reduction in personnel is not the type of change that the prohibition on unlawful unilateral changes is intended to address. A unilateral change is unlawful because such a 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 Institute of Technology*, UP-023-20 at 30-31 (citing *NLRB v. Katz*, 369 US 736, 743-44, 82 S Ct 1107 (1962)) (emphasis added). Here, the shortfall in available employees from October 18 through November 30 did not convey the message that the Port, acting alone, can change the terms and conditions of the firefighters' employment.

In sum, we conclude that the temporary shortfall in firefighters available to work between October 18 and November 30, 2021, did not constitute an unlawful unilateral change to the status quo in minimum staffing by the Port in violation of ORS 243.672(1)(e).

Because we conclude that there was no change by the employer to the status quo in minimum staffing, it is unnecessary to determine whether the alleged change involved a mandatory subject of bargaining. *See* ORS 243.650(7)(f) (for these employees, mandatory subjects of bargaining include "staffing levels that have a significant impact on the on-the-job safety of the employees."). Because there was no change in minimum staffing, it is also unnecessary to determine whether the reduced number of firefighters able to work under OAR 333-019-1010 had an impact on mandatory subjects. Likewise, it is not necessary to consider the Port's defense that it was permitted by the management rights provision in the parties' collective bargaining agreement to take the actions it did, a defense it argued at hearing but did not allege in its answer. *See Portland Fire Fighters' Ass'n, IAFF Local 43 v. City of Portland*, 302 Or App 395, 403, 461 P3d 1001 (2020) (because "waiver of the right to bargain is an affirmative defense, it is the employer's obligation to plead and prove it.").

5. The Port did not violate ORS 243.672(1)(f) when it did not provide the Union with written notice of anticipated changes to mandatory subjects of bargaining.

ORS 243.672(1)(f) makes it an unfair labor practice to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.809." The Union contends that the Port failed to comply with ORS 243.698(2), which provides that a public employer "shall notify the exclusive representative in writing of anticipated changes that impose a duty to bargain." Specifically, the Union alleges that the Port failed to provide a written notice before making changes to minimum staffing standards that had impacts on safety, workload, hours of work, compensation, leave usage, and other mandatory subjects.

The provisions of ORS 243.698, which governs midterm bargaining, do not apply unless "the employer is obligated to bargain over employment relations during the term of a collective bargaining agreement * * *." ORS 243.698(1). For the reasons explained above, there was no change by the employer to the status quo on minimum staffing, and therefore no duty on the Port to bargain or to provide a written notice with respect to any change to minimum staffing. Consequently, the Port did not violate ORS 243.672(1)(f).

ORDER

The complaint is dismissed.

DATED: April 14, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

*Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Khosravi Dissenting in Part:

I respectfully dissent from the conclusion that the Port did not violate ORS 243.672(1)(g). Although I agree with the majority that the MOU did not necessarily require the Port grant accommodations to all employees that were granted exceptions, I believe the Port violated the covenant of good faith and fair dealing when it applied the MOU beyond the scope of what was contemplated the parties.

This Board has previously held there is an implied covenant of good faith and fair dealing in all collective bargaining agreements. *Mapleton Education Association v. Mapleton School District 32*, Case No. UP-142-93 at 17-20, 15 PECBR 476, 492-95 (1994). The purpose of the covenant of good faith and fair dealing is to "effectuate the reasonable contractual expectations of the parties." *Best v. U.S. National Bank*, 303 Or 557, 563, 739 P2d 554 (1987). The covenant, "imposes a duty of good faith and fair dealing in contracts to facilitate performance and enforcement in a manner that is consistent with the terms of the contract." *Whistler v. Hyder*, 129 Or App 344, 348, 879 P2d 214, *rev den*, 320 Or 453, 887 P2d 792 (1994). As noted by the majority, "[a] party may violate its duty of good faith and fair dealing without also breaching the express provisions of a contract." *Elliott v. Tektronix, Inc.,* 102 Or App 388, 396, 796 P2d 361, *rev den,* 311 Or. 13, 803 P2d 731 (1990). Indeed, the duty "may be implied as to a disputed issue only if the parties have not agreed to an express term that governs that issue." *Or. Pub. Emples. Union, Local 503*, 185 Or App at 511. Furthermore, "when one party to a contract is given discretion in the performance of some aspect of the contract, the parties ordinarily contemplate that that discretion will be exercised for particular purposes. If the discretion is exercised for purposes not contemplated by the parties, the party exercising discretion has performed in bad faith." *Best*, 303 Or 557 at 563.[27]

Paragraph 4 of the parties' MOU provides the Port will, "evaluate and consider all Medical and/or Religious exceptions to vaccination submitted by any employee seeking a medical or religious accommodation under the Governor's Temporary Administrative Order PH 38-2021." Paragraph 5 states, the "only exceptions that will be evaluated and considered by Port Human Resources" are those "related to either Medical or Religious accommodations." Paragraphs 8 and 9, detail leave and layoff for employees that are not vaccinated or do not have a medical or religious exception.[28] However, those provisions do not include any reference to employees that were

---

[27]In *Best v. U.S. National Bank*, the Oregon Supreme Court considered whether a bank's NSF fees were excessive, in violation of the bank's duty of good faith in the performance of its account agreements with depositors. Nothing in the depositors' account agreement with the Bank expressly limited the Bank's authority to set the fees. The Court noted that the duty of good faith and fair dealing, "limited the Bank's apparently unlimited authority to set [the challenged] fees," holding the Bank's discretion "had to be exercised within the confines of the reasonable expectations of the depositors." *Id.* at 564.

[28]"8. *Employees who have submitted a timely medical or religious exception request but are denied* at any time after September 6, 2021, and are unable to complete vaccination by October 18, 2021, will be allowed to use their sick, vacation, and holiday bank or go on unpaid leave of absence until they are fully vaccinated. Leaves of absence will only be approved through no later than November 30, 2021 unless the leave qualifies under FMLA-OFLA or an ADA leave of absence. If the employee has not reported that they are fully vaccinated by this date, a layoff notice will be issued that is effective November 30, 2021.

"9**.** *Employees who fail to comply with the vaccination mandate or submit a timely medical or religious exception request* will be laid off from Port employment effective October 19, 2021. Employees who are laid off that date for this purpose will be placed on a rehire list through April 18, 2022 and will, upon request, be allowed to apply to any open

(Continued . . .)

granted exceptions. After granting religious exceptions to 14 firefighters, the Port determined it could not accommodate any firefighters without undue hardship and would require all Port firefighters be vaccinated in order to maintain employment. The Port then applied paragraphs 8 and 9 to the 14 firefighters with exceptions. The question is, then, whether the Port's application of the MOU was consistent with the terms of the agreement and the justified expectations of the parties.

The Port argues that the MOU permitted it to lay off employees whose requests for exceptions were approved but whose exceptions could not be accommodated without undue hardship, because the MOU assumed a two-step exception request process. Therefore, an exception request was not complete until the Port approved the exception request *and* approved an accommodation. However, the Port Labor Relations Manager, who bargained the MOU with the Union, conceded at hearing that the agreement only permitted layoff for employees that were unvaccinated or did not have approved exceptions, and that the parties never discussed laying off employees with approved exceptions.[29] Thus, I do not read this provision as a conflation of the two-step process as the Port argues. Rather, these provisions appear to limit the Port's discretion under the MOU.

This reading is consistent with the parties' bargaining history. Despite detailed conversations at the table regarding the substance of paragraphs 8 and 9 of the agreement, employees with granted exceptions were not discussed during the negotiations of those provisions. What *was* discussed - in detail - were potential accommodations that could be afforded to employees with exceptions, including the use of N95 and KN95 masks, and weekly testing. Although the Port declined to bargain accommodations into the agreement, the record shows that it was not to reserve discretion to unilaterally deny any and all accommodations, but rather, because it would be impractical.[30] Lamphier testified that when bargaining occurred, the Port had not yet finalized the relevant forms and couldn't possibly bargain "blanket" accommodations, because accommodations could "vary widely" and would ultimately depend on individual circumstances. For example, "a pregnant employee * * * versus and employee that had a history of reactions to vaccines might be dealt with differently." The Port did raise the "theoretical notion"

(Continued . . .)
position(s) within the Port Fire Department if they have been fully vaccinated and meet the qualifications of the position. If two or more employees who are on the list express an interest for an open position within the Port Fire Department and for which they are both qualified, the employee with the most service time with the Port Fire Department will be selected for the position. Members rehired from the list will retain previously accrued seniority." (Emphases added.)

[29]Union counsel: "The language [in the MOU] allows for layoffs if an employee has not received a vaccine or an approved exception right?" Lamphier: "Right." Union Counsel: "Is there anything in the MOU that you can point me to that says that an employee with an approved exception can be laid off?" Lamphier: "No." Union counsel: "Did you ever discuss laying off employees with approved exceptions with the union?" Lamphier: "No."

[30]See, Union bargaining notes: "Accommodations – Not covered in MOU due to potential need to change accommodations."

that an employee might have an exception request approved and the Port could not accommodate, but that was addressed in the context of individualized assessments. Beyond this, I do not find anything in the bargaining history that suggests that the Port communicated to the Union, that it could or would apply paragraphs 8 and 9 to employees with granted exceptions in the manner it did.[31] Furthermore, I do not agree with the majority that the parties' brief course of conduct under the MOU supports a finding that the Port had the contractual discretion to unilaterally lay off all employees with granted exceptions, when that outcome was admittedly not contemplated by the parties.

In conclusion, although the Port had a measure of discretion in evaluating exception requests and affording accommodations, paragraphs 8 and 9 placed limitations on that discretion—ultimately only allowing the Port to lay off employees that did not have a vaccination *or* an approved exception. For these reasons, I believe the Port's application of the MOU was inconsistent with the terms of the agreement and the justified expectations of the parties. Therefore, I would find that the Port beached the duty of good faith and fair dealing.

*Shirin Khosravi, Member

[31]Also of some significance, between the time the demand to bargain was filed and the execution of the MOU, both parties were consulting with other Oregon fire departments, including the departments working under mutual aid agreements with the Port. The Union and the Port also discussed, outside of but concurrent to formal bargaining, accommodations that were being provided at another Oregon fire department. As stated in this Order, all fire departments in Oregon other than the Port Fire Department have provided accommodations to firefighters with approved religious or medical exceptions to the vaccine requirement. Although I agree with the majority that the Port was not necessarily required to act in the same manner as other employers, these facts indicate the parties were aware of how Oregon fire departments were bargaining, interpreting, and enforcing the Governor's Temporary Order, further supporting the Union's justified expectation that the MOU, which was intended to bargain the impacts of the Order, would not be invoked to unilaterally lay off all unvaccinated employees with approved exceptions.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-003-21

(MANAGEMENT SERVICE REMOVAL)

W.M.,	)	
	)	
Appellant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
STATE OF OREGON, OREGON YOUTH AUTHORITY,	)	AND ORDER
	)	
	)	
Respondent.	)	
	)	

On March 4, 2022, the Board heard oral argument on Appellant's objections to a December 13, 2021, recommended order issued by Administrative Law Judge (ALJ) Jennifer D. Kaufman after a hearing on June 23 and 24, 2021, via videoconference. The record closed on September 3, 2021, following receipt of the Respondent's post-hearing brief.[1]

Daemie Kim, Attorney at Law, DMKim Law, LLC, Salem, Oregon, represented the Appellant.

Margaret Wilson, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented the Respondent.

On February 5, 2021, Appellant W.M.[2] filed an appeal of his removal from the management service (and effective dismissal from state service) by Respondent State of Oregon, Oregon Youth Authority (OYA). The issue is whether OYA violated ORS 240.570(3) when it removed Appellant from management service (terminating his employment). We conclude that OYA did not violate the statute.

[1]As explained below, Appellant's post-hearing brief was properly rejected because it was not timely filed.

[2]In this order we refer to some employees by initials.

RULINGS

1. On June 16, 2021, Appellant filed a motion to postpone the hearing in this matter pending Respondent's production of additional documents that Appellant had requested in a prehearing document request. Respondent was complying with the document request on a voluntary basis. Respondent opposed rescheduling the hearing but did not object to scheduling additional days of hearing for Appellant to present additional evidence related to the outstanding documents, if necessary. On June 16, 2021, the ALJ held a telephone conference with the parties to discuss Appellant's motion and permitted Appellant to file a supplemental memorandum of legal authorities, which Appellant filed on June 16, 2021. On June 21, 2021, the ALJ denied the motion to postpone the hearing, but agreed to schedule a continuance to afford Appellant the opportunity to introduce additional exhibits and testimony related to the outstanding documents. On June 21, 2021, Appellant filed a document entitled, "Exceptions to Order Denying Motion to Continue Hearing." After two days of hearing, on June 23 and 24, 2021, the ALJ adjourned the hearing pending Respondent's production of additional documents and the parties' resolution of a dispute that had arisen regarding the scope of the document request. During a status conference on July 20, 2021, counsel notified the ALJ that the parties had resolved their dispute over the document request, that Appellant was not requesting a continuance, and that both parties were offering additional exhibits into the record without objection. The ALJ admitted the additional exhibits and closed the evidentiary record. The ALJ acted properly within her discretion by declining to postpone the hearing.

2. Post-hearing briefs were due on September 3, 2021. Appellant's post-hearing brief was filed via email at 9:03 p.m. on September 3, 2021. Under this Board's rules in effect at the time of the filing, "[d]ocuments received after 5 p.m. shall be deemed filed with the Board the next business day." OAR 115-010-0033(1)(d).[3] On September 7, 2021, the ALJ notified the parties that Appellant's brief had not been timely filed. On September 15, 2021, Appellant filed a motion to extend the filing deadline, arguing that she was unaware of the 5:00 p.m. deadline, that acceptance of the late-filed brief would not prejudice Respondent, and that post-hearing briefs do not have a substantive impact on the evidence, but are merely intended to aid in the review of evidence. Respondent opposed the motion. On September 20, 2021, the ALJ denied Appellant's motion to extend the filing deadline. The ALJ concluded that Appellant had not established good cause for the late filing and that it would not be a reasonable exercise of her discretion to admit the untimely brief over Respondent's objection. The ALJ acted properly within her discretion in refusing to accept the late-filed brief. *See Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05 at 5-6, 22 PECBR 422, 426-27 (2008) (inadvertence, or a lack of awareness of a deadline, does not constitute good cause for late filing). In assessing whether there is good cause for a late filing, we also do not take into account whether the opposing party was prejudiced by the late filing. *Id*. at 6, 22 PECBR at 427. Furthermore, this Board has not treated untimely post-hearing briefs differently from other untimely filings. *See D.G. v. Lane Community College Employees Federation*, Case No. FR-006-18 (2020) (adopting recommended order in which the ALJ declined to extend the filing deadline for a post-hearing brief).

[3]Effective December 1, 2021, OAR 115-010-0033(1)(d) was revised to permit filings after 5:00 p.m. via email, facsimile, or the Board's online case management system. Because the new rule was not in effect at the time that post-hearing briefs were due in this matter, it is not applicable to the ALJ's ruling.

3. All other rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

Background

1. OYA is a part of the State of Oregon's juvenile justice system. OYA's mission is to protect the public and reduce crime by holding youth in custody accountable and providing them with opportunities for reform.

2. OYA's Oak Creek Youth Correctional Facility (Oak Creek), located in Albany, Oregon, is a 24-hour all-female youth custodial facility. The Oak Creek facility includes three living units, each of which is supervised by a living unit manager (LUM) and a case coordinator. The Oak Creek facility is staffed by approximately 86 employees.

3. Clint McClellan is the Assistant Director of Facility Services for OYA. Michael Riggan is the superintendent of OYA's Oak Creek facility. Beneath Riggan are the LUMs and the case coordinators, who are responsible for the day-to-day supervision of the living units.

Appellant's Employment History

4. Appellant began working for OYA as a group life coordinator in 2007. A group life coordinator is a classified position. In 2008, Appellant transferred to the Oak Creek facility.

5. In August 2010, Appellant began working out-of-class in a Principal Executive Manager B (PEM B) position at OYA in the management service. On October 18, 2010, Appellant promoted into the management service to a treatment manager position for the Cedar Unit at the Oak Creek facility. Treatment managers were responsible for supervising staff as well as handling case planning and operational matters. Appellant excelled at the treatment manager position in part because of his expertise with dialectical behavioral therapy.

6. In 2018, the treatment manager position was transitioned into a LUM position. Pursuant to this transition, Appellant's duties shifted to focus primarily on staff training and development. Case planning duties, such as working with families and parole officers and monitoring treatment, were shifted to the case coordinator position. On April 16, 2020, the LUM position was reclassified from a PEM B position to a PEM C position, which was an upward classification. Appellant supervised 13 employees in the LUM position.

7. Before the events leading up to Appellant's removal, he had no significant disciplinary history.

Facts Related to Appellant's Removal

8. Although Appellant was previously viewed as an engaged and hands-on manager, in the LUM position Appellant struggled with operational matters including staff appraisals and check-ins. Appellant did not make his staff aware of his comings and goings. Staff sarcastically

remarked about Appellant's lack of presence on the living unit by circulating a "where's [W]" joke among themselves.

9. KN, the case coordinator for the Cedar Unit, had multiple conversations with Superintendent Riggan expressing concerns about Appellant. KN reported that he felt that the whole unit was his responsibility, that Appellant was not invested, that Appellant avoided having difficult conversations with staff, and that Appellant was not reliably present.

10. On September 17, 2019, Superintendent Riggan met with Appellant to discuss staff members' concerns about his lack of presence and availability. Riggan also instructed Appellant to be more proactive about meeting with youth, to lead by example, and to process youth grievance forms in a timelier manner.

11. Superintendent Riggan noticed initial improvement in Appellant's performance after the September 2019 meeting. By December 2019, however, Riggan was concerned that Appellant was regressing. Appellant had a performance appraisal due in October 2019, but Riggan failed to provide one.

12. On November 19, 2019, Superintendent Riggan issued Appellant a memo documenting discussions that had taken place among Appellant, Riggan, and HR in connection with a Facebook posting that Appellant had made in which he referred to incarcerated youth as "crack whores." Riggan stated in the memo that he appreciated that Appellant understood that the language he used was inappropriate, unacceptable, and incompatible with OYA's mission. Riggan also stated that he expected the behavior would not be repeated.

13. On March 27, 2020, Superintendent Riggan sent Appellant an email that stated, "You have 11 grievances that are overdue. Please take care of these ASAP." On April 15, 2020, Riggan emailed Appellant about three outstanding grievances. Riggan also emailed Appellant about outstanding YIRs[4] on March 21, March 28, June 13, and September 15, 2020.

14. On April 16, 2020, Superintendent Riggan met with Appellant and told him that he was "drifting." Riggan talked to Appellant about the "where's [W]" comments that were circulating among the staff and instructed Appellant to make his schedule visible to staff, a directive intended to help Appellant be more accessible and available as a manager. Riggan also told Appellant to correct the problem of avoiding mundane tasks and informed Appellant that a work plan needed to be put in place. Appellant asked to create his own work plan, and Riggan agreed. Riggan told Appellant that if he drifted again then they would be looking at a formal HR process.

[4]YIR may refer to youth incident report.

15. On April 22, 2020, Appellant emailed a work plan to Riggan. The document states, in pertinent part:

> "My Work Plan to deal with my shortcomings:
>
> "Grievances- I will treat every grievance with a 72-hour time line. This being three days should allow me talk to the staff if necessary, in case they are on their weekend. I will calendar the grievance deadline in my outlook calendar.
>
> "Appraisals- I will become more familiar with workday first. I will calendar time on a weekly basis to work on appraisals.
>
> "1:1 supervision- at the beginning of each month when I do staff time sheets, this will be my reminder to calendar each staff's 1:1 supervision for the month.
>
> "I do believe that my Calendar is already set to public viewing however I will make sure it is if not."

16. In response to Riggan's directive that Appellant make his schedule visible to staff, Appellant did not print out a schedule and post it in his office, but he did set his Outlook calendar to public view. Appellant continued to neglect grievances. Staff continued to complain about Appellant's lack of presence in the unit.

17. In the late spring and early summer of 2020, the Cedar Unit experienced serious employee discontent fueled in large part by political differences among the staff, which escalated after the killing of George Floyd and the growth of the Black Lives Matter movement.

18. In early June 2020, in honor of Black History Month, staff screened movies for the youth dealing with the topic of racial injustice. Appellant was vocal about his belief that the agency should not take a position regarding George Floyd's death or Black Lives Matter. On June 7, 2020, Appellant sent an email to Cedar Unit staff and management that stated, in pertinent part:

> "The dialectic in this situation is that we have many youth on our unit that do not have the emotion regulation or interpersonal skills to partake in such conversations or activities without having maladaptive behaviors manifest. Of course I only speak for Cedar as I know Aspen might be different with the older youth. So while I look forward to the possibility of something positive coming out of such tragedy if possible, I believe we need to be purposeful and keep such activities structured as well as assess the ability of the youth who might be interested in participating as to not set them up with triggers and vulnerabilities that they cannot handle. I would like to refrain from showing movies that deal with this emotional topic right now just to show movies. If a staff wants to do a structured movie with a discussion before and after and is willing to clear it through [KN], Riggan, myself or another manager that is here, then I would be all for it. I only wish that it not be mandatory and is optional to the youth as well as structured other than on the main unit TV."

19. After Appellant's June 7, 2021, email, Superintendent Riggan made the decision to temporarily stop showing movies about racial injustice, which upset some staff members. In the aftermath of Riggan's decision, Appellant complained that a staff member, A, had called him a racist. Riggan talked to those staff members who were offended by his decision to stop screening movies about racial injustice, and he sent the staff an email announcing that the movies would continue to be shown, but in a more careful manner.

20. In July 2020, Riggan consulted with HR and reported that the staff were divided about political issues including Black Lives Matter and President Donald Trump, that staff were openly antagonizing one another by wearing Trump facemasks and engaging in other provocative behaviors, and that Appellant had complained about being labeled a racist. HR Administrator Michelle Johnson recommended that HR conduct a workplace culture investigation of the Cedar Unit.

21. Between July 17 and September 4, 2020, HR spoke with 18 Cedar Unit employees (most of the employees in the unit). At the end of the investigation HR Analyst Barbara Kelley drafted a report known as the "Cedar Summary."[5] The report identifies the following issues as subjects of the workplace culture investigation:

> "Reports of staff feeling unsafe and unsupported; painful accusations of racism; lack of proper boundaries between staff and youth; lack of leadership from local management; lack of trust in local leadership from staff; lack of meaningful and timely communication; lack of confidentiality; lack of respectful and professional communication between staff; lack of inclusion/acceptance of differences; lack of utilization of positive human development (PHD) skills; and a strong desire for action in the form of positive change."

22. The workplace culture investigation was not intended as an investigation of Appellant. However, because Appellant oversaw the Cedar Unit at the time and was responsible for staff training and development, and operational matters in the unit, the interviewed employees conveyed their observations of Appellant's management style and practices. Appellant was thus a focus of the investigation because, as the living unit manager, he oversaw the Cedar Unit at the time. The Cedar Summary report states:

> "Nearly every staff shared their disappointment and complete loss of confidence in the leadership and/or management ability of the Living Unit Manager (LUM) for Cedar Unit, [Appellant]. He is simply not viewed as a leader. Comments from Staff pointed to [Appellant's] lack of investment, lack of engagement and perception that he 'doesn't show up.' One staff's observation is that "[Appellant] doesn't know why he's here."

[5]The record does not establish the date when the Cedar Summary was issued.

The Cedar Summary report also states:

> "The majority of OCYCF staff see that [Appellant's] strength lies in his dialectical behavioral therapy (DBT) skills and his ability to effectively work with kids. He consistently and visibly uses PHD skills with kids, but rarely, if ever, applies those skills to his staff or peers."

23. Appellant identifies being labeled a racist as the beginning of his problems as a manager. However, HR Analyst Kelley did not substantiate Appellant's claims that he had been called a racist. Of the 18 employees that Kelley talked to, none recalled hearing Appellant referred to as a racist.

24. In connection with HR's investigation of the general environment at the Cedar Unit, certain incidents involving Appellant were brought forward. For example, in 2018 or 2019, Appellant told a colleague that a subordinate female staff member's shorts were so short that he could see her pubic hair. The staff member was extremely upset and embarrassed when she learned of Appellant's comment. Appellant later told the subordinate employee that he had seen pubic hair before and it was not a big deal. During OYA's investigation of Appellant, he explained that he made this comment to the employee in order to relieve the awkwardness that she was feeling.

25. On December 26, 2019, Appellant received a text message from a staff member reporting that she had left work early because of a painful bladder infection and had left a youth unsupervised for 20 minutes. The staff member offered to write up the incident. The next day, Appellant responded that "we dont like to make federal offenses out of honest mistakes" and that he and Superintendent Riggan "like to practice having grace for human error as long as HR doesn't throw a fit." Appellant added that he had once had a painful bladder infection and kidney stone, and "I can attest that my brain was not on my job as I was pissing blood and freaking out. I have no issues going to bat for you on that mitigating factor. I hope you are feeling better." During OYA's investigation of Appellant, he explained that he was trying to validate the staff member's concerns about her health condition.

26. Crass language was not uncommon among the staff at Oak Creek, including managers. For example, managers referred to Fridays among themselves as "F'ing Fridays," a term coined by Superintendent Riggan. Riggan also referred to Appellant in jest as "big sexy," a term that Riggan had overheard another staff member using in reference to Appellant. Appellant and Riggan used the term "MFU" among themselves as shorthand for "my f*** unit." Incarcerated youth also used foul language toward the staff.

27. In or about September 2020, Superintendent Riggan developed suspicions regarding Appellant's timekeeping practices. Managers at OYA are afforded a certain amount of latitude with their schedules but are expected to work at least 40 hours per week. When managers work more than their scheduled hours, Superintendent Riggan permits them to "flex" their schedules or take "comp time," but he expects managers to communicate with him when they plan to do so. LUM's are not allowed to telework because supervision of the living units requires their physical presence at the facility.

28. OYA utilizes a timekeeping system known as "OTIS." Managers record their time worked in OTIS as 40 hours per week even if they work more than 40 hours. When managers "flex" their schedules it is not captured in the OTIS timesheets, which Superintendent Riggan reviews and approves.[6]

29. On September 29, 2020, Superintendent Riggan met with Appellant and talked to him about schedule integrity and working a "straight 8" rather than taking a 40-minute lunch break.[7]

30. At some point in September or early October 2020, Riggan reviewed the facility's "KeyWatcher" records to see if Appellant's time at the facility coincided with his hours reported in OTIS. Riggan reviewed about three months of KeyWatcher records and discovered that there were only about 10 days that Appellant had worked a full eight hours. Appellant's work schedule at the time was Sunday through Thursday from 9:00 a.m. to 5:30 p.m.

31. KeyWatcher is an electronic key management system. When staff arrive at work, they log in to KeyWatcher with a fingerprint or a pass code to obtain keys to the facility consistent with their access privileges. When staff leave the facility for the day, they return their keys. KeyWatcher reports are not always in perfect alignment with employees' comings and goings. For example, an employee might forget to return their keys when leaving the facility or might have a conversation with a coworker at the entrance to the facility before obtaining their keys.

32. Although Appellant could have accessed the front administration office without his keys, he would not have been able to access the living unit or other areas of the building, including his own office, the property room, the conference room, or the storeroom, without obtaining keys from KeyWatcher. During the investigation, Appellant conceded that he accessed his keys as soon as he arrived to work about 80 percent of the time.

33. On October 7, 2020, Superintendent Riggan requested that HR perform a timesheet audit on Appellant's timesheets. Pursuant to that audit, HR Analyst Kelley found that there were some days with zero KeyWatcher activity where Appellant had eight hours of time recorded on his OTIS timesheet. Kelley also found that Appellant had over-reported his time by 62 hours in a three-month period.

---

[6]In his objections to the recommended order, Appellant argues that we should question Riggan's credibility because Riggan approved Appellant's timesheets even though the timesheets did not accurately reflect Appellant's time worked. The record does not, however, indicate that Riggan knowingly approved inaccurate payroll records. Under OYA's Policy I-B-1.0, "Payroll Reporting; Issuing Paychecks," non-exempt hourly employees are required to record actual hours worked. Appellant was an *exempt* employee and, like all employees, was subject to the policy's general requirement that work time "be reported in a manner that results in accurate payroll reporting." We interpret the record as demonstrating that Riggan trusted Appellant, as a management service employee, to work a full professional workweek and to accurately record his time worked, and that Riggan was not aware of the inaccuracies in Appellant's timekeeping records when Riggan approved timesheets. Therefore, we do not agree with Appellant that we should discredit Riggan's testimony merely because he approved Appellant's timesheets.

[7]LUMs were expected to eat lunch while supervising staff rather than taking a lunch break.

34. Since at least March 2020, Oak Creek staff have been required to sign a form when they arrive at work attesting that they do not have COVID-19 symptoms or a COVID-19 diagnosis, and that they are not under a health care provider's order to stay at home. A comparison of Oak Creek's COVID sign-in sheets with the KeyWatcher reports from July 1, 2020, through September 30, 2020, reflects many days with a disparity between the time that Appellant recorded his arrival on the COVID sign-in sheets and the time that he accessed KeyWatcher. For example, on July 6, 2020, Appellant recorded his arrival on the COVID sign-in sheet as 9:00 a.m., accessed KeyWatcher at 9:38 a.m., and returned his keys at 3:06 p.m. On July 16 and 17, 2020, Appellant recorded his arrival on the COVID sign-in sheets as 7:45 and 8:30 a.m., respectively, but did not access KeyWatcher at all on either day. On July 21, 2020, Appellant recorded his arrival on the COVID sign-in sheet as 8:00 a.m., accessed KeyWatcher at 8:56 a.m., and returned his keys at 4:25 p.m. On August 3, 2021, Appellant recorded his arrival on the COVID sign-in sheet as 9:25 a.m., accessed KeyWatcher at 9:52 a.m., and returned his keys at 4:08 p.m. On August 5, 2020, Appellant recorded his arrival on the COVID sign-in sheet as 9:00 a.m., accessed KeyWatcher at 9:30 a.m., and returned his keys at 3:07 p.m. On each of those days Appellant recorded his time worked in OTIS as eight hours.

Investigation and Discipline

35. On October 20, 2020, Appellant attended an initial investigatory meeting with Superintendent Riggan and HR Analyst Kelley. Appellant was given the opportunity to bring a representative to the meeting, but decided to proceed without one. Kelley questioned Appellant about a wide range of matters including Appellant's text message exchange with a subordinate regarding her bladder infection, Appellant's conversation with a subordinate involving pubic hair, Appellant's time reporting, Appellant's completion of staff appraisals and youth grievances, and whether Appellant had tried to increase his presence in the unit. During the meeting Appellant stated that he would not have guessed that he had only worked eight hours on six days since July.[8] Also during this meeting, Riggan told Appellant that he did not want to fire him.

36. On October 26, 2020, Appellant was reassigned to the OYA central office pending the results of the HR investigation, and case coordinator KN took over the LUM position on an interim basis.[9] While Superintendent Riggan was cleaning out Appellant's office to make space for the acting case coordinator, he discovered four unprocessed youth grievance forms from 2017 and six letters that had been written by incarcerated youth to grandparents and others that Appellant had never mailed.

37. On November 12, 2020, HR Analyst Kelley and Superintendent Riggan held a second investigatory meeting with Appellant. In addition to questioning Appellant about the issues that were discussed at the first meeting, Kelley also questioned Appellant about the grievances and letters that were found in his office. Appellant speculated that the letters might have been in his office because he had asked youth to remove inappropriate material, such as the names of fellow

[8]During the investigatory meeting, Appellant also stated that he "can't argue the data." We do not interpret Appellant's statement as an admission of culpability, but as an acknowledgment that OYA's records provide some information about Appellant's physical presence at OYA's facility.

[9]After Appellant's removal KN took over the LUM position on a permanent basis.

youth in custody, and the youth decided that they would rather not send the letters than have to edit them. Appellant could not recall the details of the grievances that were found in his office.[10] Toward the end of the interview Kelley asked Appellant if he had anything to add. Appellant responded, "I obviously don't dispute many much of this." Appellant also stated, "I am capable of humbling myself and if it means that I'm not the manager of Cedar anymore, in some ways that would probably be a blessing. I just don't want to lose my career." Kelley asked Appellant what position or place he felt he would be successful at within the agency, and Appellant indicated that he would like to be working with the kids and not have to worry about the staff. Kelley asked how that would change Appellant's timekeeping practices, and he responded, "I still am in awe, you know about what you reported to me last time, um you know I was under the impression or in my mind, like I said, it comes down to I thought I was putting in extra time here so I tried to get more time here and obviously I was not following through with that." Appellant further responded, "It would lessen the stress of my job where I'm less likely to not want to be there and I'd actually would want to be there again."

38. On December 7, 2020, OYA issued Appellant a notice of the commencement of process for consideration of removal from management service with effective end of state service (the predisciplinary letter). The predisciplinary letter contains three charges. The first charge alleges that Appellant violated OYA's Principles of Conduct, Professional Standards, and Payroll Reporting policies, as well as the basic expectations of his position, by over-reporting his time in OTIS nearly every day between July 5 and September 24, 2020, for a total of 62 hours. The second charge alleges that Appellant violated OYA's Principles of Conduct and Professional Standards policies, and DAS's Maintaining a Professional Workplace Policy, through conduct including not sustaining his work plan commitments, having inappropriate communications with staff, failing to mail youths' letters to family, and a lack of effectiveness as a leader. The third charge alleges that Appellant violated OYA's Principles of Conduct, Professional Standards, and Youth Grievance Process polices, and failed to demonstrate his ability or willingness to adequately perform the duties of his position, when he did not process grievances that were found in his office.

39. OYA cited several applicable policies in its notice of consideration for removal. Those policies, as excerpted by OYA, are as follows:

> "DAS Policy 50.010.03- Maintaining a Professional Workplace states in relevant part:
>
> "Employees…must foster an environment that encourages professionalism and discourages disrespectful behavior. All employees…must behave respectfully and professionally and refrain from engaging in inappropriate workplace behavior…Supervisors must address inappropriate behavior they observe or experience and should do so as close to the time of the occurrence as possible and appropriate…Inappropriate workplace behavior must be addressed and corrected...the supervisor of the individual allegedly engaging in inappropriate workplace behavior must address the report as soon as possible. Any employee found to have engaged in inappropriate workplace behavior will be counseled, or

[10]During the hearing Appellant speculated that he may have possibly processed the grievances using a copy of the grievances that were kept in the front office.

depending on the severity of the behavior, may be subject to discipline up to and including dismissal...A supervisor who fails to address inappropriate behavior will be counseled, or depending on the severity of the behavior, may be subject to discipline up to and including dismissal...

"* * *

"OYA Policy 0-2.0, Principles of Conduct states in relevant part:

"OYA's core values provide the foundation for the decisions, actions and practices that make up our daily work…Integrity: As stewards of the public trust, we display ethical and honest behavior in all that we do. Professionalism: We learn and adhere to best practices of juvenile justice, OYA's professional standards and principles of conduct, and perform our work competently and responsibly. Accountability: We conduct our jobs in an open and inclusive manner, and take responsibility for the outcomes of our performance. Respect: We treat others with fairness, dignity, and compassion, and are responsive to their unique strengths and needs with mindful consideration for equity and cultural responsiveness…Display behavior consistent with our values of integrity, professionalism, accountability, and respect; Uphold OYA's mission and policies, and follow federal, state, and local laws;…Maintain high expectations of ourselves and others…Interact with…coworkers…in a way that supports Positive Human Development and never use our positions for personal gain, benefit or advantage.

"OYA Policy 0-2.1 – Professional Standards, states in relevant part:

"…As Oregon public officials, OYA staff must adhere to ethics and boundaries described in Oregon laws and by the agency…Public officials serve the public and are expected to use laws and professional standards (not personal gain) to guide their decision making and behavior. These laws and standards include: Following the state code of ethics (ORS chapter 244)…Staff, as public officials, must not…Use or attempt to use their positions to gain a financial benefit…avoid a financial cost, or obtain a privilege for themselves…if the opportunity is available only because of the position held by the staff…Staff are expected to apply the agency's mission, core values, and principles of conduct as a framework for decision-making and personal behavior in the daily conduct of business…Staff must report for duty at the time and place required by assignment or directive…Failure to comply with any provision of OYA rules, policies, or procedures may result in disciplinary action, up to and including dismissal from state service…Staff must, in the performance of their duties, be respectful, courteous, and considerate toward others…Staff may not use terminology that disrespects the dignity or violates the human rights of others. Staff must recognize the role they play within a treatment environment serving youth, and develop and conform to professional standards…

"* * *

"OYA Policy 0-3.0 Harassment-free Workplace states in relevant part:

"OYA recognizes that harassment in any form undermines the agency's mission…Harassment: A form of offensive treatment or behavior which to a reasonable person creates an intimidating, hostile or abusive work environment…OYA maintains a work environment free from behavior, action, or language that may be perceived as harassment. Staff have the responsibility to conduct themselves in compliance with this policy to maintain an environment that is free from harassment… Management staff are held to a higher standard and are expected to be proactive in creating and maintaining a discrimination- and harassment-free workplace…

"* * *

"OYA Policy II-F-1.1 Youth Grievance Process – Facility states in relevant part:

"Staff members who receive grievances directly from youth must ensure the grievance is delivered to the grievance coordinator for tracking and response…All grievances must be tracked through an electronic tracking system by the grievance coordinator or designee…Staff assigned as a grievance responder must review the grievance with the youth within seven working days of receiving the grievance and provide the youth a written resolution. The original Youth Grievance form containing the written resolution must be forwarded to the grievance coordinator for tracking and retention. a) If it appears the process may take longer than this timeline, staff must give the youth written notification of the delay before the due date. A copy of the delay notice must be forwarded to the grievance coordinator for tracking. b) Any delay longer than 14 working days must be approved by the superintendent or camp director.

"OYA Policy I-B-1.0, Payroll Reporting (Issuing Paychecks) states in relevant part:

"OYA staff work time will be reported in a manner that results in accurate payroll reporting, adequate backup documentation, and compliance with applicable Collective Bargaining Agreements, Department of Administrative Services State Controllers Division (DAS-SCD) policies, and federal government policies…Staff who are required to report hours worked due to their status under the Fair Labor Standards Act (FLSA) and applicable Collective Bargaining Agreements must record actual hours worked. For example, when such staff work a flexible schedule, the hours and days actually worked must be reflected on their time sheets using the OTIS flex time event code (FLEX)…Upon receipt of the paycheck, it is the staff member's responsibility to review the paycheck for accuracy. Any discrepancies should be reported to payroll staff immediately for correction."

40. On December 22, 2020, OYA held a predisciplinary meeting. The meeting was attended by Appellant, Superintendent Riggan, HR Analyst Kelley, and Assistant HR Administrator Cindy Hoffman. Hoffman told Appellant that OYA had not determined what level of discipline, if any, would be issued, and that Appellant had the opportunity to speak to the charges and provide any additional information that he felt was important before a decision would be made. Appellant stated that he would have liked to have had a representative, but it did not work out because "attorneys are expensive" and he "didn't get the link to the meeting until 7:00 a.m. [that] morning." Appellant acknowledged, however, that he had received the letter notifying him of the date of the meeting on December 8, 2020.

41. During the predisciplinary meeting, Appellant stated that the time-tracking was the biggest charge and that he was taken aback by the other charges. Appellant cited the "pissing blood" comment as an example of a charge that he did not regard to be serious and stated that the only reason he was investigated was because he had been accused of being a racist. Appellant acknowledged that the comments he had made to staff about pissing blood and about pubic hair were mistakes, but argued that worse comments had been made to him on the job, that his mistakes were not different from those of other managers, and that he was being made an example of. Appellant also noted that although he was behind on his appraisals, every manager was behind on their appraisals, and he had not been given an appraisal in two years. When asked what he would do differently if he came back to the unit, Appellant stated that he would keep his political opinions to himself and would work harder to bring staff together. Appellant also stated that he would be more mindful of time tracking, but that the other charges were like "spaghetti on the wall." Appellant argued that KeyWatcher is not a timecard system, and stated "that's why I really struggle buying, the idea that I am that low on time." Appellant contended that there were many days that he had checked in his keys and remained in the front office performing administrative tasks. Toward the end of the meeting, Appellant stated, "I fully expect to lose my job."

42. On December 31, 2020, Appellant sent an email to Superintendent Riggan about personal issues that he believed were affecting his work, including his son's medical issues, the toll that the political divisiveness among the staff had taken on him, and his inadequate coping mechanisms. Appellant acknowledged leaving work early at times, but also stated that he thought that he was working 40 hours a week and that he was surprised by the KeyWatcher report. Appellant also stated that although he had welcomed HR to come and interview people, "I have to call out that they are bringing up things from over three years ago. Heck the whole me trying to validate a staff by saying I peed blood was a year ago. [M] and my Pube comment is from three years ago. I feel like they took every wrong thing I have ever done and are acting like it happened now." Appellant stated that Riggan knew that managers had "said way worse" and that he took it personally that Riggan did not come to his defense. Appellant also stated that he wanted another chance at managing the Cedar Unit, but if that was not an option then he wanted to work at Oak Creek in some capacity. Riggan did not respond to Appellant's email. On January 5, 2021, Riggan forwarded the email to Assistant Director McClellan.

43. On January 4, 2021, OYA issued Appellant a notice of removal from management service with effective end of state service. The removal letter restates the charges listed in the predismissal letter. The removal was effective January 7, 2021.

44. Assistant Director McClellan made the ultimate decision to remove Appellant. In making that determination, McClellan considered input from Superintendent Riggan and HR. Although Riggan had initially advocated for Appellant and wanted to find Appellant another place within the agency, by the end of the timekeeping investigation Riggan agreed that removal was the appropriate course of action. McClellan and Riggan both viewed Appellant's ongoing inaccurate time reporting as his most egregious offense, and the issue that ultimately led to Appellant's removal.

45. Assistant Director McClellan is unsure whether he saw Appellant's December 31, 2020, email to Superintendent Riggan before he made the decision to remove Appellant. During the hearing McClellan explained that nothing in the email would have changed McClellan's decision because, although he was troubled that Appellant was having personal issues, the issues were not communicated during the many months that Appellant's performance was going downhill, and McClellan does not believe that the personal issues excused Appellant's actions.

46. Assistant Director McClellan considered Appellant's length of service before reaching his decision to remove Appellant, but determined that given Appellant's breach of trust with the agency Appellant could not continue his employment in the management service. Although McClellan considered lesser discipline, he determined that a demotion was problematic given all the circumstances, and in particular Appellant's overt overstatement of his hours worked. McClellan also reasoned that a demotion was not appropriate because Superintendent Riggan had worked with Appellant on his performance issues multiple times and there was a consistent falling back into old patterns.

CONCLUSIONS OF LAW

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

2. OYA's removal of Appellant from management service (with effective dismissal from state service) did not violate ORS 240.570(3).

DISCUSSION

Applicable Legal Standards

Before his removal, Appellant was a management service employee. ORS 240.570(3) provides that a "management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." When a management service employee appeals an agency's removal to this Board, the agency has the burden of proving that its discipline did not violate ORS 240.570(3). OAR 115-010-0070(5)(c). The agency meets that burden if this Board determines, under all of the circumstances, that the employer's actions were "objectively reasonable." *A.D. v. State of Oregon, Department of Transportation*, Case No. MA-011-17 at 9 (March 2019).

We have defined a reasonable employer as one that disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, and considers the employee's length of service and service record. *Zaman v. State of Oregon, Department of Human Services*, Case No. MA-21-12 at 12 (April 2013). A reasonable employer also administers discipline in a timely manner, clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014). In addition, a reasonable employer applies progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or where the employee's behavior probably will not be improved through progressive measures. *Id.*

We apply a two-step process in reviewing management service disciplinary appeals. First, we determine if the employer has proven the charges that are the basis of the discipline. If the employer proves some or all of the charges, then we apply the reasonable employer standard to determine whether the employer was justified in taking the disciplinary action that it did. *Id.* at 24. If the employer's actions are not objectively reasonable, we will rescind or modify the discipline. *A.D.* at 14-15.

With those standards in mind, we turn to the facts in this case.

The Basis for Removal

OYA included three charges in the management service removal letter: (1) Appellant overreported his time in OTIS nearly every day between July 5 and September 4, 2020, in violation OYA's Principles of Conduct, Professional Standards, and Payroll Reporting policies, as well as the basic expectations of his position; (2) Appellant violated OYA's Principles of Conduct and Professional Standards policies and DAS's Maintaining a Professional Workplace Policy through conduct including not sustaining his work plan commitments, having inappropriate communications with staff, failing to mail youths' letters to family, and a lack of effectiveness as a leader; and (3) Appellant violated OYA's Principles of Conduct, Professional Standards, and Youth Grievances policies, and failed to demonstrate his ability or willingness to adequately perform the duties of his position, when he did not properly process grievances that were found in his office.

With respect to the first charge, Appellant waivered regarding the factual allegation that he overreported his hours worked. During the investigatory meetings, Appellant stated that he "[couldn't] argue the data," and that he thought that he was putting in extra time, but "obviously I was not following through with that." But Appellant later argued that he thought that he was working 40 hours a week and that KeyWatcher was not a reliable indicator of his time at the facility. While we acknowledge that KeyWatcher did not capture Appellant's exact hours at the office, we nonetheless agree with Respondent that it provided a generally accurate reflection of Appellant's comings and goings. We are not persuaded that the incidental time Appellant may have spent in the front office performing administrative tasks was enough to reconcile the 62-hour discrepancy between his reported hours and the amount of time that he had full access to the facility. The discrepancy between the COVID sign-in sheets and the time that Appellant accessed

his keys in KeyWatcher also does not close that gap. Consequently, we conclude that OYA proved its charge that Appellant overreported his time worked.

With respect to OYA's remaining charges, the essential facts are not in dispute. Turning first to Appellant's allegedly inappropriate communications with staff, Appellant concedes that the communications took place (although he disagrees with OYA's assessment regarding the gravity of those communications). While we recognize that crass language was commonplace and tolerated in the Oak Creek workplace to some extent, even among managers, we nonetheless find that some of Appellant's comments fell far beyond the scope of appropriate remarks by a manager to a subordinate. In particular, Appellant's comment to the effect that he had seen a subordinate employee's pubic hair, which caused the employee extreme embarrassment and discomfort, is one that exceeded reasonable boundaries even in a work environment where crass language was common.[11] This Board has held that agencies must be able to rely on its managers to maintain appropriate boundaries with subordinates. *E.A. v. State of Oregon, Department of Corrections*, Case No. MA-006-19 at 26 (September 2020), *adhered to on reconsideration* (October 2020); *Zaman* at 16. Therefore, we find that OYA proved its charge that Appellant violated various OYA and DAS policies through his inappropriate communications with staff.

Appellant also concedes that youth grievances and letters were found in his office. Appellant speculates that the grievances may have been processed with a carbon copy, and that the letters may have been unsent because the youth chose not to send them. We are not convinced by that speculation. Superintendent Riggan emailed Appellant on numerous occasions regarding outstanding tasks such as grievances and YIRs, and Riggan also talked to Appellant about his problem of avoiding mundane tasks. Hence, the record establishes that Appellant tended to lose track of administrative tasks. We also are not persuaded by Appellant's argument that he had inadequate opportunity to respond to this aspect of the charges. Some of the documents at issue are in the record, and Appellant had a full opportunity to explain his memory and assertions with respect to this allegation. Accordingly, the weight of the record evidence supports OYA's allegation that the grievances and letters found in Appellant's office were not processed.

OYA also alleged that Appellant was ineffective as a leader in violation of OYA's Principles of Conduct and Professional Standards policies and the DAS Maintaining a Professional Workplace Policy. We conclude that this allegation is substantiated by OYA's workplace culture investigation, in which 18 employees were interviewed, and the resulting Cedar Summary report.

Finally, we turn to OYA's allegation regarding Appellant's failure to complete performance appraisals. The record establishes that Appellant himself did not receive regular performance appraisals and that Appellant was not the only manager who did not complete performance appraisals. In these circumstances, it appears that the failure to conduct regular staff performance appraisals, including failure by Riggan, was tolerated at Oak Creek. Accordingly, we do not find that OYA proved this particular allegation against Appellant.

[11]Although this comment was apparently made over one or two years before Appellant was disciplined, it appears that OYA only learned of the interaction during the workplace culture investigation.

In sum, we conclude that OYA has proven its overall charges against Appellant. We turn next to the question of whether the charges justified Appellant's removal.

Reasonable Employer Analysis

In applying the "objectively reasonable" standard to management service appeals, an employer may hold a management service employee to high standards of behavior so long as those standards are not arbitrary or unreasonable. *Zaman* at 15; *Lucht v. State of Oregon, Public Employees Retirement System*, Case No. MA-16-10 at 24 (December 2011). A significant factor for this Board's consideration is the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to act as a member of the management team. *Id.* In addition, our precedent gives weight to the effect of the management service employee's actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. *Lucht* at 24. We have stated that an employer's "burden in justifying a removal from management service is relatively minor." *Zaman* at 15 (quoting *Plank v. Department of Transportation, Highway Division*, Case No. MA-17-90 at 29 (March 1992)).

With these standards in mind, we begin by considering the extent to which OYA could no longer have trust and confidence in Appellant, compromising his ability to act as a member of the management team. We first acknowledge that Appellant was widely regarded as effective in working with youth and had a long and successful tenure at OYA doing so. However, at the time of his removal from the management service, case planning duties and working with youth were no longer the focus of Appellant's job. We are persuaded that Appellant understood that his position, which was focused primarily on staff training and development and operational matters, required him to be available to the Cedar Unit staff. A manager's availability is a nuanced matter. In a facility such as OYA's facility, a manager's availability includes both physical presence *and* a reasonably consistent level of attention and responsiveness to subordinates' requests and concerns. Stated differently, a manager is available when that manager is both present *and* attentive to the needs of the workplace and can appropriately guide and direct the workgroup in the accomplishment of the group's work.

Here, as explained above, OYA proved that Appellant, as a living unit manager, simply was not available as a manager in the unit he oversaw. OYA proved that Appellant was not consistently and predictably at work for periods when he was expected to be on duty. As discussed above, on numerous occasions he arrived late and departed early. And, as the Cedar Summary Report documents, Appellant was viewed by the staff as disengaged from his management work. The staff lacked confidence in him to guide and direct the unit. As one example, although instructed to do so by Riggan, Appellant did not consistently meet one-on-one with the unit's staff. These two factors—Appellant's frequent unexpected physical absence for parts of a shift and his disengagement from and lack of attention to work-related issues of the workgroup—converged. The import of the employee interviews conducted during the Cedar Unit review conveyed staff's lack of confidence in Appellant as the living unit manager, even while Appellant was acknowledged as skillful in working with youth. Given the highly responsible nature of Appellant's position and the importance of maintaining adequate supervision in a youth

correctional setting, OYA reasonably concluded that its trust and confidence in Appellant as a member of the management team were harmed.

Appellant's actions in overstating his time worked on an ongoing basis added to that loss of trust and confidence in Appellant. Assistant Director McClellan explained that Appellant's timekeeping was the precipitating factor in his decision that removal was warranted. This Board has previously upheld the removal of a management service employee for misrepresentation of hours worked. *See Mabe v. State of Oregon, Department of Corrections*, Case No. MA-09-09 (July 2010) (correctional lieutenant was removed from the management service for misrepresenting hours worked on his timesheets and was also dishonest in the investigation about his hours worked; Board found removal appropriate because the appellant had signed timesheets that he knew, or recklessly failed to know, were inaccurate). Accordingly, although Appellant's inaccurate reporting of his time, on its own, would arguably support his removal, the reasonableness of OYA's loss of trust and confidence in Appellant as a member of the management team is additionally supported by the remaining charges.

In assessing the reasonableness of OYA's decision, we also take into account Appellant's inappropriate comments to staff. In particular, Appellant's comments about "peeing blood" and about an employee's pubic hair modeled inappropriate informality and crassness to subordinate staff.[12] Appellant argues that his communications must be evaluated in the context of the particular workplace, where crass language was used by others, including his own manager. Appellant is correct that the Board has viewed management service discipline with disfavor when a manager is disciplined for conduct that other managers engage in without adverse consequences. *See S.A. v. State of Oregon, Department of Human Services*, Case No. MA-004-18 at 18-19 (July 2019) (rejecting employer's argument that the terminated manager's conduct was egregious where she failed to treat a report with urgency, but other managers also failed to take actions regarding the report and were not disciplined). Here, however, Appellant made inappropriate comments to subordinates. Managers "have substantial latitude to talk freely with one another; a manager must be more circumspect in discussing personal topics with a supervised classified employee." *E.A.* at 23. A reasonable employer could reasonably expect a manager such as Appellant to be more mindful in his comments to staff, even if managers were more informal in conversation among themselves.

We conclude that a reasonable employer could determine that it no longer had trust and confidence in Appellant as a manager based on the record of his inaccurate timekeeping and lack of availability to staff, including his disengagement from operational matters in the unit. We also conclude that a reasonable employer could consider these comments as an additional reason why its trust and confidence in a manager was impaired.

[12]In his objections to the recommended order, Appellant argues that the comments were too old to provide a basis for discipline. We disagree. OYA did not learn about the comments until it reviewed the culture of the work unit where Appellant was a manager, and it acted promptly thereafter. OYA was not required to ignore the comments, which have a bearing on Appellant's management effectiveness, because the comments could reasonably undermine staff's trust in and respect for Appellant as a manager. OYA was permitted to take those comments into account in assessing whether it could continue to have trust and confidence in Appellant as a member of the management team, and we find no evidence that, as Appellant alleges, the review was unfairly "designed to learn negative information about Appellant."

Finally, we address Appellant's contentions that he was removed because he was labeled a racist or because he opposed Black Lives Matter. In his appeal, Appellant stated that he "believes that his dismissal from state service is largely related to OYA's discriminatory assumptions about him based on his opposition to showing material to youth that caused youth to want to harm themselves." In his objections to the recommended order, Appellant argues that the ALJ failed to adequately take into account the impact of Appellant's expression of concern about Black Lives Matter. Specifically, Appellant asserts that he expressed concern about OYA supporting Black Lives Matter as (in Appellant's view) a political organization with partisan political objectives. Appellant asserts that the staff misunderstood him, and inaccurately concluded that he was opposed to Black Lives Matter as a civil rights movement, when he actually supports that civil rights movement. Appellant argues that OYA failed to address the staff's confusion and then relied on that confusion to scrutinize Appellant and terminate him. As a result, according to Appellant, his termination was not in good faith.

The factual record does not support Appellant's argument. Although Appellant pinpointed being labeled a racist as the start of his downfall at the Cedar Unit, the evidence establishes that the workplace concerns arose before then. Specifically, Superintendent Riggan met with Appellant about his performance at least twice, put him on a work plan, and notified him that if he did not improve then he would be looking at a formal HR process, well before the staff became divided over the killing of George Floyd and the growth of the Black Lives Matter movement. In addition, some of Appellant's shortcomings as a manager—including his inaccurate timekeeping and his inattention to operational matters such as grievance processing—are wholly unrelated to the staff discord. Furthermore, there was no testimony presented at hearing (other than Appellant's own allegations) to support Appellant's contention that he was targeted for removal because of his real or perceived political beliefs. The record indicates that OYA lost trust and confidence in Appellant because of his inaccurate timekeeping and his lack of availability to his staff and unit, including his disengagement from operational matters in the unit, compounded by his comments to staff. The evidence does not substantiate Appellant's claim that his removal was motivated by political considerations or lacked good faith.

Appropriate Discipline

Finally, because OYA proved some of the charges against Appellant, we assess whether dismissal was consistent with ORS 240.570(3). In considering the appropriate level of discipline, we determine whether a level of discipline is "objectively reasonable in light of all the circumstances." *Rodriguez v. State of Oregon, Department of Human Services*, Case No. MA-14-11 at 9 (July 2021) (quoting *Belcher v. State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. MA-7-07 at 20 (June 2008)). In dismissal cases, this Board has attempted to strike a balance between the severity of the discipline imposed and any extenuating circumstances, such as prior discipline, length of state service, whether the employee was warned, the magnitude of the action(s), and the likelihood of repeated misconduct. *Rodriguez* at 9 (citing *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001)); *see also Garrett v. Department of Human Services*, Case No. MA-02-11 at 8 (December 2011) (a reasonable employer "considers the employee's length of service and service record"). We expect a reasonable employer to apply the principles of progressive discipline, except where an employee's offense is serious or "the employee's behavior probably will not be improved through

progressive measures." *Zaman* at 12 (quoting *Peterson v. Department of General Services*, Case No. MA-9-93 at 10 (March 1994)).

We begin with Appellant's tenure and service record. Appellant was a long-term state employee who began working for OYA as a group life coordinator in 2007. He was promoted to the management service in 2010 and then worked as a treatment manager for the Cedar Unit at the Oak Creek facility. Appellant excelled as a treatment manager—a position for which he was well-suited because of his particular skills in dialectical behavioral therapy. In 2018, Appellant's position was transitioned into a living unit manager position, which shifted the focus of his work away from working with youth to staff training and development and operational matters within the unit. Appellant also had no disciplinary history until the events at issue in this case. We treat Appellant's tenure and service record as extenuating factors in his favor.

The record is also clear that after Appellant's position transitioned into the living unit manager position, with the shift in duties toward more staff management and administrative duties, Appellant's performance faltered, and he did not improve after multiple requests that he do so. Appellant was put on notice that his performance was unsatisfactory as early as September 2019, when Riggan met with him to discuss staff members' concerns about his lack of time on the worksite and availability to staff, among other concerns. Later, in April 2020, Riggan informed Appellant that a work plan was necessary. Appellant wrote his own plan, which he labeled, "My Work Plan to deal with my shortcomings." In that plan, Appellant described how he would improve his handling of youth grievances, how he intended to handle employee appraisals, improve his availability to staff, and improve one-on-one supervision of staff. Appellant also volunteered that he would improve his management of email. Appellant's candor about his shortcomings in that plan and his specific ideas to address them are commendable. Nonetheless, the plan indicates that Appellant was aware at least by April 2020 that his performance as a manager needed to improve.

Appellant argues that the work plan was insufficient to put him on notice that he needed to improve because it was merely an "action plan" related to the operation of his unit. We disagree that the plan was as routine as Appellant asserts. To be sure, the work plan was brief and informal. But Appellant's use of the term "work plan" and reference to his "shortcomings" indicate that he was in fact on actual notice that he needed to improve. Moreover, in his objections to the recommended order, Appellant did not object to the finding that Riggan told him in April 2020 that if Appellant "drifted" again they would be "looking at a formal HR process."[13] On this record, we are persuaded that Appellant knew that a "formal HR process" was a possible consequence if Appellant did not improve his management performance beginning in April 2020.

[13]When a party does not object to a finding of fact or conclusion of law in a recommended order, we consider "potential objections unpreserved and waived." *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-022-16 at 12 n 14, 27 PECBR 112, 123 n 14 (2017), *aff'd*, 298 Or App 332, 447 P3d 50 (2019).

Additionally, Riggan's request for a work plan was only one of Riggan's multiple communications, including discussions and email, informing Appellant of his shortcomings as a manager. Riggan met with Appellant on September 17, 2019, to discuss his subordinates' concerns about him not being in onsite enough and his lack of availability.[14] Riggan gave Appellant a memo documenting a discussion among Appellant, Riggan and HR in November 2019, and sent Appellant multiple reminder emails about overdue grievances and youth incident reports in March, June, and September 2020.

The first investigatory interview did not take place until November 2020. Accordingly, Appellant was given sufficient time to improve his performance, but did not do so. We acknowledge that spring through fall 2020 coincided with an extraordinarily stressful time caused by the COVID-19 pandemic. In addition, Appellant was confronted with difficult issues in his work group arising from the prominence of polarizing cultural and social issues, including a society-wide focus on racial injustice. We do not minimize the challenges that Appellant confronted in these circumstances. However, despite those challenges, a reasonable employer could expect that an experienced manager would either improve his performance or notify management that more time or assistance was needed to do so. Weighing all these circumstances, and taking into account the unusually stressful circumstances of 2020, we conclude that Appellant was adequately warned and given sufficient time to improve.

We turn next to the question of whether a reasonable employer would forego progressive discipline on these facts. A reasonable employer "applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or the employee's behavior probably will not be improved through progressive measures." *Blank v. State of Oregon, Construction Contractors Board*, Case No. MA-007-14 at 12 (March 2015) (Reconsideration Order), *aff'd without opinion*, 277 Or App 783, 376 P3d 304 (2016); *see also Zaman* at 12. For the reasons explained below, we conclude that a reasonable employer could conclude that Appellant's conduct would probably not be improved by progressive measures.

To begin, we have previously explained that a manager is unlikely to change inappropriate conduct if that manager minimizes the conduct by claiming that it is merely part of the agency's "culture." *See A.D.* at 17-18 (manager unlikely to change behavior because, by claiming it was part of the workplace culture, he seemed not to understand the "seriousness of his conduct or its impact on the workplace."). Here, throughout the investigation, Appellant claimed that he was being made an example of and that his behavior was excusable or no worse than that of other managers. When asked what he would do differently, Appellant indicated that he would keep his political opinions to himself and work harder to track his time, but that the other charges "were spaghetti on the wall." Appellant did not distinguish between crass and informal language in conversations among managers from communications between a manager and subordinate, minimizing Appellant's own behavior. Considering Appellant's stance, a reasonable employer could conclude that Appellant was not serious about improving his behavior as a living unit manager.

[14]Appellant later acknowledged to Riggan that, in late 2019 because of a variety of events in Appellant's personal life "no doubt the team saw a change in me[.]"

This Board has held that an employer may forgo progressive discipline when "the employee's behavior probably will not be improved through progressive measures." *E.A.* at 28; *Zaman* at 12. Here, even near the end of his employment, Appellant appeared resistant to comprehending the seriousness of his shortcomings as a manager. As one example, in his December 31, 2020, email to Riggan, Appellant wrote that he "still contend[ed] that I truly thought I was working 40 hours a week because of staying late on other days." As another example, Appellant appeared not to fully accept the seriousness of the need to timely process YIRs and youth grievances. An employee who repeatedly resists grasping the seriousness of failures or misconduct is unlikely to improve through progressive discipline. On this record, we conclude that a reasonable employer could conclude that progressive discipline was not necessary.

As a final matter, we turn to Appellant's contentions that his removal violated due process. The filed appeal itself does not articulate precisely how Appellant's due process rights were allegedly violated, but we have previously found that in a removal setting, management service employees are entitled to the following preremoval safeguards: (1) notification of the charges against them; (2) notification of the kinds of sanctions being considered; and (3) at least an informal opportunity to refute the charges either orally or in writing before someone who was authorized either to make the final decision or to recommend what final decision should be made. *See Hume-Bustos v. State of Oregon, Oregon State Police*, Case No. MA-010-13 at 4 (May 2014). Here, Appellant was fully informed of the charges against him, was informed that the action being considered was removal from management service with effective end of state service, and was given an opportunity to defend himself in a predisciplinary meeting with Assistant Director McClellan, the final decision maker, as well as Superintendent Riggan and other HR officials who were involved in the decision-making process. Consequently, we conclude that Appellant was afforded the appropriate preremoval safeguards.

During the hearing, Appellant contended that he did not believe that he was afforded a full and fair opportunity to defend himself because he was lulled into a false sense of complacency when Superintendent Riggan said that he did not want to fire him. Although Riggan did make that statement during the first investigatory interview, the first investigatory interview was followed by a second investigatory interview, a predismissal letter, and a predismissal meeting. It is not credible that an employee in those circumstances would not have realized the gravity of the situation. Appellant's claim that he did not appreciate the seriousness of the charges against him is belied by his own statement during the predisciplinary meeting that he "fully expected to lose [his] job." In any event, we conclude that Appellant was afforded sufficient due process and are not persuaded by Appellant's contention otherwise.

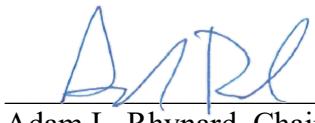
Conclusion

For the reasons stated above, we conclude that Appellant's removal was consistent with ORS 240.570(3).

ORDER

The appeal is dismissed.

DATED: April 19, 2022.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-003-19

(UNFAIR LABOR PRACTICE)

MULTNOMAH COUNTY CORRECTIONS DEPUTY ASSOCIATION, Complainant, v. MULTNOMAH COUNTY, Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On October 11, 2019, this Board issued an order holding that Multnomah County (County) had not violated ORS 243.672(1)(e), as alleged by the Multnomah County Corrections Deputy Association (Association). In the complaint, the Association alleged that the County violated ORS 243.672(1)(e) by (1) unilaterally implementing a new timekeeping and payroll system (the Workday Claim), and (2) refusing to bargain in good faith with the Association regarding mandatory safety issues (the Safety Issues Claim). The Board dismissed both claims.

On October 17, 2019, the Association filed a request for rehearing to introduce new evidence on the Workday Claim, and a petition for reconsideration on the Safety Issues Claim. The County opposed the request for rehearing, but joined in the request for reconsideration, asking that the Board clarify whether it had a duty to engage in midterm bargaining regarding the safety issues raised by the Association.[1] On October 30, 2019, we denied the Association's request for rehearing on the Workday Claim and granted the joint request for reconsideration on the Safety Issues Claim. On March 20, 2020, this Board issued an order on reconsideration adhering to the conclusion that the County did not violate ORS 243.672(1)(e), and holding that the County did have an obligation to bargain the safety issues under the circumstances.[2] The County filed an

[1]In doing so, the County explained, "ERB decided in favor of the County on the grounds that the County had discharged its obligation to bargain, but without definitively stating whether there was an obligation to bargain in this case." The County asserted that "notwithstanding the fact that the County prevailed, both parties would benefit from clarification as to whether there was a duty to bargain."

[2]Neither party asked us to reconsider our ultimate conclusion that the County did not refuse to bargain over mandatory safety issues in violation of ORS 243.672(1)(e).

appeal of the reconsideration order with the Court of Appeals, and on January 20, 2022, the court affirmed this Board's order. *Multnomah Cty. v. Mult. Cty. Corrections Deputy Assn.*, 317 Or App 89 (2022). Having received the appellate judgment, this Board now issues this order for representation costs. OAR 115-035-0055(2)(a).

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

1. The County is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1)(a).[3] The prevailing party is "the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(d).

2. This case required two days of hearing.

3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case that required two days of hearing is $5,000. OAR 115-035-0055(1)(b)(D).

ORDER

The Association shall remit $5,000 to the County within 30 days of the date of this order.

DATED: April 28, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

[3]ORS 243.676(3)(b) provides that where the Board finds that the party named in the complaint "has not engaged in or is not engaging in an unfair labor practice, the board *shall* * * * [d]esignate the amount and award representation costs, if any, to the prevailing party." (Emphasis added.)

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-046-20

(UNFAIR LABOR PRACTICE)

HILLSBORO PROFESSIONAL FIREFIGHTERS, IAFF LOCAL 2210, Complainant, v. CITY OF HILLSBORO, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On March 3, 2022, this Board heard oral argument on Complainant's objections to an October 15, 2021, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe, after a hearing was held on May 18, 2021. The record closed on July 14, 2021, upon receipt of the parties' post-hearing briefs.

Katelyn S. Oldham, Attorney at Law, Portland, Oregon, represented the Complainant.

Kathy A. Peck and Jenny Marston, Attorneys at Law, Peck, Rubanoff & Hatfield, Lake Oswego, Oregon, represented the Respondent.

On December 15, 2020, the Complainant, the Hillsboro Professional Firefighters, IAFF Local 2210 (Union, Association, or IAFF), filed an unfair labor practice complaint with the Employment Relations Board (Board or ERB) against the Respondent, the City of Hillsboro (City).

The issue is: Did the City violate ORS 243.672(1)(e) by refusing to bargain, engaging in surface bargaining, or engaging in bad faith bargaining with the Union over the impact of Senate Bill (SB) 1049 on employees holding the rank of Battalion Chief? As set forth below, we conclude that the City did not violate ORS 243.672(1)(e) as alleged in the complaint.

RULINGS

All rulings by the ALJ were reviewed and are correct.[1]

FINDINGS OF FACT

Background

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

2. The City operates the Hillsboro Fire Department. David Downey is its Fire Chief.

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

4. The Union represents two separate bargaining units of Hillsboro Fire Department employees. One of those units includes the Hillsboro Fire Department's "Rank & File" (RAF) employees. Currently, that RAF unit consists of the following classifications: Fire Lieutenant, Fire Engineer, Firefighter, Fire Inspector I, Fire Inspector II, Fire Logistics Technician, EMS Training Captain, and Fire Training Captain. The Union's other, newer unit, which was formed in April 2016, after a legislative change, exclusively includes the Fire Department's Battalion Chiefs (BCs).[2] Currently, the BC unit includes just four employees.

5. Employees included in either bargaining unit are generally part of Oregon's Public Employees Retirement System (PERS), a retirement-benefit program for covered public employee members. As explained below, the City contributes to PERS on behalf of these employees. PERS and the City are separate government entities.[3]

6. The Union and the City are parties to two separate collective bargaining agreements (CBAs). One CBA is for the RAF bargaining unit, and the other is for the BC unit. Each of those CBAs is negotiated separately and at different times. Further, each unit's CBA is on a unique contract cycle and has a unique expiration date.

7. A previous RAF CBA ran from July 1, 2017, through June 30, 2020. The current RAF CBA runs from July 1, 2020, through June 30, 2023. The first BC CBA ran from

---

[1]On May 4, 2021, the parties submitted two stipulated facts, which are included in these Findings of Fact. The ALJ also granted a May 17, 2021, unopposed request for judicial notice. During the hearing, all of the offered exhibits were admitted without objection.

[2]Other City employees belong to a third, unspecified bargaining unit.

[3]ORS 238.630(1) provides that the "governing authority of [PERS] shall be a board known as the Public Employees Retirement Board and consisting of five members appointed by the Governor subject to confirmation by the Senate in the manner provided in ORS 171.562 and 171.565." The PERS Board "administers PERS and serves as trustee of the Public Employee Retirement Fund (the fund), which the board uses to pay member retirement benefits. ORS 238.660(1); *see also White v. Public Employees Retirement Board*, 351 Or 426, 437-38, 268 P3d 600 (2011) (discussing the standards for the board when serving as a trustee)." *Moro v. State*, 357 Or 167, 175, 351 P3d 1 (2015).

July 1, 2016, through June 30, 2019. The current BC CBA (the unit's second in total) runs from July 1, 2019, through June 30, 2022.[4]

8. The RAF CBA and the BC CBA are very similar. For example, in both CBAs, Article 24 addresses the unit's retirement benefits and contains similar language. Further, before SB 1049 became law on June 11, 2019, both units had essentially the same retirement benefits. Currently, however, the RAF unit has different retirement benefits than the BC unit. (Article 24 of the BC CBAs and SB 1049 are addressed in further detail below.)

9. Typically, contract negotiations between the Union and the City have been completed quickly, and were uncontentious and "very amicable." The negotiations have also been "pretty informal," and occasionally the parties make verbal proposals. Most of the parties' contract proposals are shared in the first couple of bargaining sessions rather than later in the bargaining process, as that keeps negotiations moving forward. Historically, the Union and the City have engaged in midterm bargaining (which may end with a memorandum of understanding, or "MOU") as well as successor contract bargaining.

10. On December 6, 1994, the City introduced and adopted Resolution No. 1836, which states,

> "A RESOLUTION MAKING EMPLOYEE RETIREMENT CONTRIBUTIONS NOT SUBJECT TO STATE AND FEDERAL WITHOLDING AND ADJUSTING SALARY SCHEDULES FOR CITY EMPLOYEES COVERED BY PERS.
>
> "WHEREAS, the City Council believes that the current level of wages and benefits is contractual; and
>
> "WHEREAS, the State of Oregon Constitution, Article IX, as amended, effective December 8, 1994, will require public employees to contribute an amount equal to six percent (6%) of their salary or gross wage to the retirement plan provided by their employer effective January 1, 1995; and
>
> "WHEREAS, the Hillsboro City Council believes that such action must be preceded by an increase in employee salaries to offset this loss in income in order to preserve the City's commitments to its employees and perpetuate the City's long-standing compensation policies; and
>
> "WHEREAS, the Council has considered the relevant legal and policy issues.
>
> "NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF HILLSBORO THAT:
>
> "1. The City shall continue payment of employees' PERS contributions through December 30, 1994; however, effective December 31, 1994, the City

[4]Exh. J-1 is the 2016-2019 BC bargaining unit CBA. Exh. J-3 is the 2019-2022 BC CBA, as correctly indicated by the exhibit's cover sheet. However, throughout the rest of Exh. J-3, the footer incorrectly states that Exh. J-3 is the 2016-2019 BC CBA.

will cease from paying the employee contribution to PERS for non-represented employees as well as was previously paid in accordance with ORS 237.075.

"2. For purposes of Internal Revenue Code Section 414(h)(2), employee contributions of 6% of the salary of the retirement system or plan of the City are deemed 'picked up' as of January 1, 1995. Under this resolution employees do not have the option of receiving the salary or wages being contributed and making the retirement contribution directly. Furthermore, employees' reported salary or wages on W-2 forms will be reduced by the amount of the employees' retirement contributions for tax purposes.

"3. The wages for all positions and classifications on the salary schedule adopted by City Council on July 20, 1994 (non-represented employees only) are hereby amended to reflect a 6% increase effective on and after December 31, 1994.

"4. The Mayor and City Recorder are authorized to execute amendments to the existing Police and Fire collective bargaining agreements to establish equal treatment and parity among all employee groups consistent with the City's long-standing compensation policies.

"5. The Mayor, City Recorder and City [M]anager are authorized to accomplish all other administrative tasks necessary to implement this Resolution."

BC Successor Negotiations

11. In April 2019, the parties started successor contract negotiations for the BC bargaining unit. As detailed below, those negotiations would eventually result in the BC unit's current CBA that runs from 2019-2022. Initially, the City's bargaining team included Chief Downey (who acted as the City's spokesperson), SueLing Gandee (the City's Risk Manager), and Eric Nelson (a Human Resources Analyst for the City). The Union's bargaining team included Eric Keim (a Firefighter at the time, and currently a Lieutenant), Mark Gregg (a BC), Shane Rice (a Firefighter who acted as the Union's spokesperson for these negotiations and, at that time, was the Union's vice president), and Brian Washam (a BC, and the BC unit's shop steward).

12. Keim was the Union's president from 2013 through 2019. Keim has been a Lieutenant since around October 2019, and was previously a Firefighter. Rice, a Firefighter, has been the Union's president since January 1, 2020. Before that, Rice was the Union's vice president for six years. The Union's current vice president is a BC named Richard Vetsch.

13. About halfway through the first week of negotiations in April 2019, it became clear to the Union that the City was unprepared to discuss "compensation" for the BC bargaining unit. Accordingly, the parties decided to reconvene negotiations on May 8, 2019.

14. On May 6, 2019, SB 1049 was introduced and had its first reading.

15. Generally speaking, when SB 1049 became law, it would result in a reduction in the retirement benefits for BC and RAF bargaining unit employees for a time. Significantly, SB 1049 would cap the maximum salary that could be used in a retiree's benefits calculation. In addition, SB 1049 required PERS to "redirect" a percentage of funds given by the City to PERS for each participating employee's individual account in the Individual Account Program (IAP). Specifically, SB 1049 required PERS to redirect a portion of those IAP funds (which previously would have been invested and eventually would be paid to a BC or RAF employee upon his or her retirement) to a pooled "PERS stability fund" (from which, at least for a time, until PERS is more fully funded, a retiree would not be paid). Before SB 1049 became law, 6 percent of each BC or RAF employee's salary or gross wage was deducted by the City then paid to PERS, which would in turn put all of that money in the BC or RAF employee's IAP account. After SB 1049 became law, however, PERS (not the City) would put a percentage of the 6 percent deduction into the PERS stability fund. Historically, the entirety of the 6 percent deduction has been offset by the City via a corresponding 6 percent wage increase, in accordance with Resolution No. 1836.

16. The percentage that PERS redirects into the PERS stability fund depends on whether an employee is a Tier 1, Tier 2, or Oregon Public Service Retirement Plan (OPSRP) member, which depends on when the employee was hired. For Tier 1 and Tier 2 employees, 2.5 percent out of the 6 percent deduction is redirected by PERS, leaving only 3.5 percent of the deduction for the IAP. Currently, all of the BCs are Tier 2.[5]

17. On May 8, 2019, the parties' bargaining teams met for further negotiations as scheduled. At that time, the City added Lisa Colling, the City's Human Resources Director, to its bargaining team to help with negotiations involving "compensation." By May 8, 2019, some parts of the successor CBA had already been tentatively agreed to ("TA'd").

18. During the May 8, 2019, bargaining session, the City initially proposed giving a cost of living adjustment (COLA) pay increase for each year of the BCs' three-year CBA being negotiated (2019, 2020, and 2021), with 2.5 percent increases the first and second years and a 2 percent increase the third. Subsequently, the Union noted that the Tualatin Valley Fire and Rescue's BC bargaining unit was receiving a 5 percent "deferred compensation match," and then counterproposed that the City's BC unit receive the same deferred compensation benefit, along with the three pay increases included in the City's initial May 8, 2019, proposal. After a short break, the City rejected that counterproposal and disagreed with the Union's usage of the Tualatin Valley Fire and Rescue BCs as a "comparator." The City also told the Union that a deferred compensation package should not be part of compensation-related negotiations, that the City was "not ready" to agree to or "open the door" to deferred compensation, and that City employees did not have deferred compensation benefits at that time.[6] Additionally, the City proposed a 2.5 percent pay increase the first year, a 2.5 percent plus 1 percent increase the second year, and 2.5 percent increase the third (with no deferred compensation benefit). The Union countered that proposal by proposing a 3 percent plus 3 percent increase the first year and 3 percent pay increases the second and third years (without any deferred compensation proposal). The City responded to that by proposing a 2.5 percent increase the first year and 2.5 percent plus 1 percent increases for the second and third years (once again without any deferred compensation). The Union ended the

[5] *See* Or Laws 2019, ch 355.

[6] Limited testimony indicates that "the previous City Manager" received deferred compensation.

meeting by offering 3 percent plus 1 percent pay increases the first year, and 2.5 percent increases the second and third years.

19. Historically, the Union has used Tualatin Valley Fire and Rescue's BC bargaining unit (which serves the residents of Beaverton and other cities) as a comparator, and deferred compensation has been a top priority and long-term goal for both of the Union's Hillsboro Fire Department units.

20. SB 1049 was not mentioned at all during the May 8, 2019, bargaining session, and had not been passed and signed into law yet. Moreover, the Union's deferred compensation proposal was not made because the Union anticipated SB 1049's reduction in retirement benefits. At the time, the Union was unfamiliar with the details of the bill, but was aware that, if the bill became law, it would have the immediate effect of reducing retirement benefits for employees in both bargaining units.

21. At 10:28 a.m. on May 8, 2019, Suzanne Linneen, the City's Finance Director, sent an email to Rachael Reyes, the City's Payroll Manager, and Colling. The subject of the email was "deferred comp match." The email stated,

> "When you have a chance can you do some research on how deferred comp matches are handled? I know we have done this before, but I don't recall, and this is coming up again.
>
> "So do you pay on the match
> "SS, PERS and other costs?
>
> "If we can get the regs on that, it would be great."

22. On May 23, 2019, SB 1049 was passed by the Senate on a vote of 16 ayes and 12 nays. On May 28, 2019, SB 1049 was introduced and read in the House. On May 30, 2019, SB 1049 was passed by the House on a vote of 31 ayes and 29 nays.

23. On May 31, 2019, the parties formally TA'd updated terms for the 2019-2022 BC bargaining unit CBA, after a total of four or five negotiation sessions. Some of the changes included a 2.5 percent COLA pay increase the first year (2019) of the CBA, a 2.5 percent COLA increase and a 2 percent wage adjustment the second (2020), and a 3 percent COLA increase the third (2021). The parties did not agree to any deferred compensation benefit for the BCs.

24. On June 3, 2019, the Senate President signed SB 1049. On June 4, 2019, the House Speaker signed SB 1049. On June 11, 2019, Governor Kate Brown signed SB 1049 into law.

25. On June 14, 2019, the Union ratified the TA'd 2019-2022 BC bargaining unit CBA. Later, on June 18, 2019, City Council approved and adopted the same.

The Union's Initial Demand to Bargain

26. On June 24, 2019, Keim (who was still the Union's president at the time) sent a letter to Gandee, Chief Downey, and Colling via email. In the letter, Keim wrote,

> "As you are no doubt aware, the Legislature recently passed SB 1049 and Governor Brown signed the bill on June 11, 2019. Under that legislation, public employers who participate in PERS and OPSRP will be required to take various actions to comply with the changes approved through the bill, causing a significant reduction in the retirement income for bargaining unit members. This change in the status quo involves–at a minimum–the mandatory subject of direct monetary compensation.
>
> "Please consider this letter the Union's demand to bargain for both Rank & File and BC bargaining units over the impact of the changes to employee compensation and retirement benefits caused by SB 1049, as authorized under ORS 243.698, ORS 243.702, and CBA Articles 2.2 and 24.2.[7] We understand that certain portions of the legislation will not become effective until 2020, but the Union wants to ensure that a timely demand to bargain is made and that the process begins early enough to give the parties ample time to address these changes before the changes become effective. Please let us know what dates work for the City to begin negotiations."

27. Article 2 of both of the BC bargaining unit CBAs concerns "Existing Conditions." Article 2.2 of the BC CBAs specifically states,

> "Changes in existing conditions of employment adopted by the City of Hillsboro relating to wages, hours and working conditions, except those covered by Article 5 hereof, shall be subject to mutual agreement of the parties before becoming effective. Such mutual agreement shall be expressed in writing and signed by the parties to this Contract."

28. Article 24 of both the BC bargaining unit CBAs states, in its entirety,

> "24.1 The City agrees to remain a member of Public Employees Retirement System (PERS) of the State of Oregon, and its successor.
>
> "24.2 The City and the Union agree to implement Resolution 1836 that was adopted by the Hillsboro City Council on December 6, 1994. Both parties agree that if any changes or mandated court order affect the resolution or the benefits union members receive from this resolution, then negotiations may be reopened by either party to deal with the effect of those changes.
>
> "The City hereby agrees to make available, to the PERS eligible City employees who are members of the bargaining unit, the Public Employees Retirement System (PERS) sick leave conversion program."

[7]ORS 243.698 outlines the expedited midterm bargaining process. ORS 243.702 concerns the renegotiations of invalid provisions in agreements and refers to ORS 243.698. We return to these statutes below.

29. In the Union's June 24, 2019, demand to bargain letter, and afterward, the Union never specifically informed the City that it was formally "reopening" or sought to "reopen" Article 24 of the BC bargaining unit's CBA. However, historically, the Union has never used such terminology or other special language when it has demanded to bargain. Instead, the Union has always issued demands to bargain that resemble the Union's June 24, 2019, letter.

30. In a June 25, 2019, email, Gandee (again, the City's Risk Manager) responded to the Union's demand to bargain, writing, in part,

> "Thank you for your email regarding SB 1049. As you noted, the City has also been watching the movement of this bill. While we're happy to sit down and discuss the contents of the bill itself, we are not prepared to enter into negotiations. We don't yet have a full understanding of the bill's impacts on the City, the nature and scope of any bargaining obligations, and we expect a certain amount of evolution over the near future. Until we have a more thorough and certain understanding around the impacts and what this means for the City, we wouldn't be prepared to respond in a prudent and meaningful way.
>
> "As I said, we're happy to meet and discuss IAFF's perspective and interests regarding the bill at this point but we're not yet at a place to commit to interim bargaining."

31. On June 27, 2019, Keim replied to Gandee's email, essentially reasserting that bargaining the impacts of SB 1049 was mandatory.

32. On July 4, 2019, the parties signed the BC bargaining unit's successor CBA.

33. On July 25, 2019, Keim sent Gandee another email. That email, which was also sent to Colling (the Human Resources Director), stated, in part, "It's been four weeks and we have yet to receive a response to our demand to bargain. We would like to get interim bargaining dates scheduled."

34. On August 1, 2019, Colling sent an email back to Keim. Her email stated,

> "Thank you for checking in on the status of the demand to bargain. My apologies for the delay on our end. The City is still uncertain, and perhaps in disagreement, over whether we are obligated to bargain over the impact of passage of SB 1049. This may be resolved through a Declaratory Ruling by ERB or potential legal challenges to SB 1049. As such we believe it would be mutually beneficial to defer any impact bargaining that may be required under PECBA until we have more information regarding the legality of SB 1049, as well as more certainty regarding impact bargaining obligations.[8]
>
> "If you and the Local are open to this I can send a draft agreement for review and discussion."

[8] "PECBA" is an acronym for Oregon's Public Employee Collective Bargaining Act.

35. After the August 1, 2019, email, the parties exchanged a number of other emails about jointly filing for a declaratory ruling with the Board regarding whether the City would have to bargain the impact of SB 1049. The parties eventually determined that, instead, they would negotiate a "deferral agreement." The negotiations concerning that deferral agreement were mostly conducted by Keim and Colling over the telephone and through email. Ultimately, the parties signed a written deferral agreement on December 19, 2019.

36. The first half of the deferral agreement consisted of the following "Recitals":

"• The Association has demanded that the City bargain over the impact of passage of SB 1049.

"• The City is in the process of determining whether it has an obligation to impact bargain over the passage of SB 1049.

"• January 1, 2020 is the effective date of Section 35 of SB 1049 which relates to the rehire of PERS retirees. July 1, 2020 is the effective date for Section 1 of SB 1049 which relates to employee pension stability contributions.

"• Litigation challenging the legality of SB 1049 has been filed with the Oregon Supreme Court.

"• The parties also understand that the Employment Relations Board (ERB) may be requested to issue a Declaratory Ruling addressing whether the passage of SB 1049 triggers impact bargaining obligations.

"• Given the delayed effective date of the key provisions of SB 1049 uncertainty regarding the potential legal challenges to SB 1049 and disagreement over whether the City is obligated to bargain over the impact of passage of SB 1049, which may be resolved through a Declaratory Ruling, the parties agree that it would be mutually beneficial to defer any impact bargaining that may be required under the Public Employee Collective Bargaining Act (PECBA)."

The second half of the deferral agreement consisted of numbered "Sections," including:

"1. The parties agree to defer any impact bargaining, if there is an impact bargaining obligation, to successor contract negotiations for the Rank & File bargaining unit and for up to thirty (30) calendar days, following ratification of the Rank & File successor contract, for the Battalion Chiefs bargaining unit, as provided herein.

"2. Inasmuch as the Oregon Supreme Court may not issue its decision regarding whether SB 1049 is legal prior to June 30, 2020 or in sufficient time to provide clear guidance to the parties during successor bargaining, it is understood that the City and the Association may make proposals

addressing the impact of SB 1049 conditioned upon the Court determining that SB 1049 is illegal.

"3. The City will not assert that the Association waived its right to impact bargain, if any, or failed to timely demand bargaining by entering into this Agreement.

"4. The Association reserves its right to renew its demand to bargain the impact of passage of SB 1049 on the Battalion Chiefs bargaining unit by issuing written notice to the City's Director of Human Resources within thirty (30) calendar days after the ratification of the Rank and File successor contract.

"5. If the City refuses to bargain, the Association reserves its right to take legal action, including but not limited to, the filing of an unfair labor practice complaint with the ERB.

"6. The parties may by written agreement agree to extent the period for deferral of any bargaining obligation which may be owed under PECBA.

"7. Nothing in this Agreement will be construed to be an admission that the City owes a bargaining obligation. The City reserves its right to claim that it has no obligation to bargain the impact of passage of SB 1049 in whole or part during bargaining for both bargaining units. Likewise, nothing in this Agreement is intended to waive any right the Association has under PECBA to demand bargaining or file an unfair labor practice charge challenging any refusal to bargain by the City in accordance with the PECBA."

RAF Successor Negotiations

37. In April 2020, the parties started successor contract negotiations for the RAF bargaining unit. During these negotiations, the City's bargaining team once again consisted of Chief Downing (acting as spokesperson), Colling, Gandee, and Nelson. Meanwhile, the Union's bargaining team consisted of Rice, Vetsch (a BC and, at that time, the Union's vice president), Sam Keeran, and Jeremy Menear.

38. The parties conducted additional bargaining sessions regarding the RAF bargaining unit's successor CBA on May 14, 20, and 27; June 5; July 7, 9, and 15; and August 13, 2020. During those sessions, whenever a deferred compensation match or retiree "work back" language was discussed, those topics were explicitly linked with addressing the impacts of SB 1049. In essence, a work back program would allow recently retired employees to return to work for a limited window of time.

39. On August 6, 2020, while the RAF bargaining unit's successor CBA was still being negotiated, the Oregon Supreme Court upheld the lawfulness of SB 1049.[9]

[9] *James v. State of Oregon*, 366 Or 732, 471 P3d 93 (2020).

40. On August 13, 2020, the parties TA'd the RAF bargaining unit's successor CBA. Among other things, the parties agreed to a 2 percent COLA pay increase and a 1 percent deferred compensation match the first year of the CBA (FY 20-21); a 2 percent COLA pay increase and a 2 percent deferred compensation match the second year of the CBA (FY 21-22); and a 2 percent COLA, 1.5 percent wage increase, and a 2 percent deferred compensation match the third year of the CBA (FY 22-23).

41. During negotiations for the RAF bargaining unit's 2020-2023 CBA, the City's bargaining team expressed that if proposed deferred compensation was increased, then a proposed COLA would be decreased and vice versa. During the same negotiations, the City's team never told the Union's team that whatever deferred compensation the City negotiated with the RAF unit would automatically also be applied later to the BC unit.

The Union's Renewed Demand to Bargain

42. On September 18, 2020, Rice sent an email to Chief Downey and others. It stated,

> "We are writing to demand to bargain the impact of SB 1049 on compensation for the BCs, pursuant to the deferral agreement we signed with the City a few months ago. I have included a signed copy of that deferral agreement. Please let us know when you are available to begin bargaining the impact of SB 1049 on the BCs.
>
> "As you know, we have already reached an agreement on the rank and file to include deferred comp and work back as a result of the impact of SB 1049. We are seeking the same kind of remedy for the four BCs, as the rank and file to satisfy the MOU."

Where Rice referenced an MOU at the end of this email, he was actually referring to the parties' deferral agreement.

43. On October 6, 2020, Colling sent a memorandum to Hillsboro City Manager Robby Hammond recommending that the City Council vote to approve the ratification of the agreed-upon 2020-2023 RAF bargaining unit CBA. In the letter's notes describing the negotiations, Colling wrote that the agreement reached concerning deferred compensation and work back "satisfies any bargaining obligation the parties may have with regard to SB 1049."

44. Later in the day on October 6, 2020, City Council approved and adopted the negotiated 2020-2023 RAF bargaining unit CBA.

45. On October 16, 2020, the parties had a short "labor/management meeting." In the City's view, the purpose of the meeting was "to discuss" the Union's demand to bargain the impacts of SB 1049 on the BC unit and the deferral agreement. In the Union's view, the same meeting was scheduled in order to bargain the impacts of SB 1049 in accordance with the deferral agreement. During the meeting, the City was represented by Chief Downing, Colling, and Gandee. The Union was represented by Rice, Vetsch, and Washam. Keim did not attend.

46. At the beginning of the October 16, 2020, meeting, Colling (the HR Director) took the lead for the City and read aloud from a "Discussion Points" memorandum (written by the City's attorney, Kathy Peck, in advance of the meeting). While reading the memorandum, Colling explained that the City did not believe that it had to bargain deferred compensation "midterm" (*i.e.*, outside of regular successor contract negotiations) or the impacts of SB 1049, and would not do so. Colling also stated, however, that the City was willing to bargain retiree work back language for the BCs midterm. After a brief caucus, the Union stated that it disagreed with the City's position, that the City did have an obligation to bargain, and that the signed deferral agreement also stated that the parties would bargain the impacts of SB 1049. At the time, the Union was confused and surprised by the City's refusal to negotiate the impact of SB 1049, given the agreement that had just been reached for the RAF unit. At some other point in the meeting, the City explained that it was distinguishing between the two benefits because deferred compensation had previously been proposed in the successor negotiations for the BC bargaining unit's 2019-2022 CBA, but work back was not discussed during the same. At the end of the meeting, which concluded without any agreement, Rice (speaking for the Union) stated that the Union's legal counsel would proceed to the next steps.

47. On November 12, 2020, the parties signed the RAF bargaining unit's 2020-2023 CBA, as well as a memorandum of agreement establishing a retiree work back program for the same unit. It was the first time that any group of City employees was offered deferred compensation.

48. On December 15, 2020, the Union filed the instant unfair labor practice complaint with the Board.

49. As of the May 18, 2021, hearing for this case, the Union has not filed a contract grievance asserting that Article 24 of the BC bargaining unit CBA has been violated. Since SB 1049 became law, the City has not altered how it pays or what percentage it pays PERS. Under SB 1049, less money is ultimately going into BCs' IAPs currently, amounting to a reduction in retirement benefits for a time.

CONCLUSIONS OF LAW

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

2. The City did not violate ORS 243.672(1)(e) by refusing to bargain with the Union over the impact of SB 1049 on BCs.

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 violates ORS 243.672(1)(e) when it flatly refuses to bargain over a mandatory subject of bargaining when it is otherwise obligated to bargain over that subject.

Here, the Union first alleges that the City violated ORS 243.672(1)(e) when it refused, during the term of the parties' CBA, to bargain over the impact of SB 1049. Specifically, the Union asserts that, because SB 1049 affected the retirement benefits of Union-represented employees, the City was required to bargain new retirement benefits different from those negotiated in the

parties' existing CBA. Put another way, the Union essentially argues that the City was required to reopen the parties' CBA and bargain over new retirement benefits because SB 1049 affected those benefits. In advancing that argument, the Union relies on *Multnomah County v. Multnomah County Corrections Deputy Association*, Case No. UP-003-19, *recons*, *aff'd*, 317 Or App 89 (2022). For the following reasons, we find that case inapposite.

In *Multnomah County*, the Board held that a public employer violates ORS 243.672(1)(e) when it refuses to bargain, during the term of a contract, over a mandatory subject of bargaining *that is not specifically covered by the parties' existing agreement* (and the union did not waive its statutory right to bargain). *See Multnomah County*, UP-003-19, *recons*, at 3. In this case, the Union relies on that holding in arguing that the City was required to bargain, during the term of the parties' contract, over retirement benefits. The difficulty with the Union's argument is that the subject of retirement benefits *is specifically covered by the parties' contract*, meaning that *Multnomah County* simply does not apply here. Under *Multnomah County*, and the precedent that it relies on, the obligation to bargain over mandatory subjects of bargaining during the term of the contract does not include an obligation to reopen or bargain over subjects expressly covered by the contract. Therefore, *Multnomah County* does not provide a basis for finding that the City violated ORS 243.672(1)(e) in this case.

The Union next argues that the City was required to reopen the contract and negotiate retirement benefits under ORS 243.702. ORS 243.702(1) states,

> "In the event any words or sections of a collective bargaining agreement are declared to be invalid by any court of competent jurisdiction, by ruling by the Employment Relations Board, by statute or constitutional amendment or by inability of the employer or the employees to perform to the terms of the agreement, then upon request by either party the invalid words or sections of the collective bargaining agreement shall be reopened for negotiation."[10]

A party that refuses to reopen invalid words or sections of a collective bargaining agreement within the meaning of ORS 243.702 violates ORS 243.672(1)(e). *Oregon School Employees Association v. Baker School District 5J*, Case No. UP-81-89 at 14-15, 12 PECBR 474, 488-89 (1990). Here, the Union asserts that, because of SB 1049, the City was unable "to perform to the terms of the agreement" and was therefore obligated to reopen the retirement benefits under the parties' CBA. The record does not establish, however, that the City is no longer able to perform its PERS obligation under the contract. To the contrary, the record shows that, at all times material, the City

[10]The other part of the statute, ORS 243.702(2), states, "Renegotiation of a collective bargaining agreement pursuant to this section is subject to ORS 243.698." ORS 243.698 outlines PECBA's expedited midterm bargaining process, which generally cannot exceed 90 days. Expedited bargaining under ORS 243.698 is an exception to the regular bargaining process, and is limited to the "special circumstances" the legislature sought to address—*i.e.*, where the employer wishes to make a midterm change in a condition of employment that is not already covered by the existing contract. *See Laborers' International Union of North America, Local 483 v. City of Portland, Bureau of Human Resources*, Case No. UP-027-12 at 16, 25 PECBR 801, 825 (2013) (citing *In the Matter of the Joint Petition for Declaratory Ruling filed by Medford School District 549C and Oregon School Employees Association Chapter 15*, Case No. DR-2-04 at 8-9, 20 PECBR 721, 727-28 (2004)).

has contributed 6 percent of each BC's paycheck to PERS on the BC's behalf. Even after SB 1049 went into effect, the City continued to pay the exact same percentage to PERS. Stated differently, the Union has not established that the City, because of SB 1049, was unable to perform its contractual obligation to continue contributing 6 percent of each BC's paycheck to PERS on the BC's behalf. Accordingly, ORS 243.702 is inapplicable to this case, and the City did not violate ORS 243.672(1)(e) by refusing to reopen and renegotiate retirement benefits as demanded by the Union.[11]

3. The City did not make a unilateral change to the status quo in violation of ORS 243.672(1)(e).

It is a *per se* violation of ORS 243.672(1)(e) for a public employer to unilaterally change 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) (in the absence of "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."). To determine whether an employer has made an unlawful unilateral change, we often first identify the status quo and then determine if the employer changed it. If the employer did change the status quo, we then decide whether the change concerns a mandatory subject of bargaining or has impacts on mandatory bargaining subjects. If the change concerns a mandatory subject, we determine if the employer completed its bargaining obligation. If, upon completion of this analysis, we conclude that the employer was required to bargain a change but failed to do so, we then consider any affirmative defenses raised by the employer. *American Federation of State, County, and Municipal Employees, Local 189 v. City of Portland (Portland Police Bureau)*, Case No. UP-049-08 at 25, 24 PECBR 612, 636 (2012) (citing *Lebanon Education Association/OEA v. Lebanon Community School District*, UP-4-06 at 38, 22 PECBR 323, 360 (2008)). However, we need not apply our analysis in a mechanical manner, and we may proceed to a particular step if that step will be dispositive of the issue. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09 at 32, 24 PECBR 730, 761 (2012).

Here, the Union asserts that the City was required to bargain over the impact that SB 1049

[11]In the Recommended Order, the ALJ also rejected the Union's argument that Article 24.2 of the parties' agreement contained an express reopener provision and, in doing so, noted that the Union had not (a) claimed a (1)(g) violation; (b) referenced Article 24.2 or Resolution 1836 in any of its pleadings; or (c) exhausted the contractual grievance procedure for an alleged contract violation. On Board review, the Union asserts that the ALJ misunderstood the nature of its argument. Specifically, the Union states that its references to Article 24.2 and Resolution 1836 are rooted in its claim that the City was unable to perform its obligations under the contract. For the reasons set forth above, we conclude that the Union has not established that *the City* was unable to perform its obligations with respect to its PERS contributions. To the extent that the Union maintains an argument that the City's actions violated a contractual agreement to reopen the contract, we decline to address that argument because the Union did not plead or brief a violation of ORS 243.672(1)(g), or demonstrate that it did not need to exhaust the parties' grievance procedure before bringing any such unfair labor practice claim before the Board.

Relatedly, the ALJ also rejected the Union's suggestion that the parties' December 19, 2019, deferral agreement required the City to bargain about the impact of SB 1049, noting that the express terms of that agreement disavowed any bargaining obligation. We agree with the ALJ's analysis, and the Union has not pursued that argument on Board review.

had on BC retirement benefits. There is no dispute that the subject of retirement benefits is mandatory for bargaining. There is also no dispute that the City refused the Union's demand to bargain the impacts of SB 1049. The dispositive question, then, is whether the City changed the status quo with respect to retirement benefits. On that question, there also is really no dispute, as the Union acknowledges that the City made no change to its PERS contributions. Rather, the Union argues that SB 1049 made a change to how PERS allocates the City's contributions, that such a change affected its members' benefits, and that, therefore, the City was required to bargain over the impacts of that change.[12]

The Union's arguments on this point misunderstand the unilateral change doctrine, which concerns *an employer's* change to the status quo, not any changes implemented by outside entities (like PERS) that might affect mandatory subjects of bargaining. Where, as here, the employer does not change the status quo, and continues to perform in adherence to the status quo (by continuing its 6 percent PERS contributions), the unilateral change doctrine simply does not apply. There being no evidence that the City changed the status quo, we dismiss the Union's unilateral change allegation.

4. The City did not engage in surface bargaining in violation of ORS 243.672(1)(e).

In cases alleging a violation of ORS 243.672(1)(e) by "surface bargaining," we assess whether a party merely went through the motions of collective bargaining with no sincere desire or real intent of reaching agreement. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85 at 37-43, 8 PECBR 8160, 8196-202 (1985). For surface bargaining claims, the Board examines the totality of the respondent's conduct during negotiations. Typically, the factors we consider include (1) whether dilatory or overly hasty tactics were used, (2) the content of a party's proposals, (3) the behavior of a party's negotiator, (4) the nature and number of concessions or counterproposals made, (5) whether a party failed to explain or reveal its bargaining positions, and (6) the course of negotiations overall. However, we also consider other factors that might be relevant in any given case. *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-77-11 at 12, 25 PECBR 506, 517 (2013); *Oregon School Employees Association v. Clatskanie School District*, Case No. UP-9-04 at 5-6, 21 PECBR 599, 603-04 (2007), *aff'd without opinion,* 219 Or App 546, 183 P3d 246 (2008). Notably, ORS 243.650(4) specifically provides that the PECBA obligation to meet and negotiate "does not compel either party to agree to a proposal or require the making of a concession."

Here, the Union asserts that the City engaged in bad faith or surface bargaining over the reduction of retirement benefits for the BC bargaining unit when the City indicated that it was willing to discuss work back but not any additional compensation, such as deferred compensation. According to the Union, negotiating any kind of work back agreement would not have remedied the loss in retirement contributions to union members caused by SB 1049. The Union also contends that the City knew that refusing to provide the same benefits to the BC unit as had been agreed to for the RAF unit would be viewed as unacceptable by the Union.

[12]The Union recognizes that the City had no role in the change caused by SB 1049.

Here, as set forth above, the City informed the Union that the City believed that it had no obligation to engage in interim bargaining on the issue at all, and then it declined to bargain. Under those circumstances, a surface bargaining charge is inapposite. Accordingly, the Union did not establish that the City engaged in unlawful surface bargaining.

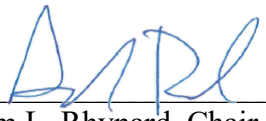
Conclusion

For the reasons outlined above, the City did not violate ORS 243.672(1)(e) by refusing to bargain, unilaterally changing the status quo, or engaging in surface bargaining with the Union over the impact of SB 1049 on BCs.

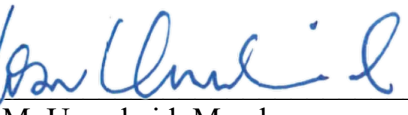
ORDER

The complaint is dismissed.

DATED: May 4, 2022.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-015-21

(UNIT CLARIFICATION)

WASHINGTON COUNTY SHERIFF'S OFFICE, Petitioner, v. WASHINGTON COUNTY POLICE OFFICER'S ASSOCIATION, Respondent.	)	ORDER CLARIFYING PUBLIC EMPLOYEE STATUS

On September 24, 2021, Washington County Sheriff's Office (WCSO) filed a unit clarification petition under OAR 115-025-0050(6) to exclude the position of Senior Criminal Records Specialist from the existing bargaining unit represented by Washington County Police Officer's Association (Association) on the ground that the position is supervisory.

On September 27, 2021, the Board's Election Coordinator caused a notice of the petition to be posted at WCSO by September 30, 2021. OAR 115-025-0060. Pursuant to the terms of the notice posting and OAR 115-025-0063(6), objections to the unit clarification were due within 14 days of the date of the notice posting (*i.e.*, by October 14, 2021).

On October 5, 2021, the Association filed timely objections to the petition. On October 21, 2021, WCSO filed an amended petition to also exclude the position of Investigative Support Specialist - Senior from the bargaining unit, on the ground that the position is also supervisory. The Association also objected to that exclusion, and the matter was set for hearing.

On May 4, 2022, after three days of hearing, the Association withdrew its objections and requested that its certification as the exclusive representative be amended to reflect that the objected-to positions are excluded from the bargaining unit.

ORDER

The amended petition is granted, and the bargaining unit represented by the Association is clarified to exclude the positions of Senior Criminal Records Specialist and Investigative Support Specialist – Senior.

DATED: May 6, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DR-001-22

(DECLARATORY RULING)

IN THE MATTER OF THE PETITION FOR A DECLARATORY RULING JOINTLY FILED BY PORTLAND FIRE FIGHTERS' ASSOCIATION, LOCAL 43, IAFF AND CITY OF PORTLAND.	)	DECLARATORY RULING

Aruna Masih, Attorney at Law, Bennett, Hartman, Morris & Kaplan LLP, Portland, Oregon, represented Petitioner Portland Fire Fighters' Association, Local 43, IAFF.

Fallon Niedrist, Deputy City Attorney, City Attorney's Office, Portland, Oregon, represented Petitioner City of Portland.

On March 11, 2022, the Portland Fire Fighters' Association, Local 43, IAFF (Association) and the City of Portland (City) filed a joint petition for a declaratory ruling pursuant to ORS 183.410 and OAR 137-002-0010. The petitioners requested a declaratory ruling to determine whether a proposed sublease agreement between the City and the Portland Fire Fighters Charitable Fund, Inc. (Fund), a 501(c)(3) non-profit affiliated with the Association, would violate ORS 243.672(1)(b) of the Public Employee Collective Bargaining Act (PECBA).

On March 24, 2022, this Board requested that the petitioners stipulate to answers concerning questions posed by the Board, before the Board's initial determination on whether to grant the petition, and offered that petitioners could submit their responses as stipulated alternative facts under OAR 137-002-0040(2). On March 29, 2022, the petitioners submitted joint responses to this Board's questions, confirming that we could rely on the parties' answers as stipulated alternative facts in deciding the question presented in the petition, if the petition was granted. That same day, this Board notified petitioners that we were exercising our discretion to grant the petition. On April 7, 2022, the City submitted a prehearing statement in this matter.

On April 18, 2022, this Board held a declaratory ruling hearing. Both parties presented oral arguments.

FINDINGS OF FACT[1]

Background

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

2. Portland Fire & Rescue (PF&R) is a bureau within the City, and is the largest fire and emergency services provider in the State of Oregon, serving Portland and the regional metropolitan area. PF&R provides critical public safety services including fire prevention, public education, and emergency response to fire, medical, and other urgent incidents.

3. The Association is a "labor organization" within the meaning of ORS 243.650(13). The Association is the exclusive bargaining representative of a bargaining unit of sworn personnel working in PF&R.

4. The current executive board of the Association is as follows: Isaac McLennan, President; Travis Chipman, Secretary/Treasurer; Terry Foster, Vice President; and Rob Garrison, Vice President.

5. The Association owns its headquarters located at 330 South Curry Street, Portland, Oregon. The Association uses the top floor of the building for its operations and leases the bottom floor to the Fund.

6. The Fund is a 501(c)(3) nonprofit organization whose mission is to: (1) assist the Portland Fire Bureau's Toy and Joy Makers; (2) assist burn victims and support the Oregon Burn Center and various local medical centers; (3) assist families that have lost homes and belongings in fires; (4) assist the Muscular Dystrophy Association; (5) sponsor and conduct activities to further support charitable enterprises; and (6) sponsor and conduct activities that lend physical or emotional support to firefighters, their families, and the community in their time of need due to illness, death, disability, catastrophic event, or community crisis.

7. The Fund does not have as one of its purposes representing the Association bargaining unit employees or any other employees in their employment relations with PF&R, or any other public employer.

[1]The Findings of Fact are based on the parties' joint statement of facts and stipulated alternative facts.

8. Serving on the Fund's Board of Directors are Isaac McLennan, President; Travis Chipman, Secretary/Treasurer; Terry Foster, Vice President; and Rob Garrison, Vice President.[2]

9. The members of the Fund Board of Directors receive no financial compensation for their service on the Board and serve on a purely voluntary basis. Fund Directors, in their capacity as directors, are charged with following the Articles of Incorporation and charitable purposes outlined in those articles.

10. Fund Directors, in their capacity as directors for the charitable organization, do not engage in any contract administration activities for City of Portland represented employees, or for any other employees represented by the Association.

The Proposed Sublease Between the Fund and PF&R

11. PF&R is currently expanding its Portland Street Response (PSR) and Community Health Assess and Treat (CHAT) programs, which includes adding 86 new positions. To accommodate this expansion, PF&R needs to lease additional space for the new employees and additional operations.

12. The Association has proposed that the City sublease space from the Fund on the bottom floor of the 330 South Curry Street Building. The proposed sublease would be "at a competitive rate of $20 per square foot[,]" and would include access to a health and wellness room, parking spaces for 50 employees, and proximity to the freeways.

13. If the sublease is executed, 95 percent of the Community Health Division (PSR & CHAT) will be located at the Fund-leased space, which will be used as a main hub for the Community Health Division. Other satellite offices will be used in the southeast and northwest areas of Portland. Five percent of the administrative staff for the Division will remain at PF&R's administrative building in downtown Portland.

14. The currently proposed sublease is for three years. The proposed monthly rent for year one of the sublease is $8,800 per month for approximately 6,300 square feet, including use of commons areas and egress areas and parking spots. The proposed monthly rent for year two of the sublease is $9,000 per month. The proposed monthly rent for year three of the sublease is $9,200 per month. The proposed sublease also allows the Fund, on each anniversary following the commencement of the sublease, to assess additional rent based on the Consumer Price Index (CPI). The proposed sublease permits the City to exercise a one-time termination option in the event that funding for the PSR program is discontinued.

[2]Approximately seventy percent of the Association Executive Board is not part of the Fund Board.

15. Water, sewer, and electricity are included in the monthly sublease rate. The Fund, as landlord, retains the right to charge a reasonable rate for excessive use of utilities. Internet, janitorial services, and other utilities are excluded. The proposed sublease also permits the Fund to assess operating expense adjustments as additional rent, which include costs of operating, maintaining, and repairing the building as determined by standard real estate accounting practice, including, but not limited to: all water and sewer charges; the cost of natural gas and electricity provided to the building; janitorial and cleaning supplies and services; administration costs and management fees; superintendent fees; security services, if any; insurance premiums; licenses; and permits for the operation and maintenance of the building and all its component elements and mechanical systems; ordinary and emergency repairs and maintenance; the annual amortized capital improvement cost of any capital improvements to the building required by any governmental authority or those that have a reasonable probability of improving the efficiency of the building; and all assessments under recorded covenants or master plans and/or by owners' associations.

16. Currently, the City has no intentions to make improvements to the property. Improvements require the Fund's written approval, which it may withhold in its sole discretion. The Fund has indicated it would authorize the City to create gender neutral bathrooms if it so chose.

17. On behalf of the City, Pauline Gobe, a Planning and Portfolio Manager for the City, is responsible for negotiating and administering the sublease, with input and advice from the City Attorney's Office and PF&R management. Additionally, PF&R's business operations personnel will be responsible for paying monies due under the sublease. Gobe does not participate in any respect to the collective bargaining agreement between the Association and PF&R. PF&R management, including business operations personnel, are involved in collective bargaining and dispute resolution on the parties' collective bargaining agreement. The City Attorney's Office likewise is indirectly involved in collective bargaining and directly involved in dispute resolution; however, typically, different attorneys provide labor advice as compared to operational advice (such as negotiating this commercial sublease).

18. On behalf of the Fund, the sublease and all aspects of the sublease will be negotiated and administered by a commercial leasing company: Craig Gilbert, Principal Broker Windermere / Community Commercial Realty. Fund Director, Travis Chipman, has been coordinating all aspects of the sublease through Craig Gilbert. Chipman is a member of the Association bargaining team and grievance committee. These groups include members who do not serve in any capacity for the Fund.[3]

[3]The parties stipulated that "[t]hese groups include members who do not serve in any capacity" for the Fund. We understand that by "these groups," the parties were referring to the bargaining team and grievance committee.

19. The Fund will remit 95 percent of the monthly lease or rental amount to the Association just as it would if it subleased the space to any other entity.

20. The Association admits that it will receive an indirect financial benefit or security from the proposed sublease but asserts that the indirect financial benefit or security would not impact its advocacy and zealous representation of bargaining unit members before the City in any manner.

21. The parties agree that the location of the property would serve the public interest and purpose and the terms of the sublease will be subject to approval by the City Council. However, the parties, wishing to avoid any appearance of impropriety and to assure that entering into such a sublease agreement would not violate their respective obligations under the PECBA, jointly submitted a petition for declaratory relief to the Board before any agreement is submitted to the City Council for approval.

QUESTION PRESENTED BY PETITIONERS

Would PF&R subleasing a space from the Fund, a 501(c)(3) nonprofit affiliated with the Association, violate ORS 243.672(1)(b), where the Fund has overlapping Board members with the Association, and leases the space in question from the Association, in a building owned by the Association?

DISCUSSION

ORS 243.672(1)(b) makes it an unfair labor practice for a public employer to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." As the Board has explained, an unlawful assistance charge under ORS 243.672(1)(b) "turns on the interplay of three fundamental PECBA objectives: 1) the guarantee of employee freedom of choice in the exercise of organizational and representational rights; 2) the promotion of employer-union cooperation; and 3) the protection of employee organizations from employer interference or domination." *Bates v. Portland Federation of Teachers and Classified Employees and Portland School District 1J*, Case No. UP-6-87 at 11, 11 PECBR 563, 573, *recons*, 11 PECBR 629 (1989), *aff'd*, 106 Or App 221, 807 P2d 306, *rev dismissed*, 311 Or 426, 812 P2d 826 (1991). Because the difference between lawful cooperation with an employee organization and unlawful conduct is "essentially a matter of degree, the question of whether an employer's conduct has exceeded statutory limits requires an examination of the totality of circumstances surrounding the employer's actions." *Id*. "In the final analysis, the difference between lawful and unlawful employer aid to a labor organization will turn on how, and the extent to which, the employer conduct affects employees' exercise of PECBA rights." *Id*. at 574.

The concerns of ORS 243.672(1)(b), however, are directed at unlawful employer domination, interference, or assistance with respect to an *employee organization*. Therefore, our typical first step in a (1)(b) claim is to determine whether the entity at issue is an "employee

organization," which we have held is equivalent to "labor organization," as defined in ORS 243.650(13). *See Eagle Point Education Association/OEA/NEA v. Jackson County School District No. 9*, Case No. UP-61-09 at 30, 24 PECBR 943, 974 (2012). Under that provision, a "labor organization" is "any organization that has as one of its purposes representing employees in their employment relations with public employers." ORS 243.650(13). ORS 243.650(7)(a) provides that "[e]mployment relations" includes "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." Additionally, ORS 243.650(7)(f) provides that for "employees covered by ORS 243.736 * * *, '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."[4]

With that framework, to determine whether the City entering the proposed sublease would violate ORS 243.672(1)(b), we must first determine whether the Fund, the other party to the sublease, is a "labor organization" within the meaning of ORS 243.650(13).

Here, the parties have stipulated that the Fund is a 501(c)(3) nonprofit organization whose mission is to:

> "(1) assist the Portland Fire Bureau's Toy and Joy Makers; (2) assist burn victims and support the Oregon Burn Center and various local medical centers; (3) assist families that have lost homes and belongings in fires; (4) assist the Muscular Dystrophy Association; (5) sponsor and conduct activities to further support charitable enterprises; and (6) sponsor and conduct activities that lend physical or emotional support to firefighters, their families, and the community in their time of need due to illness, death, disability, catastrophic event, or community crisis."

The parties further stipulated that the Fund "*does not* have as one of its purposes representing [the Association] bargaining unit employees or any other employees in their employment relations with PF&R or any other public employer." (Emphasis added.) Indeed, Fund Directors, in their capacity as directors for the charitable organization, do not engage in any contract administration activities for City represented employees, or for any other employees represented by the Association. Although Chipman is a Fund director and a member of the Association bargaining team and grievance committee, Chipman is one of four Fund directors; the stipulated facts do not indicate that the remaining three directors participate directly in any collective bargaining activities. Further, there are no facts that suggest that the Fund was created to address, or has ever addressed, matters of employment relations with the City, or any other public employer.

[4]Firefighters are covered by ORS 243.736.

Additionally, there are no facts indicating that the proposed sublease is a pretense or subterfuge to facilitate the movement of funds from the City to the Association through the Fund in a way that would suggest that the Fund is a sham entity or shadow organization. To the contrary, the facts stipulated by the parties indicate that PF&R requires space for an expansion of its PSR and CHAT programs, and the proposed location meets its needs at a competitive rate, subject to annual increases as determined by standard real estate accounting practices. The Fund is using a commercial leasing company, Windermere / Community Commercial Realty, to negotiate and administer "all aspects of the sublease[.]"[5] In short, there are no facts suggesting that the sublease is anything other than an arms-length commercial business transaction between the City and the Fund. Likewise, the Fund is an established charitable organization with its own defined purpose, Board of Directors, and Articles of Incorporation. Although some of the Association's executive officers also serve as Fund Directors, these positions require directors to follow the Fund's Articles of Incorporation and charitable purposes outlined in those articles. Furthermore, the sublease will be negotiated and administered by the City and by a commercial leasing company retained by the Fund, and not by the Association, and the same percentage of funds from the sublease will be remitted to the Association, regardless of the entity leasing the space.

For the reasons set forth above, based on the facts set forth in the petition and the alternative stipulated facts, we conclude that the Fund is not engaged in matters of employment relations and is, therefore, not a "labor organization" as defined by PECBA. Because the actions at issue here concern the City and a non-labor organization, the proscriptions under ORS 243.672(1)(b) do not apply, and it is unnecessary to determine whether those actions would otherwise amount to unlawful domination, interference, or assistance within the meaning of that statute. *Jackson County School District No. 9*, UP-61-09 at 29-30, 24 PECBR 971-972 (a (1)(b) analysis is a two-step inquiry that first asks whether the entity at issue is a labor organization); *accord Electromation, Inc.,* 309 NLRB 990, 994, 142 LRRM 1001 (1992), *enforced,* 35 F3d 1148, 147 LRRM 2257 (7th Cir. 1994) ("Before a finding of unlawful domination can be made under Section 8(a)(2) a finding of 'labor organization' status under Section 2(5) is required.").

// // //

// // //

// // //

[5]As explained above, the petitioners stipulated that the facts described in their joint March 29, 2022, letter constitute stipulated facts within the meaning of OAR 137-002-0040(2).

RULING

PF&R subleasing a space from the Fund, a 501(c)(3) nonprofit affiliated with the Association, does not violate ORS 243.672(1)(b).[6]

DATED: May 6, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

[6]OAR 137-002-0040(2) permits us to issue a ruling limited to "the facts stated in the petition" and any alternative, stipulated facts permitted by the presiding officer. Here, those facts relate only to a distinct, single act: the execution of the proposed sublease agreement by the City. As we explain above, that single act—entering the proposed sublease agreement—does not itself constitute an unfair labor practice under ORS 243.672(1)(b) because the other party to the sublease, the Fund, is not an "employee organization" and, therefore, ORS 243.672(1)(b) simply does not apply.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-046-21

(UNFAIR LABOR PRACTICE)

AIRPORT FIRE FIGHTERS' ASSOCIATION, IAFF LOCAL 43, Complainant, v. PORT OF PORTLAND, Respondent.	)	ORDER DENYING PETITION FOR RECONSIDERATION

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

Melissa Healy, Attorney at Law, Stoel Rives LLP, Portland, Oregon, represented Respondent.

On April 14, 2022, the Board issued and served its final order in this matter. Under OAR 115-010-0100(1), a party had 14 days from that date to file a petition for reconsideration, meaning that any such petition was due on April 28, 2022. The Board did not receive a petition by that date. On April 29, 2022, the Board received Complainant's petition for reconsideration, dated April 29, 2022. Because the petition appeared to be untimely, the Board asked Complainant to provide any response as to why the petition should be considered.

On May 10, 2022, Complainant provided its submission, stating that the petition was untimely due to several factors, including a calendaring error on Complainant's part. Complainant requested that we nevertheless grant the petition because there would be no undue prejudice in doing so, and that denying the petition would not advance the purposes and policies of the Public Employee Collective Bargaining Act.

On May 17, 2022, as permitted by the Board, Respondent filed its opposition to the Complainant's request, asserting that the untimely petition should not be considered.

As noted above, our rules require that a petition for reconsideration be filed within 14 days from the date of service of a Board order. OAR 115-010-0100(1). Here, there is no dispute that the

petition was not timely filed. The Board did not receive a motion to extend the time to file the petition, and there is no assertion that there is good cause to excuse the untimely filing. In these circumstances, the petition for reconsideration is denied on the ground that the filing was untimely.

DATED: May 18, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-002-22

(UNIT CLARIFICATION)

OREGON STATE UNIVERSITY PUBLIC SAFETY ASSOCIATION, Petitioner, v. OREGON STATE UNIVERSITY, and SEIU LOCAL 503, Respondents.	)	ORDER TRANSFERRING POSITIONS TO A MORE APPROPRIATE BARGAINING UNIT

On February 18, 2022, Oregon State University Public Safety Association (OSUPSA) filed a unit clarification petition under OAR 115-025-0050(1)(d) and (8) to determine whether the positions of Dispatcher and Public Safety Officer, currently within the bargaining unit represented by SEIU Local 503 (SEIU), more appropriately belong in the bargaining unit represented by OSUPSA. A majority of eligible employees in the positions signed valid authorization cards indicating a desire to select OSUPSA as their bargaining representative. *See* OAR 115-025-0050(8)(b).

On February 22, 2022, the Board's Election Coordinator caused a notice of the petition to be posted at Oregon State University (OSU) by February 25, 2022. *See* OAR 115-025-0060. Pursuant to the terms of the notice posting, objections to the transfer were due within 14 days of the date of the notice posting (*i.e.*, by March 11, 2022). On March 8, 2022, SEIU filed objections, and the case was transferred to the Hearings Division. On March 21, 2022, SEIU withdrew its objections.

Thereafter, the parties entered into a consent election agreement for a self-determination election. *See* OAR 115-025-0050(8)(d); OAR 115-025-0066(2). A notice of election was furnished to the employer. *See* OAR 115-025-0070. Pursuant to the consent election agreement, the Election

Coordinator sent ballots to the eligible voters on April 18, 2022. Ten valid ballots were returned by the deadline of May 9, 2022, which constitutes the date of the election. *See* OAR 115-025-0072(1)(b)(A). The two choices on the ballot were (1) representation by OSUPSA; or (2) representation by SEIU. A tally of ballots was held on May 10, 2022, and a majority of the votes counted were cast for OSUPSA. The tally of ballots was provided to the parties on May 10, 2022.

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 May 20, 2022). *See* OAR 115-025-0075. No objections were filed.

ORDER

The result of the election is certified, and the petition to transfer the positions of Dispatcher and Public Safety Officer to the bargaining unit represented by Oregon State University Public Safety Association is granted.

DATED: May 23, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-008-22

(UNIT CLARIFICATION)

OREGON SCHOOL EMPLOYEES ASSOCIATION, Petitioner, v. SOUTH COAST EDUCATION SERVICE DISTRICT, Respondent.	)	ORDER MERGING BARGAINING UNITS

On April 29, 2022, Oregon School Employees Association (OSEA) timely filed a petition under OAR 115-025-0050(10) to merge two existing bargaining units at South Coast Education Service District (District) into a single bargaining unit.[1] Specifically, OSEA seeks to merge a unit of approximately 5 part-time classified employees and a bargaining unit of approximately 47 full-time classified employees into a single unit that will retain the name of the larger unit (Oregon School Employees Association Chapter 119).

Under OAR 115-025-0050(10)(c), a merger petition must be supported by a showing interest of a majority of employees in each unit stating that they wish their unit to be merged with the other unit. Here, the petition was supported by such a showing of interest.

As directed, the District posted a notice of the petition by May 10, 2022. Under the terms of the posting and OAR 115-025-0060(1)(c), objections to the petition were due by May 24, 2022. No objections to the petition were received.

Under OAR 115-025-0050(10)(b), we shall order a clarification through merger when we determine that the merged unit includes all employees in the existing units and describes an

[1] Under OAR 115-025-0050(10)(d), a merger petition must be filed during the open period provided for in OAR 115-025-0015(2)(a)(A), as that rule applies to the larger (or largest) of the bargaining units. Here, the open period is the same for both units, and the petition was timely filed.

appropriate unit. After reviewing the petition, including the showing of interest, we conclude that the merged unit includes all employees in the two existing units and is an appropriate unit.

ORDER

Accordingly, OSEA's petition is granted, and the bargaining units are merged.

DATED: May 26, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

STATE OF OREGON

EMPLOYMENT RELATIONS BOARD

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF ENGINEERING EMPLOYEES OF OREGON, Complainant, v. STATE OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES Respondent.	Case No. UP-047-21 CONSENT ORDER

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

Brena Lopez, Senior Assistant Attorney General, and Tessa Sugahara, Attorney in Charge, Oregon Department of Justice, Salem, Oregon, represented the Respondent.

On October 27, 2021, the Association of Engineering Employees of Oregon (the "Complainant") filed an unfair labor practice complaint against the State of Oregon alleging violations of ORS 243.672(1)(g). The case was procedurally consolidated with several other cases involving the same conduct but impacting different bargaining units of State employees. In lieu of litigating the case, the 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 Complainant is a labor organization as defined in ORS 243.650(13).

2. The Complainant is the exclusive representative for a bargaining unit of approximately 1121 employees of the State of Oregon employed at the Oregon Department of

Transportation ("ODOT"), Oregon Parks and Recreation Department ("OPRD"), and the Oregon Department of Fish and Wildlife ("ODFW)," (collectively the "State").

3. The State is a public employer as defined in ORS 243.650(20).

4. On August 10, 2021, Governor Kate Brown announced that all State of Oregon executive branch employees would be required to be fully vaccinated against the COVID-19 virus by October 18, or six weeks after a vaccine received full approval from the U.S. Food and Drug Administration, whichever was later.

5. On August 13, 2021, Governor Brown issued Executive Order 21-29 which prohibited state employees in the Executive Branch from engaging in work for the Executive Branch after October 18, 2021 (or six weeks after the date that the USFDA approves a vaccination against COVID-19, whichever is later) if the employee had not been fully vaccinated against COVID-19 and required those employees to provide the State with documentation confirming their vaccination status (the "Executive Order"). The vaccine mandate is subject to certain limited exceptions for employees who cannot receive the vaccine for medical reasons or because of a religious objection to the vaccine. Employees were required to submit additional documentation in support of any requested medical or religious exception.

6. The COVID vaccine mandate had impacts on mandatory subjects of bargaining. As a result, the Complainant demanded to bargain over the impacts of the Executive Order. The State agreed to bargain with the Complainant and the parties began meeting to discuss.

7. One key priority for the Complainant was protecting employees' privacy and confidentiality relating to the sensitive information the State was requiring employees to disclose under the Executive Order. Whether or not they intended to get vaccinated, many bargaining unit members were deeply troubled by having to share their private medical and religious information with the State, in part due to general privacy concerns, but many employees were specifically alarmed about the possibility of the State disclosing their vaccine or exception status to the public or people within the State workforce that should not have access to the employees' personal information.

8. The disclosure of such information would violate employees' medical privacy rights and potentially allow people to draw conclusions about an employee's religion, health conditions, and/or political beliefs. Therefore, the Complainant sought strong assurances from the State that it would properly maintain and protect information regarding employee vaccination status.

9. The Complainant and the State signed a Letter of Agreement ("LOA") regarding the impacts of the Executive Order on bargaining unit employees. Regarding vaccination records, the LOA prohibited the State from disclosing whether any individual was vaccinated, but allowed the disclosure of such information if it was de-identified and in the aggregate (i.e. 95% of its employees have been vaccinated).

10. Since Governor Brown's order was issued, many media organizations, including the Oregonian/OregonLive and the Statesman Journal, have sought and received updates on the aggregate figures for each State agency that reflect the number of vaccinated state employees and those that have received exemptions and accommodations.

11. On or about October 18, 2021, in response to a request from the Oregonian and Statesman Journal for updated information, a representative of the State sent the Oregonian and Statesman Journal an unredacted spreadsheet containing individualized information about the vaccination status of approximately 43,000+ executive branch employees including those represented by the Complainant.

12. On the same day that the data breach occurred, the Oregon Department of Administrative Services ("DAS") sent an email to all Executive Branch employees describing the situation and expressing regret for the inadvertent disclosure. In addition, DAS activated its incident response protocol to assess the situation and determine any obligations under the Oregon Consumer Information Protection Act ("OCIPA"). A second email with additional information was sent to all Executive Branch employees on October 20, 2021.

13. The Oregonian and the Statesman Journal published articles detailing the State's data breach on October 18, 2021. The State has acknowledged the improper data disclosure to the media and its employees. The State contacted the media outlets requesting assurances that the inadvertently disclosed information had not been further disseminated, and indeed had been deleted. The Oregonian has refused to destroy the confidential information and has also refused to agree not to publish the information in the future should it wish to do so. The Statesman Journal agreed not to publish the confidential information and agreed to delete the document.

14. Within minutes after the first article detailing the incident was published, the Complainant began receiving emails, phone calls, and other messages from employees who were angry and frightened by the data disclosure. The Complainant subsequently filed this unfair labor practice complaint to enforce the terms of the LOA.

15. In December 2021, DAS issued a formal Notice of Data Breach, in accordance with OCIPA. This provided a detailed description of the data released and provided a description of the steps the State's Cyber Security Services program took to address the data disclosure. It also provided a toll-free number which employees could call to speak with someone about the event and provided consumer protection information.

Stipulated Conclusions of Law

1. The Board has jurisdiction over these parties and subject matter.

2. The State's disclosure of the data regarding vaccination status violated the LOA and ORS 243.672(1)(g).

3. The violation was egregious and a civil penalty of $1,000 is appropriate.

Stipulated Order

1. The State violated ORS 243.672(1)(g) as stipulated above.

2. The State will cease and desist from committing the unfair labor practice above and will comply with the LOA.

3. The State shall email the attached notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

4. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

5. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

6. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

7. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

8. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

DATED this 25th day of May 2022.

BRIAN LIGHT
On Behalf of the Respondent

JASON WEYAND
On Behalf of the Complainant

////

////

////

////

This Consent Order is approved and adopted by the Board.

DATED this 27 day of May 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-047-21, *Association of Oregon Engineering Employees v. State of Oregon, Oregon Department of Administrative Services*, and to effectuate the policies of the Public Employee Collective Bargaining Act, we notify our employees of the following:

On October 18, 2021, the State of Oregon, Oregon Department of Administrative Services ("DAS") disclosed a vaccine exception spreadsheet that contained confidential state employee information to two media sources. Immediately following this disclosure, DAS activated its incident response protocol and investigated the circumstances. In December 2021, DAS issued a formal Notice of Data Breach to all impacted employees, in accordance with requirements under state law, that provided a description of the data released and the steps taken to address the disclosure.

The Employment Relations Board has found that the disclosure by DAS of the data regarding vaccination status violated the Letter of Agreement regarding the impacts of Executive Order 21-29 and ORS 243.672(1)(g). To remedy this violation, the Employment Relations Board ordered:

1. The State will cease and desist from committing the unfair labor practice above and will comply with the Letter of Agreement.

2. The State shall email this notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

3. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

4. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

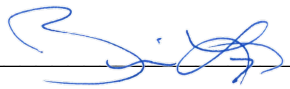
5. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

6. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

7. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

EMPLOYER

Dated May 25, 2022

By: 

Title: HR Administrator, DAS CHRO

STATE OF OREGON

EMPLOYMENT RELATIONS BOARD

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75, DEPARTMENT OF CORRECTIONS UNITS, Complainant, v. STATE OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES ON BEHALF OF OREGON DEPARTMENT OF CORRECTIONS, Respondent.	Case No. UP-048-21 CONSENT ORDER

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

Brena Lopez, Senior Assistant Attorney General, and Tessa Sugahara, Attorney in Charge, Oregon Department of Justice, Salem, Oregon, represented the Respondent.

On October 27, 2021, the American Federation of State, County and Municipal Employees Security and Security Plus bargaining units, which includes Locals 2376, 405, 745, 947, 1643, 3361, 1878, 3371, 3940, 3941, 3942, and 3943 (the "Complainant"), filed an unfair labor practice complaint against the State of Oregon, Department of Administrative Services on behalf of the Oregon Department of Corrections ("DOC," collectively the "State"), alleging violations of ORS 243.672(1)(g). The case was procedurally consolidated with several other cases involving the same conduct but impacting different bargaining units of State employees. In lieu of litigating the case, the 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 Complainant is a labor organization as defined in ORS 243.650(13).

2. The Complainant is the exclusive representative for the strike prohibited Security bargaining unit of approximately 1,900 DOC employees, as well as the Security Plus strike permitted bargaining unit of approximately 1,500 DOC employees.

3. The State is a public employer as defined in ORS 243.650(20).

4. On August 10, 2021, Governor Kate Brown announced that all State of Oregon executive branch employees would be required to be fully vaccinated against the COVID-19 virus by October 18, or six weeks after a vaccine received full approval from the U.S. Food and Drug Administration, whichever was later.

5. On August 13, 2021, Governor Brown issued Executive Order 21-29 which prohibited state employees in the Executive Branch from engaging in work for the Executive Branch after October 18, 2021 (or six weeks after the date that the USFDA approves a vaccination against COVID-19, whichever is later) if the employee had not been fully vaccinated against COVID-19 and required those employees to provide the State with documentation confirming their vaccination status (the "Executive Order"). The vaccine mandate is subject to certain limited exceptions for employees who cannot receive the vaccine for medical reasons or because of a religious objection to the vaccine. Employees were required to submit additional documentation in support of any requested medical or religious exception.

6. The COVID vaccine mandate had impacts on mandatory subjects of bargaining. As a result, the Complainant demanded to bargain over the impacts of the Executive Order. The State agreed to bargain with the Complainant and the parties began meeting to discuss.

7. One key priority for the Complainant was protecting employees' privacy and confidentiality relating to the sensitive information the State was requiring employees to disclose under the Executive Order. Whether or not they intended to get vaccinated, many bargaining unit members were deeply troubled by having to share their private medical and religious information with the State, in part due to general privacy concerns, but many employees were specifically alarmed about the possibility of the State disclosing their vaccine or exception status to the public or people within the State workforce that should not have access to the employees' personal information.

8. The disclosure of such information would violate employees' medical privacy rights and potentially allow people to draw conclusions about an employee's religion, health conditions, and/or political beliefs. Therefore, the Complainant sought strong assurances from the State that it would properly maintain and protect information regarding employee vaccination status.

9. The Complainant and the State signed a Letter of Agreement ("LOA") regarding the impacts of the Executive Order on bargaining unit employees. Regarding vaccination records,

the LOA prohibited the State from disclosing whether any individual was vaccinated, but allowed the disclosure of such information if it was de-identified and in the aggregate (i.e. 95% of its employees have been vaccinated).

10. Since Governor Brown's order was issued, many media organizations, including the Oregonian/OregonLive and the Statesman Journal, have sought and received updates on the aggregate figures for each State agency that reflect the number of vaccinated state employees and those that have received exemptions and accommodations.

11. On or about October 18, 2021, in response to a request from the Oregonian and Statesman Journal for updated information, a representative of the State sent the Oregonian and Statesman Journal an unredacted spreadsheet containing individualized information about the vaccination status of approximately 43,000+ executive branch employees including those represented by the Complainant.

12. On the same day that the data breach occurred, the Oregon Department of Administrative Services ("DAS") sent an email to all Executive Branch employees describing the situation and expressing regret for the inadvertent disclosure. In addition, DAS activated its incident response protocol to assess the situation and determine any obligations under the Oregon Consumer Information Protection Act ("OCIPA"). A second email with additional information was sent to all Executive Branch employees on October 20, 2021.

13. The Oregonian and the Statesman Journal published articles detailing the State's data breach on October 18, 2021. The State has acknowledged the improper data disclosure to the media and its employees. The State contacted the media outlets requesting assurances that the inadvertently disclosed information had not been further disseminated, and indeed had been deleted. The Oregonian has refused to destroy the confidential information and has also refused to agree not to publish the information in the future should it wish to do so. The Statesman Journal agreed not to publish the confidential information and agreed to delete the document.

14. Within minutes after the first article detailing the incident was published, the Complainant began receiving emails, phone calls, and other messages from employees who were angry and frightened by the data disclosure. The Complainant subsequently filed this unfair labor practice complaint to enforce the terms of the LOA.

15. In December 2021, DAS issued a formal Notice of Data Breach, in accordance with OCIPA. This provided a detailed description of the data released and provided a description of the steps the State's Cyber Security Services program took to address the data disclosure. It also provided a toll-free number which employees could call to speak with someone about the event and provided consumer protection information.

Stipulated Conclusions of Law

1. The Board has jurisdiction over these parties and subject matter.

2. The State's disclosure of the data regarding vaccination status violated the LOA

and ORS 243.672(1)(g).

3. The violation was egregious and a civil penalty of $1,000 is appropriate.

Stipulated Order

1. The State violated ORS 243.672(1)(g) as stipulated above.

2. The State will cease and desist from committing the unfair labor practice above and will comply with the LOA.

3. The State shall email the attached notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

4. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

5. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

6. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

7. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

8. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

DATED this 25th day of May 2022.

BRIAN LIGHT
On Behalf of the Respondent

JASON WEYAND
On Behalf of the Complainant

//// ////

This Consent Order is approved and adopted by the Board.

DATED this 27 day of May 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-048-21, *Oregon AFSCME Council 75, Corrections Units v. State of Oregon, Oregon Department of Administrative Services on Behalf of Department of Corrections*, and to effectuate the policies of the Public Employee Collective Bargaining Act, we notify our employees of the following:

On October 18, 2021, the State of Oregon, Oregon Department of Administrative Services ("DAS") disclosed a vaccine exception spreadsheet that contained confidential state employee information to two media sources. Immediately following this disclosure, DAS activated its incident response protocol and investigated the circumstances. In December 2021, DAS issued a formal Notice of Data Breach to all impacted employees, in accordance with requirements under state law, that provided a description of the data released and the steps taken to address the disclosure.

The Employment Relations Board has found that the disclosure by DAS of the data regarding vaccination status violated the Letter of Agreement regarding the impacts of Executive Order 21-29 and ORS 243.672(1)(g). To remedy this violation, the Employment Relations Board ordered:

1. The State will cease and desist from committing the unfair labor practice above and will comply with the Letter of Agreement.

2. The State shall email this notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

3. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

4. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

5. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

6. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

7. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

EMPLOYER

Dated May 25, 2022

By: 

Title: HR Administrator, DAS CHRO

STATE OF OREGON

EMPLOYMENT RELATIONS BOARD

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75, CENTRAL TABLE UNITS, Complainant, v. STATE OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES, Respondent.	Case No. UP-049-21 CONSENT ORDER

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

Brena Lopez, Senior Assistant Attorney General, and Tessa Sugahara, Attorney in Charge, Oregon Department of Justice, Salem, Oregon, represented the Respondent.

On October 27, 2021, the American Federation of State, County and Municipal Employees, Council 75 (the "Complainant"), filed an unfair labor practice complaint against the State of Oregon, Department of Administrative Services (the "State"), alleging violations of ORS 243.672(1)(g). The case was procedurally consolidated with several other cases involving the same conduct but impacting different bargaining units of State employees. In lieu of litigating the case, the 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 Complainant is a labor organization as defined in ORS 243.650(13).

2. The Complainant is the exclusive representative for bargaining unit of approximately 3,140 State employees in multiple State agencies, departments, and offices.

3. The State is a public employer as defined in ORS 243.650(20).

4. On August 10, 2021, Governor Kate Brown announced that all State of Oregon executive branch employees would be required to be fully vaccinated against the COVID-19 virus by October 18, or six weeks after a vaccine received full approval from the U.S. Food and Drug Administration, whichever was later.

5. On August 13, 2021, Governor Brown issued Executive Order 21-29 which prohibited state employees in the Executive Branch from engaging in work for the Executive Branch after October 18, 2021 (or six weeks after the date that the USFDA approves a vaccination against COVID-19, whichever is later) if the employee had not been fully vaccinated against COVID-19 and required those employees to provide the State with documentation confirming their vaccination status (the "Executive Order"). The vaccine mandate is subject to certain limited exceptions for employees who cannot receive the vaccine for medical reasons or because of a religious objection to the vaccine. Employees were required to submit additional documentation in support of any requested medical or religious exception.

6. The COVID vaccine mandate had impacts on mandatory subjects of bargaining. As a result, the Complainant demanded to bargain over the impacts of the Executive Order. The State agreed to bargain with the Complainant and the parties began meeting to discuss.

7. One key priority for the Complainant was protecting employees' privacy and confidentiality relating to the sensitive information the State was requiring employees to disclose under the Executive Order. Whether or not they intended to get vaccinated, many bargaining unit members were deeply troubled by having to share their private medical and religious information with the State, in part due to general privacy concerns, but many employees were specifically alarmed about the possibility of the State disclosing their vaccine or exception status to the public or people within the State workforce that should not have access to the employees' personal information.

8. The disclosure of such information would violate employees' medical privacy rights and potentially allow people to draw conclusions about an employee's religion, health conditions, and/or political beliefs. Therefore, the Complainant sought strong assurances from the State that it would properly maintain and protect information regarding employee vaccination status.

9. The Complainant and the State signed a Letter of Agreement ("LOA") regarding the impacts of the Executive Order on bargaining unit employees. Regarding vaccination records, the LOA prohibited the State from disclosing whether any individual was vaccinated, but allowed the disclosure of such information if it was de-identified and in the aggregate (i.e. 95% of its employees have been vaccinated).

10. Since Governor Brown's order was issued, many media organizations, including the Oregonian/OregonLive and the Statesman Journal, have sought and received updates on the aggregate figures for each State agency that reflect the number of vaccinated state employees and those that have received exemptions and accommodations.

11. On or about October 18, 2021, in response to a request from the Oregonian and Statesman Journal for updated information, a representative of the State sent the Oregonian and Statesman Journal an unredacted spreadsheet containing individualized information about the vaccination status of approximately 43,000+ executive branch employees including those represented by the Complainant.

12. On the same day that the data breach occurred, the Oregon Department of Administrative Services ("DAS") sent an email to all Executive Branch employees describing the situation and expressing regret for the inadvertent disclosure. In addition, DAS activated its incident response protocol to assess the situation and determine any obligations under the Oregon Consumer Information Protection Act ("OCIPA"). A second email with additional information was sent to all Executive Branch employees on October 20, 2021.

13. The Oregonian and the Statesman Journal published articles detailing the State's data breach on October 18, 2021. The State has acknowledged the improper data disclosure to the media and its employees. The State contacted the media outlets requesting assurances that the inadvertently disclosed information had not been further disseminated, and indeed had been deleted. The Oregonian has refused to destroy the confidential information and has also refused to agree not to publish the information in the future should it wish to do so. The Statesman Journal agreed not to publish the confidential information and agreed to delete the document.

14. Within minutes after the first article detailing the incident was published, the Complainant began receiving emails, phone calls, and other messages from employees who were angry and frightened by the data disclosure. The Complainant subsequently filed this unfair labor practice complaint to enforce the terms of the LOA.

15. In December 2021, DAS issued a formal Notice of Data Breach, in accordance with OCIPA. This provided a detailed description of the data released and provided a description of the steps the State's Cyber Security Services program took to address the data disclosure. It also provided a toll-free number which employees could call to speak with someone about the event and provided consumer protection information.

Stipulated Conclusions of Law

1. The Board has jurisdiction over these parties and subject matter.

2. The State's disclosure of the data regarding vaccination status violated the LOA and ORS 243.672(1)(g).

3. The violation was egregious and a civil penalty of $1,000 is appropriate.

Stipulated Order

1. The State violated ORS 243.672(1)(g) as stipulated above.

2. The State will cease and desist from committing the unfair labor practice above and

will comply with the LOA.

3. The State shall email the attached notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

4. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

5. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

6. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

7. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

8. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

DATED this 25th day of May 2022.

BRIAN LIGHT
On Behalf of the Respondent

JASON WEYAND
On Behalf of the Complainant

////

////

////

////

This Consent Order is approved and adopted by the Board.

DATED this 27 day of May 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-049-21, *Oregon AFSCME Council 75, Central Table Units v. State of Oregon, Oregon Department of Administrative Services*, and to effectuate the policies of the Public Employee Collective Bargaining Act, we notify our employees of the following:

On October 18, 2021, the State of Oregon, Oregon Department of Administrative Services ("DAS") disclosed a vaccine exception spreadsheet that contained confidential state employee information to two media sources. Immediately following this disclosure, DAS activated its incident response protocol and investigated the circumstances. In December 2021, DAS issued a formal Notice of Data Breach to all impacted employees, in accordance with requirements under state law, that provided a description of the data released and the steps taken to address the disclosure.

The Employment Relations Board has found that the disclosure by DAS of the data regarding vaccination status violated the Letter of Agreement regarding the impacts of Executive Order 21-29 and ORS 243.672(1)(g). To remedy this violation, the Employment Relations Board ordered:

1. The State will cease and desist from committing the unfair labor practice above and will comply with the Letter of Agreement.

2. The State shall email this notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

3. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

4. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

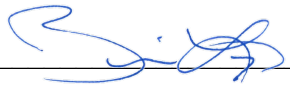
5. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

6. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

7. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

EMPLOYER

Dated May 25, 2022

By: 

Title: HR Administrator, DAS CHRO

STATE OF OREGON

EMPLOYMENT RELATIONS BOARD

(UNFAIR LABOR PRACTICE)

SEIU LOCAL 503, Complainant, v. STATE OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES, Respondent.	Case No. UP-050-21 CONSENT ORDER

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

Brena Lopez, Senior Assistant Attorney General, and Tessa Sugahara, Attorney in Charge, Oregon Department of Justice, Salem, Oregon, represented the Respondent.

On October 27, 2021, the Service Employees International Union, Local 503 (the "Complainant"), filed an unfair labor practice complaint against the State of Oregon, Department of Administrative Services (the "State"), alleging violations of ORS 243.672(1)(g). The case was procedurally consolidated with several other cases involving the same conduct but impacting different bargaining units of State employees. In lieu of litigating the case, the 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 Complainant is a labor organization as defined in ORS 243.650(13).

2. The Complainant is the exclusive representative for bargaining unit of approximately 24,000 State employees in multiple State agencies, departments, and offices.

3. The State is a public employer as defined in ORS 243.650(20).

4. On August 10, 2021, Governor Kate Brown announced that all State of Oregon executive branch employees would be required to be fully vaccinated against the COVID-19 virus by October 18, or six weeks after a vaccine received full approval from the U.S. Food and Drug Administration, whichever was later.

5. On August 13, 2021, Governor Brown issued Executive Order 21-29 which prohibited state employees in the Executive Branch from engaging in work for the Executive Branch after October 18, 2021 (or six weeks after the date that the USFDA approves a vaccination against COVID-19, whichever is later) if the employee had not been fully vaccinated against COVID-19 and required those employees to provide the State with documentation confirming their vaccination status (the "Executive Order"). The vaccine mandate is subject to certain limited exceptions for employees who cannot receive the vaccine for medical reasons or because of a religious objection to the vaccine. Employees were required to submit additional documentation in support of any requested medical or religious exception.

6. The COVID vaccine mandate had impacts on mandatory subjects of bargaining. As a result, the Complainant demanded to bargain over the impacts of the Executive Order. The State agreed to bargain with the Complainant and the parties began meeting to discuss.

7. One key priority for the Complainant was protecting employees' privacy and confidentiality relating to the sensitive information the State was requiring employees to disclose under the Executive Order. Whether or not they intended to get vaccinated, many bargaining unit members were deeply troubled by having to share their private medical and religious information with the State, in part due to general privacy concerns, but many employees were specifically alarmed about the possibility of the State disclosing their vaccine or exception status to the public or people within the State workforce that should not have access to the employees' personal information.

8. The disclosure of such information would violate employees' medical privacy rights and potentially allow people to draw conclusions about an employee's religion, health conditions, and/or political beliefs. Therefore, the Complainant sought strong assurances from the State that it would properly maintain and protect information regarding employee vaccination status.

9. The Complainant and the State signed a Letter of Agreement ("LOA") regarding the impacts of the Executive Order on bargaining unit employees. Regarding vaccination records, the LOA prohibited the State from disclosing whether any individual was vaccinated, but allowed the disclosure of such information if it was de-identified and in the aggregate (i.e. 95% of its employees have been vaccinated).

10. Since Governor Brown's order was issued, many media organizations, including the Oregonian/OregonLive and the Statesman Journal, have sought and received updates on the aggregate figures for each State agency that reflect the number of vaccinated state employees and those that have received exemptions and accommodations.

11. On or about October 18, 2021, in response to a request from the Oregonian and Statesman Journal for updated information, a representative of the State sent the Oregonian and Statesman Journal an unredacted spreadsheet containing individualized information about the vaccination status of approximately 43,000+ executive branch employees including those represented by the Complainant.

12. On the same day that the data breach occurred, the Oregon Department of Administrative Services ("DAS") sent an email to all Executive Branch employees describing the situation and expressing regret for the inadvertent disclosure. In addition, DAS activated its incident response protocol to assess the situation and determine any obligations under the Oregon Consumer Information Protection Act ("OCIPA"). A second email with additional information was sent to all Executive Branch employees on October 20, 2021.

13. The Oregonian and the Statesman Journal published articles detailing the State's data breach on October 18, 2021. The State has acknowledged the improper data disclosure to the media and its employees. The State contacted the media outlets requesting assurances that the inadvertently disclosed information had not been further disseminated, and indeed had been deleted. The Oregonian has refused to destroy the confidential information and has also refused to agree not to publish the information in the future should it wish to do so. The Statesman Journal agreed not to publish the confidential information and agreed to delete the document.

14. Within minutes after the first article detailing the incident was published, the Complainant began receiving emails, phone calls, and other messages from employees who were angry and frightened by the data disclosure. The Complainant subsequently filed this unfair labor practice complaint to enforce the terms of the LOA.

15. In December 2021, DAS issued a formal Notice of Data Breach, in accordance with OCIPA. This provided a detailed description of the data released and provided a description of the steps the State's Cyber Security Services program took to address the data disclosure. It also provided a toll-free number which employees could call to speak with someone about the event and provided consumer protection information.

Stipulated Conclusions of Law

1. The Board has jurisdiction over these parties and subject matter.

2. The State's disclosure of the data regarding vaccination status violated the LOA and ORS 243.672(1)(g).

3. The violation was egregious and a civil penalty of $1,000 is appropriate.

Stipulated Order

1. The State violated ORS 243.672(1)(g) as stipulated above.

2. The State will cease and desist from committing the unfair labor practice above and

will comply with the LOA.

3. The State shall email the attached notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

4. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

5. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

6. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

7. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

8. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

DATED this 25th day of May 2022.

BRIAN LIGHT
On Behalf of the Respondent

JASON WEYAND
On Behalf of the Complainant

////

////

////

////

This Consent Order is approved and adopted by the Board.

DATED this 27 day of May 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-050-21, *SEIU Local 503 v. State of Oregon, Oregon Department of Administrative Services*, and to effectuate the policies of the Public Employee Collective Bargaining Act, we notify our employees of the following:

On October 18, 2021, the State of Oregon, Oregon Department of Administrative Services ("DAS") disclosed a vaccine exception spreadsheet that contained confidential state employee information to two media sources. Immediately following this disclosure, DAS activated its incident response protocol and investigated the circumstances. In December 2021, DAS issued a formal Notice of Data Breach to all impacted employees, in accordance with requirements under state law, that provided a description of the data released and the steps taken to address the disclosure.

The Employment Relations Board has found that the disclosure by DAS of the data regarding vaccination status violated the Letter of Agreement regarding the impacts of Executive Order 21-29 and ORS 243.672(1)(g). To remedy this violation, the Employment Relations Board ordered:

1. The State will cease and desist from committing the unfair labor practice above and will comply with the Letter of Agreement.

2. The State shall email this notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

3. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

4. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

5. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

6. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

7. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

EMPLOYER

Dated May 25, 2022

By: 

Title: HR Administrator, DAS CHRO

STATE OF OREGON

EMPLOYMENT RELATIONS BOARD

(UNFAIR LABOR PRACTICE)

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 3340—KINGSLEY FIRE FIGHTERS' ASSOCIATION, Complainant, v. STATE OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES, ON BEHALF OF THE OREGON MILITARY DEPARTMENT (KINGSLEY AIR BASE), Respondent.	Case No. UP-051-21 CONSENT ORDER

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

Brena Lopez, Senior Assistant Attorney General, and Tessa Sugahara, Attorney in Charge, Oregon Department of Justice, Salem, Oregon, represented the Respondent.

On October 27, 2021, the International Association of Firefighters, Local 3340 – Kingsley Firefighters Association (the "Complainant"), filed an unfair labor practice complaint against the State of Oregon, Department of Administrative Services, on behalf of the Oregon Military Department—Kingsley Air Base (the "State"), alleging violations of ORS 243.672(1)(g). The case was procedurally consolidated with several other cases involving the same conduct but impacting different bargaining units of State employees. In lieu of litigating the case, the 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 Complainant is a labor organization as defined in ORS 243.650(13).

2. The Complainant is the exclusive representative for bargaining unit of 28 fire fighters employed by the State at Kingsley Air Base.

3. The State is a public employer as defined in ORS 243.650(20).

4. On August 10, 2021, Governor Kate Brown announced that all State of Oregon executive branch employees would be required to be fully vaccinated against the COVID-19 virus by October 18, or six weeks after a vaccine received full approval from the U.S. Food and Drug Administration, whichever was later.

5. On August 13, 2021, Governor Brown issued Executive Order 21-29 which prohibited state employees in the Executive Branch from engaging in work for the Executive Branch after October 18, 2021 (or six weeks after the date that the USFDA approves a vaccination against COVID-19, whichever is later) if the employee had not been fully vaccinated against COVID-19 and required those employees to provide the State with documentation confirming their vaccination status (the "Executive Order"). The vaccine mandate is subject to certain limited exceptions for employees who cannot receive the vaccine for medical reasons or because of a religious objection to the vaccine. Employees were required to submit additional documentation in support of any requested medical or religious exception.

6. The COVID vaccine mandate had impacts on mandatory subjects of bargaining. As a result, the Complainant demanded to bargain over the impacts of the Executive Order. The State agreed to bargain with the Complainant and the parties began meeting to discuss.

7. One key priority for the Complainant was protecting employees' privacy and confidentiality relating to the sensitive information the State was requiring employees to disclose under the Executive Order. Whether or not they intended to get vaccinated, many bargaining unit members were deeply troubled by having to share their private medical and religious information with the State, in part due to general privacy concerns, but many employees were specifically alarmed about the possibility of the State disclosing their vaccine or exception status to the public or people within the State workforce that should not have access to the employees' personal information.

8. The disclosure of such information would violate employees' medical privacy rights and potentially allow people to draw conclusions about an employee's religion, health conditions, and/or political beliefs. Therefore, the Complainant sought strong assurances from the State that it would properly maintain and protect information regarding employee vaccination status.

9. The Complainant and the State signed a Letter of Agreement ("LOA") regarding the impacts of the Executive Order on bargaining unit employees. Regarding vaccination records, the LOA prohibited the State from disclosing whether any individual was vaccinated, but allowed

the disclosure of such information if it was de-identified and in the aggregate (i.e. 95% of its employees have been vaccinated).

10. Since Governor Brown's order was issued, many media organizations, including the Oregonian/OregonLive and the Statesman Journal, have sought and received updates on the aggregate figures for each State agency that reflect the number of vaccinated state employees and those that have received exemptions and accommodations.

11. On or about October 18, 2021, in response to a request from the Oregonian and Statesman Journal for updated information, a representative of the State sent the Oregonian and Statesman Journal an unredacted spreadsheet containing individualized information about the vaccination status of approximately 43,000+ executive branch employees including those represented by the Complainant.

12. On the same day that the data breach occurred, the Oregon Department of Administrative Services ("DAS") sent an email to all Executive Branch employees describing the situation and expressing regret for the inadvertent disclosure. In addition, DAS activated its incident response protocol to assess the situation and determine any obligations under the Oregon Consumer Information Protection Act ("OCIPA"). A second email with additional information was sent to all Executive Branch employees on October 20, 2021.

13. The Oregonian and the Statesman Journal published articles detailing the State's data breach on October 18, 2021. The State has acknowledged the improper data disclosure to the media and its employees. The State contacted the media outlets requesting assurances that the inadvertently disclosed information had not been further disseminated, and indeed had been deleted. The Oregonian has refused to destroy the confidential information and has also refused to agree not to publish the information in the future should it wish to do so. The Statesman Journal agreed not to publish the confidential information and agreed to delete the document.

14. Within minutes after the first article detailing the incident was published, the Complainant began receiving emails, phone calls, and other messages from employees who were angry and frightened by the data disclosure. The Complainant subsequently filed this unfair labor practice complaint to enforce the terms of the LOA.

15. In December 2021, DAS issued a formal Notice of Data Breach, in accordance with OCIPA. This provided a detailed description of the data released and provided a description of the steps the State's Cyber Security Services program took to address the data disclosure. It also provided a toll-free number which employees could call to speak with someone about the event and provided consumer protection information.

Stipulated Conclusions of Law

1. The Board has jurisdiction over these parties and subject matter.

2. The State's disclosure of the data regarding vaccination status violated the LOA and ORS 243.672(1)(g).

3. The violation was egregious and a civil penalty of $1,000 is appropriate.

Stipulated Order

1. The State violated ORS 243.672(1)(g) as stipulated above.

2. The State will cease and desist from committing the unfair labor practice above and will comply with the LOA.

3. The State shall email the attached notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

4. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

5. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

6. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

7. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

8. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

DATED this 25th day of May 2022.

BRIAN LIGHT
On Behalf of the Respondent

JASON WEYAND
On Behalf of the Complainant

//// ////

This Consent Order is approved and adopted by the Board.

DATED this 27 day of May 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-051-21, *IAFF Local 3044, Kingsley Fire Fighters' Association v. State of Oregon, Oregon Department of Administrative Services, on Behalf of the Oregon Military Department (Kingsley Air Base)*, and to effectuate the policies of the Public Employee Collective Bargaining Act, we notify our employees of the following:

On October 18, 2021, the State of Oregon, Oregon Department of Administrative Services ("DAS") disclosed a vaccine exception spreadsheet that contained confidential state employee information to two media sources. Immediately following this disclosure, DAS activated its incident response protocol and investigated the circumstances. In December 2021, DAS issued a formal Notice of Data Breach to all impacted employees, in accordance with requirements under state law, that provided a description of the data released and the steps taken to address the disclosure.

The Employment Relations Board has found that the disclosure by DAS of the data regarding vaccination status violated the Letter of Agreement regarding the impacts of Executive Order 21-29 and ORS 243.672(1)(g). To remedy this violation, the Employment Relations Board ordered:

1. The State will cease and desist from committing the unfair labor practice above and will comply with the Letter of Agreement.

2. The State shall email this notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

3. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

4. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

5. The State's violation of the LOA was egregious and the State will pay a civil

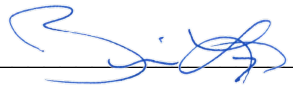
penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

6. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

7. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

EMPLOYER

Dated May 25, 2022

By: 

Title: HR Administrator, DAS CHRO

STATE OF OREGON

EMPLOYMENT RELATIONS BOARD

(UNFAIR LABOR PRACTICE)

OREGON PUBLIC SAFETY ASSOCIATION, Complainant, v. STATE OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES Respondent.	Case No. UP-052-21 CONSENT ORDER

Becky Gallagher, Attorney at Law, Fenrich & Gallagher, PC, Eugene, Oregon, represented the Complainant.

Brena Lopez, Senior Assistant Attorney General, and Tessa Sugahara, Attorney in Charge, Oregon Department of Justice, Salem, Oregon, represented the Respondent.

On October 28, 2021, the Oregon Public Safety Association (the "Complainant") filed an unfair labor practice complaint against the State of Oregon alleging violations of ORS 243.672(1)(g). The case was procedurally consolidated with several other cases involving the same conduct but impacting different bargaining units of State employees. In lieu of litigating the case, the 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 Complainant is a labor organization as defined in ORS 243.650(13).

2. The Complainant is the exclusive representative for a bargaining unit of approximately 74 employees of the State of Oregon ("State") employed at the Oregon Department of Public Safety Standards and Training ("DPSST").

3. The State is a public employer as defined in ORS 243.650(20).

4. On August 10, 2021, Governor Kate Brown announced that all State of Oregon executive branch employees would be required to be fully vaccinated against the COVID-19 virus by October 18, or six weeks after a vaccine received full approval from the U.S. Food and Drug Administration, whichever was later.

5. On August 13, 2021, Governor Brown issued Executive Order 21-29 which prohibited state employees in the Executive Branch from engaging in work for the Executive Branch after October 18, 2021 (or six weeks after the date that the USFDA approves a vaccination against COVID-19, whichever is later) if the employee had not been fully vaccinated against COVID-19 and required those employees to provide the State with documentation confirming their vaccination status (the "Executive Order"). The vaccine mandate is subject to certain limited exceptions for employees who cannot receive the vaccine for medical reasons or because of a religious objection to the vaccine. Employees were required to submit additional documentation in support of any requested medical or religious exception.

6. The COVID vaccine mandate had impacts on mandatory subjects of bargaining. As a result, the Complainant demanded to bargain over the impacts of the Executive Order. The State agreed to bargain with the Complainant and the parties began meeting to discuss.

7. One key priority for the Complainant was protecting employees' privacy and confidentiality relating to the sensitive information the State was requiring employees to disclose under the Executive Order. Whether or not they intended to get vaccinated, many bargaining unit members were deeply troubled by having to share their private medical and religious information with the State, in part due to general privacy concerns, but many employees were specifically alarmed about the possibility of the State disclosing their vaccine or exception status to the public or people within the State workforce that should not have access to the employees' personal information.

8. The disclosure of such information would violate employees' medical privacy rights and potentially allow people to draw conclusions about an employee's religion, health conditions, and/or political beliefs. Therefore, the Complainant sought strong assurances from the State that it would properly maintain and protect information regarding employee vaccination status.

9. The Complainant and the State signed a Letter of Agreement ("LOA") regarding the impacts of the Executive Order on bargaining unit employees. Regarding vaccination records, the LOA prohibited the State from disclosing whether any individual was vaccinated, but allowed the disclosure of such information if it was de-identified and in the aggregate (i.e. 95% of its employees have been vaccinated).

10. Since Governor Brown's order was issued, many media organizations, including the Oregonian/OregonLive and the Statesman Journal, have sought and received updates on the

aggregate figures for each State agency that reflect the number of vaccinated state employees and those that have received exemptions and accommodations.

11. On or about October 18, 2021, in response to a request from the Oregonian and Statesman Journal for updated information, a representative of the State sent the Oregonian and Statesman Journal an unredacted spreadsheet containing individualized information about the vaccination status of approximately 43,000+ executive branch employees including those represented by the Complainant.

12. On the same day that the data breach occurred, the Oregon Department of Administrative Services ("DAS") sent an email to all Executive Branch employees describing the situation and expressing regret for the inadvertent disclosure. In addition, DAS activated its incident response protocol to assess the situation and determine any obligations under the Oregon Consumer Information Protection Act ("OCIPA"). A second email with additional information was sent to all Executive Branch employees on October 20, 2021.

13. The Oregonian and the Statesman Journal published articles detailing the State's data breach on October 18, 2021. The State has acknowledged the improper data disclosure to the media and its employees. The State contacted the media outlets requesting assurances that the inadvertently disclosed information had not been further disseminated, and indeed had been deleted. The Oregonian has refused to destroy the confidential information and has also refused to agree not to publish the information in the future should it wish to do so. The Statesman Journal agreed not to publish the confidential information and agreed to delete the document.

14. Within minutes after the first article detailing the incident was published, the Complainant began receiving emails, phone calls, and other messages from employees who were angry and frightened by the data disclosure. The Complainant subsequently filed this unfair labor practice complaint to enforce the terms of the LOA.

15. In December 2021, DAS issued a formal Notice of Data Breach, in accordance with OCIPA. This provided a detailed description of the data released and provided a description of the steps the State's Cyber Security Services program took to address the data disclosure. It also provided a toll-free number which employees could call to speak with someone about the event and provided consumer protection information.

Stipulated Conclusions of Law

1. The Board has jurisdiction over these parties and subject matter.

2. The State's disclosure of the data regarding vaccination status violated the LOA and ORS 243.672(1)(g).

3. The violation was egregious and a civil penalty of $1,000 is appropriate.

Stipulated Order

1. The State violated ORS 243.672(1)(g) as stipulated above.

2. The State will cease and desist from committing the unfair labor practice above and will comply with the LOA.

3. The State shall email the attached notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

4. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may contact CHRO.Investigations@das.oregon.gov who will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

5. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

6. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

7. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

8. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

DATED this 25th day of May 2022.

BRIAN LIGHT	BECKY GALLAGHER
On Behalf of the Respondent	On Behalf of the Complainant

//

//

This Consent Order is approved and adopted by the Board.

DATED this 27 day of May 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-052-21, *Oregon Public Safety Association (OPSA) v. State of Oregon, Oregon Department of Administrative Services*, and to effectuate the policies of the Public Employee Collective Bargaining Act, we notify our employees of the following:

On October 18, 2021, the State of Oregon, Oregon Department of Administrative Services ("DAS") disclosed a vaccine exception spreadsheet that contained confidential state employee information to two media sources. Immediately following this disclosure, DAS activated its incident response protocol and investigated the circumstances. In December 2021, DAS issued a formal Notice of Data Breach to all impacted employees, in accordance with requirements under state law, that provided a description of the data released and the steps taken to address the disclosure.

The Employment Relations Board has found that the disclosure by DAS of the data regarding vaccination status violated the Letter of Agreement regarding the impacts of Executive Order 21-29 and ORS 243.672(1)(g). To remedy this violation, the Employment Relations Board ordered:

1. The State will cease and desist from committing the unfair labor practice above and will comply with the Letter of Agreement.

2. The State shall email this notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

3. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

4. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

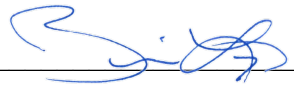
5. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

6. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

7. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

EMPLOYER

Dated May 25, 2022

By: 

Title: HR Administrator, DAS CHRO

STATE OF OREGON

EMPLOYMENT RELATIONS BOARD

(UNFAIR LABOR PRACTICE)

FEDERATION OF OREGON PAROLE AND PROBATION OFFICERS, Complainant, v. STATE OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES Respondent.	Case No. UP-053-21 CONSENT ORDER

Becky Gallagher, Attorney at Law, Fenrich & Gallagher, PC, Eugene, Oregon, represented the Complainant.

Brena Lopez, Senior Assistant Attorney General, and Tessa Sugahara, Attorney in Charge, Oregon Department of Justice, Salem, Oregon, represented the Respondent.

On October 29, 2021, the Federation of Oregon Parole and Probation Officers (the "Complainant") filed an unfair labor practice complaint against the State of Oregon alleging violations of ORS 243.672(1)(g). The case was procedurally consolidated with several other cases involving the same conduct but impacting different bargaining units of State employees. In lieu of litigating the case, the 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 Complainant is a labor organization as defined in ORS 243.650(13).

2. The Complainant is the exclusive representative for a bargaining unit of approximately 30 employees of the State of Oregon ("State") employed at the Oregon Department of Corrections ("DOC").

3. The State is a public employer as defined in ORS 243.650(20).

4. On August 10, 2021, Governor Kate Brown announced that all State of Oregon executive branch employees would be required to be fully vaccinated against the COVID-19 virus by October 18, or six weeks after a vaccine received full approval from the U.S. Food and Drug Administration, whichever was later.

5. On August 13, 2021, Governor Brown issued Executive Order 21-29 which prohibited state employees in the Executive Branch from engaging in work for the Executive Branch after October 18, 2021 (or six weeks after the date that the USFDA approves a vaccination against COVID-19, whichever is later) if the employee had not been fully vaccinated against COVID-19 and required those employees to provide the State with documentation confirming their vaccination status (the "Executive Order"). The vaccine mandate is subject to certain limited exceptions for employees who cannot receive the vaccine for medical reasons or because of a religious objection to the vaccine. Employees were required to submit additional documentation in support of any requested medical or religious exception.

6. The COVID vaccine mandate had impacts on mandatory subjects of bargaining. As a result, the Complainant demanded to bargain over the impacts of the Executive Order. The State agreed to bargain with the Complainant and the parties began meeting to discuss.

7. One key priority for the Complainant was protecting employees' privacy and confidentiality relating to the sensitive information the State was requiring employees to disclose under the Executive Order. Whether or not they intended to get vaccinated, many bargaining unit members were deeply troubled by having to share their private medical and religious information with the State, in part due to general privacy concerns, but many employees were specifically alarmed about the possibility of the State disclosing their vaccine or exception status to the public or people within the State workforce that should not have access to the employees' personal information.

8. The disclosure of such information would violate employees' medical privacy rights and potentially allow people to draw conclusions about an employee's religion, health conditions, and/or political beliefs. Therefore, the Complainant sought strong assurances from the State that it would properly maintain and protect information regarding employee vaccination status.

9. The Complainant and the State signed a Letter of Agreement ("LOA") regarding the impacts of the Executive Order on bargaining unit employees. Regarding vaccination records, the LOA prohibited the State from disclosing whether any individual was vaccinated, but allowed the disclosure of such information if it was de-identified and in the aggregate (i.e. 95% of its employees have been vaccinated).

10. Since Governor Brown's order was issued, many media organizations, including the Oregonian/OregonLive and the Statesman Journal, have sought and received updates on the

aggregate figures for each State agency that reflect the number of vaccinated state employees and those that have received exemptions and accommodations.

11. On or about October 18, 2021, in response to a request from the Oregonian and Statesman Journal for updated information, a representative of the State sent the Oregonian and Statesman Journal an unredacted spreadsheet containing individualized information about the vaccination status of approximately 43,000+ executive branch employees including those represented by the Complainant.

12. On the same day that the data breach occurred, the Oregon Department of Administrative Services ("DAS") sent an email to all Executive Branch employees describing the situation and expressing regret for the inadvertent disclosure. In addition, DAS activated its incident response protocol to assess the situation and determine any obligations under the Oregon Consumer Information Protection Act ("OCIPA"). A second email with additional information was sent to all Executive Branch employees on October 20, 2021.

13. The Oregonian and the Statesman Journal published articles detailing the State's data breach on October 18, 2021. The State has acknowledged the improper data disclosure to the media and its employees. The State contacted the media outlets requesting assurances that the inadvertently disclosed information had not been further disseminated, and indeed had been deleted. The Oregonian has refused to destroy the confidential information and has also refused to agree not to publish the information in the future should it wish to do so. The Statesman Journal agreed not to publish the confidential information and agreed to delete the document.

14. Within minutes after the first article detailing the incident was published, the Complainant began receiving emails, phone calls, and other messages from employees who were angry and frightened by the data disclosure. The Complainant subsequently filed this unfair labor practice complaint to enforce the terms of the LOA.

15. In December 2021, DAS issued a formal Notice of Data Breach, in accordance with OCIPA. This provided a detailed description of the data released and provided a description of the steps the State's Cyber Security Services program took to address the data disclosure. It also provided a toll-free number which employees could call to speak with someone about the event and provided consumer protection information.

Stipulated Conclusions of Law

1. The Board has jurisdiction over these parties and subject matter.

2. The State's disclosure of the data regarding vaccination status violated the LOA and ORS 243.672(1)(g).

3. The violation was egregious and a civil penalty of $1,000 is appropriate.

Stipulated Order

1. The State violated ORS 243.672(1)(g) as stipulated above.

2. The State will cease and desist from committing the unfair labor practice above and will comply with the LOA.

3. The State shall email the attached notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

4. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may contact CHRO.Investigations@das.oregon.gov who will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

5. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

6. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

7. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

8. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

DATED this 25th day of May 2022.

BRIAN LIGHT On Behalf of the Respondent	Becky Gallagher BECKY GALLAGHER On Behalf of the Complainant

//

//

This Consent Order is approved and adopted by the Board.

DATED this 27 day of May 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-053-21, *Federation of Oregon Parole and Probation Officers (FOPPO) v. State of Oregon, Oregon Department of Administrative Services*, and to effectuate the policies of the Public Employee Collective Bargaining Act, we notify our employees of the following:

On October 18, 2021, the State of Oregon, Oregon Department of Administrative Services ("DAS") disclosed a vaccine exception spreadsheet that contained confidential state employee information to two media sources. Immediately following this disclosure, DAS activated its incident response protocol and investigated the circumstances. In December 2021, DAS issued a formal Notice of Data Breach to all impacted employees, in accordance with requirements under state law, that provided a description of the data released and the steps taken to address the disclosure.

The Employment Relations Board has found that the disclosure by DAS of the data regarding vaccination status violated the Letter of Agreement regarding the impacts of Executive Order 21-29 and ORS 243.672(1)(g). To remedy this violation, the Employment Relations Board ordered:

1. The State will cease and desist from committing the unfair labor practice above and will comply with the Letter of Agreement.

2. The State shall email this notice to all employees in the Complainant's bargaining unit along with an apology for the improper sharing of employees' confidential information.

3. The State and the Complainant shall establish a system whereby an employee who believes they have been the victim of identity theft as a result of the data breach may submit a report to DAS through the CHRO Investigations at the following email address: CHRO.Investigations@das.oregon.gov. CHRO Investigations will review the situation and will provide assistance if the data disclosure that is the subject of this action was the cause of the identity theft. The assistance provided may include financial assistance where reasonable and appropriate (e.g., reimbursement for expenses incurred for credit protection services).

4. The State will continue to take reasonable steps to prevent future data incidents including continuing to develop systems and protocols to protect employees' confidential information and providing any State employees with access to confidential data the training, technology, and resources necessary to comply with those protocols.

5. The State's violation of the LOA was egregious and the State will pay a civil penalty of $1,000.00 to Complainant within 30 days of the entry of this order.

6. The State will reimburse the Complainant's filing fee under OAR 115-035-0075.

7. The State will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055.

EMPLOYER

Dated May 25, 2022 By: 

Title: HR Administrator, DAS CHRO

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-004-22

(REPRESENTATION)

UMATILLA PROFESSIONAL FIREFIGHTERS, Petitioner, v. UMATILLA RURAL FIRE PROTECTION DISTRICT, Respondent.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE

On May 10, 2022, Umatilla Professional Firefighters (UPF) filed a petition under ORS 243.682(2) and OAR 115-025-0030 to certify (without an election) UPF as the exclusive representative of certain Umatilla Rural Fire Protection District (District) employees. Specifically, the petition sought to certify UPF as the exclusive representative of all full-time paid District firefighters responding to fire, medical, and rescue emergencies in Umatilla County. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating UPF as the exclusive representative of the proposed bargaining unit.

On May 11, 2022, 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 May 31, 2022). There were no objections to the petition or a request for an election.

// // // //

// // // //

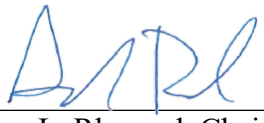
// // // //

ORDER

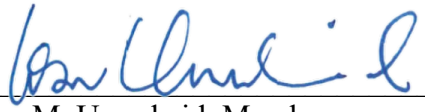
Accordingly, it is certified that Umatilla Professional Firefighters is the exclusive representative of the following bargaining unit of District employees:

> All full-time paid firefighters responding to fire, medical, and rescue emergencies in Umatilla County.

DATED: June 1, 2022.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-003-20

(UNFAIR LABOR PRACTICE)

GAULT, Complainant, v. PORTLAND FIREFIGHTERS' ASSOCIATION, LOCAL 43 AND CITY OF PORTLAND FIRE AND RESCUE BUREAU, Respondents.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 21, 2022, this Board heard oral argument on Complainant's objections to an October 8, 2021, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing was held on February 4, March 16, and May 4, 2021. The record closed on June 10, 2021, following receipt of the parties' post-hearing briefs.

Craig Gault, Complainant, Vancouver, Washington, represented himself.

Elizabeth A. Joffe, Attorney at Law, McKanna Bishop Joffe, LLP, Portland, Oregon, represented Respondent Association, succeeding Barbara Diamond, Attorney at Law, Portland, Oregon.

Fallon Niedrist, Deputy City Attorney, Portland, Oregon, represented Respondent City of Portland Fire and Rescue (party dismissed before hearing).

On September 3, 2020, Complainant Gault filed a complaint for unfair labor practices under the Public Employee Collective Bargaining Act (PECBA) against the Portland Firefighters' Association, Local 43 (Association), and the City of Portland Fire and Rescue Bureau (Bureau or City) regarding the Association's refusal to pursue Gault's grievance to change his job classification's eligibility for certain overtime opportunities. On September 24, 2020, the City moved to dismiss Gault's claims against it; Complainant's response to the City's motion stated that Complainant agreed with the City's motion, and, on October 9, 2020, the ALJ dismissed the

City from this action. On January 19, 2021, the Association filed its Answer admitting and denying allegations in the complaint and raising some affirmative defenses, as well as a motion to dismiss Gault's claims.

The issue is: With respect to ORS 243.672(2)(a), did the Association wrongfully handle Gault's overtime grievance by failing to (a) bargain the grievance with Portland Fire and Rescue in good faith; or (b) allow the Association Grievance Committee to hear, rule on, and act on the grievance?[1]

This Board concludes that the Association did not violate ORS 243.672(2)(a).

RULINGS

On September 24, 2020, the City filed a motion to dismiss the complaint for failure to state a claim for relief against it. Gault agreed with the City's motion, and, on October 9, 2020, the ALJ properly dismissed the City from the proceeding.[2]

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. The Bureau employs approximately 660-700 personnel.

2. The Association is a labor organization as defined by ORS 243.650(13) and is the exclusive representative of all non-supervisory sworn fire and rescue personnel employed in the Bureau, a bargaining unit of approximately 600 employees.[3]

3. The current collective bargaining agreement (CBA) between the Association and the City is effective July 1, 2019 through June 30, 2023.

4. The Bureau has two primary divisions: the Fire Marshal's Office (FMO) or fire prevention division, and the Emergency Operations (EOPS) division. The Fire Investigations Unit

[1]The complaint identified a violation of ORS 243.672(2)(a). In the statement of claims attached to the complaint, Complainant referenced ORS 243.672(2)(b). In his post-hearing brief, Complainant briefed a violation of ORS 243.672(2)(a), which is consistent with the nature of the alleged violations. Therefore, we analyze the allegations under ORS 243.672(2)(a).

[2]The Association subsequently moved to dismiss the complaint on grounds of timeliness and failure to state a claim. The ALJ denied the motion, and the Association did not file cross-objections, so we do not revisit the ruling on the motion.

[3]Sworn firefighters are those certified by the Oregon Department of Public Safety Standards and Training (DPSST). *See* ORS 181A.410; OAR 259-009-0000 – 259-009-0130.

(FIU), which includes the represented classifications of Fire Inspector and Fire Investigator, is part of the FMO. EOPS includes the various classifications engaged in firefighting and emergency medical response. For purposes of this order, we will generally refer to EOPS employees as "firefighters" for simplicity, but that division also includes emergency medical services (EMS) and other personnel.

5. There are generally five to seven Fire Investigators serving in the Bureau. Their classification has among the highest regular salaries in the Association bargaining unit.

6. Gault began work for the Bureau before 2018, working in EOPS. In his EOPS positions, Gault was required to engage in a certain number of hours per year of emergency response work to maintain his certification as a sworn firefighter. Gault became a Fire Investigator in September 2019. To become a Fire Investigator, Gault had to undergo specific training, including at the Department of Public Safety Standards and Training (DPSST). From the DPSST perspective, Fire Investigators are a form of police officer, and carry firearms.

7. During his work in EOPS, Gault had a reputation as a "callshift hawk," eager to seize overtime opportunities as soon as they became available.[4]

Work Schedules

8. Front-line firefighters in EOPS work a "suppression schedule" comprised of a 24-hour shift followed by 48 hours off, with an additional "Kelly Day" off every eight weeks to conform their schedules with the requirements of the Fair Labor Standards Act. Their overtime is determined by a 28-day, 216-hour schedule, which is 54 hours per week. Most Fire Investigators work a 42-hour week comprised of a 24-hour shift followed by 72 hours off. One or two Investigators work a 40-hour week schedule containing either five 8-hour days or four 10-hour days.

Callshifts

9. In the Bureau, a "callshift" is a work shift filled by an off-duty bargaining unit member during the absence of the regularly assigned unit member. Callshifts are valuable sources of extra work and income for the employees who work them. Not only do they provide additional hours of work, but that work is generally overtime work, compensated at a higher level. The CBA does not specify how callshifts are assigned. However, Article 13 of the CBA contains an "Existing Conditions" clause, which provides that "[a]ll mandatory conditions of employment relating to wages, hours, and working conditions not specifically mentioned in this Agreement shall remain at not less than the level in effect at the time of the signing of this Agreement." The procedures used by the Bureau in assigning callshifts have been generally the same since at least the 1990s, if not the 1970s. Both parties have generally treated callshift assignments as a long-established, fixed procedure.

10. Bureau General Order No. 10 sets out the procedures for assigning callshifts. The version of the General Order in effect at the time of hearing had been in place since 2011. Callshift

[4]The term "callshift" is defined below.

assignments are made by officials in Battalion Headquarters, who seek to keep unit members within two callshifts of each other at all times. The General Order refers to the relevant employees as "firefighters," and refers to firefighter station assignments throughout the document. It does not refer to Fire Investigators, who are not given station assignments. However, the Bureau has an established practice of following the same callshift procedures with Fire Investigators to fill empty Fire Investigator shifts. That said, because Fire Investigators are DPSST-certified positions, only Fire Investigators may fill empty Fire Investigator shifts.

11. Historically, since at least the 1990s, Bureau callshifts have been assigned only to employees in their particular division. Thus, firefighters are only assigned to fill in for absent EOPS employees. Fire Investigators are only assigned to fill in for absent FMO employees: principally Fire Investigators and Fire Inspectors. Firefighters are not permitted, by statute, to fill Fire Investigator or Fire Inspector positions, even if they have been DPSST-certified to perform those duties. Even if a certified Investigator chose to transfer back to EOPS, they could not fill in for absent Investigators; overtime opportunities within the FIU can only be worked by current Investigators. There is no legal obstacle to Fire Investigators filling in for EOPS firefighters so long as they are certified to perform that work.

12. Fire Investigators are entitled to overtime pay if they are held beyond their shift, if they work callshifts to replace absent Fire Investigators, if they work more than 171 hours in a 28-day period, or if they are called to testify in court. Fire Investigators typically have unexpected absences because of illness or being called to testify in court or before a grand jury.

Fire Investigator Attempts to Change Callshift Policy

13. Historically, Fire Investigators were not permitted to sign up for callshifts in EOPS. In the late summer of 2009, Fire Investigator Dan Stewart asked to work EOPS callshifts. The request was reviewed by then Chief Fire Marshal John Nohr.

14. Nohr addressed the issue as a serious request for a policy change. He consulted with other, more senior Bureau employees and learned that the practice of not permitting Fire Investigators to work firefighter callshifts had been in place since the 1970s. Nohr also talked with EOPS Division Chief Mark Schmidt to get Schmidt's perspective on the operational reasons for the practice of excluding Fire Investigators from firefighter callshifts.

15. Nohr determined that because there are only a few Fire Investigators, the Bureau had to make sure there were off-duty Investigators available to cover shifts for absent Investigators. A Fire Investigator working a 24-hour firefighter callshift would not be available to fill a vacant Fire Investigator shift. Even if an Investigator working a firefighter callshift were pulled back to fill a Fire Investigator shift, that change would in turn force EOPS to replace that Investigator for a partial firefighter callshift, which is harder to fill than a full one. The callshift issue was also complicated by the different shift times in EOPS and the FMO.

16. Nohr also considered that Fire Investigators carry firearms, but there is no appropriate, secured firearm storage available in fire stations or on EOPS vehicles, and firearms are not permitted when working a fire.

17. Nohr also considered that while Fire Inspectors could do overtime firefighter work as well as their own, firefighters could not do Fire Inspector work. In addition, while the amount of Fire Investigator overtime varied, generally Investigators had access to a "tremendous amount" of overtime while at the highest base pay in the bargaining unit.[5]

18. Nohr concluded that there were no persuasive reasons to change the practice of barring Fire Investigators from working overtime in the EOPS division by picking up EOPS callshifts. Accordingly, on September 1, 2009, then Chief Fire Investigator Greg Wong sent an email to Fire Investigators that stated, "Per Chief Nohr, members working in Investigations are not eligible to sign up for EOPS callshifts."

19. Association officers, including one who was a Fire Investigator, reviewed Stewart's proposed changes. None of them supported the proposed changes.

20. In 2018, Fire Investigator Jason Andersen asked Deputy Chief Gary Boyles to change the Fire Inspector/EOPS callshift policy. On July 14, 2018, Boyles responded by an email to the Fire Investigators stating that "a decision has been made to now allow members the opportunity to sign up for EOPS Callshifts if you so desire." Later that day, Deputy Chief Greg Espinosa raised questions about how the change would be implemented.

21. Boyles did not notify the Association of the change. The Association learned of it when a firefighter contacted the Association because he lost a 24-hour callshift to Fire Investigator Andersen. The Association President, Alan Ferschweiler, filed a grievance on the firefighter's behalf.

22. Ferschweiler informed the Bureau that the remedy sought by the grievance was a return to the status quo, but also stated that the Bureau could discuss the issue and explain its rationale to Association Vice President Terry Foster if it wanted to discuss a potential change. Ferschweiler contacted Fire Investigator Andersen to inform him of the grievance and invited him to explain the reasoning behind his request to work EOPS callshifts. Andersen asked to have a discussion regarding the issue.

23. Within a few days, the Fire Marshal notified the Fire Investigators that, because of the Association grievance, "Management has agreed to return to the status quo" that "Fire Investigators will not be allowed to work overtime in Emergency Operations." Association Vice President Kyle MacLowry followed up with the discussion Andersen had requested and included another Investigator, Rob Garrison. MacLowry acknowledged that the Bureau had returned to the original callshift policy, but agreed that Andersen had raised some issues that warranted further discussion. One such issue was the desire of some Investigators to work enough EOPS hours to retain their skills and firefighter certification in the event of transfer or promotional opportunities.

[5]According to the 2019–2023 collective bargaining agreement, the wage of an entry-level firefighter working 51.69 hours per week is $18.38 per hour. The wage of an entry-level Fire Investigator working 42 hours per week is $44.14 per hour.

24. After further discussions between Investigators and Association officers, MacLowry stated that they would continue to seek a solution, but that, going forward, FIU members "should be able to work OT on the line [in an EOPS shift] any time BHQ [Battalion Headquarters] needs a [bargaining unit] member." Such a Bureau "need" triggered the Bureau's "mandatory overtime mode." In mandatory overtime mode, the Bureau could order employees to continue working after the end of their scheduled shift or even call in employees to work during their scheduled time off. Before those steps, the Bureau would give employees who had previously signed up to cover such shifts the chance to take the shifts. Allowing Inspectors to work EOPS shifts during mandatory status gave the Investigators overtime and certification time with minimal impact on EOPS employees.

25. During September 2018, the Association Executive Board met with the Fire Investigators to discuss the issue. On October 17, 2018, MacLowry asked Chief Boyles to meet and discuss the issue further.

26. On October 23, 2018, Ferschweiler asked Fire Marshal Nate Takara to send him a list of the amount of each Fire Investigator's overtime over the previous three years. The documents revealed that Investigator overtime had decreased in the last year because an additional Investigator was added to the unit. That addition was in response to Investigator complaints about working too much overtime in 2016 and 2017. However, the Investigators still worked a significant amount of overtime that year, between 150 and 167 hours, and their overtime over the last three years was substantial.[6]

27. After reviewing this data, Foster concluded that "trying to have [Investigators] work [EOPS] when in Mandatory mode is appropriate." Foster did not, however, want to make "big changes" only to have the Investigators go "back to working $30K in OT and still working OT in EOPS." Foster noted that Investigators working in EOPS was not "apples to apples."

28. After Association leadership agreed, Foster proposed to Boyles that they do a six-month trial during which Investigators could work EOPS callshifts when EOPS is in mandatory mode, and Boyles agreed.

29. During November 2018, Gault was in training to be an Investigator, but was not yet sworn or assigned to the FIU. On November 4, 2018, Gault emailed Ferschweiler to oppose the Association callshift grievance, point out the lack of a written policy to support the Association leadership's position that Investigators were not permitted to work EOPS callshifts, and ask for the issue to be placed on the next membership meeting agenda. Ferschweiler replied that the topic was on the November meeting agenda, as it had been in past months; that Gault could call one of the primary officers to learn the history of the issue; and that Ferschweiler had authorized a six-month trial period for Investigators to work callshifts in EOPS when it was in mandatory mode.

30. During the November 2018 membership meeting and others, the EOPS callshift issue was discussed. Garrison asked why Investigators were not allowed to work EOPS callshifts

[6]At the time of hearing, Investigator overtime had increased substantially due to two or three of the Investigators being out on leave. In this small, closed work unit, the absence of any Investigator creates significant overtime for the other Investigators.

and Foster explained the historic practice of having separate divisional overtime and the fairness issues involved. Gault was present for that discussion.

31. Foster worked with Bureau officials to implement the decision to allow Investigators to work EOPS callshifts while in mandatory mode for the trial period. In December 2018, Boyles asked the Investigators to notify him if they did not plan to ever work 52-hour callshifts in EOPS so that they would not receive unwanted notifications in the "Crew Sense" notification system they used. On December 20, 2018, Ferschweiler formally approved Investigators working in EOPS during mandatory mode on a trial basis.

32. During the trial period, Foster continued discussions with Andersen and Garrison. Andersen argued that allowing the five investigators to work EOPS callshifts would have a minimal impact on regular EOPS employees as a whole. However, one EOPS member losing a callshift to an Investigator loses 24 hours of work at overtime pay, approximately $1,200. Foster told Andersen that he was "just trying to do the right thing," and explained that many of the members care about overtime "and thus the grievance," and that Investigators have their own exclusive overtime.

33. The six-month trial was successful. The new policy remained in place at the time of hearing. However, some Investigators believed that this procedure did not meet their needs, in part because the relevant callshift opportunities became available shortly before they had to be worked, and the electronic notices of callshift availability sometimes arrived late at night, disrupting spouses' sleep.

Gault's Grievance

34. Under the CBA, Fire Investigators receive a three percent premium upon completion of their DPSST training and an additional three percent upon completion of the Fire Training Officer program. Investigators also receive $7.80 per hour for standby time, and an additional six percent premium if they are assigned as a Fire Training Officer.

35. On November 29, 2018, Gault completed his DPSST training. On September 5, 2019, Gault completed his Fire Training Officer training and was fully sworn and certified as an Investigator. Between November 29, 2018 and September 5, 2019, Gault was still able to work EOPS callshifts in non-mandatory mode because he was not yet able to work overtime as a Fire Investigator. However, on September 13, 2019, at 6:02 a.m., Crew Sense notified Gault that he was assigned to work a 24-hour EOPS callshift. This notification was based on an error Deputy Chief Andy Ponce had made in using Crew Sense. At 6:42 a.m., Ponce notified Gault that, because Gault had become a full-fledged Investigator, Gault could not work that shift unless EOPS was placed on mandatory hiring status.

36. On September 23, 2019, Gault filed a grievance protesting the September 13 denial of the EOPS callshift. Article 14 of the CBA permits unit members to file grievances on their own and pursue them through Step 2 without Association consent or involvement.

37. On September 30, 2019, at Ferschweiler's request, MacLowry offered to meet with Gault, Foster, and any other Investigator to discuss Gault's grievance.

38. On October 10, 2019, MacLowry and Foster met with Investigators Gault, Anderson, and two other Investigators to discuss Gault's grievance and EOPS callshifts generally. Foster and MacLowry considered the meeting a brainstorming session. The Investigators stated that it was unfair to deny them access to EOPS callshifts, and raised concerns about not being able to keep up their EOPS skills and certification needed for potential promotional opportunities. The parties discussed various options, including expanding the ability of Investigators to work short-notice callshifts in addition to mandatory EOPS callshifts. Regarding the skills issue, Foster and MacLowry raised a potential solution, namely permitting Investigators to work rotations on the line. Foster and MacLowry did not believe they had made any agreement with the Investigators or the Bureau, and informed the Investigators that they would need to have further discussions with the Bureau and Ferschweiler.

39. On October 17, 2019, several members of Bureau management and payroll met with the four Association Vice Presidents, including MacLowry and Foster, to discuss various issues regarding the Bureau's new Crew Sense scheduling and recording process. One issue the parties discussed was the feasibility of allowing Investigators to work short notice callshifts in EOPS.

40. MacLowry summarized the callshift portion of the meeting in an email to Gault, stating in part:

> "Members present: Hawks, Rossing, Handley, Leon, Oneisha, D. Kelly, Ponce, Foster, Chipman, Lehman, McLennan, MacLowry
>
> "Investigator callbacks were one of the items we discussed. Here are the take aways, from my perspective:
>
> "• Hour for hour overtime is conceptually feasible, though it would be 'a lot of work' for Oneisha and BHQ. It also has the down side of having a lag time between the hours worked showing up in your OT bucket as they are entered in different ways on different systems that don't talk to each other
>
> "• Don Kelly suggested that the FIU work OT like the Liaison. As a unit that generates its own overtime, regular callbacks are only available within the unit and Investigators can sign up for short notice callbacks on the line. Short notice callbacks [for callshifts arising with less than 24 hours' advance notice] will be assigned to FIU members same as everyone else in EOPS, by hours worked (in the short notice bucket).
>
> "• FYI - Ponce has appreciated Gault working a few times recently to avoid having to mandatory someone else. Apparently he has talked to and apologized to [Gault] about the time he called and then took the shift back (which led to the grievance). It was an anomaly while he was learning the system in his new position. It likely has not and will not happen again.

"• For the time being we are remaining at status quo while BHQ is working on some global OT/Crew Sense issues and fixing the numbers that got scrambled a while back. (I just learned about this yesterday)

"It is my understanding that filling regulars in house for everybody (EOPS for EOPS, FMO for FMO, FIU for FIU, etc) and letting the short notice be a 'free for all' is the direction we are going.

"It seemed like a decent solution to me, but I am sure there are angles that I am not seeing.

"Please let us know your thoughts, comments and concerns."

41. While Foster and MacLowry were openly pleased with the proposal, they did not believe they had made an agreement with the Bureau or the Investigators to adopt the proposed policy, and lacked the power to do so, even on behalf of the Association.

42. Gault replied to MacLowry's email by stating, "Sounds great! Thanks for the work. I look forward to a written policy and the ability to sign up again." Another Investigator emailed MacLowry to say, "Thank you, This sounds great. Will we get notification on/after 10/29 that it is approved? It would be great to be sure they have completed all needed entries. I appreciate your quick work on this." Foster responded to the email chain, stating "I've asked BHQ to come up with some documentation on how they staff as this has been inconsistent in the past. Hopefully we will be moving forward with that asap. I'll let you know when any staffing policy has changed."

43. On October 26, 2019, Ponce sent a memo to all Bureau EOPS personnel regarding the resetting of the hours in employee "callback banks" to correct problems that occurred when the Bureau changed the mechanism that tracked EOPS callshifts and determined how EOPS callshifts were assigned within EOPS.

44. At the end of October, Foster and MacLowry met with Ferschweiler about their October 10 and October 17 Investigators and Crew Sense meetings. They talked about allowing Investigators to work short-notice callshifts in EOPS.

45. Ferschweiler stated that he opposed the idea, but that he wanted to continue the new practice of giving Investigators EOPS callshift opportunities when EOPS was in mandatory mode.

46. Ferschweiler explained his reasoning to Foster and MacLowry as follows: only Investigators can work the overtime required by their unit; Investigators cannot be *required* to work mandatory callshifts in EOPS, but EOPS employees could be so required; having Investigators being called off EOPS callshifts to fill Investigator absences would pose logistical problems; allowing Investigators to work non-mandatory callshifts would take overtime opportunities away from the lowest paid unit members; Investigators having 72 hours off between shifts gave them more opportunities to take such callshift work from lower-paid firefighters; the lack of safe storage for investigator firearms (which could not remain on their person at a fire);

and the lack of a comprehensive Bureau-wide overtime policy that would equalize opportunities and mandatory callshifts.

47. Foster and MacLowry were frustrated by Ferschweiler's opposition to the callback proposal, which they thought was agreeable to all participants in their meetings. However, after discussion, they realized that they had viewed the issue from the Investigator's perspective without considering the effect on EOPS employees, and acknowledged the appropriateness of Ferschweiler's "10,000 foot view."

48. On December 13, 2019, Gault moved his grievance to Step 2, arguing that denying the EOPS shift to him violated General Order No. 10 and Article 7 of the collective bargaining agreement. Gault did not provide an explanation of how those provisions were allegedly violated.

49. On December 30, 2019, Gault filed an unfair labor practice charge with the National Labor Relations Board (NLRB) alleging that the Association restrained and coerced an employee in the exercise of federal labor rights by refusing to process his grievance for arbitrary or discriminatory reasons or in bad faith. The NLRB sent the charge to Ferschweiler that same day. On January 6, 2020, the NLRB informed Ferschweiler that the charge had been withdrawn.

50. On January 15, 2020, City Labor Relations Manager Marquis Fudge provided a substantive Step 2 response to Gault's grievance. He stated that the "City's practice has been to restrict the Investigator's overtime opportunities to that of their own workgroup," and stated that this practice did not violate Article 7 of the CBA. Fudge also stated that the Association could appeal to Step 3, and the Bureau was willing to have conversations with the Association about potential resolutions. However, Fudge stated that any such settlement of the grievance required written approval by the Association President and City Director of the Bureau of Human Resources pursuant to Article 14, Section 1 of the CBA.

51. The Association Grievance Committee is comprised of the four Association Vice Presidents, who were then Foster, Jason Lehman, Isaac McLennan, and Investigator Garrison. Garrison had replaced MacLowry in January 2020. Lehman chairs the committee.

52. On January 15, Gault emailed the Association Grievance Committee requesting that it issue a written decision as to whether it would proceed to Step 3 within eight days.

53. As a practice, the Grievance Committee does not consider grievances until they have been moved to Step 4. That step requires the Association to decide whether to proceed to an arbitration.

54. On January 23, 2020, the Grievance Committee met to discuss Fire and Police Disability and Retirement subsidy requests. The Committee did not discuss any grievances. Lehman informed Gault that the Committee had met.

55. On January 24, 2020, Gault emailed Lehman to request the agenda and meeting minutes from the January 23 meeting.

56. On January 28, 2020, then Association counsel Barbara Diamond moved Gault's grievance to Step 3 to meet a grievance process deadline. On February 3, 2020, Ferschweiler notified Gault of the appeal to Step 3.

57. The City did not provide a Step 3 response, so the Association moved the grievance to Step 4 to meet the grievance process deadline. On February 26, 2020, Ferschweiler notified Gault that he had moved the grievance to Step 4.

58. On February 26, 2020, Gault emailed Bureau Human Resources Business Partner Keith Hathorne asking whether there had been any discussion between the Association and the Bureau on the issue and asking for Hathorne's view regarding a solution to the callback shift issue to "determine if I need to file an ERB complaint for an ULP – duty to represent claim against local 43." Hathorne forwarded the email to Fudge, who handles grievances at Step 3 and above.

59. On March 13, 2020, Fudge replied to Gault that the City was willing to discuss a resolution to the grievance but that granting the requested remedy would require a signed agreement between the Association and the Bureau.

60. In March or April 2020, consistent with the Association's practice regarding grievances at Step 4, Ferschweiler asked Association counsel Diamond to give the Grievance Committee a legal opinion regarding the merits of Gault's grievance.

61. On May 8, 2020, Diamond telephoned Gault, giving him a chance to explain his position so she could consider it in reaching her legal opinion. The conversation lasted 45 minutes to an hour. Gault told Diamond that: Chief Nohr had changed the practice in 2009, and the Association should have responded with a grievance; Foster and MacLowry had agreed in the October 10, 2019, meeting to allow Investigators to work more EOPS callshifts; and he did not want to pursue his grievance to arbitration, because his intent was to induce Ferschweiler to negotiate a formal callback shift agreement with the City. Gault also told Diamond that he thought Ferschweiler's opposition on the issue was not discriminatory, but was unreasonable.

62. Diamond explained the Grievance Committee process to Gault, but did not promise that Committee members would contact him, or that the Committee would act, within a short period of time.[7]

63. On June 4, 2020, Diamond gave the Grievance Committee a written legal opinion stating her assessment of Gault's grievance. Diamond concluded that the collective bargaining agreement had not been violated. Instead, the agreement's maintenance of standards provision required the Bureau to continue following the historic overtime practice. Diamond stated that the rationales for the practice were reasonable, especially given that former Chief Nohr had supported the practice, and that Diamond knew him to be fair, reasonable, and highly respected. Diamond's

[7]Gault claimed that Diamond said he would hear something in two weeks. Diamond denied saying that and explained why she would not have made such a statement. We credit Diamond's testimony. Diamond was very familiar with the Association/Bureau grievance process and practices, and based on that knowledge, promising contact with Gault in two weeks would have made no sense.

conclusion was that the grievance had no merit, and that the Association would not breach its duty of fair representation if it chose not to take it to arbitration.

64. On October 8, 2020, the Grievance Committee met for the first time since its January 23 meeting. The length of time between meetings occurred for a number of reasons. In general, it was not uncommon for the Committee to take six to 12 months to meet about a grievance; as of October 8, 2020, there were three or four grievances older than Gault's that were still awaiting review. In particular, during the time at issue here, there were significant and unusual demands on Committee members' time due to the COVID-19 pandemic and its effect on the safety of unit members; the George Floyd protests; the unprecedented wildfires during the summer; and successor bargaining with the Bureau in the midst of an economic downturn from the pandemic. Except for Investigator Garrison, Association officers were all front-line EOPS workers; even the Association President was released for Association work only for approximately 25 percent of his time.

65. All four members of the Grievance Committee attended the October 8, 2020, meeting to consider Gault's grievance. Committee members considered Diamond's legal opinion and discussed the substance of the grievance. Gault spoke to the Committee by video conference and was given all the time he wanted to present his arguments. Ferschweiler spoke to the Committee by video conference as well, explaining his position, but left the meeting before the Committee's deliberation and vote on whether to proceed to arbitration. The Committee voted unanimously not to take the grievance to arbitration. The meeting lasted approximately an hour and a half.[8]

66. On October 9, 2020, Lehman notified Gault of the Committee's decision. On October 20, 2020, Lehman gave Gault the minutes of the October 8 meeting and told him that he could appeal the Grievance Committee's decision to the Executive Board at its next meeting on November 9, 2020. On October 22, 2020, Gault notified the Association that he would appeal to the Executive Board and requested a statement from the Grievance Committee regarding the reason for its decision.

67. On November 2, 2020, Lehman provided Gault with information about the November Executive Board meeting at which the appeal would be heard. Regarding the Committee's rationale for the denial, Lehman wrote:

> "The Grievance Committee decided not to pursue your grievance to arbitration because it does not believe it is meritorious. The parties' past practice of awarding callshifts has been in place for many years (other than recently allowing Investigators to work callshifts in emergency operations when in mandatory mode). Changing that past practice would reduce overtime opportunities for emergency operations personnel. We believe this position is in the best interest of the bargaining unit as a whole."

[8]There is no evidence that this decision resulted from anything but a fair, reasoned consideration of Gault's grievance.

68. On November 10, 2020, the Association Executive Board met and considered Gault's appeal. Gault was given as much time as he wanted to present his arguments. The Executive Board also granted Gault's request to have fellow Investigator Anderson address the Executive Board, and reviewed a letter from Investigator Stanley in support of Gault's position.

69. No Executive Board member made a motion to reverse the Grievance Committee's decision, and therefore the Committee's decision was left in place.

CONCLUSIONS OF LAW

Gault alleges that the Association violated ORS 243.672(2)(a) by not following up with him after his conversation with Diamond as promised, and by choosing not to take his grievance to arbitration. We conclude that Gault failed to meet his burden to establish that the Association violated its statutory obligations under PECBA.

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

Timeliness of Original Complaint

Complainant filed his complaint on September 3, 2020. Under ORS 243.672(6), an unfair labor practice complaint must be filed within 180 days "following the occurrence of an unfair labor practice." The statute is also subject to 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. *Rogue River Education Assoc. v. Rogue River School,* 244 Or App 181, 260 P3d 619 (2011). As applied in this case, only any unlawful conduct occurring after March 7, 2020 (180 days before the filing of the complaint) would be timely. Here, the only events relevant to Gault's claims that took place after March 7, 2020, were (1) the Association's alleged failure to follow up immediately after his May 2020 meeting with attorney Diamond; and (2) the Grievance Committee's formal meetings and decision in October and November 2020 not to proceed with Gault's grievance. Any alleged unlawful Association actions that occurred before March 7, 2020, are untimely, and we do not consider them, except to the extent that those actions may be relevant to any alleged unlawful conduct occurring after March 7, 2020.[9]

2. With respect to ORS 243.672(2)(a), the Association did not wrongfully handle Gault's overtime grievance by failing to (1) bargain the grievance with the Bureau in good faith or (2) allow the Association Grievance Committee to hear, rule on, and act on the grievance.

Standards for Decision

ORS 243.672(2)(a) makes it an unfair labor practice "for a labor organization or its designated representative" to "[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed" by PECBA, 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. ORS 243.672(2)(a) imposes a "duty of fair representation" on a labor organization

[9]The ALJ issued such a ruling before the hearing, and Gault did not challenge it.

when it acts as the exclusive representative of a bargaining unit of employees. *Griffin v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Employment Department*, Case No. FR-002-09 at 24, 24 PECBR 1, 24 (2010). At the same time, "a labor organization's actions and decisions as the exclusive representative of employees must be afforded broad discretion." *Block v. Amalgamated Transit Union, Division 757,* Case No. FR-001-15 at 4, 26 PECBR 486, 489 (2015). *See also Caddy and Van Hooser v. Multnomah County Deputy Sheriff's Association*, Case No. C-62-84 at 10-11, 7 PECBR 6545, 6554-55 (1984) (citing *Ford Motor Co. v. Huffman*, 345 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." *Block*, FR-001-15 at 4, 26 PECBR at 489.

A labor organization's action is arbitrary if it lacks a rational basis or is so perfunctory that no reasoned decision is made. *Howard Jr. v. Western Oregon State College Federation of Teachers, Local 2278, OFT and Western Oregon State College*, Case Nos. UP-80/93-90 at 27, 13 PECBR 328, 354 (1991). A labor organization's conduct is unlawfully discriminatory if there is "substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives." *Id*. (quotation marks and citation omitted). A labor organization's conduct is in bad faith "if it intentionally acts against a member's interest and does so for an improper reason." *Block,* FR-001-15 at 4, 26 PECBR at 489.

To determine whether a labor organization fairly represented an employee by deciding not to take a grievance to arbitration, we consider several factors. First, as stated above, labor organizations have broad discretion to make decisions concerning the representation of employees. Decisions about whether to file or pursue a grievance are entitled to substantial deference. *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98 at 10, 18 PECBR 79, 88 (1999). This deference exists because "[i]f a union's decisions are constantly attacked by disgruntled members, the organization's collective power is weakened and the employees' interest in having a strong and effective organization to represent them is defeated." *Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91 at 14, 14 PECBR 409, 422 (1993).

However, a labor organization can violate its duty of fair representation if its decision not to pursue a grievance is arbitrary, discriminatory, or made in bad faith. To answer this question, this Board focuses on the labor organization's conduct and the process by which it made its decision, not the merits of the grievance. *Chan 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 13, 21 PECBR 563, 575 (2006), *recons den*, 21 PECBR 597 (2007). As long as the labor organization acts reasonably, it may rationally decide not to pursue a grievance, even if it would likely win in arbitration. *Martin v. Ashland School District #5, Morris, OSEA; Fields, Helman Elementary*, Case No. UP-30-01 at 14, 20 PECBR 164, 177 (2003).

Based on these standards, we accord discretion to a union's choices in investigating a potential grievance, so long as some reasonable good-faith investigation is undertaken. *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20 and Metropolitan Exposition Recreation Commission*, Case Nos. UP-15/16-92 at 22, 15 PECBR 85, 106 (1994), *aff'd without opinion*, 134 Or App 414, 894 P2d 1267 (1995).

Analysis

In this case, Gault contends that the Association violated its duty of fair representation by (1) failing to contact him at an appropriate time on matters related to his grievance and (2) refusing to take his grievance to arbitration.

As far as the contact issue is concerned, we have determined as a matter of fact that Association counsel Diamond did not promise a two-week window for Association officials to contact Gault about his grievance and the Grievance Committee. The record also shows that Association officials and Gault were in regular communication before and during the Gault grievance process until the matter was before the Grievance Committee. We note that there was an approximately eight-month period in 2020 when Gault was waiting for the Grievance Committee to decide whether to take the grievance to arbitration. However, the record demonstrates that Gault's grievance was treated in the same fashion as other grievances, if not better; and that any delays in the process had nothing to do with Gault or the nature of his grievance. We conclude that the Association did not violate ORS 243.672(2)(a) regarding the investigation and processing of his grievance.

We turn to the decision not to pursue the grievance to arbitration. At the outset, we note that Gault voluntarily dismissed the City from this case, effectively acknowledging that there was no contractual breach that would be the basis for a meritorious grievance. Thus, there can be no legitimate argument that the Association breached its duty to fairly represent Gault by not taking his admittedly nonmeritorious grievance to arbitration. That alone is sufficient to dispose of the claim.

Moreover, the record shows that Association officials were heavily involved in addressing the issues raised by Gault's grievance even before it was filed. Indeed, the City/Association callshift procedures were changed December 20, 2018, to address, in part, the concerns of Gault and the other Investigators regarding the ability to work EOPS callshifts. We determine that Association officials were not biased against Gault and were fully informed of the issues relevant to Gault's grievance. Gault was fully informed of the process, fully involved in the process, and had repeated opportunities to provide evidence and plead his case to the Association. The grievance proceeded through the Grievance Committee process on a timeline that was not unusual. Although we have concluded, as a matter of fact, that Gault was not promised immediate follow up after his discussion with Association counsel Diamond, even if he were, Gault has not demonstrated any resulting impact on him or his grievance. We conclude that the Association conducted a reasonable good-faith investigation.

When Association officials decided not to take Gault's grievance to arbitration, those officials were fully informed of the callshift issue. Their knowledge of the issues was broadened by review of the matter by Association counsel and her subsequent opinion letter. The grievance was carefully evaluated and considered, and the decision that it lacked merit was a reasonable one. In addition, Gault's admitted purpose of the grievance was not to enforce or interpret the collective bargaining agreement. Instead, it had the internal union political goals of changing the views of Association leadership regarding an issue that could pit one group of bargaining unit members against another. Gault's internal union political goal was to tilt that balance towards himself and a

few other highly compensated employees and away from a much larger number of lesser compensated employees. Nothing in this process indicates that the Association's decision not to pursue the grievance was arbitrary, discriminatory, or made in bad faith.

We conclude that Complainant Gault has failed to meet his burden to prove that the actions of the Association were arbitrary, discriminatory, or taken in bad faith such that the Association violated its duty of fair representation to him. Accordingly, we dismiss the complaint.

ORDER

The complaint is dismissed.

DATED: June 1, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-008-21

(MANAGEMENT SERVICE REPRIMAND)

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

Appellant JN, Aumsville, Oregon, represented himself.

Margaret J. Wilson, Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, represented Respondent.

On May 11, 2022, 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.[1] OAR 115-010-0090(4).

ORDER

The appeal is dismissed.

DATED: June 2, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

[1]We have corrected four statutory/regulatory citation errors.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-008-21

(MANAGEMENT SERVICE REPRIMAND)

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

A hearing was held before Administrative Law Judge (ALJ) Jennifer Kaufman on December 22, 2021, by Zoom teleconference hosted in Salem, Oregon. The record closed on February 3, 2022, following submission of Respondent's post-hearing brief (Appellant did not file a post-hearing brief). In a periodic reassignment of cases, the matter was transferred to ALJ B. Carlton Grew for issuance of a Recommended Order.

Appellant JN, Aumsville, Oregon, represented himself.

Margaret J. Wilson, Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, represented Respondent.

On September 22, 2021, the State of Oregon, Oregon Department of Corrections (Department) issued JN a written reprimand. On October 21, 2021, JN filed a timely appeal to this Board.

The issue is: Did the Department violate ORS 240.570(3) when it issued JN a written reprimand?

As discussed below, we conclude that the Department proved some of the charges in JN's written reprimand, and that the Department's reprimand of JN did not violate ORS 240.570(3). We therefore dismiss the appeal.

RULINGS

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

FINDINGS OF FACT

The Parties

1. The Department manages the State's correctional institutions, including Santiam Correctional Institution (Santiam), Oregon State Correctional Institution (OSCI), and Oregon State Penitentiary (OSP).

2. Kimberly Hendricks is the Superintendent of Santiam. She supervises the Institution Security Manager (ISM), who who supervises the prison's Corrections Lieutenants, who in turn supervise line Correction Corporals and Officers.

JN and His ISM Position

3. JN is the Institution Security Manager (ISM) at the Department's Santiam facility. The Department hired JN as a Correctional Officer at OSCI in March, 1996. He was promoted to Correctional Corporal in July 1999; Correction Sergeant in June, 2010; Correctional Lieutenant in June 2013; and Correction Captain in August 2015. In March 2018 JN transferred to OSP. In February 2019, JN became Institution Security Manager (ISM) at Santiam (a lower-level position than his previous one), where he remained at the time of hearing. That ISM position is one of the most challenging in the Department.

4. JN's ISM position is classified as a Principal Executive Manager D ("PEM-D"). In this ISM position, JN is responsible for advising managers regarding security and safety matters, recommending hiring, and conducting investigations on both staff and inmates. He is also responsible for developing staff skills to enhance their competence and promotional opportunities. JN directly supervises six Lieutenants, and serves as acting Superintendent when Superintendent Hendricks is not available.

5. JN's position description states that the ISM "is expected to recognize their responsibility to act ethically at all times in accordance with the very highest standards of integrity." (Exhibit R-4 at 2.) The ISM is expected to promote positive working relationships, support co-workers, and maintain good working relationships with Department staff.

6. Like all Department managers and employees, JN has received training regarding the appropriate managerial response to allegations of inappropriate workplace conduct, particularly conduct raising issues of a hostile work environment.

7. JN has a direct, candid, unvarnished communication style, and delivers his verbal communications in a stentorian voice. Some subordinates perceive JN to be yelling while JN does

not perceive himself to be doing that.[2] JN does not use belittling or insulting words with his subordinates.

Events Regarding Corrections Officer TT

8. During the time at issue here, Corrections Officer TT, a new employee, was working under the Department's one-year trial service period. Two of TT's supervising lieutenants were DM and MM, with 24 and 17 years of experience, respectively, as Correction Lieutenants at Santiam. Earlier in her employment, TT had told DM about inappropriate content she saw on a Santiam computer. DM told TT to report the incident to Santiam managers, which TT did. That report led to an internal investigation and the termination of another trial service officer. Some employees at Santiam did not believe the termination was warranted, resulting in a sometimes uncomfortable working environment for TT.

9. In late November or early December, 2020, TT had what she explicitly called a peer support conversation with DM. TT told DM that Santiam Lieutenant DB was being disrespectful towards TT because of TT's report about content on a workplace computer that resulted in the termination of a fellow officer. TT was reluctant to discuss the events in detail because of her trial status, but ultimately told DM that TT felt bullied and intimidated by DB. In particular, TT stated that DB told TT that she could only use a "cell-in" in an inmate conduct order, when in fact corrections officers had other options for such an order. TT also stated that DB made comments expressing disagreement with the termination of the officer dismissed as a result of TT's report, who DB had been required to escort out of Santiam's premises. DB had made similar comments, such as "she should never have been fired," to DM. (DM Testimony.) TT also reported that DB told TT that the reason TT was having trouble with her job duties was because of her appearance.

10. TT asked DM not to report TT's comments because she feared retaliation. DM told TT that she and MA were required to report actions that raised issues of a non-respectful, or hostile, workplace.

11. Around the same time, TT told MA about another conversation she had with DB, during which DB described TT as a "drama queen," spoke about TT's lack of rapport with the AICs (adults in custody, e.g. inmates), and how TT handled herself, all while a corrections employee whom TT had some problems with was present. MA was particularly concerned about the term drama queen and wrote it down on a piece of paper so she would remember. MA asked TT whether she had spoken to anyone else about the conversation, and TT stated that she had sought peer support from DM. MA told TT that DB's comments raised an issue of a hostile work environment, that MA is a mandatory reporter, and that this information needed to be reported to upper management.

[2]Lieutenant MA appreciated JN's candid, unvarnished style, but nevertheless abruptly left her employment with the Department when JN changed her work schedule. Lieutenant MC, whom a longtime co-worker believed was ill-suited for a Corrections Lieutenant position, had frequent interactions with JN in which he was critical of her work, and MC was consistently uncomfortable in her interactions with him.

12. About a week later, MA told DM that DM needed to report TT's comments to JN and offered to visit JN's office with DM. On December 21, 2020, DM told MA that she was going to speak with JN and headed towards JN's office. MA followed behind her.

13. JN was present in his office, and the three had a conversation. DM told JN what TT had told her about feeling intimidated and bullied by DB, and that DB had talked about other managers with TT in an inappropriate manner. MA backed up DM's comments. JN responded that DB would not act in such a manner and therefore JN was not going to discuss the alleged behavior with him. JN also indicated that TT was a drama queen.[3] Ultimately, JN said that he would have a conversation with DB and ask DB for his view of TT.[4]

14. DM later described JN's response as "unbelievable" and "jaw-dropping." MA described JN's comments as inappropriate and harsh. MA believed JN's demeanor was both stern and matter of fact, and that JN could have been more professional. MA saw that JN's response was upsetting to DM.

15. After they left JN's office, MA told DM that she had no problem describing what happened in the meeting if DM was going to "push this forward." DM felt obligated to take the matter to upper management so that something would be done about JN's behavior.

16. After a conversation with a Department manager outside Santiam, DM filed a complaint against JN. That complaint led to an investigation resulting in the discipline at issue here.

June 23, 2020 Text Message, Pre-Christmas Communication

17. DM's work schedule during the relevant time period was [hours] Friday through Monday. DM's effective weekend was Tuesday, Wednesday, and Thursday. On June 23, 2020, a Tuesday, JN initiated the following text conversation with DM:

> JN: "Hey there please get with me on Friday I have a grievance about OT I need to discuss
>
> DM: "Couldn't this have waited till I came back to work now I'll be worried all of my weekend that I'm going to get in trouble

[3]In her testimony, Superintendent Hendricks thought the allegations that both BB and JN reportedly used, or agreed with, applying the term "drama queen" to TT affected the credibility of those reports.

[4]Investigatory documents indicate that JN stated that he promptly told Superintendent Hendricks about "the entire nature of the conversation" regarding TT's concerns, and Hendricks had not directed JN to take any action. (Exh. R-2 at 2.) Hendricks did not recall such a conversation. JN believed that the nature of the conversation was that MC and MA engaged in unprofessional, coordinated venting of dislike of BB, noting that MA and MC did not provide JN with documentation regarding any complaint. We conclude that if JN did indeed raise the issue with Hendricks, JN did so in such a vague or generalized way that Hendricks felt no need to make a substantive response.

JN: "You're never in trouble am I that bad. Yes it can wait. Please don't be paranoid"

(Exh. R-13 at 2-3.)

18. In fact, the "grievance" at issue was simply that one Corrections Officer had asked why another Officer got a particular overtime assignment instead of her. This communication sought and required only an explanation of the relevant work rules, not the start of the grievance process. In addition, one reason JN reached out to DM when he did was to remind himself to resolve the issue.

19. DM was offended by JN's use of the word paranoid, a term which did not allay her concerns about the alleged grievance. The interaction upset DM and cast a shadow over her weekend.

20. On DM's "Friday" before her 2020 Christmas weekend, JN told DM that they would meet the following Monday, and that DM should bring another manager as they were going to be discussing DM's job duties. JN told DM that he was not comfortable saying more about the meeting at that moment. JN added that he hoped he didn't, or didn't want to, ruin DM's weekend. DM believed that JN's comments, and the tone in which he delivered them, were disrespectful and confusing. JN, while intending to communicate deep concern about the underlying issue, genuinely did not wish to ruin DM's weekend.

JN's Supervisory Style With DM

21. During the relevant time period, DM worked a 4/10 schedule, Thursdays 12 to 10, Fridays 12 to 10, and 6 to 10 on Sunday and Mondays. Tuesdays and Wednesdays were her weekend equivalent. DM's work schedule did not overlap very much with JN's, making his supervision of DM more challenging.

22. Every Monday, JN met with DM, at his request, to discuss her work. JN rarely complimented any of her work. Most of the time, the meetings were to discuss something that JN believed DM had done incorrectly. DM, who regularly took actions at work which prompted critique from JN, was a challenging employee to supervise and counsel because she required significant supervision but was frequently defensive.[5]

23. JN often texted DM on her work and personal phones. JN later acknowledged that texting DM's personal phone was not appropriate. JN also stated he texted DM on her weekends in part as a reminder to himself of the issues they needed to discuss when she returned to the institution.

24. Sometimes JN peppered DM with questions without giving DM the time she needed to formulate responses. This upset DM. DM eventually raised the issue with JN. When DM told JN that this practice confused her, JN responded "I know. Heh heh." (Exh. R-2 at 3.) DM

[5]At hearing, MC used a loud and energetic voice in her testimony, objected to questions from JN, and interrupted the question-and-answer format of her examination by asking to make a statement.

took JN's comments as indicating laughter at her expense; JN did not intend his comments to be laughter at DM's expense, but an attempt to keep the conversation lighter in tone.

25. JN told DM that she was responsible for the inability to pursue criminal charges against a staff member after she investigated an issue and chose to issue only a verbal warning. In fact, DM had acted as JN had originally directed.

26. On one occasion, JN asked DM to make a copy of a surveillance film. JN and DM reviewed the film together. Later, JN misplaced the disc and approached DM, while she was in the Officer In Charge's office, and asked her to make another copy of the disc. When DM was unable to do so, JN spoke to her in a loud voice. After seeking help from another staff member, DM learned that a computer system failure had prevented her from making the copy.

27. In general, JN's tone with DM was occasionally disrespectful and often excessively loud. Although he had been made aware of the issue, JN was not entirely cognizant of how the tone and volume of his communications appeared to subordinates, particularly DM, who found JN's demeanor to be unprofessional and stressful at times.

28. On April 27, 2021, a Department Human Resources investigator interviewed JN about the matters raised by DM. The investigator also interviewed other witnesses, and issued an investigation report on September 1, 2021. The report and its relevant exhibits exceeded 100 pages, although some documents appeared multiple times. The investigator concluded that the allegations against JN were substantiated.

29. Santiam Human Resources Manager Eric Wilkinson received the investigator's report and reviewed the discipline imposed in some comparable cases. In one case, a Corrections Lieutenant was given a written reprimand for minimizing and not following up on a female staff member's allegations regarding an incident with a Corrections Officer. Subsequently, in a meeting with the staff member about the Officer, the Lieutenant became distracted and effectively dismissed the staff member.

30. In another case, a Corrections Principal Executive Manager-E was given a written reprimand for making, and allowing subordinates to make, repeated, unprofessional negative comments about staff using protected COVID-related leave time.

31. In another case, a Corrections Lieutenant was given a written reprimand for repeating, to a Corrections Officer and in front of another staff member, a rumor he had heard from inmates that involved another staff member and relative of the Officer. The rumor involved off-work sexual activity, which the Lieutenant described in vulgar language.

32. In another case, a Corrections Manager/Principal Executive Manager-D was given a written reprimand a direct management style that was perceived as curt, and rude. The Manager had also belittled, talked down to, and expressed outward disappointment and frustration towards a particular staff member when he made mistakes.

33. Hendricks made the decision to impose a written reprimand. She considered mitigating factors such as JN's length of service and his quality of character in the workplace, but believed that the reprimand was consistent with the comparable discipline imposed in other situations.

Written Reprimand

34. On September 22, 2021, Hendricks issued a written reprimand to JN.

35. The reprimand included the following statements:

"CURRENT SITUATION:

> "On December 21, 2020 it was reported you allegedly failed to investigate allegations raised by [DM] and being disrespectful to [DM] on various dates and times. An investigation started and was completed on August 30, 2021.
>
> "• It was alleged you failed to investigate allegations raised by [dm] about [DB] and [another individual].
>
> "• It was alleged you were disrespectful to [DM] by texting her on her personal phone on her weekend about a grievance when there was no grievance.
>
> "• It was alleged you were disrespectful to [DM] in words and behavior.
>
> "CHARGES SUPPORTING DISCIPLINE:
>
> "1. On December 21, 2020 you failed to investigate allegations raised by [DM] about [DB] and [another individual] when [DM] told you she was feeling intimidated and bullied by [DB]. You said you know [DB] and he would never do anything like that. In your investigative interview you stated, 'there was nothing shared during the meeting about [DB] that was egregious, out of character, or out of scope of the job.'
>
> "2. On June 23, 2020 you were disrespectful to [DM] by texting her on her personal phone on her weekend about a grievance when there was no grievance. * * *
>
> "3. You were disrespectful to [DM] in words and behaviors over various dates and times.
>
> "• Every Monday you called [DM] to discuss all the negative things she had done over the [her] weekend [shifts]. * * *

"• You would not give [DM] an opportunity to respond to multiple questions you asked to [DM]. * * *

"• In May 2019 you directed [DM] on how to handle a staff investigation * * * and you later told [DM] it was her fault they couldn't pursue a criminal charge against the staff member.

"• You yelled at [DM] demanding she make a copy of a lost disk with surveillance video after you had lost the original.

"• On December 21, 2020 you met with [DM] and stated, 'We're going to have a meeting next Monday. Make sure you bring another manager as we're going to be discussing your job duties. That's all I'm comfortable saying and I hope I didn't ruin your weekend.'

"CONCLUSION:

"In reviewing all the information presented to me and consideration of your overall performance while employed at Santiam Correctional Institution, I am issuing this Letter of Reprimand. Conducting yourself in a professional manner and following the Department of Corrections (DOC) policies and directives is essential to the safe and secure operation of the facility. Being employed as an Institution Security Manager you are held to a high standard. Failure to follow DOC policy cannot be tolerated and will lead to further discipline, up to and including dismissal."

(Exh. R-1 at 4-5.)

JN's Department Appeals

36. On October 21, 2021, JN appealed his written reprimand to this Board, and to Department Director Collette Peters and the Department of Administrative Services. JN denied wrongdoing.

CONCLUSIONS OF LAW

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

2. The Department's written reprimand of JN did not violate ORS 240.570(3).

At hearing, and in his appeal letter, JN argued that the Department failed to establish adequate grounds for his reprimand. Therefore, JN argues, the Department's reprimand violated ORS 240.570(3). We conclude that the Department has met its burden to establish that JN's reprimand was consistent with ORS 240.570(3). We turn to our analysis.

Standards for Decision

JN is a management service employee. ORS 240.570(3) provides that a "management service employee may be disciplined by reprimand * * * if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." When a State management service employee appeals an agency's discipline to this Board, the agency has the burden of proving that the discipline did not violate ORS 240.570(3). OAR 115-010-0070(5)(c); *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 14 (October 2001).

We review management service disciplinary appeals using a two-step process. *Dubrow v. State of Oregon, Parks and Recreation Department*, Case No. MA-03-09 at 27 (May 2010), *recons* (June 2010). First, we determine if the employer proved a charge or charges that are the basis of the discipline. *State of Oregon, Parks and Recreation Department* at 27. The employer need not prove all of the charges on which it relies. *Ahlstrom* at 15. Second, if the employer has proven some or all of the charges, we apply a reasonable employer standard to determine whether the employer was justified in taking the disciplinary action. *Greenwood v. Oregon Department of Forestry*, Case No. MA-03-04 at 30 (July 2006), *recons den* (September 2006).

A reasonable employer is one who disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, considers the employee's length of service and service record, and applies the principles of progressive discipline, except where the offense is gross. *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001). A reasonable employer also clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. *Stark v. Mental Health Division, Oregon State Hospital*, Case No. MA-17-86 at 35 (January 1989).

A management service employee may be held to high standards of behavior, so long as those standards are not arbitrary or unreasonable. *Stoudamire v. State of Oregon, Department of Human Services*, Case No. MA-4-03 at 7 (November 2003). Further, we may consider any damage to trust in the relationship between a management service employee and the employer. *See Reynolds v. Department of Transportation*, Case No. 1430 at 10 (October 1984).

Finally, a written reprimand is the mildest discipline that the State can impose. This Board has stated that:

> "* * * An employer generally imposes a reprimand to inform the employee that particular behavior is unacceptable and to obtain a correction of that behavior. Because a reprimand does not have an economic impact on an employee, its primary purpose is a form of notice. * * *."

Minard v. State of Oregon, Department of Transportation, Driver and Motor Vehicle Division, Case No MA-9-05 at 12 (September 2006), citing *Hill v. State of Oregon, Department of Transportation*, Case No. MA-7-02, at 13 (November 2002).

The Department's Written Reprimand of JN

MM's April 2, 2021, written reprimand cites three categories of JN's conduct in justifying imposition of the discipline: (1) failure to investigate allegations raised by TT, through DM about DB; (2) texting DM on her personal phone on her weekend about a grievance when there was no grievance; (3) being disrespectful to DM in words and behavior. We address only the allegations regarding the TT matter, as they are dispositive.

We have determined that the Department has met its burden to establish that JN did the actions at issue. JN was presented with an allegation of hostile work environment caused by a Correction Lieutenant DB, made by two experienced Lieutenants, regarding female trial service Corrections Officer TT. Upon hearing the allegation, JN immediately announced his opinion that the Lieutenant in question would not have acted as described, and, for all practical purposes, dismissed the allegation. In doing so, JN acted in a manner that, historically, was the reason that clear rules about reporting and investigating allegations of poor treatment of women and others in the workplace were adopted – JN decided the merits of the matter in an instant and dismissed the allegations without an investigation because it was inconsistent with his opinion of Corrections Lieutenant DB and Officer TT.

We turn to the imposition of the written reprimand.

Level of Discipline

We now consider whether the Department's written reprimand of JN was the action of a reasonable employer. We note that an employer may hold a management service employee to strict standards of behavior, so long as those standards are not arbitrary or unreasonable. *Lucht v. State of Oregon, Public Employees Retirement System*, Case No. MA-16-10 at 24 (December 2011); *Helfer v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992). A significant factor this Board considers is the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to act as a member of the management team. *Salchenberger v. State of Oregon, Department of Corrections*, Case No. MA-19-12 at 11 (July 2013); *Lucht* at 24. In addition, this Board gives weight to the effect of the management service employee's actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. *Salchenberger* at 11; *Lucht* at 24. Finally, we note that the employer's burden in justifying even a removal from management service is "relatively minor." *Zaman v. State of Oregon, Department of Human Services,* MA-21-12 at 15 (April 2013) (quoting *Plank v. Department of Transportation, Highway Division*, Case No. MA-17-90 at 29 (March 1992)).

We need only consider the allegation regarding JN's failure to investigate or follow up on DM and MA's report to him about TT's potentially hostile work environment, because our resolution of that issue is disposite of the appeal. In Department training and direction, and in the way the Department has handled comparable workplace issues, reports of potential misconduct relevant to a hostile work environment are to be taken seriously and reported to the appropriate staff to investigate and evaluate such claims. In this case, JN was approached by two very experienced lieutenants about a problem affecting a trial service corrections officer, one of the

most vulnerable positions in the institution. JN's response was to leap to the defense of the alleged perpetrator, cast doubt on the judgment of the person reporting the issue, and take no other meaningful action. JN did not even make a clear report to his supervisor regarding the issue. It is also relevant that JN was one of the highest level managers at Santiam.

The level of discipline imposed by the Department was proportionate to JN's offense. In choosing the mildest, type of formal discipline – a written reprimand – Department officials weighed the nature and importance of JN's wrongful conduct against mitigating factors such as JN's length of service and his quality of character in the workplace. The imposition of the lowest level of discipline was also consistent with the principles of progressive discipline. While Department officials could have used other tools, such as a frank conversation, or a letter of expectations, the issue was important enough in this hierarchical and challenging workplace to justify a disciplinary response and thus reinforce a clear expectation that managers must respond to reports of inappropriate workplace conduct.

Here, in consideration of all the circumstances, the Department acted as a reasonable employer in good faith and for cause when it disciplined JN. Therefore, the Department's decision to issue a written reprimand to JN was consistent with ORS 240.570(3). Therefore, this Board will dismiss the Appeal.

PROPOSED ORDER

The Appeal is dismissed.

SIGNED AND ISSUED 11 May 2022.

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@erb.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-030-20

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION, Complainant, v. CLACKAMAS COUNTY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 21, 2022, this Board heard oral argument on Complainant's and Respondent's objections to a recommended order issued by Administrative Law Judge (ALJ) Jennifer D. Kaufman on September 7, 2021, after a hearing on April 14, 2021, via videoconference. The record closed on May 26, 2021, following receipt of the parties' post-hearing briefs.

Kevin Keaney, Kevin Keaney PC, Driftwood, Texas, represented Complainant.

Andrew Narus, Assistant County Counsel, Clackamas County Counsel, Oregon City, Oregon, represented Respondent.

On September 11, 2020, Complainant Clackamas County Employees' Association (Association) filed an unfair labor practice complaint against Respondent Clackamas County (County). The complaint alleged that the County violated ORS 243.672(1)(a), (b), and (g) by restricting the Association president's access to his employee email account. The County filed a timely answer.

The issues litigated at the hearing are:

1. Did the County interfere with, restrain, or coerce employees in the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a), by restricting the access of Robert Escudero, president of the Association, to his employee email account?

2. Did the County interfere with the administration of the Association, in violation of ORS 243.672(1)(b), by restricting Escudero's access to his employee email account?

3. Should the County be required to pay a civil penalty pursuant to ORS 243.676(4) and OAR 115-035-0075?

4. Should the County be required to post a notice of any violations found?

For the reasons discussed below, we conclude that the County violated ORS 243.672(1)(a) and (b). We decline to order the County to pay a civil penalty but require the County to post and electronically distribute a notice.

RULINGS

The complaint alleged that the County's restriction of President Escudero's email account violated ORS 243.672(1)(g), in addition to ORS 243.672(1)(a) and (b). The ALJ placed the (1)(g) claim in abeyance pending exhaustion of the parties' contractual grievance procedure. On May 28, 2021, after the record closed in this case, Arbitrator Paul Gordon issued an award on the contract grievance in the Association's favor. On June 2, 2021, via email, the ALJ asked the Association to withdraw the 1(g) allegation. The Association declined to do so, stating that it had no intention of reinstating the claim, that the claim was not an issue at the hearing, and that it "decline[d] to withdraw an 'issue' that is not an issue." Consequently, we dismiss the (1)(g) claim as moot.

The County objected to the admission of Exhibit C-7 because it was not provided to the County until the day of hearing and was therefore untimely under OAR 115-010-0068(3), which requires that exhibits shall be provided no later than seven days before the hearing. The ALJ reserved ruling on the admissibility of Exhibit C-7 and asked the Association to brief the issue of whether good cause existed for not furnishing the exhibit before the hearing. *See* OAR 115-010-0068(4) (a party that fails to comply with OAR 115-010-0068(3) shall be denied the right to offer such evidence unless good cause is shown). The Association argued that Exhibit C-7 was offered for the purpose of impeaching the prior testimony of a witness, or alternatively, to refresh his recollection. On June 25, 2021, the ALJ admitted Exhibit C-7 into the hearing record, having determined that the Association had established good cause for not furnishing the exhibit before the hearing. The ALJ acted properly within her discretion in admitting the exhibit. *See Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-014-17 at 2 (2018), *reversed and remanded on other grounds*, 312 Or App 377, 494 P3d 993 (2021) (accepting an untimely rebuttal exhibit).

On June 8, 2021, the Association filed a motion to admit Arbitrator Gordon's arbitration award into the hearing record. On June 22, 2021, the County responded that it was not opposed to admitting the award into the hearing record, but argued that the award was not entitled to any deference in resolving the unfair labor practice issues that were litigated at the hearing. On June 25, 2021, the ALJ admitted the award into the hearing record as Exhibit C-8. The ALJ clarified that, in doing so, she was not concluding whether the arbitrator's award would be accorded any weight in her recommended order. The ALJ acted properly within her discretion in admitting Exhibit C-8 into the hearing record.

Furthermore, the ALJ did not abuse her discretion in declining to give the arbitration award preclusive effect. In its objections, the Association relies on *Nelson v. Emerald People's Utility Dist*., 318 Or 99, 104, 862 P2d 1293 (1993), which states that if one tribunal has decided an issue, the decision on that issue "may preclude relitigation of the issue in another proceeding" if certain factors are met. When those factors "are met, the court must also consider the fairness under all the circumstances of precluding a party." *Marshall v. PricewaterhouseCoopers, LLP*, 316 Or App 610, 620, 504 P3d 1236 (2021) (quoting *Minihan v. Stiglich*, 258 Or App 839, 855, 311 P3d 922 (2013) (internal quotation marks omitted)). Here, the Association identifies seven issues that should be given preclusive effect because those issues were decided by the arbitrator in the contract grievance matter. However, at the time that the record had closed in this case, the arbitrator had not made any award and had not decided any issues. Thus, one of the primary reasons to find issue preclusion—avoiding the time and expense of relitigating an issue decided by another tribunal—is absent in this case because the parties had already completed the evidentiary litigation of this unfair labor practice hearing before the arbitration award issued. In these circumstances, we conclude that issue preclusion is not warranted in this case.

Moreover, as we explain below, even without considering Arbitrator Gordon's decision, we conclude that the parties had a well-established practice for at least eight years in which Escudero, as Association president, used his County email account daily as his standard method of communicating with bargaining unit employees and others on collective bargaining matters. Without reference to Arbitrator Gordon's decision, we conclude that the County violated ORS 243.672(1)(a) and (b) when it barred Escudero from exercising the right that arose from that long-standing practice.

The ALJ's remaining rulings have been reviewed and are correct.

FINDINGS OF FACT

1. The Association is a labor organization within the meaning of ORS 243.650(13).

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

3. The Association is the County's largest labor organization, representing approximately 1,000 County employees in three different bargaining units. Bargaining unit employees are stationed among about a dozen facilities housing various County divisions including Public Services, Developmental Services, the Juvenile Department, the District Attorney's office, the Housing Authority, and Community Corrections. Bargaining unit employees work throughout a large geographic area that includes Oregon City, Portland, Sandy, and rural Clackamas County.

4. Robert Escudero has been employed in the County's Juvenile Department as a Juvenile Counselor 2 since 1995. At the time of the events underlying this case, Escudero reported to Brian Ferguson, who reported to Juvenile Department Assistant Director Mark McDonnell.[1] Escudero's duties as a Juvenile Counselor 2 included supervising youth assigned to him who were involved in the juvenile justice system. Escudero used a statewide electronic system known as the Juvenile Justice Information System to take notes, make referrals, communicate with other

[1]McDonnell retired in January 2021.

agencies, make assessments, and document other case-related information. In addition, Escudero also used his County email to communicate with other agencies about the youth he was supervising. Those emails could include confidential information about youth such as addresses or parent's names.

5. Escudero has been the Association's president since 2012. Escudero's union-related duties include communicating with County managers and administrators regarding collective bargaining matters, communicating with the Association's membership about matters related to enforcement and administration of the collective bargaining agreement, and attending Association meetings. Escudero also represents bargaining unit employees at investigatory meetings, a responsibility he shares with six Grievance Committee members.

6. Don Miller has been the vice president of the Association since about 2011. Miller is a member of the Association's Grievance Committee and its Negotiating Committee, and he is the chair of the Association's Bylaws Committee. Miller, who has been employed by the County since 1997, works as a maintenance coordinator with the County Housing Authority.

7. The Association has representatives assigned to most, but not all, of the County's departments. The main duties of Association representatives are to attend monthly union board meetings and relay information to bargaining unit employees.

8. Article 23(7) of the parties' collective bargaining agreement provides that Association representatives "may use the County email system to communicate concerning collective bargaining matters" and that Association members "may use the County email system to contact Association representatives regarding collective bargaining matters."[2]

9. Because bargaining unit employees work at numerous worksites spanning a large geographic area, the Association relies on the County email system as its primary method of communicating with its members. With the onset of the COVID-19 pandemic and the increased use of telecommuting, email communication became essential for the Association.

10. Until July 27, 2020, President Escudero's employee email account was his primary method of communicating with Association members, Association officers, and County management about union-related matters.

[2]As explained above, Arbitrator Paul Gordon resolved the parties' contractual dispute in the Association's favor. Arbitrator Gordon concluded that Escudero "had a right under Article 23(7) of the collective bargaining agreement to use the County email system, which includes his County email account, even though he was on paid administrative leave." Arbitrator Gordon concluded that the "clear and unambiguous language" in Article 23 provided Escudero that right, and none of the limitations on email use stated in the article applied. In reaching his conclusion, the arbitrator found that the County did not prove "a binding past practice whereby both Parties recognize that an Association officer or member can have their County email address restricted while they are on paid administrative leave. There is no binding past practice which modifies or amends the clear and unambiguous language of Article 23(7)." The arbitrator also found that the parties' bargaining history "does not demonstrate the Parties intended that access by Association officers or members to their County email accounts would be restricted for those on paid administrative leave."

11. Before July 27, 2020, President Escudero did not use his personal email account to communicate with Association members, Association officers, or County management about union-related matters.

12. Association members are accustomed to communicating with President Escudero using his employee email address, which has been publicized to members as long as Escudero has held office with the Association.

13. President Escudero typically received about five to 15 daily emails from Association members at his County email address. As of July 2020, Escudero was receiving a higher volume of email inquiries than usual from members because of questions about COVID-19-related issues such as telecommuting.

14. On July 27, 2020, the County placed President Escudero on paid administrative leave pending a disciplinary investigation. The administrative leave notice issued to Escudero stated that while on paid administrative leave, Escudero was "not to work or conduct any County business and [Escudero's] access to County property, buildings, electronic systems, etc. is limited to what is afforded the general public." That same day, the County restricted Escudero's access to the Juvenile Justice Information System. The County also changed Escudero's email password so that he could no longer access his employee email account.

15. The County did not notify the Association or President Escudero before it suspended Escudero's access to his employee email account.

16. The County did not offer to set up an alternate County email account for President Escudero to use for the purpose of communicating about Association matters while he was on paid administrative leave, and Escudero did not ask the County to do so.

17. After President Escudero's employee email access was suspended, Vice President Miller received emails from Association members stating that Escudero had not responded to their emails and that they needed Miller's help with their inquiries.

18. The Association did not notify the membership as a whole that President Escudero no longer had access to his County email account. The Association wanted to protect Escudero's privacy regarding the potential disciplinary action against him. Additionally, the Association was concerned about being inundated with inquiries from members about why the County had placed Escudero on paid administrative leave.

19. After President Escudero was placed on paid administrative leave, he used his personal Yahoo email account to communicate with Vice President Miller and Grievance Committee Chair Greta Nickerson. Escudero asked Association officers to furnish his personal Yahoo address to members when they had specific questions that they needed to reach him about, and Miller forwarded certain member inquiries to Escudero's personal email address. Although Escudero communicated with several members using his Yahoo email account, the Association did not publicize Escudero's personal email address to the membership as a whole.

20. After President Escudero was placed on paid administrative leave, he continued to attend Association meetings including Labor-Management Committee meetings and "President's Meetings." Pursuant to Escudero's request, the County sent Zoom invitations for certain Association meetings to Escudero at his Yahoo email account.

21. After President Escudero's employee email access was suspended, the County continued to send emails regarding labor relations matters to Escudero's employee email address. For example, on October 7, 2020, the County sent an email related to the proposed discipline of a member to Escudero's employee email address, as well as to Vice President Miller and to Kevin Keaney, who served as both the Association's legal counsel and designated service representative. Human Resources Deputy Director Eric Sarha generally sent union-related emails to Escudero's employee email address, as well as to Miller and the Association's legal counsel. At times, however, Escudero was not included on Association-related communications. For example, in September 2020, Sarha sent a telework policy to Miller and Keaney, but not to Escudero. There were emails related to collective bargaining matters sent to Escudero's County email address after July 27, 2020, that have not been seen by Escudero because his email access was blocked.

22. As a result of President Escudero's email access being suspended, Vice President Miller experienced an increase in workload. Miller spent a significant amount of time responding to inquiries from employees who were unable to reach Escudero, as well as forwarding emails regarding Association matters to Escudero's personal email account.

23. On August 21, 2020, the Association filed a grievance alleging that the County's suspension of President Escudero's access to his employee email account was a violation of Article 23 of the collective bargaining agreement. The Association asked the County to immediately reinstate Escudero's email access.

24. On August 26, 2020, Human Resources Deputy Director Sarha sent an email to the Association's legal counsel stating that President Escudero was:

> "free to continue his use of the County's email system for the purposes described in Article 23. However, his access to his own work email will continue to be restricted as a result of his placement on paid administrative leave. Consequently, I disagree with your assertion that the County has denied [Escudero] 'access to using the County email system.' He is free to continue using the system from a personal email account to conduct union business consistent with Article 23."

25. On September 21, 2020, the County asked if it would make it easier for President Escudero to communicate with bargaining unit members if the County provided a list of their email addresses. Keaney responded that it would not.

26. On October 6, 2020, the County denied the Step 1 grievance. The County's grievance response reiterated that President Escudero was free to conduct union business from a personal email account. The County also noted that it had previously restricted the email access of another Association representative while he was on administrative leave.[3] The following day, the Association advanced the grievance to Step 2.

27. On October 29, 2020, the County denied the Step 2 grievance. The County's Step 2 response stated, among other things, that if President Escudero would furnish the County with a personal email address or an email address managed by the Association, the County would be willing to send matters related to collective bargaining to that email address until Escudero's County email access was restored.

28. In March 2021, President Escudero set up a Gmail account for the purpose of conducting union business while he was on administrative leave. The Association did not share the Gmail address with the membership as a whole, but Escudero asked Association officers to provide the Gmail address to members when they needed to contact him directly.

29. Association members did not regularly respond to emails that President Escudero sent from his Gmail account.

30. Human Resources Deputy Director Sarha and Labor Relations Analyst Sherryl Childers consider it a best practice to restrict employees' email access when they are placed on paid administrative leave. However, neither the County nor the Juvenile Department maintain a written policy regarding the termination of email access during paid administrative leave. When the County does restrict employees' access to electronic systems during paid administrative leave, it does so to ensure that employees are not engaging in work while on paid administrative leave, to preserve evidence contained within employees' email accounts, and to ensure that employees who are under investigation will not misuse sensitive information contained within their email accounts.

31. The County has previously restricted the email access of at least three other Juvenile Department employees who were placed on paid administrative leave. Each of those employees faced fairly serious allegations of misconduct. Two of the employees, both of whom were supervisors, faced allegations of inappropriate communication with staff members. The third employee, MB, faced allegations of unauthorized physical restraint of a youth. MB, who was placed on paid administrative leave in December 2018, was an Association representative for a work group within the Juvenile Department. Escudero testified that the group was a "subunit" within the Juvenile Department that consisted of eight to 10 employees, including part-time and temporary employees and managers. MB was not an Association officer, had no duties regarding the 1,000 bargaining unit employees generally, and did not communicate with the bargaining unit as a whole.

32. On March 1, 2021, the District Attorney of Clackamas County charged President Escudero with five misdemeanor counts of Official Misconduct in the First Degree and five

[3] *See* Finding of Fact 31. The County suspended that Association representative's email access while he was on paid administrative leave, but that representative was not an Association officer and he did not have duties related to the bargaining unit as a whole.

misdemeanor counts of Tampering with Public Records. The charges for Official Misconduct in the First Degree alleged that Escudero altered the risk assessment score of five juveniles with intent to obtain a benefit. The charges for Tampering with Public Records alleged that Escudero provided inaccurate and incomplete information that resulted in a false risk assessment score for the same five juveniles. The criminal charges stemmed from Escudero's employment with the County.

33. On March 9, 2021, the County proposed the termination of President Escudero's employment for, among other things, falsification of records. The March 9 letter proposing termination of employment relies, in part, on evidence contained in Escudero's emails and in his entries in the Juvenile Justice Information System.

34. As of the date of the hearing, Escudero had not been granted access to his employee email account.

CONCLUSIONS OF LAW

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

2. The County violated ORS 243.672(1)(b) when it suspended President Escudero's access to his employee email account.

Under ORS 243.672(1)(b), it is an unfair labor practice for a public employer or its designated representative to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." Section (1)(b) is concerned with the rights of the union itself, rather than the rights of the employees. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07 at 43, 22 PECBR 752, 794 (2008). To prevail on a section (1)(b) claim, a labor organization "must demonstrate that the employer's actions actually, directly, and adversely affected the labor organization's ability to serve as exclusive representative." *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05 at 26, 22 PECBR 372, 397 (2008). The complainant "must provide evidence to support the conclusion that *some actual interference* with its existence or administration occurred as a result of the employer's actions." *City of Portland*, UP-7-07 at 43, 22 PECBR at 794 (quoting *Junction City Police Association v. Junction City*, Case No. UP-18-89 at 10, 11 PECBR 780, 789 (1989) (emphasis added)).

The Association contends that the County interfered with the administration of the Association by terminating the Association president's access to his County email account because there was a well-established practice and contractual right permitting the Association president to communicate on Association-related matters by using his County email account. The County asserts that the Association's evidence of interference is too speculative and vague to prove a violation. It also disputes that it prevented Escudero from using the County email system because Escudero was always able to communicate with other County employees at *their* County email addresses. The County also argues that it treated Escudero exactly like all other Juvenile Department employees who were placed on administrative leave and therefore its action cannot be viewed as interference with the administration of the Association.

The basic facts are not in dispute. Escudero is the president of the Association and has held that office since 2012. As Association president, Escudero has used his County email account as his primary means of communicating on Association-related matters for approximately eight years. Significantly, the 1,000 bargaining unit employees are dispersed over a wide geographic area and over ten to 12 locations or campuses, making email a particularly useful communications tool for the Association, and even more so during the spring and early summer of 2020, when more employees were teleworking because of the COVID-19 pandemic. Until the dispute at issue in this case, during his tenure as Association president, Escudero received approximately five to 15 emails daily from Association-represented employees. The volume of emails that Escudero received from bargaining unit employees increased in the few months immediately before July 27, 2020, because of the onset of the COVID-19 pandemic.

The parties' collective bargaining agreement contains an article related to the Association's use of the County email system. Article 23 provides that "Association representatives (those persons holding positions as officers within the Association) may use the County email system to communicate concerning collective bargaining matters." "Collective bargaining matters" is defined to mean "official Association announcements to the Association membership"; the "meaning, interpretation or application" of the collective bargaining agreement; the "presentation and adjustment of grievances to management under Article 12"; and "matters directly related to the collective bargaining relationship between the County and the Association."[4]

It is undisputed that the County blocked Escudero's access to his County email account on July 27, 2020, when it placed him on administrative leave. Beginning that day, Escudero could not access emails sent to that account or send emails from that account. After Escudero was blocked from his email, Association Vice President Miller was told by bargaining unit members that Escudero had not responded to their emails and that they needed Miller's help. Miller forwarded some bargaining unit employee emails to Escudero at his private email address. County managers sent some emails related to Association business to Escudero at his non-County email address. But while Escudero was on leave and unable to access his County email, the County continued to send some Association-related emails to his County email address (although it knew he could not access them), while paradoxically omitting Escudero from at least one email on Association business. Specifically, on September 15, 2020, it sent a telework policy to Association Vice President Miller and Association Service Representative Keaney, but not Escudero. Escudero set up a Gmail

[4]Neither party argued at hearing or in their post-hearing briefs that the Association's right to use the County email system arose from ORS 243.804(5). Because the parties did not assert that ORS 243.804(5) applies in this case, we do not consider the effect, if any, of that statute on the Association's claims. ORS 243.804(5) provides:

> "An exclusive representative shall have the right to use the electronic mail systems or other similar communication systems of a public employer to communicate with the employees in the bargaining unit regarding:
>
> (a) Collective bargaining, including the administration of collective bargaining agreements;
> (b) The investigation of grievances or other disputes relating to employment relations; and
> (c) Matters involving the governance or business of the labor organization."

account in March 2021 to conduct Association business, but Association members did not regularly respond to emails Escudero sent from that account.

These facts indicate that the County's action of blocking the Association president's access to his standard method of communicating on collective bargaining matters directly interfered with the administration of the Association. Beginning July 27, 2020, because of the County's action, Escudero could no longer communicate with bargaining unit employees by sending emails to them from the email account that they trusted and would recognize. That disruption was significant under any circumstances, but particularly during this period, when teleworking had increased due to the onset of the COVID-19 pandemic. There is really no dispute that this disruption interfered with the Association's ability to quickly assist bargaining unit employees. Some bargaining unit employees told Miller that they had emailed Escudero for advice or assistance, but could not reach him. Likewise, it cannot reasonably be doubted that Escudero, as Association president, did not see or receive some Association-related communications from the County itself, which affected the Association's ability to determine how to respond. On this record, we conclude that the County's suspension of Escudero's access to his County email account actually and directly deprived the Association of a president "capable of performing the full range" of duties as president "on behalf of the Association and its members." *See Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 33, 22 PECBR 323, 355 (2008) (discipline of the union president for communicating directly with a school board member violated ORS 243.672(1)(b)); *see also Polk County Deputy Sheriff's Association v. Polk County*, Case No. UP-107-94 at 16-17, 16 PECBR 64, 79-80 (1995) (sheriff's private meeting with association president to "train" him that his advice to bargaining unit members could be subject to discipline was an "attempt[] to muzzle" the association president that violated section (1)(b)). By suspending Escudero's email access, the County actually, directly, and adversely affected the administration of the Association in violation of ORS 243.672(1)(b).

Moreover, the evidence also indicates that the County's action had the additional effect of increasing the Association-related workload of another Association officer. Vice President Miller received emails from Association-represented employees after July 27, 2020, informing him that they were attempting to reach Escudero by email but were unable to do so. Miller then responded, in lieu of Escudero, to those bargaining unit employees or forwarded their emails to Escudero at his private email address. This evidence bolsters our conclusion that the County's action actually, directly, and adversely affected the administration of the Association in violation of section (1)(b).

The County disputes this interpretation of the record and argues that the evidence offered by the Association is speculative and too vague to support a conclusion that the County violated section (1)(b). The County argues that this is not a situation in which the County's conduct is "so inimical to the core values" of the Public Employee Collective Bargaining Act (PECBA) that it violates (1)(b) "even if there is no proof that [the conduct] directed affected any union activity." *See State of Oregon, Department of Corrections*, *Santiam Correctional Institution*, UP-51-05 at 27, 22 PECBR at 398. We disagree with the County because, in this case, there is such proof. To begin, there is direct evidence that the County's action interfered with Escudero's communications, such as the County's own omission of Escudero from one Association-related notice regarding the County's telework policy. In addition, the evidence shows that the County continued to send other Association-related emails to Escudero at his County email address, even though the County knew his access to that account was blocked. There is also evidence—

Escudero's testimony—that, after he established a substitute Gmail account for his Association communications, he received fewer responses from bargaining unit employees. In addition to this direct evidence, we also rely on the reasonable inferences from the evidence in the record. *See Polk County*, UP-107-94 at 20, 16 PECBR at 83 (Board relied on reasonable inferences to find interference with the labor organization). In particular, we rely on the fact that, before being placed on leave, Escudero received five to 15 Association-related emails per day for many years. We can reasonably infer from that volume of daily email correspondence that, once Escudero's email access was blocked, there was a significant amount of email correspondence that Escudero, and thus the Association, never saw. This record contains sufficiently specific evidence of actual interference. We do not require a labor organization to wait until it misses a grievance-filing deadline or sustains a similar harm to file a section (1)(b) claim.

The County also contends that it did not interfere in the administration of the Association because its action did not actually prevent Escudero from using the County email system. The County avers that, even after July 27, 2020, Escudero could use a private email account, such as a Yahoo or Gmail account, to correspond with bargaining unit employees at *their* County email addresses. The County also emphasizes that it even offered to give the Association a list of bargaining unit employees' County email addresses to facilitate Escudero's communication with employees. The County's factual assertions are accurate, but immaterial. The County's argument ignores the fact that the parties' well-established practice included Escudero *receiving* five to 15 emails related to Association business at his County email address every day. Even though Escudero could, as the County asserts, use a non-County email account to send emails to County employees at their work email addresses, the fact remains that Escudero could not see emails sent to his County email beginning on July 27, 2020. And that meant that employees who initiated communication with Escudero (for example, those who raised concerns about their working conditions) were unable to obtain his assistance or advice unless they took additional steps to contact Miller or another Association representative after they did not receive a response from Escudero. Given the fact that Escudero previously received five to 15 emails per day, we can reasonably infer that there were employees from July 2020 through the date of hearing who contacted him for assistance and advice and who either abandoned their attempts to get help when Escudero did not respond or had to take additional steps (such as contacting Miller) to get help from the Association. Consequently, we disagree with the County's assertion that its action did not interfere in the administration of the Association merely because Escudero could have used an alternate email address.

Finally, the County asserts that it treated Escudero the same as all other Juvenile Department employees placed on administrative leave whose email access the County also suspended. According to the County, because it treated similarly situated employees the same, its action cannot be viewed as interference with the Association. But Escudero is not similarly situated to the other Juvenile Department employees whose email access was suspended. Unlike those employees, Escudero is an Association officer, and he remained in office while on administrative leave. Thus, when the County cut off Escudero's access to his County email account, it did not suspend only his ability to communicate as a Juvenile Department employee, it also suspended his ability to communicate as an Association officer—the Association president, no less. The resulting adverse effect on the Association as the labor organization did not disappear merely because the County suspended the email access of other Juvenile Department employees who were not Association officers.

In sum, we conclude that the County violated ORS 243.672(1)(b) when it suspended the Association president's access to the County email account that he had used for at least eight years on a daily basis to communicate with bargaining unit employees, Association officers, and County managers on collective bargaining matters.

3. The County's suspension of Association President Escudero's access to his County email account interfered with, restrained, or coerced Escudero and bargaining unit employees in the exercise of PECBA-protected rights in violation of ORS 243.672(1)(a).

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 employees in or because of the exercise of any right guaranteed by PEBCA, including "the right to * * * 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. ORS 243.672(1)(a) includes "two distinct prohibitions: (1) restraint, interference, or coercion 'because of' the exercise of protected rights; and (2) restraint, interference, or coercion 'in' the exercise of protected rights." *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000); *see also International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12 at 17-18, 25 PECBR 871, 887-88 (2013). To prove a violation of the "because of" prong of paragraph (1)(a), a complainant must show that the employer took the disputed action *because* an employee exercised a protected right. *Id*. In this case, the Association does not assert that the County violated the motive-based "because of" prong of the statute.

When we analyze whether an employer's actions interfered with, restrained, or coerced employees "in" the exercise of their protected rights, the claim at issue in this case, "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). Rather, the question in an "in" claim is whether the employer's action, "'objectively viewed * * * under the particular circumstances[,] would chill [Association] members generally in their exercise of protected rights.'" *Clackamas County Employees' Assn. v. Clackamas County*, 308 Or App 146, 152, 480 P3d 993 (2020) (quoting *AFSCME Council 75 v. Josephine County*, 234 Or App 553, 560, 228 P3d 673 (2010)). 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. An "in" violation is often, but not always, "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").[5]

[5]Violations of the "in" prong may be derivative or independent. A derivative violation derives from a proven "because of" violation. That is, 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*
(Continued. . ..)

In this case, the Association alleges that the County violated the "in" prong of section (1)(a) when it blocked Escudero's access to his County email account and actually interfered with and restrained Escudero's and bargaining unit employees' exercise of their right to communicate by County email regarding collective bargaining matters. In response, the County contends that suspending Escudero's email access did not have the natural and probable effect of interfering with the exercise of protected rights, considering the totality of the circumstances. The County also asserts that its action was lawful because it had the right, as the employer, to assert control over Escudero's employee email account while Escudero was on paid administrative leave, just as it had done with other Juvenile Department employees on administrative leave.

We begin with the Association's argument that the County violated ORS 243.672(1)(a) by interfering with Escudero's exercise of his rights as the Association president. The County acknowledges that communication between a union president and bargaining unit employees is PECBA-protected activity. As we explained above, these parties had a well-established, long-standing practice in which Escudero, as the Association president, used his County email address to conduct Association business. The County's action *actually prevented* Escudero from engaging in that PECBA-protected activity—*i.e*., communicating as Association president on collective bargaining matters using his County email account. *See Sandy Education Association and Davey v. Sandy Union High School District No. 2 and Heaton*, Case No. UP-42-87 at 9, 10 PECBR 389, 397 (1988) (employer's directive to a bargaining unit member not to discuss a work-related incident violated ORS 243.672(1)(a)). By blocking Escudero from using his County email to communicate on collective bargaining matters, the County interfered with and restrained Escudero's exercise of a PECBA-protected right.[6] That action by the County violated ORS 243.672(1)(a).

(Continued. . ..)
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). In this case, because the Association did not pursue a "because of" violation, we consider only an independent "in" claim.

[6]In *Sandy Union High School District No. 2 and Heaton*, UP-42-87, 10 PECBR 389, the superintendent directed a bargaining unit employee not to discuss a work incident with other teachers, where several teachers in the employee's department were union officers. The Board concluded that the employer violated ORS 243.672(1)(a) and explained:

> "There can be no question that an employer would violate (1)(a) if it threatened to fire an employee who spoke with the employee's union business representative regarding the filing of a grievance. This case is far at the other end of the spectrum: The employer *directed* the employee—without any sanction being mentioned—not to discuss an incident with other employees. The effect is the same: An employer interferes with protected activity when it intervenes in any way in an employee's consideration of whether or not to file a grievance." *Id*. at 9, 10 PECBR at 397 (emphasis added).

Here, the County went further than a threat or a directive—it actually prevented Escudero from communicating with bargaining unit employees by making it impossible for him to use the email account he had used on a daily basis for eight years to conduct Association business.

The County contends that the suspension of Escudero's email access did not have the natural and probable effect of deterring Escudero from exercising a PECBA-protected right, considering all the circumstances. In support of that argument, the County asserts that it encouraged Escudero to continue to communicate by using other electronic methods, such as a Yahoo or Gmail account. It points out that it offered to give the Association a list of bargaining unit employees' County email addresses. We understand the County to argue that these measures counteracted any deterrent or chilling effect that otherwise would have resulted from the County's suspension of Escudero's email access. The problem with the County's argument is that it did not merely deter or chill Escudero from communicating through his County email account on Association-related matters. Rather, it outright barred him from doing so. The fact that the County suggested ways to minimize the effects of that loss of access, such as the use of alternative electronic communication methods, does not erase or change the fact that the County imposed a bar. The violation of PECBA occurred at that point, and later circumstances do not make the County's unlawful conduct lawful.

The County also asserts that Escudero did not take any steps to set up a separate email account specifically for Association business until March 2021, and even then, he did not inform bargaining unit employees of that email address. With this argument, the County appears to contend that its action cannot be viewed as chilling when, in the County's view, Escudero could easily have communicated using another email account, but did not attempt to do so for approximately eight months. But, as explained above, the County violated ORS 243.672(1)(a) in July 2020. Actions that Escudero took or did not take many months later do not change that conclusion.

The County also argues that it had legitimate reasons to suspend Escudero's email access because his email contained sensitive and private information about juveniles, and the concerns that resulted in Escudero's administrative leave included concerns about public records. It also asserts that it has the right, as the employer, to assert control over employees' email accounts when those employees are on administrative leave, and that right extended to Escudero's email account. In other words, the County argues that it had prudent, or at least legitimate and nonretaliatory, reasons to block Escudero's email access, and that its restraint of Escudero's email access based on those reasons could not have violated PECBA. The problem with the County's argument is that the employer's motive is not relevant in a claim that a public employer interfered with, restrained, or coerced employees "in" the exercise of PECBA-protected rights. *See Tri-County Metropolitan Transportation District of Oregon*, UP-39-10 at 15, 25 PECBR at 339 (employer's motive is irrelevant); *Portland Assn. Teachers*, 171 Or App at 624 ("neither [the employer's] motive nor the extent to which employees actually were coerced is controlling). Rather, we "focus only on the effect of the employer's actions on the employees." *Tri-County Metropolitan Transportation District of Oregon*, UP-39-10 at 15, 25 PECBR at 339. Thus, the only question in this claim is the effect of the County's action on Escudero's exercise of a protected right. Even if the County's reasons for blocking Escudero's email access were prudent and nonretaliatory, the County's action nonetheless stopped Escudero, in his role as Association president, from using his County email account to communicate as the Association president on collective bargaining matters. On the facts in this case, that effect is what makes the County's action unlawful under ORS 243.672(1)(a).

Next, we turn to the Association's argument that the County's conduct interfered with bargaining unit employees' ability to communicate with Escudero in his role as Association president. The County acknowledges that represented employees have a PECBA-protected right to confer with union officers about potential grievances and other matters arising out of the employment relationship. *See Roseburg Education Association v. Douglas County School District,* Case No. UP-16-96 at 7, 16 PECBR 868, 874 (1996) ("an employee has PECBA-protected rights to discuss a potential grievance with union officers"); *Sandy Union High School District No., 2*, UP-42-87 at 9, 10 PECBR at 397 (PECBA's purposes "can be attained only when employees are free to discuss with other unit members and union representatives any matters arising out of the employment relationship"); *Chemeketa Part-Time Education Association v. Chemeketa Community College and Drexel Cox and Arthur Binnie*, Case No. C-236-81 at 7, 6 PECBR 5456, 5462 (1982), *aff'd without opinion*, 64 Or App 339, 668 P2d 491 (1983) ("The right the PECBA protects is that of employees to be communicated with."). The record demonstrates that, beginning July 27, 2020, bargaining unit employees were unable to communicate with Escudero as easily and quickly as they had been able to previously. Some employees informed Miller, the Association vice president, that they had tried to reach Escudero without success. That is sufficient evidence that the County's action had the effect of interfering with and restraining bargaining unit employees from communicating with the Association president. Further, we can reasonably infer from the daily volume of Escudero's previous email correspondence and his testimony that there were bargaining unit employees who tried to reach him after July 27, 2020, but were unable to do so. On this record, we conclude that the Association proved that the County interfered with and restrained bargaining unit employees in the exercise of the protected activity of communicating with the Association president, and that the County violated ORS 243.672(1)(a) when it did so.

In sum, for all the reasons explained above, the County violated the "in" prong of ORS 243.672(1)(a) when it blocked Escudero's email access on July 27, 2020, which interfered with and restrained the exercise of protected rights by Escudero and by bargaining unit employees.

Remedy

Having found that the County violated ORS 243.672(1)(a) and (b), we order it to cease and desist from the unfair labor practice conduct. ORS 243.676(2)(b). Additionally, we order the County to post and email a notice. This Board generally requires the posting of an official notice in situations in which the violation: (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent's personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82 at 12, 6 PECBR 5590, 5601, *aff'd without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). This "list of factors is to be read in the disjunctive." *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05 at 18, 21 PECBR 891, 908 (2007). 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), *rev'd and rem'd on other grounds*, 244 Or App 194, 260 P3d 626 (2011). Here, two factors are present. First, the County's action had a significant actual impact on the functioning of the Association as the exclusive representative

because the Association did not have the benefit of the full services of its president while Escudero's County email access was blocked. Second, as described above, the County's action affected a significant portion of bargaining unit employees who were unable to quickly and easily communicate with the Association president to confer about workplace issues. Consequently, we order the County to post a notice. In addition, because the record establishes that email was the common and preferred method of communication between the County and its employees during the period at issue in this case, when more employees were teleworking as a result of the COVID-19 pandemic, we order the County to distribute the notice by email to bargaining unit employees. *See Oregon Tech American Association of University Professors v. Oregon Institute of Technology*, Case No. UP-023-20 at 37 (2020).

We decline the Association's request that we require the County to pay a civil penalty. PECBA 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 labor practice was egregious. *See* ORS 243.676(4). To prove that a violation was repetitive, we generally require a complainant to show "the existence of a prior Board order involving the same parties that establishes that prior, similar activity was unlawful." *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04 at 16, 21 PECBR 206, 221 (2005) (quotation marks and citation omitted). Egregious means "conspicuously bad and flagrant." *Id*., UP-56-04 at 18, 21 PECBR at 223. The Association argues that the County's suspension of Escudero's email access was knowing and repetitive because the Association warned the County repeatedly that its action was an unfair labor practice. There is, however, no evidence of a prior Board order establishing that prior, similar activity was unlawful, and there is no evidence of egregious conduct. Therefore, we decline to award a civil penalty.

We also reject the Association's request for reimbursement of its filing fee. Under ORS 243.672(6), we may order fee reimbursement if an answer was frivolous or filed in bad faith. Under OAR 115-035-0075, any request for fee reimbursement must include a statement as to why reimbursement is appropriate, along with a clear and concise statement of the facts alleged in support of the statement. Here, the Association did not include the necessary statements as part of its request, nor does the record establish that the County's answer was frivolous or filed in bad faith. In addition, the Association did not object to the recommended order on the basis that it did not recommend reimbursement of its filing fee. Therefore, we do not order the County to reimburse the Association's filing fee.

ORDER

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

2. The County shall post the attached notice for 30 days in prominent places where Association-represented employees are employed.

3. The County shall distribute the attached notice by email to all Association-represented employees within 10 days of the date of this order.

DATED: June 6, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, 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-030-20, *Clackamas County Employees' Association v. Clackamas 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 Clackamas County (County) committed unfair labor practices in violation of ORS 243.672(1)(a) and (b).

The Board concluded that the County violated ORS 243.672(1)(a) and (b) when it suspended the Association President's access to his County email account while he was on paid administrative leave.

To remedy this violation, the Board ordered County to:

1. Cease and desist from violating ORS 243.672(1)(a) and (b).

2. Post this notice for 30 days in prominent places where Association-represented employees are employed.

3. Distribute this notice by email to all Association-represented employees within 10 days of the date of the order.

Clackamas County

Dated: _____, 2022

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. DC-001-22

(REPRESENTATION)

CERTAIN EMPLOYEES OF KLAMATH COUNTY, Petitioner, v. KLAMATH COUNTY DISTRICT ATTORNEY ASSOCIATION, and KLAMATH COUNTY, Respondents.	)	CERTIFICATION OF ELECTION RESULTS (PETITION FOR DECERTIFICATION)

On March 23, 2022, certain employees of Klamath County (County) filed a petition under ORS 243.682(1)(b)(D) and OAR 115-025-0045 to decertify Klamath County District Attorney Association as the exclusive representative of all Deputy District Attorneys at the County.

On March 29, 2022, the Board's Election Coordinator asked the County 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 6, 2022. OAR 115-025-0060. Pursuant to the terms of the notice posting and OAR 115-025-0060, objections to the petition were due within 14 days of the date of the notice posting (*i.e.*, by April 20, 2022). No objections were filed.

Pursuant to the terms of a consent election agreement, the Election Coordinator sent ballots to eligible voters on May 5, 2022, and ballots were due on May 26, 2022, which constitutes the date of the election. *See* OAR 115-025-0072(1)(b)(A). The two choices on the ballot were (1) representation by Klamath County District Attorney Association; or (2) No Representation. A tally of ballots was held on May 27, 2022, and a majority of valid returned ballots selected No Representation. The tally of ballots was provided to the parties on May 27, 2022.

Objections to the conduct of the election (or conduct affecting the results of the election) were due within 10 days of furnishing the ballot tally to the parties (*i.e.*, by June 6, 2022). OAR 115-025-0075. No objections were filed, and the Board accordingly issues this certification of the results of the election. OAR 115-025-0076.

ORDER

The result of the election is certified, and Klamath County District Attorney Association is decertified as the exclusive representative of Klamath County Deputy District Attorneys.

DATED: June 7, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-006-21

(UNFAIR LABOR PRACTICE)

SALEM KEIZER EDUCATION ASSOCIATION, Complainant, v. SALEM-KEIZER SCHOOL DISTRICT, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Margaret Olney, Bennett Hartman LLP, Portland, Oregon, represented Complainant.

Paul Dakapolos, Garrett Hemann Robertson P.C., Salem, Oregon, represented Respondent.

On May 12, 2022, 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). 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 District shall cease and desist from violating ORS 243.672(1)(e).

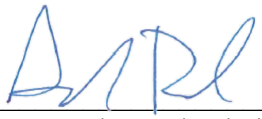
2. The District shall restore the status quo with respect to calculating full-time equivalency (FTE) for the purpose of compensating its part-time secondary teachers and for compensating teachers for the buyout of their preparation periods.

3. The District shall make all affected bargaining unit employees whole by paying them the portion of their salaries that they would have received if their FTE had been calculated based on the number of periods taught in proportion to a full-time teaching load, from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum.

4. The District shall post the attached notice for 30 days in prominent places where Association-represented employees are employed.

5. The District shall distribute the attached notice by email to all Association-represented employees within 10 days of the date of this order.

DATED: June 8, 2022.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-006-21

(UNFAIR LABOR PRACTICE)

SALEM KEIZER EDUCATION ASSOCIATION,	)	
Complainant,	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER
v.	)	
SALEM-KEIZER SCHOOL DISTRICT,	)	
Respondent.	)	

A hearing was held before Administrative Law Judge (ALJ) Jennifer Kaufman on October 19, 20, and 21, 2021. The record closed on January 11, 2022, following receipt of the parties' post-hearing briefs.

Margaret Olney, Bennett Hartman, Portland, Oregon, represented Complainant.

Paul Dakapolos, Garrett Hemann Robertson P.C., Salem, Oregon, represented Respondent.

On February 19, 2021, Salem Keizer Education Association (the Association) filed an unfair labor practice complaint against Salem-Keizer School District (the District) alleging that the District had violated ORS 243.672(1)(e) by unilaterally changing its past practice of calculating full-time equivalency (FTE) for its educators and by failing to provide the Association with relevant requested information in a timely manner. On September 27, 2021, the District filed a timely answer.

The issues are: (1) Did the District refuse to bargain collectively in good faith with the Association, in violation of ORS 243.672(1)(e), by unilaterally changing its past practice of calculating full-time equivalency for its educators, and/or by failing to timely provide the Association with relevant requested information related to the District's FTE calculations; and (2) if so, whether the District must post a notice of any violations found, and distribute the notice

electronically.[1] As set forth below, we conclude that the District violated ORS 243.672(1)(e) as alleged in the complaint. We also conclude that an electronic notice posting is warranted.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. The Association is a labor organization within the meaning of ORS 243.650(13).

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

3. The District operates a public school system in Salem and Keizer, Oregon. The District employs about 7,000 staff members, including approximately 2,500 licensed professionals. John Beight is the District's Executive Director of Human Resources. Brett Cheever is the Director of Staffing, and Gweneth Bruey-Finck is the Director of Secondary Curriculum and Instruction. Peggy Stock is the Director of Labor Relations.

4. The Association exclusively represents a bargaining unit of the District's licensed professionals including teachers, counselors, nurses, school psychologists, physical and occupational therapists, audiologists, speech language pathologists, and social workers. Eric Schutz, a UniServ Consultant for the Oregon Education Association, has been the Association's staff representative for approximately 10 years. Tyler Scialo-Lakeberg has been the Association's president since July 2021. Before July 2021, Scialo-Lakeberg was the Association's vice-president and Mindy Merritt was the Association's president.

Secondary Teacher Scheduling and FTE Designation

5. Class schedules or "bell schedules" at the District's secondary level[2] vary over time and may vary from one location to another. Full-time secondary teachers are scheduled to teach six or seven periods per day, or they may be scheduled to teach under block schedules known as "A" days and "B" days (A/B schedules). Full-time teachers are also scheduled for daily preparation periods, which provide educators with teacher-directed time for planning, grading, and providing

[1]The Association withdrew its complaint allegation that the District unilaterally departed from an agreement it had reached with the Association regarding working conditions for certain specialists. The withdrawal was made pursuant to an agreement between the parties that if the Association prevailed in this proceeding, then the District would extend the remedy to affected specialists.

[2]The Association's allegations involve FTE calculations for teachers at the secondary level only. The facts recited herein are applicable to middle and high school teachers and are not necessarily applicable to the District's operations at the elementary level, where it is uncommon for teachers to work part-time schedules.

feedback to students. Full-time teachers are given at least one preparation period per day. Part-time teachers are given preparation time in proportion to their FTE.

6. The District's teachers, who are exempt employees under the Fair Labor Standards Act, perform work-related tasks as needed outside of their scheduled workdays. Full-time teachers routinely work more than 40 hours per week. For example, high school teacher Vicki Mashos regularly completed planning and grading work on evenings and weekends when she worked a full-time schedule. Mashos currently works a .84 FTE schedule and although she is usually present at her work site for eight hours a day, Mashos chooses not to work a full-time schedule because it would require significantly more than eight hours of work per day to complete the planning, grading, differentiation, and student contact time required of a full-time teaching assignment. Similarly, Curriculum Director Bruey-Finck, who started her career with the District as a teacher, stated that she was "never a teacher that contained [her] work within the contract day." (Test. Bruey-Finck.) As middle school teacher Zachary Coonen explained, the work associated with teaching a class is "much more than the 53 minutes of the day. It's the extra 20 percent grading, differentiation, phone calls, relationship building, names to learn." (Test. Coonen.)

7. Mashos has taught at the District for 24 years under various class schedules. Mashos started her teaching career under a six-period schedule, followed by a modified four-by-four schedule,[3] a rotating A/B schedule, a seven-period schedule, and then another A/B schedule. During the COVID-19 pandemic Mashos taught under the District's "comprehensive distance learning" (CDL) schedule. Mashos currently teaches under a rolling A/B schedule. In 2005, Mashos moved from a full-time teaching position to a .67 FTE position. At that time, Mashos worked under an A/B schedule and taught two periods per day while full-time teachers taught three periods per day. When Mashos worked as a .67 FTE under a seven-period schedule, she taught four periods per day. In 2019, Mashos moved to a .84 FTE position, teaching five classes while full-time teachers taught six classes. Mashos's understanding is that FTE for part-time teachers has always been based on the number of periods taught in proportion to that of a full-time teacher.[4] When Mashos was working a part-time schedule, she generally took a lunch break with her colleagues if it fell within her time at the school. When she did so, Mashos was never told that she had to remain in the building for an additional 30 minutes to make up that time.

8. The District's staffing team, which is a part of the District's Human Resources (HR) Department, is responsible for the budgeting and allocation of FTE resources to schools throughout the District. The staffing team is managed by Staffing Director Cheever. Cheever has worked in the HR Department since 2009 and has been in his current position since 2016. Cheever is regarded as the District's expert regarding FTE calculations.

---

[3]Under the modified four-by-four schedule, students took four classes per day, four days per week, and full-time teachers taught three classes, or periods, per day.

[4]Mashos's testimony that the District has historically calculated FTE based on the number of periods taught in proportion to a full-time teaching load was corroborated by the testimony of Representative Schutz, who taught at the District at the secondary level for 8 years, and President Scialo-Lakeberg, who has taught at the District at the secondary level for over 20 years.

9. In 2017, the District's HR Department created matrices reflecting FTE, preparation time, and minutes on duty for part-time employees at the middle and high school levels. The middle school matrix, based on a seven-period day of 49 minutes per period, is as follows:

Periods Taught for a Less than full time teacher	Full-Time Equivalency	Minutes Preparation Time	Hours: Minutes on Duty Excluding Lunch
5 (30 min lunch)	.84 (.84167)	41	6:14 (404 MIN TOTAL W/lunch)
4 (30 min lunch)	.69 (.691667)	33	5.02 (332 MIN TOTAL w/lunch)
3 (no lunch)	.47 (.46875)	25	3:45 (225 MIN TOTAL)
2 (no lunch)	.27 (.272917)	0	2:11 (131 MIN TOTAL)
I (no lunch)	.13 (.13125)	0	1.03 (63 MIN TOTAL)

(Exhs. C-54 at 1, R-3 at 1.) The high school matrix, based on an eight-period day of 49 minutes per period, is as follows:

Periods Taught for a Less than full time teacher	Full-Time Equivalency	Minutes Preparation Time	Hours: Minutes on Duty Excluding Lunch
5 (30 min lunch)	.84 (.84167)	41	6:14 (404 MIN TOTAL w/lunch)
4 (30 min lunch)	.69 (.691667)	33	5.02 (332 MIN TOTAL w/lunch)
3 (no lunch)	.47 (.46875)	25	3:45 (225 MIN TOTAL)
2 (no lunch)	.27 (.272917)	0	2:11 (131 MIN TOTAL)
I (no lunch)	.13 (.13125)	0	1.03 (63 MIN TOTAL)

(Exhs. C-54 at 2, R-3 at 2.)[5]

10. In January 2020, the District's Human Resources department created a document titled "High School / Middle School FTE Matrix." That document includes the following matrix:

High School FTE Matrix• —8 periods

Periods Taught	FTE	Prep Min.
6	1.00	90
5	0.83	75
4	0.67	60
3	0.50	45
2	0.34	31
1	0.17	15

Prep Buyout — High School

Additional Periods	Additional FTE
1	.17
2	.34

Middle School FTE Matrix 6 periods

Periods Taught	FTE	Prep Min
5	1.00	57
4	0.80	46
3	0.60	34
2	0.40	23
1	0.20	11

Prep Buyout — Middle School

Additional Periods	Additional FTE
1	.20
2	.40

(Exhs. C-3, R-3 at 3.)[6]

[5]Staffing Director Cheever did not provide specific testimony regarding the use or distribution of the 2017 FTE matrices.

[6]Staffing Director Cheever acknowledged that the 2020 matrix was followed during the 2019-2020 school year, but he also testified that the FTE matrices were insufficient to provide staffing guidance because they did not include all components of a teacher's scheduled workday. The record does not establish to whom the 2017 and 2020 FTE matrices were distributed, but the Association first saw them shortly before the hearing in this matter.

11. To meet student and District needs, secondary teachers frequently "sell" their preparation periods. This may be done on an ad hoc basis, such as when a teacher substitutes for an absent colleague and executes a pre-planned lesson.[7] Teachers may also sell their preparation period to teach an additional class for a semester or a year, in which case the teacher is responsible for all duties associated with the teaching of that class including planning, student and family contact, and grading. Teachers who sell their preparation periods to teach an additional class are not allotted additional minutes of preparation time to account for the additional planning and other responsibilities that flow from adding an extra class to their workloads.

12. Middle school teacher Archie Linn sold his preparation period for several years to fill the role of "data specialist." Linn was compensated an additional .17 FTE for selling his preparation period. The additional .17 FTE that Linn was compensated for the preparation period he sold is consistent with the ratio of one period in a full-time teaching load of six periods per day.

13. Middle school teacher Doug Livermore regularly sold his preparation periods since at least 2011. Linn was compensated an additional .17 FTE for each preparation period that he sold, or .34 FTE for selling both of his preparation periods.[8] The additional .17 FTE that Livermore was compensated for each preparation period he sold is consistent with the ratio of one period in a full-time teaching load of six periods per day.

14. Association President Scialo-Lakeberg, who has been teaching for the District since 1999, sold her preparation period to teach a culinary arts class. At the time, Scialo-Lakeberg was teaching a four-by-four schedule with 84-minute periods. The District compensated Scialo-Lakeberg an additional .33 FTE for the buyout of her preparation period, which is consistent with the ratio of one period in a full-time teaching load of three periods.[9]

The COVID-19 Pandemic and the Transition to Comprehensive Distance Learning (CDL)

15. In March 2020, due to the emergence of the COVID-19 pandemic and the spread of cases throughout the state of Oregon, Governor Kate Brown issued an order closing all public schools. In the wake of the initial school closures the District adopted a CDL model that allowed students to receive instruction remotely for the remainder of the school year.

16. In summer 2020, District leaders began preparing for the possibility of ongoing CDL and the need for a comprehensive CDL model for the 2020-21 school year. In early June 2020, a work group was formed with Curriculum Director Bruey-Finck and other District leaders,

[7]There is no dispute that when a teacher sells a preparation period to substitute for another teacher on an ad hoc basis, which does not include the assumption of responsibilities beyond instructional time, the teacher is compensated based on a calculation of a per diem rate of pay.

[8]Certain positions, including data specialist positions, are provided more than one preparation period per day.

[9]Staffing Director Cheever testified that compensation for preparation period buyouts is based on the number of minutes in the preparation period. As discussed below, we do not credit that testimony.

and five or six Association members. The group discussed general ideas and concerns about the possibility of ongoing of CDL. At that time, it was unclear to the District and the Association alike what the format for the 2020-21 school year would be.

17. In late June 2020, the District received guidance from the State about requirements for continuing CDL in the fall. In early July 2020, the District made the decision to move to a four-by-four schedule. On July 14, 2020, Curriculum Director Bruey-Finck sent an email to High School Education Director Larry Ramirez and Middle School Education Director Matt Biondi stating:

> "I spoke with [Staffing Director Cheever] today, and he is putting together guidance for schools on how to split FTE given the new bell schedules (.17 FTE for one period at HS, for example). He wanted this to come out in an official way, not just through the rumor mill (understandable!). I gave him the 85-90 min range per period for HS and apx 70 min range for MS.
>
> "Larry, he confirmed that I can share with CAPs tomorrow that, on the 4x4:
> - One period is .17 FTE
> - A .83 employee would teach 2 periods, have 1 period of Prep, and 1 period of Release
> - A .5 employee would teach 1 period, have 1 period of Prep, and 2 periods of Release
> - He and I agreed we should avoid .67 if at all possible because it means someone would teach more sections one Quarter than another Quarter, which could get messy with payroll if anything changed in the assignment down the road."

(Exhs. C-4, R-5 at 1.)

18. On August 3, 2020, Staffing Director Cheever sent an email to Education Directors Biondi and Ramirez stating, "Attached is an Excel workbook which takes the middle and high school schedules as I understand them and converts them to common, full-week FTE examples for part-time staff." (Exhs. C-6 at 1, R-6 at 1.) That same day, Cheever shared the Excel spreadsheets, which he titled "Common FTE Scenarios," with HR Executive Director Beight and Labor Relations Director Stock.

19. Staffing Director Cheever's FTE scenarios for high school teachers were as follows. Tuesday through Friday, full-time employees would teach three 85-minute periods per day with an 85-minute preparation period and 110 minutes of "other"[10] time; .53 FTE employees would teach two 85-minute periods per day with a 44-minute preparation period and 40 minutes

[10]"Other" time was designed to approximate the time between classes, known as "passing time," that teachers experienced during traditional in-person instruction when they would still have some responsibility for supervising students. The District's 2019-20 bell schedules reflect that time between middle and high school classes was generally five to seven minutes. *See* Exh. R-4. "Other" time under CDL also included District-directed time for advisory and "family connections," otherwise known as office hours.

of other time; and .27 FTE employees would teach one 85-minute period per day with a 25-minute preparation period and 20 minutes of other time. On Mondays, when no classes were taught, full-time employees would be given 365 minutes of other time and an 85-minute preparation period, .53 FTE employees would be given 210 minutes of other time and a 44-minute preparation period, and .27 FTE employees would be given 105 minutes of other time and a 25-minute preparation period. Full-time employees were given a 30-minute paid lunch period each day; part-time employees were not given a paid lunch period.

20. Staffing Director Cheever's FTE scenarios for middle school teachers were as follows. Tuesday through Friday, full-time employees would teach four 67-minute periods per day with a 67-minute preparation period and 115 minutes of other time; .63 FTE employees would teach three 67-minute periods per day with a 42-minute preparation period and 60 minutes of other time; .42 FTE employees would teach two 67-minute periods per day with a 28-minute preparation period and 40 minutes of other time; and .21 FTE employees would teach one 67-minute period per day with a 14-minute preparation period and 20 minutes of other time. On Mondays, when no classes were taught, full-time employees would be given 383 minutes of other time and a 60-minute preparation period, .63 FTE employees would be given 261 minutes of other time and a 42-minute preparation period, .42 FTE employees would be given 174 minutes of other time and a 28-minute preparation period, and .21 FTE employees would be given 87 minutes of other time and a 14-minute preparation period. Full-time employees were given a 30-minute paid lunch period each day; part-time employees were not given a paid lunch period.

21. On August 4, 2020, Director Cheever emailed the FTE scenario spreadsheets to District administrators at the middle and high school levels. The spreadsheets were not shared with the Association.

22. In late August 2020, the District published its CDL bell schedules. The bell schedules reflected students' daily schedules but did not reflect scheduled workdays for teachers. In September 2020, the District shared a PowerPoint presentation about the fall CDL schedules. That presentation was also geared toward parents and did not reflect teachers' entire workdays on the schedule.

23. The CDL schedules were a significant departure from a traditional teaching schedule. There were no classes scheduled on Mondays, which were dedicated to preparation, meetings, and training. On Tuesdays through Fridays there were fewer class periods scheduled per day, but the length of the periods was increased. Middle and high school teachers alike experienced a decrease in overall instructional time and an increase in overall preparation time and "other" time under the CDL schedules.

24. Notwithstanding the overall decrease in instructional time and the overall increase in preparation time and other time that teachers were scheduled for during CDL, teachers experienced an increase in workload.[11] Teachers had to learn how to engage students virtually, a

[11]The workload impact was greater on part-time teachers, who did not receive as much preparation time and other time per class taught as full-time teachers. For example, a full-time high school teacher taught 12 periods weekly and was scheduled for 425 minutes of preparation time and 805 minutes of other

time-consuming task that they had not previously undertaken. The transition to CDL required teachers to learn the use of new technology, such as teleconferencing applications and various interactive learning management platforms. The process of formatting and uploading lessons for students was laborious and time consuming, as was the process of reviewing and grading online assignments. Teachers also spent a significant amount of time engaging in outreach to students who were not regularly attending remote classes.

25. With the implementation of the fall 2020 CDL schedules some secondary school administrators struggled with the District's FTE calculations. For example, on August 6, 2020, Education Director Biondi emailed Director Cheever with a question about FTE for one period of instruction in a five-period day. Biondi stated, "For a 6 period it was .2, 7 period it is a .17, I am assuming for a 5 period day it is a .25. On the spreadsheet you sent out with all of the staffing scenarios it was a .21." (Exhs. C-9 at 2, R-10 at 2.) Cheever responded, in part,

> "Your original thought of .25 would work if we used the total # of periods taught by a full-time teacher a representative of the entire work day; but given that there are chunks of time in the day that don't fall into the period structure, it is not an exact match. Monday is also problematic using that answer, as was the decision to award 20min of 'other' time per period taught (rather than award a percentage of the full 'other' time based upon the number of periods taught compared to the number of periods taught by a full-time teacher). These both step away from looking at the day as a uniform percentage of a whole.
>
> "Instead, we're currently looking at FTE from a minutes worked perspective (which is, in the strictest sense, what FTE was originally designed to measure . . . we've just gotten away from that a little bit in education)."

(Exhs. C-9 at 1-2, R-10 at 1.) Cheever went on to state, "The outcome is that part-time staff cost slightly LESS in FTE than a strict reading of total periods vs. periods taught." Cheever further stated, "said another way – by strictly paying for the time worked, you are able to purchase more periods of instruction…allowing the same amount of total FTE to purchase more staff." (Exhs. C-9 at 2, R-10 at 2).

26. With the implementation of the fall 2020 CDL schedules some secondary teachers had concerns about the District's FTE calculations. High school teacher Marty Wilkins worked as a .5 FTE mathematics teacher with the District for eight years. Before CDL, Wilkins taught under an A/B schedule, sharing a full-time position with another .5 FTE teacher. Wilkins taught three classes on "B" days, with one preparation period, while his teaching partner taught three classes on "A" days, with one preparation period. Under the fall 2020 CDL schedule, Wilkins was assigned to teach two classes per instructional day and was designated a .53 FTE. Together, Wilkins and his teaching partner taught four classes per day for a total of 1.06 FTE, while 1.0 FTE teachers taught three classes per day. Wilkins was troubled that he had two-thirds of the students, two-thirds of the preparation and grading, and two-thirds of the family contacts as a full-time

---

time per week. A .53 FTE high school teacher taught eight periods weekly and was scheduled for 220 minutes of preparation time and 370 minutes of other time per week.

teacher but he was getting paid approximately half as much. Furthermore, Wilkins found that preparing for CDL classes took significantly more time than preparing for in-person classes. Wilkins was unable to finish his class preparation during the time that he was scheduled to work, and completed most of his preparation during the evenings or on weekends.

27. On September 8, 2020, program associate Andie Andeen sent an email to Staffing Director Cheever about a teacher who believed that his .63 FTE assignment was incorrect. Andeen stated, "[H]e feels that since his Leslie colleagues teach 4 classes for 1.0 he should receive .75 for 3 classes." (Exhs. C-14 at 1, R-17 at 1.) The next day, Staffing Director Cheever responded to Andeen stating, in part, "FTE…looks a little different this year. In prior years, our bell schedules essentially ran the length of the work day and almost all of that time was blocked into periods, which allowed us to use the number of periods taught as a kind of shorthand for the number of minutes worked. This year's hybrid schedule looks pretty different, so we've found it helpful to look back at total minutes worked (in some instances)." (Exhs. C-14 at 1, R-17 at 1.)

28. On September 14, 2020, middle school teacher Carolee Zavala emailed Assistant Principal Adam Matot stating that she seemed to be overscheduled for her .84 FTE position. Principal Suzanne Leonard responded to Zavala and stated that her schedule equated to .84 FTE. On September 15, 2020, Zavala responded to Principal Leonard stating, in pertinent part:

> "Last year I was scheduled for 6/7 periods a day or 30 out of 35 possible classes taught in a week, including my prep (85% of possible time). Though I am still .84 FTE this year I am scheduled 22 out of 24 possible class periods in a week (92% of the possible advisory/teaching/prep time). I just found out yesterday afternoon that I also have advisory. That's a lot of teaching time. Could you explain the process you used to determine how this works out to be .84%?"

(Exhs. C-16 at 2, R-19 at 2.)

29. On September 16, 2020, Principal Leonard emailed Staffing Director Cheever about Zavala's inquiry and stated that she wanted to make sure that there had not been an error in scheduling Zavala. Cheever responded that FTE should be based on the total number of minutes that an employee is scheduled to work, and stated, "While it's not uncommon for folks in education to think of FTE as the number of periods taught and for that to be mostly accurate during a typical year, that idea doesn't hold up well in a year in which the bell schedule doesn't apply to each day of the week AND the bell schedule leaves blocks of time outside the teaching day unaccounted for." (Exhs. C-16 at 1, R-19 at 1.)

30. In late August or early September 2020, part-time secondary teachers began contacting the Association with questions about their FTE calculations. At that time, the Association presumed that the questioned FTE calculations were a result of errors made by the District. The Association raised the issue during a Labor Management Committee meeting in early September 2020, and Labor Relations Director Stock responded that the District would bring Staffing Director Cheever to a meeting to discuss the issue.

31. With the implementation of the fall 2020 CDL schedules, compensation for preparation period buyouts also became an issue. On September 28, 2020, Staffing Analyst Lori

Chamberlin sent an email to middle school administrators stating that there had been a change to FTE calculations for preparation buyouts. Chamberlin stated, "Originally, we were informed they would be .21 FTE but a new calculation has been released by HR." (Exh. C-19 at 2.) Middle school principal David Wood asked, "Why was there a change from .21? Aren't we buying their prep time every day (1 of the 5 periods?)" (Exh. C-19-1.) Chamberlin responded that the change had come from HR.

32. In 2018 and 2019, middle school teacher Linn was compensated an additional .17 FTE for selling his preparation periods. During CDL, Linn's compensation for selling his preparation period was changed to .12 FTE. On October 2, 2020, Linn sent an email to District employee Jody Heit stating, "For last year, I was paid an extra 17% for my prep in which I worked for 47 minutes a day for 5 days, which equals 3.91 hours. In the present model, I work for 1 hour for 4 days, which equals 4 hours per week. So, I am working for more hours and less pay, which I do not understand." (Exh. C-80 at 3.)

33. On October 5, 2020, HR Staffing Specialist Allison Handley responded to Linn's inquiry, stating, "In previous years, we calculated FTE by periods, so 1.0 middle school teachers were teaching six periods at .17/each (technically 16.66). For prep buyout, we continued with .17 instead of looking at the specific prep minutes of 48 mins (minimum per CBA). This year, because Monday's schedule is so incredibly different, our HR directors worked for several weeks along side SKEA to produce a mutually agreed upon schedule and FTE breakdown, which resulted in calculating by minutes instead of periods." (Exh. C-80 at 2). Linn forwarded Handley's email to the Association, and Representative Schutz refuted Handley's statements that the Association had been involved in determining the District's FTE calculations.

34. High school teacher Livermore was historically compensated an additional .17 FTE for each preparation period that he sold. On January 27, 2021, Livermore exchanged emails with HR Specialist Handley about his compensation for selling his preparation period under CDL, and Handley told Livermore that the District was calculating preparation period buyouts based on the number of minutes worked. Livermore asked if the District was going to continue using that formula, and Handley responded that the District would like to "pay everyone very specifically for work time scheduled." Livermore in turn responded:

> "[F]rom a teacher perspective, I think the formula falls short. As a teacher I am contracted to teach three periods a day, or six classes over two days. When I teach through a prep period I am taking on an additional 17% workload (100% divided by six classes), but currently, I am being compensated for the student contact time only, not the prep time and grading time also associated with each class. *** In the past I was compensated at about 16% - 17% per class for each of the prep periods I worked. To me this seemed fair because it was based on workload, but when based on minutes I end up being compensated for student contact time at just over half of what I was compensated for in the past. Does this make sense? I understand each Monday this year does give me some prep time back, but I am still working with an additional 34% workload compared to other teachers that have a prep period for each day. Had I known this compensation package was going to change so dramatically, I would not have agreed to work through my prep periods."

(Exh. C-42 at 3.) Livermore is no longer selling his preparation periods to the District.

Association Grievance and Information Request

35. In October 2020, Staffing Director Cheever attended a Labor Management meeting to discuss FTE calculations. Also present at that meeting were HR Executive Director Beight, Labor Relations Director Stock, Association Representative Schutz, Mindy Merritt (at that time, the Association's president), and Scialo-Lakeberg (at that time, the Association's vice president). Cheever explained that from the District's perspective FTE had always been calculated based on the sum of time scheduled to work. Cheever further stated that although staff at the secondary level had developed a habit of using the number of periods taught as a "shorthand" for measuring FTE, that concept was not reflective of the District's actual practice. Schutz disagreed with Cheever's representations and stated that the District appeared to have changed its past practice of calculating FTE for part-time secondary teachers, which was based on the number of periods taught in proportion to a full-time teaching load.

36. On October 14, 2020, Association Representative Schutz sent an email to Labor Relations Director Stock and HR Director Beight stating, "To date, we still have not received from the District an accounting of how FTE is being calculated. Please provide this information to SKEA as quickly as possible." (Exh. C-20 at 1.) Schutz stated that the Association had also learned that the District appeared to have changed the way that sold preparation periods were being compensated. Schutz explained:

> "A 1.0 FTE teaches 4 out of 5 periods and thus each period is equal to .25 FTE. From this, SKEA concludes that this member is being shorted compensation equivalent to .13 FTE (.25 -.12). This is a fundamental shift in how the District is compensating employees without providing SKEA notice. ***If this is how the District plans to move forward with FTE calculations and compensation, then consider this as notice that SKEA is demanding to bargain over this."

(Exh. C-20 at 1-2.)

37. On November 9, 2020, the Association orally initiated a grievance alleging that the District had changed the way it was calculating FTE. That same day, Representative Schutz sent an email to Labor Relations Director Stock requesting documents "to help understand the scope of this grievance." Schutz stated:

> "The specific information SKEA is requesting in an electronic sortable document is as follows:
> "Employee Name or ID
> "FTE amount
> "Time worked (schedule including prep time)
> "Number of class periods assigned (if applicable)

> "In our conversation we also discussed that SKEA submitted a Demand to Bargain over this issue on October 14th. My understanding is that both SKEA and the District understand that we are pursuing resolution of this issue through two different means – the grievance process (loss of compensation) and expedited bargaining (FTE calculation definition and impact to compensation) – with the hopes that through one of these two means we will reach a resolution.
> "I'm glad that we had this conversation to get on the same page about the level of seriousness that SKEA had been viewing this issue."

(Exhs. C-21 at1- 2, R-25 at 2.)

38. On November 17, 2020, Labor Relations Director Stock notified Representative Schutz that the District was working on the information request and planned to provide the information by the end of the day on November 20, 2020.

39. On November 24, 2020, Representative Schutz emailed Labor Relations Director Stock stating that the Association had not received the requested information. Stock responded on November 25, 2020, stating:

> "I am attaching documents containing most of the information you have requested. The District does not have a system for tracking the number of teaching periods for each educator that is 100% accurate (It does not track the number of bought prep periods) so we are asking for confirmation from all our secondary administrators. We are awaiting confirmation for the blanks in the "#_Periods_Taught_Week" column. We hope to have this to you by next Wednesday. We will send you updates as we receive them beginning next Monday."

(Exhs. C-22 at 1, R-26 at 3.)

40. On December 1, 2020, Representative Schutz emailed Labor Relations Director Stock stating that he had numerous questions about the information provided on November 25, 2020. Schutz also commented that the information furnished by the District contained FTE calculations that were inconsistent with the District's long-standing practice of calculating FTE, and stated,"While SKEA still maintains that the correct solution is to undo this unilateral change in FTE calculation, having the actual schedules for these educators (with regard to what periods they are teaching and when) would greatly increase our ability to accurately discuss this matter and its impacts." (Exhs. C-23 at 2, R-26 at 2.)

41. On December 3, 2020, Labor Relations Director Stock sent the Association an updated spreadsheet including FTE information for EDGE[12] employees. Later that day, Stock emailed Representative Schutz stating:

[12]The EDGE program provides online instruction for those families who wish to engage solely in distance learning and do not want their students to return to in-person education.

> "At this time the District does not maintain a centralized collection of employee schedules and we anticipate it would be very time consuming for the District to collect all of the schedules being requested. If SKEA would still like us to fulfill this request, we would have to evaluate the amount of time the work would take to complete the request and provide a cost estimate for SKEA to consider . *** please let us know and we will provide you with the estimate for service."[13]

(Exh. C-25 at 1.)

42. On December 3, 2020, the District denied the Association's grievance. The District maintained that it had not modified its FTE calculation or its practices for preparation period buyouts, which had always been based on time worked.

43. On December 18, 2020, the Association's attorney, Margaret Olney, sent a letter to the District's attorney, Paul Dakopolos, stating that the Association did not believe it had been given complete and accurate information. The Association also requested the following documents:

> "1. Copies of all emails, directives, training materials or other guidance from the central office to building administrators on how to determine and/or allocate and employee's FTE status for the 2018-2019 and 2019-2021 school years.
>
> "2. Beginning in March 2020, copies of all emails, directives, training materials or other guidance from the central office to building administrators about how to schedule employees based on FTE status, if and when the District began offering distance learning.
>
> "3. Copies of all emails, directives, training materials or other guidance from the central office to building administrators on how to determine and/or allocate and employee's FTE status for the 2020-2021 school year.
>
> "4. Copies of any emails to or from building administrators asking for direction or clarification for any individual teacher for the 2020-2021 school year.
>
> "5. Copies of building level "master schedules" for 2018-2019, 2019-2020 and 2021-2022 school years.
>
> "6. The name, FTE and schedule for all AVID Coordinators, Activity Directors, IB Coordinators, Data Specialists, and Link Advisors. Note that the parties had discussed adjustments relating to these employees' schedules during labor management (particularly around buying out preparation time), but it is not clear from the District's data that it is doing what it promised.
>
> "7. The name, FTE and schedule for all elementary specialists."

[13]Article I.D.6 of the CBA entitles the District to seek reimbursement for costs incurred in responding to information requests submitted by the Association.

(Exh. C-29 at 4-5.) Olney followed up regarding the status of the information request on January 12, 2021.

44. On January 22, 2021, Olney emailed Dakopolos stating that she had received some information from Dakopolos, that the Association had seen most of the information before, and that it did not clear up the Association's questions. Olney also stated that she would be filing an unfair labor practice complaint, and that the Association continued to request a complete response to its December 18, 2020, information request.[14]

45. On February 4, 2021, Olney emailed Dakopolos stating that the Association had still not received additional information from the District. Olney reiterated that the Association would be pursuing an unfair labor practice complaint.

46. On February 5, 2021, Dakopolos responded to Olney stating, in part, "The District's position is that it has not changed the status quo. The payroll department has consistently paid based upon an FTE calculation by minutes, not classes." (Exh. R-31 at 2.) Dakopolos further stated,

> "I think what I sent you satisfies your requests 1-4. When we talked on the phone about this some time ago, I mentioned that some of the information would take time to retrieve and that we would need to know if SKEA wants to pay for the time it will take to retrieve this information. Requests 5-7 fall in that category. The parties CBA recognizes that the [A]ssociation will pay for information that is not easily obtainable. Would you like me to get an estimate of the cost of compiling the documents for Requests 5-7?"

(Exh. R-31 at 2.) That same day, Olney responded that she would like the District to provide an estimate. Olney also stated that the information provided contained inaccuracies and inconsistencies, and she asked the District to provide any evidence it had that the District has historically calculated FTE for part-time educators and those who sell their preparation time based on a calculation of minutes.

47. On February 19, 2021, Olney notified Dakopolos that the Association had filed an unfair labor practice complaint.[15] Olney advised that the Association's request for information continued, and she reiterated her request for an estimate of the charge to produce the outstanding documents.

48. On March 1, 2021, Olney sent an email to Dakopolos requesting a status update on the information request. On March 3, 2021, Dakopolos responded that he expected to have an

[14]In January 2021, the parties bargained, and reached agreement on, a memorandum of understanding regarding certain aspects of CDL. The question of how to calculate FTE was not a part of that bargaining.

[15]After the Association filed the complaint in this matter it chose to withdraw its grievance over FTE calculations. The record does not establish the date on which the Association withdrew the grievance.

answer that week, and that the District's HR staff had been busy working with the Association to resume in-person instruction.

49. On March 18, 2021, Olney responded that she was following up again on the information request, and stated, "We are sympathetic that these are crazy times, but the Association has been asking for much of this information for five months." (Exh. C-32 at 1.)

50. On April 15, 2021, Dakopolos emailed Olney additional documents that had been furnished to him by the District. Dakopolos stated that he expected to receive an estimate of the time it would take to provide the other requested information within the next several days. Between April 30 and May 5, 2021, Olney and Dakopolos corresponded about technical issues that prevented Olney from retrieving the documents that Dakopolos had furnished on April 15, 2021.

51. On May 25, 2021, Olney emailed Dakopolos stating that while the Association appreciated receiving email correspondence related to the FTE issue, the District still had not provided the bulk of the information requested. Olney stated that the information provided was inadequate because it "does not actually identify the schedule or hours worked by these employees (either part-time or those who had their 'prep time' bought out) and also appears to include inaccurate and/or inconsistently defined information. [Schutz] identified these issues last October and has yet to receive any substantive response. After I became involved, you indicated that there may be a cost and I asked for an estimate. That still has not been provided." (Exh. R-40 at 1.) Olney went on to identify the items that had not been provided, as follows:

> "In excel format, the following information:
>
> - Employee name and ID
> - Time worked (i.e., actual schedules, including preparation time and Monday Assigned Time)
> - Number of class periods assigned (if applicable).
>
> "Copies of building level 'master schedules' for high schools or middle schools for SY 2018-2019 2019-2020 and 2021-2022.
>
> "The name, FTE and schedule for all AVID Coordinators, Activity Directors, IB Coordinators, Data Specialists, and Link Advisors."

(Exh. R-40 at 2.) On May 27, 2021, Dakopolos responded that he had conveyed the urgency of Olney's request to the District.

52. On June 3, 2021, Dakopolos emailed Olney stating that he would be furnishing master schedules the next day. Dakopolos further stated that the remaining items were kept at the school level, and he provided estimated costs for compiling that information. Dakopolos closed the email by stating, "Let me know if SKEA will pay the costs outlined above and we will proceed." (Exhs. C-33 at 1, R-41 at 1.)

53. On September 28, 2021, Dakopolos emailed Olney stating that he had not received an answer whether the Association wanted to pay for the information request at the rates he had sent to her on June 3, 2021. Olney responded that the Association would pay for the information.

54. On September 30, 2021, the Association narrowed its information request. The District furnished additional responsive documents before the hearing in this matter.

Relevant Contractual Provisions

55. The Association and the District were parties to a collective-bargaining agreement (CBA) effective from July 1, 2017, through June 30, 2021.

56. Article IX, Section A.1 of the CBA states: "The normal workweek **(Monday through Friday)** of employees shall be forty (40) hours **a week**, including a 30-minute duty-free lunch period each day. Employees starting and release times may vary, depending on building and program hours. Full-time employees shall be on duty and available on the school site or site otherwise designated by their principal or immediate supervisor for such above period of time on days employees are to report to work." (Exhs. C-1 at 26, R-1 at 26, emphasis in original.)

57. Article IX, Section B.3 of the CBA states: "Full-time middle school and high school employees shall be allowed one instructional period free of other duties or responsibilities for utilization as preparation time each workday. Middle school preparation time shall be 45 minutes or one full period, whichever is greater. High school preparation time shall be 48 minutes or one full period, whichever is greater." (Exhs. C-1 at 26, R-1 at 26.)

58. Article IX, Section B.5 of the CBA states: "The District shall provide a portion of preparation time to an employee who is contracted as .5 FTE or more per week but less than full time. The portion shall be prorated based on the ratio of the employee's scheduled workweek to the normal full-time workweek." (Exhs. C-1 at 26, R-1 at 26.)

59. Article VII, Section A.3 of the CBA states, "The District shall contribute a portion of the insurance premium for employees who are scheduled to work less than-full-time. The District's contribution shall be prorated based on the ratio of the employee's scheduled workweek to the normal full-time workweek." (Exhs. C-1 at 20, R-1 at 20.)

60. Article VIII, Section A.1.a.(1) of the CBA, covering paid sick leave, states: "An employee who serves for a fraction of the school year or school day shall receive benefits on a pro[ ]rata basis." (Exhs. C-1 at 21, R-1 at 21.)

61. Article VIII, Section A.4.b of the CBA, covering paid family illness leave, states: "An employee who serves for a fraction of the school year or school day shall receive benefits on a pro[ ]rata basis." (Exhs. C-1 at 23, R-1 at 23.)

CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(e) when it unilaterally changed its practice of calculating FTE for the purposes of compensating part-time secondary teachers and for compensating teachers for the buyout of their preparation periods.

3. The District violated ORS 243.672(1)(e) by failing to timely provide the Association with requested information that was relevant to a dispute over FTE calculations.

The Alleged Unilateral Change to FTE Calculations

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 violates 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 mandatory subject of 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*)).

We begin by determining whether there was a unilateral change to the status quo. The Association contends that the District unilaterally changed the way it calculated FTE for part-time secondary teachers and for compensating teachers for preparation period buyouts, from one based on the number of periods taught to one based on time scheduled to work.[16] The District maintains that there was no change because it has always calculated FTE based on time scheduled to work.

We determine the status quo by reference to a CBA, work rule, policy, or past practice. *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 Association contends that the status quo is determined by the District's past practice, and the District contends that the status quo is established by the parties' CBA, which the District contends is consistent with its past practice.

We first address the District's contention that the parties' CBA establishes the status quo for calculating FTE for part-time teachers. 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*

[16]The Association does not allege that the District's changes to class schedules under CDL, in and of themselves, triggered a bargaining obligation. As the Association states, "this case is not about a failure to bargain the CDL schedule or the workload caused by the CDL schedule. The dispute is about a unilateral decision made in HR to no longer set FTE based on proportional workload – *i.e*., periods taught – which has resulted in part-time teachers being paid less than full-time employees for the same work." (Association's brief at 19.)

Association v. Lincoln County School District, Case No. UP-14-04 at 10, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). We first examine the text of the disputed contract language in the context of the contract as a whole, and if the language is clear, the analysis ends. If the provision is ambiguous, we examine extrinsic evidence of the parties' intent, to the extent it is available. If the provision remains ambiguous after considering the extrinsic evidence, we apply appropriate maxims of contract construction. *Yogman*, 325 Or at 364.

The District relies on Article IX.A.1, which states: "The normal workweek (Monday through Friday) of employees shall be forty (40) hours a week, including a 30-minute duty-free lunch period each day. . . .Full-time employees shall be on duty and available on the school site or site otherwise designated by their principal or immediate supervisor for such above period of time on days employees are to report to work." (Exhs. C-1 at 26, R-1 at 26, emphasis omitted.) According to the District, the quoted provision establishes that full-time employees work 40 hours per week, and that FTE is therefore a calculation of time relative to that 40-hour week.

We disagree. The plain language of Article IX.A.1 does not state anything about the calculation of FTE. At most, Article IX.A.1 sets the expectation that full-time employees be "on duty and available on the school site" for 40 hours per week during a normal work week. The District also points to other language in the CBA to establish that the CBA's contractual provisions generally operate based on a principle of time scheduled to work. Specifically, the District relies on a provision in Article VII stating that the District's portion of insurance premiums for part-time employees shall be based on "the ratio of the employee's scheduled workweek to the normal full-time workweek," and on provisions in Article VIII stating that an "employee who serves for a fraction of the school year or school day shall receive benefits on a pro[ ]rata basis" for sick leave and family illness leave. (Exhs. C-1 at 20-21, 23; R-1 at 20-21, 23.) The District contends that this language shows that the CBA provisions are based upon calculations of time, not calculations of the number of periods taught. At most, the quoted provisions establish that the parties agreed to calculate certain employment benefits based on a calculation of time scheduled to work. They do not establish that the parties also agreed to set salary for part-time teachers based on a calculation of time scheduled to work in proportion to a 40-hour work week, or that the parties agreed to set compensation for the selling of preparation periods based on the number of minutes in the preparation period.

Even if we thought there was ambiguity about whether the quoted language established a methodology for calculating FTE, the record establishes, and the District does not dispute, that teachers are professional, exempt employees who routinely work beyond their scheduled hours to complete their work duties. Consequently, the language cited by the District does not control the number of hours that full-time teachers work per week. In practice, the language relied on by the District operates as a minimum expectation for the number of hours worked by a full-time teacher; it does not define or encompass their entire work schedules. Given that Article IX.A.1 does not control, or reflect, the number of hours that teachers actually work per week, we decline to find that Article IX.A.1 must mean, by extension, that FTE for part-time teachers is based on the percentage of time they are scheduled to work in proportion to a 40-hour work week. For these reasons, we are not persuaded by the District's argument that the CBA establishes the status quo for the District's FTE calculations. *See Eugene Police Employees' Association v. City of Eugene*,

Case Nos. UP-38/41-08 at 25-26, 23 PECBR 972, 996-97 (2010) (no status quo established by agreements that did not specifically prohibit or address complained-of action).

Having determined that the CBA does not determine the status quo for how the District has conducted its FTE calculations, we turn to the parties' past practice. A past practice in labor relations is characterized by clarity and consistency, repetition over a long period of time, acceptability to both parties, and mutuality. *Oregon AFSCME Council 75 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993-94 (2005). Acceptability means that both parties know about the conduct and consider it the acceptable method of dealing with a particular situation. Mutuality means that the practice arose from a joint undertaking by the labor organization and the employer. *Id.* Here, the Association contends that the District had a past practice of calculating FTE based on the number of classes, or periods, taught in proportion to a full-time teacher. The District contends that it has always calculated FTE based on the sum of the amount of time that a teacher is scheduled to work. For the reasons discussed below, we conclude that the evidence supports the Association's contention.

We first address the FTE matrices introduced into evidence by the parties. The District argues that the 2017 matrices support its position that FTE is based on the number of minutes a teacher is scheduled to work, while the Association contends that the 2020 matrix supports its position that FTE correlates with the number of periods a part-time teacher is assigned in proportion to a full-time teacher. We conclude that the FTE matrices are of limited value in establishing the District's historic practice because the record does not contain detailed evidence about their usage. Although the record establishes that the 2017 and 2020 FTE matrices were created and maintained by the District's HR Department, there was no specific testimony establishing to whom the matrices were distributed, to what extent they were used, or for how long. Because the use of the District's FTE matrices is not adequately explained in the record, the documents, standing alone, are of little value. We note, however, that the credible record testimony regarding the District's practice for calculating FTE, discussed below, is consistent with the 2020 matrix.

We turn now to the record testimony regarding the District's past practice of calculating FTE. The credible testimony of high school teacher Mashos, who worked for the District for 24 years under various bell schedules, and who worked under a part-time schedule as early as 2005, establishes that FTE has historically corresponded to the number of periods taught relative to a full-time teaching load, not to the number of minutes a teacher was scheduled to work. Mashos's testimony was corroborated by Representative Schutz and President Scialo-Lakeberg. Furthermore, Middle School Education Director Biondi's August 6, 2020, email exchange with Staffing Director Cheever reveals that Biondi also equated FTE with the number of periods taught in proportion to a full-time teacher.

The District dismisses this evidence on the basis that teachers and administrators at the "building level" had a habit of equating FTE with number of classes taught as a "shorthand" for estimating FTE. The District reasons that while this shorthand was a roughly accurate method for determining FTE when the bell schedule encompassed the entire length of each workday, the method falls apart under the CDL model. The District's argument is belied by several pieces of record evidence. First, Middle School Education Director Biondi is a District-level manager, not

a building-level manager. Furthermore, Cheever himself stated in an email to a staff member that "FTE…looks a little different this year." (Exhs. C-14 at 1, R-17 at 1.) Moreover, several statements in Cheever's email correspondence are inconsistent with the District's claim that it has always paid its teachers based on the number of minutes they were scheduled to work. In his August 6, 2020, email exchange with Biondi, Cheever addressed Biondi's understanding about how FTE was calculated by stating, "Instead, we're *currently* looking at FTE from a minutes worked perspective" and that "we've just gotten away from that a little bit in education." (Exhs. C-9 at 1-2, R-10 at 1, emphasis added.) Cheever's comments plainly reflect that the District's "current" practice was a departure from the way it handled FTE in the past. Moreover, Cheever stated that part-time staff "cost slightly LESS in FTE than a strict reading of total periods vs. periods taught" and that "by strictly paying for the time worked, you are able to purchase more periods of instruction…allowing the same amount of total FTE to purchase more staff."[17] (Exhs. C-9 at 2, R-10 at 2, emphasis in original). It is unclear how the District would be able to "purchase more staff" for the same amount of FTE if it did not change the way it was calculating FTE.

The District's position that its FTE calculations have been exclusively based on time scheduled to work is further undermined by evidence regarding the District's past practice for compensating teachers for preparation period buyouts, which contradicts the District's claims. In the two years before CDL, the District compensated middle school teacher Linn an additional .17 FTE for the buyout of his preparation period. If Linn had been compensated based on the number of minutes in his preparation period, .17 of a 480-minute day is 81.6 minutes. As Linn stated in his October 2, 2020, email to the District, however, the length of his sold preparation period was 47 minutes.[18] Similarly, high school teacher Livermore, who has sold his preparation periods to the District since 2011, was compensated .17 FTE for each preparation period that he sold. The .17 figure could not have equated to the number of minutes in Livermore's preparation period unless his preparation period was 81.6 minutes long. In a seven-period day, however, periods are between 40 and 50 minutes long.[19]

For the reasons stated above, we conclude that the record evidence persuasively establishes that the District's past practice has been to calculate FTE for part-time teachers and for preparation period buyouts based on the number of periods taught in proportion to a full-time teaching load. We further conclude that the practice has been longstanding and consistent among the District's teachers at the secondary level. Mashos has been with the District for 24 years and has worked under numerous bell schedules, and Linn has been selling his preparation periods since at least 2011. The evidence also establishes that the practice was acceptable to both parties, that is, that

[17]Staffing Director Cheever's plan to purchase more staff for less money is illustrated by the experiences of high school teacher Wilkins and his teaching partner, who together taught four classes per day for a total of 1.06 FTE, while a full-time teacher taught three classes per day.

[18]Even assuming the District included five minutes of "passing time" (time between classes) on each end of the preparation period into its calculation of the number of minutes it was "buying" from Linn, it would not equate to 81.6 minutes.

[19]In the bell schedule under which Livermore taught, full-time teachers taught six classes and received one preparation period, for a total of seven periods per day.

both parties knew about the practice. Although the District contends that the practice of equating FTE with number of classes taught was not "known or acquiesced to" by the District,[20] as discussed above, not only were District administrators familiar with the practice, but Staffing Director Cheever acknowledged the previous practice in his email communications with District staff. Finally, we conclude that the practice was mutual. There is no evidence that there have been any previous disputes between the Association and the District regarding FTE calculations. In sum, we conclude that the practice of calculating the FTE based on the number of periods taught meets the criteria for a past practice. We further conclude that the District's actions were inconsistent with the status quo when it began calculating FTE for part-time teachers and preparation period buyouts based on the number of minutes scheduled to work.

Next, we turn to the questions of whether the subject of the change at issue concerns a mandatory subject of bargaining and if so, whether the District met its bargaining obligation. The method the District uses to calculate FTE for part-time teachers and for preparation period buyouts is tied to a monetary benefit – salaries – and is a mandatory subject for negotiations. *See* ORS 243.650(7)(a). *See also Oregon Tech American Association of University Professors v. Oregon Institute of Technologies*, Case No. UP-023-20*,* 35, __ PECBR at __ (2020) (compensation is a mandatory subject). The District does not contend otherwise. Furthermore, the District's change to calculating FTE by minutes scheduled to work also impacted workload, a mandatory subject of bargaining. *See Id.* at 27. Finally, the District does not dispute that it did not provide notice to the Association about the change because, from the District's perspective, there was no change. The District did not share its FTE scenarios with the Association before implementing its fall 2020 CDL schedules, and the Association only learned of the change to the status quo regarding FTE calculations when its members began to report problems with their pay calculations.[21] An employer must bargain about its decision to change a mandatory subject for bargaining before deciding to make the change. *Three Rivers Education Association, SOBC/OEA/NEA v. Three Rivers School District*, Case No. UP-16-08 at 5, 25 PECBR 712, 716 (2013). Accordingly, the District did not meet its obligation to provide the Association with notice and an opportunity to bargain over the change.

Consequently, for the reasons stated above, we conclude that the District violated ORS 243.672(1)(e) by changing its practice of calculating FTE for part-time secondary teachers and for preparation period buyouts from one based on periods taught in proportion to a full-time teaching load to one based on time scheduled to work.

Alleged Failure to Timely Provide Requested Information

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*

[20]Respondent's post-hearing brief at 30.

[21]Although the parties bargained, and reached agreement on, a memorandum of understanding regarding certain aspects of CDL in January 2021, the question of how to calculate FTE was not a part of that bargaining.

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. Here, the Association's requested information meets the relevance standard because it was directly related to a pending grievance over the District's alleged change to its method for calculating FTE. Furthermore, the District does not dispute the relevance of the requested information.

The Association alleges that the District unreasonably delayed in the handling of its information request. The question of whether an employer has unreasonably delayed in responding to an information request is dependent on the totality of the circumstances. *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81 at 5, 6 PECBR 5027, 5031 (1982). In assessing the totality of circumstances, we are 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.* at 5031-32.

Here, the Association's stated reason for the request was in support of a grievance and to investigate member complaints that they were not being paid correctly, a factor which weighs in favor of prompt disclosure. *See Id.* at 5031 (a "request for information relating to a pending grievance ordinarily will require a quicker and more specific response than a request for information that concerns the administration of a collective bargaining agreement generally.")

Turning to the second factor, the ease or difficulty with which the information could have been produced, the Association alleges that the requested reports would have been easy to produce, while the District alleges that the information initially requested by the Association – data explaining how many minutes each part-time employee in middle or high school was present at their work site – was data that did not exist. The District also asserts that its handling of the information request was reasonable given the extra demands and challenges placed on its staff because of the COVID-19 school closures.

In assessing the reasonableness of the District's response, we are mindful that the Association's information request came during a very difficult time for the District, with increased workload on its administrators and support staff because of the challenges of CDL and the uncertain timeline for the reopening of schools. We are also mindful that there was a significant amount of correspondence between the parties regarding the information requests, including modifications by the Association, and that the Association did not immediately respond to the District's request to let it know whether it wanted a cost estimate for compiling certain categories of requested documents. Nonetheless, the Association affirmatively requested the cost estimate on February 5, 2021, and the District did not provide the estimate until approximately four months later, on June 3, 2021. Furthermore, the master schedules, which were first requested on December 18, 2020, were not furnished until over five months later, on June 4, 2021. In these circumstances, we agree with the Association that the District's delay was unacceptable. *See Oregon Public Employees Union, SEIU, Local 503, AFL-CIO, CLC v. State of Oregon, Executive Department, Labor Relations Division*, Case No. C-64-84, 8 PECBR 7863, 7871 (1985) (a three-month delay in beginning to compile information requested by a union is unreasonable notwithstanding that the information sought was extensive and involved a large number of the employer's divisions); *Lebanon Education Association/OEA v Lebanon Community School District*, Case No. UP-4-06,

22 PECBR 323, 369 (2008) (a school district's delay of two months to respond to a union's information request was untimely).

With respect to the third factor, the type of information requested, the District has raised no confidentiality argument or other argument that would preclude the disclosure of the information requested by the Association. And finally, with respect to the fourth factor, the history of the parties' labor-management relations, the evidence does not establish that the Association has engaged in "a pattern of numerous requests or of 'fish-and-grieve' expeditions," such that the time to provide the information may be lengthened or excused. *See Colton*, 6 PECBR at 5032. Accordingly, this factor does not justify delay by the District.

Based on the totality of the circumstances, we find that the District unreasonably delayed in responding to the Association's information request, in violation of ORS 243.672(1)(e).

Remedy

We turn to the remedy for the District's good faith bargaining violations. Because the District violated ORS 243.672(1)(e), we are required to enter a cease-and-desist order. ORS 243.676(2)(b). We will also "[t]ake such affirmative action * * * as necessary to effectuate the purposes of [PECBA]." ORS 243.676(2)(c). We generally order an employer to affirmatively remedy a unilateral change violation by restoring the status quo. In this case, we order the District to restore the status quo with respect to calculating FTE for its part-time secondary teachers and for its preparation period buyouts. Because the record establishes that, under the status quo, some of the District's teachers would have received a higher salary than what they received after the District began calculating FTE based on time scheduled to work, a make-whole remedy is also necessary. We will, therefore, order the District to make teachers whole for any loss of salary they suffered due to the District's change in calculating FTE, from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04 at 16, 21 PECBR 206, 221 (2005) (citing *Oregon School Employees Association, Chapter 84 v. Redmond School District 2J*, Case No. C-237-80 at 14, 6 PECBR 4726, 4739 (1981)).

The Association 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 District'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 District and the represented

employees. Accordingly, we will order the District to post the notice and distribute it to bargaining unit employees by email.

PROPOSED ORDER

1. The District shall cease and desist from violating ORS 243.672(1)(e).
2. The District shall restore the status quo with respect to calculating full-time equivalency (FTE) for the purpose of compensating its part-time secondary teachers and for compensating teachers for the buyout of their preparation periods.

3. The District shall make all affected bargaining unit employees whole by paying them the portion of their salaries that they would have received if their FTE had been calculated based on the number of periods taught in proportion to a full-time teaching load, from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum.

4. The District shall post the attached notice for 30 days in prominent places where Association-represented employees are employed.

5. The District shall distribute the attached notice by email to all Association-represented employees within 10 days of the date of this order.

DATED: May 12, 2022.

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@ERB.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-006-21, *Salem Keizer Education Association v. Salem-Keizer School District*, 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 Salem-Keizer School District committed unfair labor practices in violation of ORS 243.672(1)(e), which prohibits a public employer from refusing to bargain in good faith with the exclusive collective-bargaining representative of its employees.

The Board concluded that Salem-Keizer School District violated the duty to bargain in good faith when it unilaterally changed its past practice for calculating full-time equivalency (FTE) for the purpose of paying its part-time secondary teachers and for buying out employees' preparation periods. The Board also concluded that Salem-Keizer School District violated the duty to bargain in good faith when it unreasonably delayed in furnishing Salem Keizer Education Association with relevant requested information.

To remedy these violations, the Board orders Salem-Keizer School District to:

1. Cease and desist from violating ORS 243.672(1)(e).

2. Restore the status quo with respect to calculating full-time equivalency (FTE) for the purpose of compensating part-time secondary teachers and for compensating teachers for the buyout of their preparation periods.

3. Make all bargaining unit employees whole by paying them any additional salary they would have received if their FTE had been calculated based on the number of periods taught in proportion to a full-time teaching load, from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum.

4. Post this notice for 30 days in prominent places where Association-represented employees are employed.

5. Distribute this notice by email to all Association-represented employees within 10 days of the date of this order.

EMPLOYER

Dated: _____, 2022

By:_____

Title:_____

****

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

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

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-004-21

(MANAGEMENT SERVICE REPRIMAND)

MM, Appellant, v. STATE OF OREGON, OREGON BUSINESS DEVELOPMENT DEPARTMENT, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 17, 2022, the Board heard oral argument on Respondent's objections and Appellant's cross-objections to a March 16, 2022, recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew after a hearing on October 5, 2021, via videoconference. The record closed on November 16, 2021, following receipt of the parties' post-hearing briefs.

Appellant MM, Salem, Oregon, represented herself.

Margaret J. Wilson, Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, represented Respondent.

On April 2, 2021, the State of Oregon, Oregon Business Development Department (Department) issued a reprimand to Appellant. On May 3, 2021, Appellant filed a timely appeal to this Board.

The issue is: With respect to ORS 240.570(3), did the Department appropriately reprimand Appellant on April 2, 2021, for misconduct, inefficiency, insubordination, and other unfitness to render effective service, specifically: using an inappropriate tone and volume of voice; disrespectful comments; cursing; arguing with people requesting assistance; refusing, challenging, or failing to complete assignments; and, inconsistent communication?[1]

[1]The issue statement included a reference to ORS 240.555, which provides that the appointing authority may "suspend, reduce, demote or dismiss" an employee for "misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service." Appellant was not suspended, reduced, demoted, or dismissed, so we have modified the issue statement to omit reference to ORS 240.555.

As discussed below, we conclude that the Department proved some of the charges in Appellant's letter of reprimand, and that the Department's reprimand of Appellant did not violate ORS 240.570(3). We therefore dismiss the appeal.

RULINGS

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

FINDINGS OF FACT

The Parties

1. The Department, known as "Business Oregon," is the State of Oregon's economic development agency. The Department has several divisions, including the Arts & Culture Division, Economic Development Division, and the Operations & Finance Division.

2. The head of the Department's Operations & Finance Division is Assistant Director Brenda Bateman. The Operations & Finance Division contains several sections, including Business & Public Finance, Communications & Research, and Fiscal & Budget.

3. The head of the Fiscal & Budget Section is the Chief Financial Officer (CFO) of the agency. This position reports to Assistant Director Bateman. At the time of hearing, the CFO of the Fiscal & Budget Section was Renee Frazier. Before the events at issue here, the CFO was Jenny Wilfong.

4. The Section has two main components, a budget team, and a tracking and distribution team. The CFO is ultimately responsible for both teams, but is the direct manager of the budget side of the Fiscal & Budget Section, which creates the Department budget.

Appellant and the Financial Tracking and Distribution Team

5. The tracking and distribution side of the Fiscal & Budget Section is responsible for tracking and distributing virtually all state and federal funds administered by the Department, transferred by the State of Oregon to entities (not individual persons) outside state government. The head of that portion of the Section is the Accounting Manager, who directs and supervises the accounting staff of the Section, which includes five accountants. The Accounting Manager reports to the CFO.

6. At the time of hearing, Appellant was the Accounting Manager and an exemplary employee. Appellant was originally hired by the Department in December 2013 as an Accountant 4. In 2018, the Department reclassified her position to a Principal/Executive Manager E (PEM E).

7. The work of the tracking and distribution team is very technical, requires great accuracy, and raises issues of accounting practice and compliance with federal and state law. It requires high-level decision-making capabilities because of the Department's large budget and complex accounting structure. For example, Appellant and her team oversaw 450 separate accounts, while the Oregon Department of Energy, a similar-sized agency, has fewer than five

such accounts. In normal times, Appellant and her five subordinates distributed and accounted for approximately $1 billion in distributed funds. Appellant received "30-40-50 emails a day on average" that she had to respond to immediately, and "plenty" of emails that she could respond to more slowly. The day of hearing, Appellant received 40 emails between 9:30 a.m. and 3:00 p.m.

COVID Pandemic, Mass Wildfires, and Disaster Relief

8. During 2020 and 2021, Oregon faced two unprecedented crises. The first, the COVID-19 pandemic, had massive effects on Oregon's health care system and economy, including affecting the ability of employees to attend and perform work and the ability of the public to patronize businesses. The second crisis was a spate of extraordinary wildfires that destroyed entire communities.

9. As a result of these crises, the state and federal governments provided an extraordinary amount of money to be distributed to various Oregon entities for assistance with these crises. Appellant's Section, with its six employees, was the funnel through which some or all of that money had to be accounted for and distributed. Much of that money was subject to stringent deadlines for distribution to the ultimate recipients, and requirements that, if the deadlines were not met, the funds would be withdrawn. Instead of the usual $1 billion distribution, Appellant's team would have to distribute $1.5 billion in the 2020–2021 fiscal year.[2]

10. The work of Appellant and her five staff was normally demanding, but became more so with the additional funding duties and the additional time pressure. Appellant believed that the rest of the distribution team were working at capacity if not more than that. Appellant herself was regularly working 50 to 60 hours per week.

Replacement of Chief Financial Officer (CFO)

11. During mid-2020, Department CFO, then Wilfong, left the agency for another position in state government. Department Assistant Director Bateman had a managerial goal of changing the culture of the Fiscal & Budget Section to one that was more open, transparent, and less of a traditional accounting environment. When CFO Wilfong left, Bateman decided to use the opportunity of a vacancy in the position to seek a CFO who would have both the technical skills and coaching and mentoring skills, and that would help to further Bateman's goals.

12. Appellant was a member of the first of three panels considering the CFO applicants, one of whom was Frazier. During that process, Appellant was vocal about her belief that a critical qualification for the CFO position was an accounting background and experience in Oregon state government. In particular, Appellant did not believe that Frazier was qualified for the CFO position, in part because Frazier had only five years of accounting experience (which was in local government) and no experience working for the state or with State of Oregon financial systems. Frazier had 23 years of experience working for the City of Salem in finance, urban development, and procurement, including management experience and grant management.

[2]For context, the total adopted state budget for the 2021-23 biennium is $112.789 billion. (2021-23 Legislatively Adopted Budget; General Fund/Lottery Funds – Summary.)

13. Ultimately, Bateman chose to hire Frazier effective October 1, 2020. Bateman based her decision on Frazier's qualifications and experience working for the City of Salem, and because Bateman believed Frazier to be a people-oriented person, who could change the Section's workplace culture as Bateman desired.

14. After deciding to hire Frazier, both Bateman and an upper management official telephoned Appellant to reassure Appellant that Frazier would have adequate support and training to adequately perform the duties of the CFO position.

15. Frazier assumed the CFO position on October 1, 2020. Within a month after Frazier's hiring, the two most-senior budget specialists left their positions.[3] The departing individuals would have played a very important role in training Frazier.

16. Bateman arranged for a mentor for Frazier from the Oregon Parks and Recreation Department to help her learn the state-specific systems. However, Bateman also expected that others on the management team, including Appellant, would assist Frazier in her transition to state employment by providing information and guidance as needed.

17. Appellant was very unhappy about Frazier's hiring and the amount of work that would be required of her to help onboard Frazier. Appellant was responsible both for helping to onboard Frazier while already working 50 to 60 hours per week, and dealing with emergency funds to be distributed.

18. Frazier's requests for assistance, explanations, and reports added to Appellant's heavy work demands. Appellant turned down Frazier's offer of extra help for Appellant's unit (before the loss of a distribution team member). Appellant also repeatedly told Frazier and Human Resources Employee Services Manager Dana Northrup about the extra work and time that Frazier's newness to state government had required of Appellant.

19. Frazier felt disadvantaged because the previous CFO did not leave her a desk manual, and because she was only given general information about various state processes. Frazier did not know state finance terminology and was unfamiliar with the way state financial information was presented in documents. Frazier wanted Appellant to assist her in learning the Department's processes, computer systems, and the scope of the CFO's responsibilities. As a result, Frazier repeatedly asked Appellant to provide information that Appellant believed Frazier could access on her desktop. Appellant had no working knowledge about how to do certain budget-related tasks and other core CFO responsibilities, but Frazier repeatedly asked Appellant about budget matters.

20. Appellant often responded tersely to Frazier's inquiries, and on occasion, Frazier did not understand that Appellant's responses contained the information or answers Frazier sought. In some cases, Frazier did not know what she did not know, making it difficult for Appellant to determine what Frazier actually needed. In addition, Frazier wanted to have a greater understanding of the work of Appellant and her unit, and sought granular details of information Appellant supplied others as part of Appellant's job.

[3]The record does not contain an explicit explanation for these departures. However, these staff joined previous CFO Wilfong at her new agency.

21. Within the Section, Appellant was known as a "direct communicator." Frazier was surprised and occasionally offended by Appellant's direct, candid responses. On one occasion, after Appellant had been asked to provide guidance to Frazier on how to complete a budgetary task that Appellant repeatedly explained to Frazier that she did not know how to do because it was the CFO's responsibility, and not something Appellant had done before, Appellant told Frazier, "I don't think its fair or reasonable [for me to have] to tell you how to do the job you were hired to do." Soon after this exchange, Frazier and Appellant had a frank discussion about Frazier's expectations regarding Appellant's overall responsiveness and Frazier's expectation that Appellant act respectfully towards Frazier.

22. Appellant's burden of work, the fast and decisive action required by that work, personal communication style, temperament, and the detailed, focused mindset required by Appellant's job left Appellant ill-suited to convey to Frazier the duties of the CFO position, or to educate Frazier about Appellant's work. Appellant's belief that Frazier lacked essential knowledge and expertise for the CFO position caused Appellant anxiety and resentment when she responded to some of Frazier's questions and desire for explanation. In addition, Appellant was not familiar with many of the tasks required by the CFO job, particularly the work required on budget issues.

23. Frazier, meanwhile, wanted a more narrative and contextual explanation of particular aspects of the tracking and distribution work. Because of Appellant's workload, her position's focus on fast and decisive responses to inquiries, and personal work style, Appellant found Frazier's approach difficult. Frazier was also focused on learning Appellant's duties so she could supervise them in more detail, as well as Frazier's own budget duties. Frazier repeatedly told Appellant that the way Appellant supplied information to her was insufficient for Frazier to learn and understand. During a meeting in October 2020, Frazier told Appellant that Frazier's style of learning was through thorough description and explanation, and that Appellant's comments to the effect of, "Just look in the file," were insufficient for Frazier.[4]

24. In discussing Appellant's responsibilities to train Frazier, Bateman testified that "there's a responsibility to make sure your upline has the information they need to do their job and are able to find everything and really feel comfortable knowing what to do, when and what some of the obligations are." Bateman had an expectation that a PEM E manager such as Appellant would assist in "onboarding" the new CFO.

Letter of Expectations

25. On November 6, 2020, Frazier issued Appellant a letter of expectation, which listed the following expectations[5]:

"Behave in a respectful, supportive manner toward new and current employees

[4]Frazier testified that, as of the date of hearing, she had an incomplete understanding of Appellant's job duties. Frazier's level of knowledge about Appellant's job influenced Frazier's communications with Appellant.

[5]Frazier did not assert that Appellant had failed to respond to any of Frazier's inquiries in the letter of expectations.

"Work to create a welcoming and inviting team environment
"Assist in training employees as requested
"Be mindful that everyone learns in different ways
"Be willing to help others instead of displaying an 'it's not my job' attitude
"Be open to constructive feedback without being defensive or negative
"Refrain from making comments that undermine or express doubt about the competency of myself or any other leaders or peers at Business Oregon."

The Letter also stated that Appellant was expected to collaborate with other staff, including sharing knowledge with those who may need it, and,

"At this time, no changes are being made to your work assignments or responsibilities – I am asking you to share, in plain language, what it is that you and your team do, and to share any and all information that will assist new staff become proficient as rapidly as possible. Having an understanding of our accounting structure and how, when and why funds are moved between our accounts is intrinsically tied to budget development, administration and reporting. Learning how to utilize our software and obtain data will allow new staff to do their own queries and ultimately relieve you and your staff of this responsibility."

Oregon Growth Account and the Oregon Growth Fund

26. Beginning in late November 2020, and continuing into February 2021, Ricardo Lopez, Investment Strategist for the Department Oregon Growth Board, Appellant, and Frazier, exchanged the following emails[6] regarding the amounts in two State funds, the Oregon Growth Account (OGA) and the Oregon Growth Fund (OGF), under the subject lines "OGF Cash Balance" and "OGA/OGF Transaction Info":

"From: [Lopez]
"Sent: Tuesday, November 24, 2020, 9:18 PM
"To: [Frazier]
"Subject: OGF Cash Balance
"Would you be able to give me an update on how much capital I have available for OGF? Before she left, Jenny [Wilfong] told me we had $350,000 in Lottery funds (which we have to deploy by June 30th) and an additional amount in Other funds (which come from our own returns). I'm about to recommend a $350k commitment to a VC Fund next week, if that is indeed how much we have in Lottery funds.
"* * *

"From: [Frazier],
"Sent: Monday, November 30, 2020, 9:15 AM
"To: [Appellant]
"Subject: FW: OGF Cash Balance
"I looked at the cash balance report and I am finding a couple of cash accounts for OGF, 4000 (split into two) and 4001.

[6]Only the substantive portions of the emails are reproduced here.

"4001 seems clear to me it is 'other funds', and going back and looking at previous years cash reports, the balance in 4000 appears to have been derived from Lottery. Can you explain the difference between 25155 and 25152 within the D23 4000 account?
"* * *

"From: [Appellant]
"Sent: Monday, November 30, 2020, 9:24 AM
"To: [Frazier]
"Subject: RE: OGF Cash Balance
"25152 is investments that were derived from SRF funds. We felt we needed to keep them separated since SRF is so highly political.
"It's not cash but it's cash equivalent.
"* * *

"From: [Frazier]
"Sent: Monday, November 30, 2020, 9:41 AM
"To: [Appellant]
"Subject: RE: OGF Cash Balance
"Ok, so to address Ricardo's question, there is $1.59 M available (25155) for him?
"* * *

"From: [Appellant]
"Sent: Monday, November 30, 2020, 9:54 AM
"To: [Frazier]
"Subject: RE: OGF Cash Balance
"No, sorry these accounts with investments in them are a bit difficult at times.
"And I noticed that the side notes in the cash balances were off. Sorry about that. It has been fixed.
"The current cash balance as of today in D23 4000 is $836,313.01 and 25152 is no longer an active PCA, as the appropriation ended in AY19. I can combine the two in the November reconciliation if you'd like. It would certainly make things easier aesthetically.

[The attachment to this email was a screenshot of an electronic document called a "Cash Control Financial Inquiry" dated November 30, 2020, at 9:47 a.m. The pertinent data from the screenshot appears below.]

"CASH CONTROL FINANCIAL INQUIRY

AGENCY: 123 APPR FUND: CASH FUND: FUND: 4000 GRANT NO/PH:

INQ TYPE: MC (MA, YA, MY, YY, MC, YC) DETAIL/SUMMARY: D

INQ YEAR: 21 INQ MONTH: 05 CASH BALANCE: 836,313.01

BT	TITLE	AMOUNT	BT	TITLE	AMOUNT
12	CASH REVEN	8,098.95			
13	PYMTS OUTS	.00			
15	CASH EXPEN	287,113.11			
20	TRAN IN-CA	4,283,920.93			
21	TRAN OUT-C	388,513.00			
22	OTHER INCR	2,592,392.74-			
23	OTHER DECR	25,000.00			
34	UNREC DEPO	162,688.02			

"* * *

"From: [Frazier]
"Sent: Monday, November 30, 2020, 3:46 PM
"To: [Lopez]
"Subject: RE: OGF Cash Balance
"Hi, my apologies for the late response.
"There is $836,313 of lottery cash as of today, and $262,791 of other funds.
"Please let me know if you need anything additional.
"* * *

"From: [Lopez]
"Sent: Monday, November 30, 2020, 4:50 PM
"To: [Frazier]
"Subject: RE: OGF Cash Balance
"Thank you Renee!
"Is that all for the Oregon Growth Fund? I was only expecting there to be $350k in lottery cash, but perhaps we got another transfer from lottery? I have no idea how Jenny kept track of these, but would it be possible for me to get a cash flow statement/spreadsheet to understand our contributions this year? I just want to make sure I plan to deploy OGF's capital before the end of the biennium.
"Thanks again!
"* * *

"From: [Frazier]
"Sent: Sunday, December 6, 2020, 11:34 AM
"To: [Appellant]
"Subject: FW: OGF Cash Balance
"Good morning,
"I'm following up on all my e-mails, I think we discussed this Tuesday - were you able to provide this information? I don't think it's urgent, but I didn't see anything on it, so I'm checking.
"* * *

"From: [Appellant]
"Sent: Monday, December 7, 2020, 7:21 AM

“To: [Frazier]
“Subject: RE: OGF Cash Balance
“I looked at the balances and I’m not sure exactly where the $350k number comes from. The OGF gets quarterly lottery distributions so that’s likely why there is more than he thought but as to the exact amount of what needs to be spent by biennium end, I’m not sure. Ricardo should have a pretty good idea of any commitments in the fund and that would likely be a part of it.
“* * *

“From: [Frazier]
“Sent: Tuesday, January 5, 2021, 7:38 AM
“To: [Appellant]
“Subject: RE: OGF Cash Balance
“Could you please create a summary of transactions in/out of the cash accounts for both OGA and OGF for 19-21 to date? I think it’s D23 4000 and 4001.
“* * *

“From: [Appellant]
“Sent: Tuesday, January 5, 2021, 8:09 AM
“To: [Frazier]
“Subject: RE: OGF Cash Balance
“Those funds are both OGF. Do you want OGA as well?
“* * *

“From: [Frazier]
“Sent: Tuesday, January 5, 2021, 8:11 AM
“To: [Appellant]
“Subject: RE: OGF Cash Balance
“Yes, please.
“* * *

“From: [Appellant]
“Sent: Tuesday, January 5, 2021, 8:32 AM
“To: [Frazier]
“Subject: RE: OGF Cash Balance
“Are you looking for something like this?
“* * *

“From: [Frazier]
“Sent: Tuesday, January 5, 2021, 8:34 AM
“To: [Appellant]
“Subject: RE: OGF Cash Balance
“Yes, with the beginning and ending balance added, I think that would be helpful – thank you!
“* * *

"From: [Appellant]
"Sent: Thursday, January 7, 2021, 11:55 AM
"To: [Frazier]
"Subject: RE: OGF Cash Balance
"**Attachments: OGA-OGF Transactions.xlsximage012.png**[7]
"finally! Everything balances.
"* * *

"From: [Frazier]
"Sent: Friday, January 8, 2021, 9:15 AM
"To: [Lopez]
"Cc: [Appellant]
"Subject: OGA/OGF Transaction Info
"[Appellant] was able to put together information on transactions for this biennium. "On OGF, the lottery funds are shown as $2.6M on the attached, but [Appellant] noted $1.6M are in investments, so the available cash would be just shy of $1M. [Appellant], feel free to correct me if I've misunderstood.
"* * *

"From: [Appellant]
"Sent: Friday, January 8, 2021, 9:19 AM
"To: [Frazier]; [Lopez]
"Subject: RE: OGA/OGF Transaction Info
"You are correct Renee. I can break out the investment portion if you'd like.
"* * *

"From: [Lopez]
"Sent: Monday, January 11, 2021, 8:53 AM
"To: [Appellant]; [Frazier]
"Subject: RE: OGA/OGF Transaction Info
"This is a step in the right direction but we're not entirely there. Investments are indeed not the same as cash, since they're not liquid. Ideally, I would like to see our 3 key financial statements at the beginning and end of the biennium. I know the income statement would be the hardest because the agency hasn't kept track of our investment valuations. However, our balance sheet at the beginning should split out how much these portfolios held in investments, outstanding loans, and cash. Then our cash flow statement should take it from there like it does on the report you provided, focusing on liquidity. Finally, another balance sheet as of the end of the biennium would adjust those initial asset values and tell us how much liquidity we have.
"In OGF, is account 4000 Lottery while 4001 is Other funds? Why do we pay Treasury through OGF if they help us process OGA cash flows? And I don't see the wires to Oregon Angel Food 2020 and Bend Venture Conference Impact 2020. Also not sure where you would adjust but we also forgave our outstanding loans to MESO, Craft3, and Community Lending Works.

[7]The attachment to this email, which was included in Appellant's exhibits, consists of a detailed spreadsheet completed by Appellant.

“It is crucial that we know how much we have available to deploy at any given time. Particularly in OGF, we need to know our liquidity in terms of Lottery and Other funds, since Lottery dollars have to be deployed each biennium.
“* * *

“From: [Appellant]
“Sent: Tuesday, January 12, 2021, 5:21 PM
“To: [Lopez]
“Cc: [Frazier]
Subject: RE: OGA/OGF Transaction Info
“I’ve finally had a chance to look at this email and I’ve attached a revision with a tab for OGF investments that may be helpful to you. Just keep in mind that I didn’t groom it at all. I just did a data dump, which includes corrections, etc. Investments are entered into SFMA as a swap of one asset for another (cash for investments) on the balance sheet. They are also included in the cash balances that I update monthly, so that’s what the first tab is balanced to as well.
“The original request from Renee was to provide activity information that affected cash balance, so the first OGF rendition is limited to revenues and expenses. One thing to note is that revenues are depicted as negative numbers, as they are a credit on the operating statement and expenses or reductions as positive numbers.
“As for your questions regarding the funds. Yes, 4000 is lottery and 4001 is other fund. All treasury funds, except bond related funds, are assessed fees. The fees on the OGF accounts are typically $10 per month unless we process wires. The OGA fees are on the OGA tab.
“One more thing to note, the OGA info was provided to me by DAS. The layout is more inclusive and includes all transactions (including investments) in one tab. And lastly, I’m not sure if you are already aware of this or not, but the OGA does not have expenditure limitation. Therefore, any expense type items are actually entered into SFMA as a reduction of revenue.
“It’s a work in progress and I know it’s not exactly what you are looking for but hopefully this is a little closer. We’ll get there eventually.
“* * *

“From: [Lopez]
“Sent: Wednesday, January 13, 2021, 8:15 AM
“To: [Appellant]
“Cc: [Frazier]
“Subject: RE: OGA/OGF Transaction Info
“Thank you [Appellant]! Really appreciate the explanation. I’ll take a closer look of this version.
“In the meantime, I really need to certify how much liquid cash I have available in OGF. Even if I treat the $1,692,392.74 as investments and subtract that from the OGF tab Ending Balance of $2,690,259.57, that still implies I have $997,866.83 in cash in Lottery and $263,499.02 in cash in Other. These numbers do not jive with anything I’ve heard since I started working here. OGF only gets ~$600k from Lottery every biennium, so how could we have more cash than that after deploying

capital to OCF, OAF, and BVC this year? Even if we deployed all 3 of those from Other, how could we have more than $600k in Lottery?
"* * *

"From: [Appellant]
"Sent: Wednesday, January 13, 2021, 9:16 AM
"To: [Lopez]
"Cc: [Frazier]
"Subject: RE: OGA/OGF Transaction Info
"As of right now, we have exactly $835,178.81 in true cash and $162,688.02 in unreconciled deposits, which equates to cash. That amount is from previous corrections and I'm working on getting that resolved and converted to cash in the accounting system. The cash amounts you noted below are accurate and there are currently no investments in 4001.
"Fund 4000 has been active since August of 2015. In 2017, the state began reverting unused lottery funds back to DAS for redeployment each biennium. However, if there are commitments of the lottery funds, those are excluded from the reversion. The OGF will usually be left with at least some balance at the end of each biennium. Those calculations have always been done by the CFO. There is also interest income that is added to the account each month. The number Jenny gave you may have been cash, less commitments she was aware of. Or maybe what her anticipated reversion amount was, because there is a chance that some of the funds will be reverted in October/November when it's time for that transaction to happen.
"* * *

"From: [Lopez]
"Sent: Friday, January 22, 2021, 3:26 PM
"To: [Appellant]
"Cc: [Frazier]; [Kate Sinner][8]
"Subject: RE: OGA/OGF Transaction Info
"Thank you again [Appellant]. The 4000 amount makes sense to me, but I still don't understand how the 4001 cash amount could be correct. We only get $600k into that account from legislature every biennium, and it has to be deployed each biennium. If the proceeds from investments and interest from loans goes to 4000, how could we have more than $600k in cash in 4001? That's not even considering the fact that we made investments during the biennium. Don't get me wrong, if we do have the money and I'm just misunderstanding how the intricacies are supposed to work, please tell me so. I just want to me crystal clear before I go out and make commitments.
"* * *

"From: [Frazier]
"Sent: Monday, February 22, 2021, 6:38 AM
"To: [Appellant]
"Subject: FW: OGA/OGF Transaction Info
"Were you able to answer Ricardo's questions on the source of the cash?

[8]Sinner is a staff person with the Department.

“I know we’ll not be able to reconcile the $350K amount he was given by Jenny, I’m sure it was a point in time number and was correct at the time.
“However, we should be able to research and document our cash balance.
“Do you need to go back to the beginning of the account to answer the question? It needs to be addressed, so we can spend or commit unused cash prior to the end of the biennium.
“Let me know how this can be accomplished, thanks,
“* * *

“From: [Appellant]
“Sent: Monday, February 22, 2021, 7:18 AM
“To: [Frazier]
“Subject: RE: OGA/OGF Transaction Info
“I haven’t heard back from DAS yet. I’ll let you know when I do.
“* * *

“From: [Frazier]
“Sent: Monday, February 22, 2021, 7:23 AM
“To: [Appellant]
“Subject: RE: OGA/OGF Transaction Info
“Hi, this is related to the OGF balance, which I understand is ours. The balance in the OGF is far greater than expected, and I don’t believe we’ve ever been able to explain the “why” behind that.
“I thought DAS handled the OGA and that is the information we are waiting on from them?
“* * *

“From: [Appellant]
“Sent: Monday, February 22, 2021, 7:31 AM
“To: [Frazier]
“Subject: RE: OGA/OGF Transaction Info
“Got it.
“Yes, DAS handles the OGA and I’m still waiting to hear from them. 4001 is OF and I did explain this to him. The cash balances I provided to Investment Strategist, OGB for both funds are accurate.
“* * *

“From: [Frazier]
“Sent: Monday, February 22, 2021, 7:40 AM
“To: [Appellant]
“Subject: RE: OGA/OGF Transaction Info
“I understand they are accurate, but the amounts are far greater than Jenny indicated and we need to be able to explain where the funds came from.
“The below e-mail, and subsequent conversations I’ve had with Kate and Ricardo indicate they still do not have a clear understanding of the source of the cash.

"I believe this is a reasonable question we should be able to address with a history of transactions.
"* * *

"From: [Appellant]
"Sent: Monday, February 22, 2021 7:49 AM
"To: [Frazier]
"Subject: RE: OGA/OGF Transaction Info
"I'm not sure what more I can provide. I gave both of you all of the transactions and balanced them. The funds come from lottery, interest income and at a point, there were small loans repaid. If you feel the amounts are accurate, what more am I supposed to come up with. Jenny told him what he had available to spend, or more likely what he needed to spend before the end of the biennium in order to not have it swept. I suspect she was giving him budget information, not cash. Since I wasn't in on that conversation, I can only surmise.
"* * *

"From: [Frazier]
"Sent: Monday, February 22, 2021 8:04 AM
"To: [Appellant]
"Subject: RE: OGA/OGF Transaction Info
"I'm asking for a complete history going back to the inception of the account **if that is what is necessary to answer the question.**
"I agree, none of us are in a position to know why Jenny provided the information she did. However, if we have cash that is not committed, we need to commit it so we don't have to revert it.
"If we don't know for certain where it came from and how it accumulated, folks are understandably hesitant to commit it.
"* * *

"From: [Appellant]
"Sent: Monday, February 22, 2021 8:12:12 AM
"To: Frazier
"Subject: RE: OGA/OGF Transaction Info
"I asked Jenny.
"She said both Ricardo and Kate knew how much was in the account. At the time she talked with them, she told them to only plan on spending/committing half in case of a major shortfall in LF due to the pandemic. Then they could plan on the other half later in the biennium." (Emphases added.)[9]

[9]The Department reproduced the email chain under the subject line "OGA/OGF Transaction Info" in Exhibit R-13 as an example of Appellant failing to follow through with requests. In its post-hearing brief, the Department states, "The LOR includes examples of situations when Appellant was not collaborative or failed to respond to a request from Ms. Frazier. One such incident occurred in November 2020 when Ms. Frazier asked Appellant to answer questions regarding the Oregon Growth Account and Oregon Growth Fund. This request was unmet * * *." As Appellant explained at hearing, that email chain examined in context with additional relevant emails under the subject line "OGF Cash Balance" along with associated

27. Appellant did not believe that additional information was necessary to answer the question posed; nevertheless, Appellant began to research and create the comprehensive accounting document she believed Frazier was requesting. During this time period, Frazier asked Monica Brown, a Fiscal Analyst, to obtain what Frazier thought was the same information she had requested from Appellant, and received that information that same day.

28. Frazier contended that this series of emails above demonstrated that Appellant was recalcitrant and unhelpful:

> "As a result of numerous emails between you and Ricardo and Ricardo's continued questions about the balance, I asked you to go back to the beginning of the account to answer the questions on the source of the OGF cash balance. After additional emails between you and I, on February 22, 2021, I specifically directed you to run a complete transaction history for the OGF cash account. Rather than completing the assignment, you responded to my request with 'I asked Jenny. She said both Ricardo and Kate know how much was in the account. At the time she talked with them, she told them to only plan on spending/committing half in case of a major shortfall in LF due to the pandemic. Then they could plan on the other half later in the biennium.' This failed to meet my request to run a total transaction history from the beginning of the account, and did not meet our customer's need. I asked another staff member if they could run this report and it took less than an hour to get the transaction history."

29. Appellant explained the email thread, underlying financial issue, and her work in response as follows:

> "Regarding the OGF example given, November, 2020, the original question raised by Ricardo Lopez about the Oregon Growth Account (OGA) and Oregon Growth Fund (OGF) balances was, 'what is the current balance in the OGF'? When the balance of around $600k was revealed to him, he indicated that Jenny (the previous CFO for the agency) had said the balance available to spend was around $300k. Why is that? This became the crux of the question indicated in the LOR. I let both Renee and Ricardo know that the cash balance was indeed accurate and further surmised that Jenny was most likely factoring in budget availability for some reason because point in time matters when asking questions of cash balances because of the allotment. I was then instructed to provide detailed accounting transactions for both the OGA and the OGF for the entire biennium. I provided this information and balanced the amounts to the current cash balances. This took a considerable amount of time for me to do because there are investment accounts that are housed at DAS, balance sheet accounts, and original transfers from DAS to factor in. It took approximately 6 hours of work-time over 2 days to complete this task accurately. As part of my research and as a way that I could answer the initial question, I reached out to Jenny and asked her why she told Ricardo and Kate there was only about $300k available in the OGF. To which she responded that she had indicated to Ricardo and Kate to only ***plan*** (in budget terms) on spending/committing half in

attachments, does not support the Department's allegations that Appellant was not collaborative or failed to respond to a request from Frazier about the Oregon Growth Account and Fund.

case of a major shortfall in LF due to the pandemic. *Then* they could plan on the other half later in the biennium. This answered the original question that Ricardo had. The "transaction history" provided by Monica (another staff member indicated in the LOR) was a high level budget history, it was not inclusive of all of the cash and investment information that I provided. Much different than a full accounting transaction history, which I did not refuse to do but Renee had Monica do her query quicker than I could get the time needed to do mine. I would like to point out that the end result remained the same, the balance did not change and the answer I provide from Jenny was really what the initial question was." (Emphases in original.)

Frazier's Request for a List of Reports Appellant Prepares

30. In early November 2020, Frazier asked Section staff to send her a complete list of reports they issued so that she could determine which reports she wanted to review before their release. Appellant responded that she only prepared the cash balance account report.

31. On February 5, 2021, Frazier received a request for additional information from a legislator regarding a report that Appellant or her team had submitted to the legislative fiscal office before Frazier joined the Department. Frazier was apparently unaware that the report was submitted to the legislative fiscal office before her employment. The legislator's request led Frazier to question the accuracy of Appellant's list of reports, and prompted the following exchange of emails from 3:01 to 4:00 p.m. that day under the subject line "Delinquent debt":

Frazier: "I've not seen this report – is this something produced by our workgroup, and who is on the distribution list?

Appellant: "It's the AR delinquency reports. I submit them to DAS quarterly and LFO and DAS annually. Our situation is a bit complex in that loans are not included in the report unless there is a past due payment on a loan. I have advocated to no avail that our report does not add value to the state as a whole since nearly all of our loans that have delinquencies are collateralized. We rarely write off any loans, only forgivable loans, which are not counted.
"The reports are in the LFO delinquency folder. named that because we didn't used to have to report to DAS. That became a new rule in 2018 or 2019.

Frazier: "I would like to see reports of this nature before they are submitted.
I asked in the first week of November for all staff to provide me with a list of reports that were regularly generated. The only report mentioned at that time was the cash balance report.

"If you could reconsider the question and provide a list of reports our group generates, I could indicate which I would like to review and which I don't feel I need to see.

Appellant: "Sorry about that. I don't even think about it until I get a reminder email from DAS.

"I'll be glad to share that with you.
"As for the list…
"Other than that report, we have all of the CAFR files including SEFA and then the financials for SPWF and Water (the newest audit) which go to the IFA board.
"The CAFR related items are the foremost on my mind at any given moment, so that's what I focus on the most. I honestly can't think of any others at this time. I'll reach out to the rest of the team and try to come up with a list."[10]

Assignment of Tasks to Shared Employee

32. Frazier supervised an employee, Dick Moreland, who sometimes performed work for Appellant and her team at their request. It does not appear that Appellant or her team was generally required to get Frazier's permission to make those requests, and Appellant was accustomed to using that resource.

33. On February 19, 2021, Frazier and Appellant exchanged emails, stating in part,

Frazier: "Dick mentioned he has been training with April to cover some of her tasks while we recruit for a replacement.

"I do not recall hearing that it was your intent to utilize Dick for this purpose.

"I understand Dick has been a shared resource, but would like to be consulted if you are interested in adding things to his plate in the future.

Appellant: "My apologies. If you aren't ok with it, I'll have someone else do it. I only asked him to help with a few of the grant payments out of Arts. It was my understanding when you started that it was ok to keep him busy with payable items. Let me know if you would like me to redirect that work.

Frazier: "I don't necessarily have a concern with having him assist, but I am asking for open communication between us.
"I'd be happy to discuss if you'd like when we meet on Monday."

34. Throughout this period, Appellant shared her concerns about Frazier with an official in Department upper management and with Human Resources Employee Services Manager Northrup, whom Appellant considered a friend. Without informing Appellant, Northrup regularly reported Appellant's comments to Bateman.

35. In early 2021, April Kinney, an Accountant 2 and an excellent member of Appellant's team, left to take a promotion in another agency. Appellant immediately began recruiting a replacement for her team. After Frazier gave her approval, the position was posted, and Appellant believed she had located a good candidate for the position.

[10]The record contains no follow up to the last email above from Frazier, Appellant, or Appellant's team. There is no evidence in the record that there were, in fact, any additional regular reports beyond what Appellant had already supplied and Appellant confirmed in her testimony that there were indeed no additional regular reports beyond what Appellant had already supplied to Frazier.

February 22, 2021 Virtual Meeting

36. On February 19, 2021, Frazier and Northrup met after Frazier sent a calendar invite the previous day to Northrup saying she wanted to "chat a bit about filling April's position and some other ideas/thoughts I have" regarding the recruitment for the Accountant 2 vacancy in the distribution team.

37. On February 22, 2021, Frazier and Northrup held a virtual meeting with Appellant. Near the beginning of the meeting, Frazier told Appellant that Frazier had paused the recruitment process for the Accountant 2 position on Appellant's team pending a determination of whether the position could be better used elsewhere in the Department. Frazier said she had heard that other Sections of the Department had unmet accounting needs.[11]

38. Appellant had no inkling that the decision to potentially remove the position was even being contemplated. Frazier had signed off on the recruitment before the opening was posted. Appellant was shocked and dismayed by Frazier's announcement that she now wanted to pause the recruitment. Appellant later described the news as a "gut punch." During the meeting, Appellant responded to the news by loudly asking, "Are you fucking kidding me?" Appellant also stated, "[H]ave you ever managed a manager before? Because you just don't do this." Appellant further stated that Frazier was throwing her under the bus and sabotaging her, that Frazier was causing Appellant's blood pressure to rise, and that Frazier was lucky Appellant had already taken her blood pressure medication that day.[12]

39. Appellant also made the following statements at the meeting:

"[T]his is ridiculous

"I'm working my butt off, working 50 – 60 hours a week and you have no idea what I'm dealing with or what my team is dealing with and you are working my staff into the ground

"You came down hard on me for assigning Dick additional tasks

"Don't you think this position has been looked at? All of my positions have been looked at every biennium

"What am I going to tell my team, sorry you don't get any help?"

[11]Appellant believed that Frazier's motive for putting Appellant's recruitment on hold was retaliation related to an exchange that occurred a few days before the February 22 meeting, where Appellant had not alerted Frazier that Frazier needed to review financial statements related to a Secretary of Sstate audit (referred to as "SPWF audit and SPWF financial findings"). At hearing, Frazier denied that her decision to reduce Appellant's team was related to the exchange regarding the audit, a denial that is supported by the timing of relevant communications between Bateman, Frazier, and Northrup.

[12]In Appellant's cross-objections, Appellant disputes that she said Frazier was "lucky" Appellant took her medication, and instead said, "it's a good thing I took my medication today." We note the clarification, although we do not find it significant.

40. At one point in the conversation, Northrup told Appellant that unless Appellant calmed down, Northrup would end the meeting.

41. Frazier and Northrup were aghast that Appellant had used profanity in the meeting and were dismayed by what they perceived as Appellant's loud and unprofessional response. The use of profanity or crass language was not acceptable at the Department, even in an informal setting. Northrup and Frazier spoke after the meeting. Northrup testified that Frazier was in shock after the meeting with Appellant, distressed that anyone would use profanity in a work meeting with their supervisor and HR staff, and was having trouble processing the conversation.

42. Frazier and Bateman directed Northrup to conduct an investigation into Appellant's behavior at the meeting. During that investigation, Northrup spoke with Frazier and Appellant. During an investigatory meeting, held on March 17, Appellant did not recognize that her behavior during the February 22 meeting was inappropriate; rather, she viewed herself as "blindsided" by Frazier's announcement at the meeting that she had decided to pause the recruitment for the position on Appellant's team. When Northrup asked whether Appellant said, "are you fucking kidding me?" during the meeting, Appellant responded that she did not recall cursing, but added, "The words weren't actionable because they weren't about anyone." Appellant further stated that she believed that Frazier's decision to put Appellant's recruitment on hold was "retribution about the SPWF financial findings." Appellant also made remarks about Frazier, stating she was unqualified and that speaking with her was like "talking to a 4 year old." Following Northrup's investigation, Frazier decided to discipline Appellant by issuing a written reprimand.

43. After the February 22 meeting, Frazier asked three members of Appellant's team to keep track of their time for three weeks, but did not do a more formal time study or an in-depth analysis of the work of Appellant's team. Ultimately, Frazier did not identify any better possible location for the position and the recruitment for the vacancy on the distribution team was restarted after six weeks.

Reprimand of Appellant, April 2, 2021

44. On April 2, 2021, Frazier issued the letter of reprimand to Appellant.

45. The letter of reprimand included the following statements:

"Current Situation and Facts Supporting Discipline:

> "On February 22, 2021, you participated in a virtual meeting with Employee Services Manager, Dana Northrup and myself (your manager). In this meeting, I informed you that I would be placing your Accountant 2 recruitment on pause to allow for a more in-depth evaluation of the team's work. I explained there are some unmet needs of the agency and now that we had a vacancy, it would be a prudent time to do a time study of the Fiscal and Budget (FABs) team's duties. I apologized for not thinking about the current recruitment two weeks prior, before you had posted your recruitment, but still felt we needed to take advantage of this opportunity to ensure we identify any gaps in our team before hiring. Additionally,

Dana and I offered to get you temporary help in the form of a job rotation or a temporary employee.

"[Appellant], you responded to this message about your recruitment being paused with yelling, cursing and criticizing my decision-making. * * *

"* * * * *

"Additionally, I continue to experience a lack of responsiveness to my requests and a lack of communication. I often need to ask a question a couple of times before what I have requested is provided.

"In November of 2020 questions were raised * * * about the Oregon Growth Account (OGA) and Oregon Growth Fund (OGF) balances and transaction history. As a result of numerous emails between you and Ricardo and Ricardo's continued questions about the balance, I asked you to go back to the beginning of the account to answer the questions on the source of the OGF cash balance. After additional emails between you and I, on February 22, 2021, I specifically directed you to run a complete transaction history for the OGF cash account. Rather than completing the assignment, you responded to my request with 'I asked Jenny. She said both Ricardo and Kate know how much was in the account. At the time she talked with them, she told them to only plan on spending/committing half in case of a major shortfall in LF due to the pandemic. Then they could plan on the other half later in the biennium.' This failed to meet my request to run a total transaction history from the beginning of the account, and did not meet our customer's need. I asked another staff member if they could run this report and it took less than an hour to get the transaction history.

"On February 5, 2021, I asked you to reconsider and provide a more full response to an earlier request I had made for a complete list of reports you prepare, so that I could review the list and determine if there were any I wanted to review before they were distributed. This information has never been provided.

"On February 19, 2021, I emailed you and stated 'Dick mentioned he has been training with April to cover some of her tasks while we recruit for a replacement. I do not recall hearing that it was your intent to utilize Dick for this purpose. I understand Dick has been a shared resource, but would like to be consulted if you are interested in adding things to his plate in the future.' You responded, 'My apologies. If you aren't ok with it, I'll have someone else do it. I only asked him to help with a few of the grant payments out of Arts. It was my understanding when you started that it was ok to keep him busy with payable items. Let me know if you would like me to redirect that work.' My response was, 'I don't necessarily have a concern with having him assist, but I am asking for open communication between us. I'd be happy to discuss if you'd like when we meet on Monday.' You referenced this in our February 22, 2021 meeting as 'me coming down hard on you.' That was not my intent, nor my tone in the email. In this instance, you failed to communicate

with me about the needs of your team or assigning additional work to an employee who reports directly to me.

"Conclusion:

"Your behavior during the conversation on February 22, 2021 and failure to complete my requests are unacceptable and does not reflect our agency's values and commitment to professionalism. My expectations remain unchanged, that you will conduct yourself in a professional and respectful manner, that you will communicate with me in a collaborative and courteous tone, and that you will complete my requests.

"* * * it is not acceptable to communicate with a rude or condescending tone when working with either co-workers or managers even if you are experiencing frustration. It is inappropriate for you to raise your voice, make belittling comments, curse, or argue with people requesting your assistance. Additionally, it is unacceptable for you to refuse assignments, challenge the person giving you an assignment, or make rude comments.

"Business Oregon encourages open communication between colleagues, managers, and agency leadership. However, the fact that you disagree with me does not give you the authority to overrule or ignore my directions. Additionally, I understand you have a direct communication style. While a direct communication style is an appropriate way to communicate, this does not give you permission to embarrass, humiliate, disparage, demean, or show disrespect to another employee or manager."

46. The letter of reprimand cites applicable trainings attended by Appellant and relevant workplace policies, including the "Maintaining a Harassment Free and Professional Workplace" training and accompanying policies. The Maintaining a Professional Workplace Policy, provides, in part:

"Employees * * * must foster an environment that encourages professionalism and discourages disrespectful behavior. All employees * * * must behave respectfully and professionally and refrain from engaging in inappropriate workplace behavior.

"* * * * *

"Examples of inappropriate workplace behavior include, but are not limited to, comments, actions or behaviors of an individual or group that embarrass, humiliate, intimidate, disparage, demean, or show disrespect for another employee, a manager, a subordinate, a volunteer, a customer, a contractor or a visitor in the workplace.

"* * * * *

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

Appellant's Internal Department Appeal

47. On April 19, 2021, Appellant used the Department internal appeals process to challenge the reprimand. In her appeal letter, Appellant disputed the allegations in the reprimand, except that she agreed to communicate before directing work to Moreland in the future. On April 30, 2021, Oregon Business Director Sophorn Cheang denied Appellant's internal appeal.

CONCLUSIONS OF LAW

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

2. The letter of reprimand did not violate ORS 240.570(3).

Appellant argues that the Department failed to establish adequate grounds for her reprimand. Appellant specifically avers that her conduct was not of sufficient seriousness or was justified under the circumstances, and that underlying facts supporting the charges were inaccurate. Appellant further alleges that the HR investigation was biased and incomplete. Therefore, Appellant argues, the Department's reprimand violated ORS 240.570(3). For the reasons discussed below, we conclude that the Department has met its burden to establish that Appellant's reprimand was consistent with ORS 240.570(3).

Legal Standards for Decision

Appellant is a management service employee. ORS 240.570(3) provides that a "management service employee may be disciplined by reprimand * * * if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." When a management service employee appeals an agency's discipline to this Board, the agency has the burden of proving that the discipline did not violate ORS 240.570(3). OAR 115-010-0070(5)(c).

We review management service disciplinary appeals using a two-step process. *Dubrow v. State of Oregon, Parks and Recreation Department*, Case No. MA-3-09 at 23 (May 2010), *adhered to on reconsideration* (June 2010). First, we determine if the employer proved the basis of the discipline. *Id.* The employer need not prove all of the charges on which it relies. *Ahlstrom v. State of Oregon, Department of Corrections*, Case No. MA-17-99 at 15 (October 2001). Second, if the employer has proven some or all of the charges, we apply a reasonable employer standard to determine whether the employer was justified in taking the disciplinary action. *Greenwood v. Oregon Department of Forestry*, Case No. MA-03-04 at 30 (July 2006), *reconsideration denied* (September 2006).

A reasonable employer is one who disciplines employees in good faith and for cause, imposes sanctions that are proportionate to the offense, considers the employee's length of service and service record, and applies the principles of progressive discipline, except where the offense is so serious or unmitigated as to justify summary dismissal, or the employee's behavior probably

will not be improved through progressive measures. *Blank v. State of Oregon, Construction Contractors Board*, Case No. MA-007-14 at 12 (March 2015) (reconsideration order), *aff'd without opinion*, 277 Or App 783, 376 P3d 304 (2016). A reasonable employer also clearly defines performance expectations, expresses those expectations to employees, and informs them when performance standards are not being met. *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014).

A management service employee may be held to high standards of behavior, so long as those standards are not arbitrary or unreasonable. *Stoudamire v. State of Oregon, Department of Human Services*, Case No. MA-4-03 at 7 (November 2003). Further, we consider any damage to trust in the relationship between a management service employee and the employer. *See Zaman v. State of Oregon, Department of Human Services,* Case No. MA-21-12 at 15 (April 2013).

Finally, a written reprimand is the mildest discipline that the state can impose. This Board has stated that:

> "* * * An employer generally imposes a reprimand to inform the employee that particular behavior is unacceptable and to obtain a correction of that behavior. Because a reprimand does not have an economic impact on an employee, its primary purpose is a form of notice. * * *."

Minard v. State of Oregon, Department of Transportation, Driver and Motor Vehicle Division, Case No. MA-9-05 at 12 (September 2006) (quoting *Hill v. State of Oregon, Department of Transportation*, Case No. MA-7-02 at 13 (November 2002)).

The Basis for the Reprimand

With that two-step framework in mind, we first consider whether the Department has met its burden to prove the reasons for the discipline. The Department's letter of reprimand sets forth two reasons for Appellant's discipline: (a) Appellant's conduct during the February 22, 2021, virtual meeting and (b) Appellant's lack of responsiveness to Frazier's requests and a lack of communication.

a. Appellant's conduct during the February 22, 2021, virtual meeting was unprofessional and violated established expectations.

With respect to the first charge, Appellant is accused of "yelling, cursing and criticizing [Frazier's] decision-making" during the February 22, 2021, virtual meeting, after Frazier informed Appellant that her recruitment was being paused. Specifically, among other things, the Department reprimanded Appellant for responding "are you fucking kidding me." Appellant did not deny making that statement, although she has maintained that she does not remember saying it. Alternatively, Appellant suggested that if she did make the statement, it was not directed at a person, but rather was a reaction to the situation. Appellant also does not dispute that she raised her voice while making other unprofessional statements cited as the basis for discipline (including "this is ridiculous" and "I'm working my butt off, working 50–60 hours a week and you have no idea what I'm dealing with or what my team is dealing with and you are working my staff into the ground"). Appellant argues, however, that Frazier's decision to stop the recruitment, and the

manner in which it was presented to Appellant, were expressly intended "to evoke a negative reaction from [her] and further bolster [a] false characterization of [her]." Appellant described the news of halting the recruitment as a "gut punch" and believes that Frazier made the decision as a way to "punish" her.

To begin, we agree that Frazier's decision to stop the Accountant 2 recruitment and potentially repurpose the position out of Appellant's work unit was surprising. Appellant's position as a PEM E manager carried significant responsibility for the functioning of the Department's financial operations. For example, Appellant's position description lists as an essential duty assisting the CFO with the "strategic management direction and coordination of agency-wide financial and fiscal operations." Appellant was a member of the Management Leadership Team and responsible for leading the development of the accounting and payroll strategic plan and two- to four-year work plan. Considering the level and responsibility of Appellant's position, it is surprising that Frazier and Bateman did not confer with Appellant about possibly repurposing an Accountant 2 position, and instead announced it to her as a fait accompli. It is understandable that Appellant felt frustrated by Frazier's decision and the fact that Frazier did not consult with her before making it. Frazier's decision was also surprising in light of the critical work that Appellant and her team were doing, the fact that the team's workload had increased significantly, and the fact that the position had already been approved by Frazier and posted. Even considering all this context, however, for the reasons explained below, Appellant's behavior in the meeting was unprofessional and inappropriate. *See Nash*, MA-008-14 (December 2014) (upholding termination based in part upon multiple instant messages that contained profanities and demeaning remarks against managers and represented staff).

There is no dispute that profanity was not condoned in this workplace, let alone in a meeting with a supervisor and HR. Even if we consider the profanity as an emotional reaction to alarming news, the fact remains that Appellant was subsequently unable to regain her composure during the meeting and continued to react inappropriately, directing her frustration and criticism at Frazier. Moreover, this was not the first time that Appellant's conduct had questioned Frazier's competency and qualifications in a manner that compromised their working relationship, as Appellant had recently been coached and provided a letter of expectation addressing respectful behavior in the workplace based, in part, on Appellant's prior criticisms of Frazier's competency.

Furthermore, when Appellant was later questioned in a fact-finding meeting regarding her conduct, she did not express regret or apologize for her behavior.[13] Instead, Appellant justified her actions, stating that she had the right to stand up for herself, and that she could not be disciplined because "the words [are you fucking kidding me] weren't directed at anyone." Appellant further redirected blame to Frazier, stating that the recruitment was put on hold for a retaliatory reason, that Frazier was unqualified for the position of CFO, and Appellant's interactions with Frazier were like "talking to a 4 year old."

We recognize that Appellant was dealing with a high level of stress, was under a significant amount of pressure, and that the unforeseen decision to pause the recruitment was surprising and

[13]Appellant claimed during oral argument that she apologized during the investigatory meeting. However, we do not find evidence in the record that supports this claim. In any event, even if Appellant had apologized at a later time, it does not mean that the Department violated ORS 240.570(3) by issuing a written reprimand.

frustrating. However, we do not find that the circumstances justify Appellant's conduct in the meeting. Additionally, and significantly, after the heat of the moment passed, Appellant did not take sufficient responsibility for her behavior. The Department is entitled to expect that a manager who has an unprofessional reaction or outburst (such as one caused by undue stress) will take responsible steps to repair the relationships affected by the manager's conduct. For these reasons, we find that the Department proved that Appellant violated the established expectation that a management service employee behave respectfully and professionally, as set forth in workplace policy and the recent letter of expectation.

b. The Department did not prove that Appellant was unresponsive and uncommunicative.

We turn next to the second reason for the reprimand—that Frazier "continue[d] to experience a lack of responsiveness to [her] requests and a lack of communication." The reprimand provided three examples of Appellant's alleged lack of responsiveness to Frazier's requests and lack of communication: (1) failure to respond to Frazier's direction to run a complete transaction history for the OGF; (2) failure to provide a complete list of reports that Appellant generally filed; and (3) failure to consult with Frazier before assigning work to Moreland, Frazier's direct report.

First, we consider the dispute regarding the OGF transaction history. The Department alleges that in February 2021 Frazier "directed" Appellant to "run a complete transaction history for the OGF cash account" and that Appellant did not complete the request. The letter of reprimand further implies that Appellant was generally unresponsive to the questions raised regarding the OGA and OGF accounts. In its post-hearing brief, the Department alleges that before the purported instruction to run a complete transaction history, "in November 2020 * * * Frazier asked Appellant to answer questions regarding the Oregon Growth Account and Oregon Growth Fund. This request was unmet * * *."

The record shows, however, that Frazier asked Appellant for "a complete history going back to the inception of the [OGF] account **if that is what is necessary to answer the question**." (Emphasis added.) Thus, the request gave Appellant discretion in what she provided, and we do not agree with the Department that this constitutes a specific unequivocal direction to provide a complete history of the OGF account. Furthermore, Appellant provided the answer to the question that she believed was being asked—an explanation as to why there was significantly more in the particular account than what Lopez (the staff that was asking for an explanation) believed that the prior CFO had indicated. When the discrepancy was initially raised by Lopez, Frazier instructed Appellant to provide a detailed accounting of transactions for both the OGA and the OGF accounts for the entire biennium. Appellant promptly responded to the request, and then compiled a spreadsheet containing the information, a task that Appellant estimates took six hours to complete. Appellant's spreadsheet provided additional proof that the amount in the account, which was greater than Lopez had expected, was indeed accurate. When Frazier later asked Appellant to explain why the balance in the OGF account was greater than expected, Appellant reached out to Wilfong, the prior CFO, and asked her why she had provided Lopez a different amount. Wilfong confirmed that the amount that Appellant had provided Lopez and Frazier was not only accurate, but according to Wilfong, that amount had already been relayed to Lopez. Appellant elaborated that Wilfong had previously told Lopez to "only plan on spending/committing half in case of a major shortfall in [funding] due to the pandemic." Appellant believed that this explained the

discrepancy. Had Frazier believed that Appellant was misinterpreting the question, or Frazier believed a complete transaction history from inception was indeed necessary to respond to the question, Frazier could have responded accordingly.

Turning to the broader allegation of unresponsiveness regarding the OGA and OGF account exchange, the Department did not meet its burden to prove that Appellant was unresponsive. It is not apparent how Appellant was unresponsive or what prior "request was unmet." The relevant exchange shows, contrary to the Department's position, that Appellant responded promptly to questions and requests. Furthermore, the emails contained in Appellant's exhibits, which provided additional relevant context and information, demonstrate that Appellant spent considerable time and effort attempting to meet Frazier's requests for accounting information related to the OGA and OGF accounts. Some of Appellant's responses presumed knowledge that Frazier did not have, particularly given that Frazier was new to her position and to state government systems. Ultimately, the record establishes that Appellant and Frazier did not communicate well, and that miscommunication was the primary culprit in the charge that Appellant was unresponsive.

Next, we address the list of reports requested by Frazier. When Appellant was first asked for a list of the reports that Appellant's team issued, in November 2020, Appellant replied that she only prepared the cash balance report. In early February 2021, Frazier learned of another report that had been submitted to the legislature, a delinquent debt report, and asked Appellant about it. Appellant replied with information about her quarterly schedule for providing the reports to DAS and stated that she had forgotten this report when asked to list them because she works on them only after DAS requests them. Frazier then asked Appellant again for an actual list of reports. Appellant replied by apologizing for the oversight and that she also had a few additional reports she files:

> "As for the list…
>
> "Other than that report, we have all of the CAFR files including SEFA and then the financials for SPWF and Water (the newest audit) which go to the IFA board.
>
> "The CAFR related items are the foremost on my mind at any given moment, so that's what I focus on the most. I honestly can't think of any others at this time."

Finding of Fact 32.

The letter of reprimand states: "On February 5, 2021, [Frazier] asked [Appellant] to reconsider and provide a more full response to an earlier request [Frazier] had made for a complete list of reports [Appellant prepares] * * * This information has never been provided." However, the above referenced exchange shows Appellant did respond to the request for additional reports, shortly after Frazier's request, describing "CAFR files including SEFA" and "the financials for SPWF and Water." Appellant indicated that she would reach out to her team to determine any additional reports. Appellant did so and determined that there were no additional regular reports beyond what Appellant had already supplied to Frazier. In sum, Appellant apologized to Frazier for not reporting the delinquent debt report and then provided Frazier with the information that she had requested. Given that Appellant provided a complete account, we do not agree that it was

apparent that Appellant was required to reiterate the previously shared information, unless there were reports that had not already been included. Frazier's expectation that Appellant would collaborate with her to help her quickly learn the Department's work product and work flow, such as by helping Frazier understand in one succinct communication what reports were produced, was reasonable and is consistent with what managers at Frazier and Appellant's level typically expect of one another. However, similar to Frazier and Appellant's communications about the OGF transaction history, Frazier appears to have wanted something more than a mere email response from Appellant, and Appellant appears to have believed that a brief emailed response would be sufficient. This miscommunication cannot be attributed solely to Appellant and does not establish that Appellant was unresponsive or impermissibly uncommunicative, as the charge alleges.

Finally, we turn to Appellant's assignments to Moreland. Frazier supervised Moreland, who sometimes performed work for Appellant and her team at their request. It does not appear that Appellant or her team was generally required to get the CFO's permission to make those requests. However, Frazier objected to Appellant's use of Moreland to help with some tasks of Kinney, a departing distribution team member, without Frazier's specific permission. Appellant apologized and acknowledged that instruction.

The Department contends that Appellant's assigning additional tasks without consulting Frazier is evidence of Appellant's failure to communicate with Frazier about those assignments, and more broadly, failure to communicate to Frazier about the needs of Appellant's team. We disagree. As acknowledged by Frazier in the email exchange, Moreland was considered a "shared resource" and Appellant had a reasonable understanding that she was not required to consult with Frazier before assigning tasks to Moreland. Furthermore, Appellant repeatedly communicated her heavy workload and expressed urgency to Frazier about needing to fill the vacant position of the departing team member—a departure that resulted in Appellant's request that Moreland take on additional tasks.

In conclusion, we find that the Department proved the first charge related to Appellant's conduct during the virtual meeting, but did not prove the second charge alleging a lack of responsiveness and a lack of communication.

Reasonable Employer Standard

We now consider whether the Department's reprimand of Appellant was the action of a reasonable employer. We note that an employer may hold a management service employee to strict standards of behavior, so long as those standards are not arbitrary or unreasonable. *Lucht v. State of Oregon, Public Employees Retirement System*, Case No. MA-16-10 at 24 (December 2011); *Helfer v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992). A significant factor this Board considers is the extent to which the employer's trust and confidence in the employee have been harmed, compromising the employee's ability to act as a member of the management team. *Salchenberger v. State of Oregon, Department of Corrections*, Case No. MA-19-12 at 11 (July 2013); *Lucht* at 24. In addition, this Board gives weight to the effect of the management service employee's actions on the mission and the image of the agency and the extent to which those actions do or do not reflect the proper use of judgment and discretion. *Salchenberger* at 11; *Lucht* at 24. Finally, we note that the employer's burden in justifying even a

removal from management service is "relatively minor." *Zaman,* MA-21-12 at 15 (quoting *Plank v. Department of Transportation, Highway Division*, Case No. MA-17-90 at 29 (March 1992)).

Here, Appellant disagreed with a decision that Frazier (her direct supervisor) made and reacted unprofessionally when she cursed, raised her voice, and directed critical remarks at Frazier. Furthermore, Appellant did not apologize or otherwise take responsibility for her conduct during the meeting or the subsequent investigation. Appellant had recently been notified of the expectation that she act respectfully towards others, and that she was expected to "[r]efrain from making comments that undermine or express doubt about the competency of [Frazier] * * *." Thus, considering all the circumstances, we find that the Department acted as a reasonable employer when it disciplined Appellant for her conduct during the virtual meeting.

Turning to the level of discipline imposed by the Department, Appellant argues that the letter of reprimand was excessive. We disagree. A reprimand is the mildest type of discipline and serves primarily as "a form of notice" to an employee that certain conduct is unacceptable and needs to be corrected. *See Minard,* MA-9-05 at 12. This level of discipline appropriately reflects mitigating circumstances, including Appellant's length of service, exemplary work record, and lack of prior discipline. Furthermore, the level of discipline is also consistent with the principles of progressive discipline. Department officials had three options to address Appellant's conduct, two of which had already taken place—a frank conversation, and a letter of expectations that specifically addressed respectful behavior in the workplace. A letter of reprimand was the appropriate next step.

Finally, we turn briefly to Appellant's argument that the HR investigation was biased and incomplete and that Northrup was not adequately trained before completing the investigation. Appellant argues, in part, that Northrup should have spoken to staff aside from Frazier and Appellant; that Northrup did not adequately consider Appellant's justifications along with relevant information provided by Appellant; that manager Bateman's supervision of Northrup and Frazier created a conflict of interest; and that Appellant's prior frank conversations regarding Frazier with Northrup made it impossible for Northrup to be objective. Appellant does not articulate how these allegations should impact our analysis as to whether the Department's decision was consistent with its powers under ORS 240.570(3). For the reasons discussed above, we believe that the Department met its burden to impose the written reprimand for Appellant's conduct during the virtual meeting, and do not find any evidence in the record that would undermine that determination. Furthermore, our cases establish that when an employer reprimands a management service employee, it is sufficient to provide the employee "written notice of the discipline and state the statutory grounds on which it relied and the supporting facts." *Dickey v. Department of Corrections, Oregon State Penitentiary,* Case No. MA-8-08 at 12 (May 2009) (quoting *Jones v. State of Oregon, Department of Human Services*, Case No. MA-17-02 at 6 (February 2003)). The Department's actions in this case were consistent with that standard.

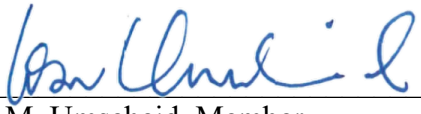
Based on consideration of all the circumstances, the Department's decision to reprimand Appellant was consistent with ORS 240.570(3).

ORDER

The appeal is dismissed.

DATED: June 17, 2022.

Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-003-22

(REPRESENTATION)

EAGLE POINT POLICE OFFICERS ASSOCIATION, Petitioner, v. TEAMSTERS LOCAL 223, and CITY OF EAGLE POINT, Respondents.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE (ELECTION RESULTS)

On April 1, 2022, Eagle Point Police Officers Association (Association) filed a petition under ORS 243.682(1) and OAR 115-025-0035 to change the exclusive representative from Teamsters Local 223 (Teamsters) to the Association for all Police Sergeants, Police Corporals, Senior Police Officers, and Police Officers at the City of Eagle Point. On May 3, 2022, the Teamsters disclaimed interest in continuing to represent the petitioned-for employees.

On May 23, 2022, the Board's Election Coordinator sent ballots to eligible voters, pursuant to the terms of a consent election agreement. Nine valid ballots were returned by the agreed-on deadline of June 13, 2022, which constitutes the date of the election. *See* OAR 115-025-0072(1)(b)(A). A tally of ballots was held on June 14, 2022, and the majority of valid votes counted were cast for the Association. The tally of ballots was provided to the parties on June 14, 2022. Objections to the conduct of the election, or conduct affecting the results of the election, were due within 10 days of furnishing the ballot tally to the parties (*i.e.*, by June 24, 2022). *See* OAR 115-025-0075. No objections were filed. Accordingly, it is certified that:

EAGLE POINT POLICE OFFICERS ASSOCIATION

is the exclusive representative of the following bargaining unit:

> All Police Sergeants, Police Corporals, Senior Police Officers, and Police Officers at the City of Eagle Point.

DATED: June 29, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-002-22

(REPRESENTATION)

CLACKAMAS COUNTY PROFESSIONAL FIREFIGHTERS, LOCAL 1159, Petitioner, v. TUALATIN VALLEY FIRE FIGHTERS, LOCAL 1660, and SANDY FIRE DISTRICT, Respondents.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE (ELECTION RESULTS)

On April 1, 2022, Clackamas County Professional Firefighters, Local 1159 (CCPF 1159) filed a petition under ORS 243.682(1) and OAR 115-025-0035 to change the exclusive representative from Tualatin Valley Fire Fighters, Local 1160 (TVFF 1660) to CCPF 1159 for paid firefighters of the Sandy Fire District in the ranks of Firefighter, Apparatus Operator, Lieutenant, and Captain.

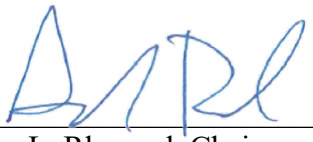
On May 23, 2022, the Board's Election Coordinator sent ballots to eligible voters, pursuant to the terms of a consent election agreement. Ten valid ballots were returned by the agreed-on deadline of June 13, 2022, which constitutes the date of the election. *See* OAR 115-025-0072(1)(b)(A). A tally of ballots was held on June 14, 2022, and the majority of valid votes counted were cast for CCPF 1159. The tally of ballots was provided to the parties on June 14, 2022. Objections to the conduct of the election, or conduct affecting the results of the election, were due within 10 days of furnishing the ballot tally to the parties (*i.e.*, by June 24, 2022). *See* OAR 115-025-0075. No objections were filed. Accordingly, it is certified that:

CLACKAMAS COUNTY PROFESSIONAL FIREFIGHTERS, LOCAL 1159

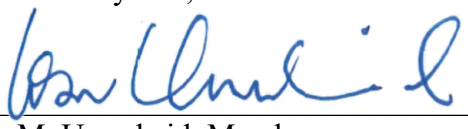
is the exclusive representative of the following bargaining unit:

> Paid firefighters of the Sandy Fire District in the ranks of Firefighter, Apparatus Operator, Lieutenant, and Captain.

DATED: June 30, 2022.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

BEFORE THE EMPLOYMENT RELATIONS BOARD

OF THE STATE OF OREGON

OREGON NURSES ASSOCIATION, Complainant, vs. BAY AREA HOSPITAL, Respondent.	Case No. UP-015-22 CONSENT ORDER

Margaret Olney, Bennett Hartman, LLP, Portland Oregon, represented the Complainant, Oregon Nurses Association.

John Stellwagen, Bullard Law, represented the Respondent, Bay Area Hospital.

On May 4, 2022, the Oregon Nurses Association filed an unfair labor practice complaint against Respondent, Bay Area Hospital, alleging violations of the duty to bargain in good faith under ORS 243.672(1)(e) and a union discrimination in violation of ORS 243.672(1)(a), (b) and (c). Complainant requested expedited consideration of the ULP, which was granted by the Board, with the hearing scheduled for June 15, 2022.

The parties wish to resolve this matter by entry of this Consent Order and waive further proceedings and review by the Board.

STIPULATED FACTS

1. The Bay Area Hospital (Hospital) is a public employer within the meaning of ORS 243.650(20).

2. The Oregon Nurses Association (Union) is a labor organization within the meaning of ORS 243.650(13).

3. The Union is the exclusive bargaining representative of nurses employed by the Hospital.

4. The most recent collective bargaining agreement between the Hospital and the Union expired December 31, 2021.

5. The parties began successor bargaining on or around September 23, 2021. The Union presented proposals modifying contract language regarding a number of topics, including workplace safety, staffing levels, disciplinary process, and wages.

6. On February 20, 2022, the Hospital made its first economic proposal: a one-year roll-over of the previous contract with wage increases, a new shift incentive program and a proposal to discuss contract modifications through committees that could then make recommendations. The Union's bargaining team presented this proposal to its membership for a vote.

7. On or around March 12, 2022, Union members voted to reject the Hospital's proposal.

8. On March 29, 2022, the Hospital made a modified proposal for another one-year contract roll-over. This proposal also included proposed wage increases.

9. On April 12, 2022, Union members rejected the Hospital's second proposal.

10. In a letter dated April 18, 2022, the Hospital notified the Union that it would be unilaterally implementing the wage and differential increases that were part of the proposal that had just been rejected.

11. On or around April 19, 2022, the Hospital notified nurses that it would be unilaterally implementing the wage and differential increases that were part of the proposal they had just rejected, effective April 24, 2022. The Hospital explained that that it was doing so "unconditionally and without prejudice which means that none of these wage adjustments restricts or hampers the ONA's ability to negotiate any aspect of the contract in the future."

12. The Hospital implemented the wage increases effective April 24, 2022.

13. The parties have not settled their contract but continue to bargain.

//

//

//

STIPULATED CONCLUSIONS OF LAW

1. The Board has jurisdiction over these parties and subject matter.

2. The Hospital violated ORS 243.672(1)(a), (1)(b), 1(c) and (1)(e) by unilaterally implementing wage increases during successor bargaining after nurses had twice voted to reject those wage increases when presented as part of a one-year contract roll-over proposal by the Hospital. This conduct violated the duty to bargain in good faith. It also had the actual or potential effect of undermining confidence in the ONA and chilling employees in the exercise of their protected rights.

3. The parties agree that the Hospital may provide bonuses to nurses without first bargaining with the Union. However, when it decides to do so, it must promptly notify the Union and identify the rationale for the bonus payments. The Hospital agrees that it cannot change the negotiated wages, differentials and other benefits set forth in the collective bargaining agreement unless agreed to through bargaining. The parties will negotiate language reflecting this agreement as part of the current bargaining process.

4. The Hospital will reimburse ONA's filing fee and pay the ONA $12,000 for its reasonable representation costs incurred to litigate this matter.

DATED this 29th day of June, 2022

John Stellwagen, OSB No. 070758
Of Attorneys for Respondent, Bay Area Hospital

Margaret S. Olney, OSB No. 881359
Of Attorneys for Complainant, Oregon Nurses Association

//
//
//

BOARD CONSENT

This Consent Order is approved and adopted by the Board.

DATED this 5 day of July, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-006-22

(REPRESENTATION)

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 555,	)	
Petitioner,	)	CERTIFICATION OF ELECTION RESULTS
v.	)	
BAY AREA HOSPITAL,	)	
Respondent.	)	

On May 5, 2022, United Food & Commercial Workers, Local 555 (UFCW 555) filed an amended petition under OAR 115-025-0050(5) to clarify via election whether the classification of Dietician should be added to the existing bargaining unit at Bay Area Hospital (Hospital). On June 1, 2022, the Board's Election Coordinator sent ballots to eligible voters, pursuant to the terms of a consent election agreement. Six valid ballots were returned by the agreed-on deadline of June 22, 2022, which constitutes the date of the election. *See* OAR-115-025-0072(1)(b)(A). A tally of ballots was held on June 23, 2022, and 3 valid votes were cast for UFCW 555, and 3 valid votes were cast for No Representation. The tally of ballots was provided to the parties on June 23, 2022. Objections to the conduct of the election, or conduct affecting the results of the election, were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by July 5, 2022). OAR 115-025-0075. No objections were filed. Because the petitioner did not receive a majority of valid votes cast, we will dismiss the petition seeking to establish UFCW 555 as the exclusive representative of the petitioned-for employees.

// // //

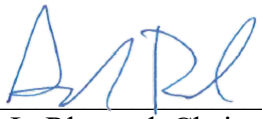
// // //

// // //

ORDER

The result of the election is certified, and the petition is dismissed.

DATED: July 7, 2022.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-001-21

(UNFAIR LABOR PRACTICE)

PRATKA, Complainant, v. LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 483, Respondent.	)	FINDINGS AND ORDER FOR REPRESENATION COSTS

On April 6, 2022, this Board issued an order holding that Respondent Laborers International Union of North America, Local 483 (Union) did not violate ORS 243.672(2)(a) or ORS 243.672(2)(c), as alleged in the complaint filed by Complainant. 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).[1]

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

1. The Union is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1)(a). The prevailing party is "the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(d). Here, the Union is the party in whose favor our order issued and is therefore entitled to representation costs.

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.

[1]Before issuing this order, the Board provided both parties the opportunity to file submissions regarding whether Complainant had to rely on personal financial resources to litigate this matter (as discussed below). The deadline for those submissions was July 5, 2022. Respondent Union did not file its submission until July 6, 2022, which was untimely. Respondent's submission, therefore, has not been considered in this order.

OAR 115-035-0055(1)(b)(C). If a non-prevailing individual establishes that they had to rely on personal financial resources to litigate the matter, the prevailing party shall be awarded $500 in representation costs, unless the Board determines that a lesser award is more appropriate. OAR 115-035-0055(1)(b)(F).

4. In this case, Complainant (the non-prevailing party) was represented by Freedom Foundation, a self-described "nonprofit, public interest organization" that "provides *pro-bono* legal assistance to public sector workers." Freedom Foundation provided Complainant with free legal representation—that is, Complainant did not rely on personal financial resources to pay attorney fees for legal representation. Complainant was required to pay only for "costs," but not attorney fees. Before the Board promulgated its rule setting forth a matrix for representation costs based on the days of hearing, the Board consistently excluded litigation expenses and "costs" from any representation costs award; in other words, costs other than attorney fees have never been considered part of the calculus for representation costs. *See, e.g. Medford Education Association v. Medford School District 549C*, Case No. UP-047-13 at 1 n 1, 26 PECBR 398, 398 n 1 (2015) (Rep. Cost Order) (non-representation costs of photocopying, clerical assistance, mileage, and telephone usage are not awardable in a representation cost award); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-069-11 at 2 n 2, 26 PECBR 412, 413 n 2 (2015) (Rep. Cost Order) (same); *Oregon School Employees' Association v. North Clackamas School District*, Case No. UP-017-13 at 2, 26 PECBR 129, 130 (2014) (Rep. Cost Order) (non-representation costs for obtaining a recording of the hearing and creating a transcript are out-of-pocket expenses not included in a representation costs award). Therefore, for purposes of our representation costs rules and awards, the fact that Complainant paid for expenses and costs distinct from attorney fees for legal representation does not mean that Complainant "had to rely on personal financial resources to litigate the matter" within the meaning of OAR 115-035-0055(1)(b)(F). Accordingly, Complainant is not entitled to a reduced representation costs award under OAR 115-035-0055(1)(b)(F).

ORDER

Complainant shall remit $3,000 to the Union within 30 days of the date of this order.

DATED: July 21, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. FR-003-21 / UP-044-21

(UNFAIR LABOR PRACTICE)

CRAM, Complainant, v. SEIU LOCAL 503, and STATE OF OREGON, DEPARTMENT OF HUMAN SERVICES, Respondents. FR-003-21	)	DISMISSAL ORDER
CRAM, Complainant, v. STATE OF OREGON, DEPARTMENT OF HUMAN SERVICES, Respondent. UP-044-21	)	

Ryan Cram, Complainant, Roseburg, Oregon, represented himself.

Jason Weyand, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Respondent SEIU Local 503.

Neil Taylor, Senior Assistant Attorney General, and Margaret J. Wilson, Senior Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, represented Respondent State of Oregon, Department of Human Services.

On October 12, 2021, Ryan Cram (Complainant) filed a complaint against SEIU Local 503 (Union) and the State of Oregon, Department of Human Services (DHS) (Case No. FR-003-21). The complaint alleges that DHS refused to allow Complainant to use the DHS email system to attempt to form an "association" of Union-represented investigators employed by DHS. The complaint alleges that Complainant was entitled to use the DHS email system for that purpose pursuant to Article 10 of the collective bargaining agreement between the Union and DHS, and that the Union, by declining to file an unfair labor practice complaint on his behalf, violated ORS 243.672(2)(a).[1] The complaint also alleges that DHS's direction that he refrain from using the DHS email system to organize an "association" violated ORS 243.672(1)(g). Also on October 12, 2021, Complainant filed a separate complaint against DHS, which alleges that DHS's actions interfered in the formation of a lawful employee organization in violation of ORS 243.672(1)(a), (b), and (g) (Case No. UP-044-21).

The complaints were assigned to Administrative Law Judge (ALJ) Martin Kehoe, who conducted an investigation to determine if an issue of fact or law existed that warranted a hearing. *See* OAR 115-035-0005. As part of that investigation, on October 27, 2021, both respondents submitted an informal response in Case No. FR-003-21. On October 26, 2021, DHS submitted an informal response in Case No. UP-044-21.

On November 1, 2021, ALJ Kehoe notified the parties that, as a preliminary matter, the complaints appeared to present issues of fact or law that warranted a hearing. ALJ Kehoe also notified the parties that it appeared appropriate to consolidate the two cases because they involve related facts. Thereafter, with all parties' approval, ALJ Kehoe consolidated the cases. Subsequently, ALJ Kehoe determined that the cases presented an issue of fact or law that warranted a hearing and, on January 14, 2022, served the complaints and scheduled a hearing for February 14 and 15, 2022.

On January 28, 2022, DHS filed an answer in Case No. FR-003-21 and, in that answer, moved to dismiss the complaint. On January 28, 2022, the Union filed its answer and, by email, joined in DHS's motion that the case be dismissed. On January 28, 2022, DHS filed an answer in Case No. UP-044-21 and, in that answer, moved to dismiss that complaint.

On February 3, 2022, the Union filed a renewed motion to dismiss and a motion in limine, and sought relief on multiple additional issues, including the statement of issues and certain subpoenas requested by Complainant. On February 7, 2022, DHS filed a renewed motion to dismiss both cases.

[1]Complainant is an employee in the bargaining unit represented by the Union. Complainant is not a member of the Union.

On February 8, 2022, six days before the hearing, appearing *pro se*, Complainant moved to postpone the hearing, relying on a medical condition and asserting that he wished to consult with legal counsel. Complainant described his medical condition as a December 21, 2021 "vaccine booster related injury." Both respondents objected to the motion to postpone the hearing.

On February 8, 2022, ALJ Kehoe granted Complainant's motion to postpone the hearing and gave Complainant two weeks to find and consult with legal counsel. ALJ Kehoe also granted the Union's request with respect to one, but not all, of Complainant's requests for subpoenas, and denied the respondents' motions to dismiss.

On February 11, 2022, Complainant reported to ALJ Kehoe on his attempt to retain legal counsel. Complainant requested that the hearing be scheduled for late in May and, in so requesting, noted that he was on a medical leave through February 22. On March 2, Complainant reported to ALJ Kehoe that he had consulted with Rebekah Millard, an attorney associated with the Freedom Foundation. Complainant reported that he was "ready to move forward" and requested May 23 and 24 hearing dates. On March 21, 2022, ALJ Kehoe scheduled a hearing for May 23 and 24, 2022, as requested by Complainant.

On May 9, 2022, Complainant sent an email to ALJ Kehoe in which he reported that his health had "continued to worsen due to vaccine reaction/injury." Complainant also reported that he had decided to continue to represent himself and would not retain counsel because of costs and scheduling issues. Complainant's email attached a completed Certification of Health Care Provider for purposes of the Family and Medical Leave Act, which certified that Complainant needed intermittent, but not continuous, medical leave for six months due to a serious health condition. The health care provider answered "no" to the question, "Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery?"

By May 12, 2022, all parties confirmed that they agreed to conduct the May 23 and 24 hearing via videoconference.

On the last business day before the hearing, May 20, Complainant filed a motion to postpone the hearing for two weeks because of what Complainant described as "communication issues" related to Complainant's wish to call a representative of the Union as a witness. Complainant did not refer to or rely on any medical condition. Both respondents objected to Complainant's motion on May 20.[2] The same day, by email, ALJ Kehoe denied Complainant's motion and explained the structure of the hearing, provided the videoconference login information, and invited the parties to inform him of any technical issues.

On May 23, 2022, at 9:00 a.m., counsel for the Union and for DHS appeared via videoconference for the hearing, as scheduled. Complainant did not appear. At 9:08 a.m., ALJ Kehoe sent an email to all parties stating that if Complainant had not joined the videoconference

[2]The Union objected on the basis that Complainant "waited three months between the original hearing date and the newly scheduled hearing to send a single email about his desire to have an unspecified witness made available by the Union, but now seeks to delay the hearing once again the Friday before the hearing."

by 9:30 a.m., he would adjourn the hearing for the day. At 9:12 a.m., the Union moved to dismiss based on Complainant's failure to prosecute the case. At 9:24 a.m., DHS joined in the Union's motion. At 9:30 a.m., ALJ Kehoe called Complainant at the telephone number he had provided to the Board's Case Management System. Complainant did not answer. At 10:55 a.m. on May 23, ALJ Kehoe emailed all parties notifying them that the hearing would not proceed the next day, May 24, in light of Complainant's failure to appear and failure to respond to the ALJ's email and telephone call that morning. ALJ Kehoe instructed Complainant that he had 14 days pursuant to OAR 115-010-0045(3) to respond to the motions to dismiss.

The following day, May 24, ALJ Kehoe received an email sent from Complainant's email address, which stated, in its entirety, "Judge Kehoe: My husband asked me to email you on his behalf and submit the attached document to you. He is unavailable at this time to respond. Ryan was sent to the ER yesterday for chest pain issues related to his ongoing medical condition. Thank you." The email attached the first page of a six-page "After Visit Summary" from the Cottage Grove Emergency Department. The document, which is redacted, appears to have been printed at 11:13 a.m. on May 23, and indicates that Complainant was seen in the emergency room for chest pain on May 23. It does not indicate that Complainant was hospitalized or incapacitated.

Complainant did not respond to the motions to dismiss by June 6, 2022, the end of the 14-day response period. On June 9, ALJ Kehoe sent Complainant an order to show cause why these cases should not be dismissed considering the circumstances and explained that when "a litigant fails to communicate and repeatedly ignores an administrative law judge's directives, the Board may dismiss the case for failure to prosecute." The ALJ explained that he would recommend to the Board that both cases "be dismissed without a hearing" if Complainant did not respond. The order to show cause required a response by June 22, 2022. Complainant did not respond.[3]

A complainant's failure to pursue a claim warrants dismissal. *See Krogstad v. Oregon School Employees Association and Gresham-Barlow School District*, Case No. FR-001-16 at 2 (2016) (complainant's failure to respond to order to show cause warranted dismissal); *Oregon AFSCME Council 75 v. City of Eugene*, Case No. UP-29-09 at 2, 23 PECBR 442, 443 (2009) (complaint dismissed where complainant failed to respond to at least three letters from the ALJ). Here, Complainant failed to appear at the hearing that was scheduled on dates that Complainant requested. Complainant then failed to respond to either of the respondents' May 23 motions to dismiss by June 6, despite specifically being instructed by the ALJ of the response deadline. Subsequently, Complainant failed to respond to ALJ Kehoe's June 9 order to show cause by June 22. Complainant did not contact the ALJ until July 22. None of the medical information

[3]On July 21, 2022, counsel for DHS sent an email to ALJ Kehoe to follow up on the ALJ's statement to the parties that he would recommend dismissal of these cases if Complainant did not respond to the order to show cause by June 22. On July 21, ALJ Kehoe replied to that email, and informed all parties, including Complainant, that he had submitted an informal recommendation to this Board. The next day, July 22, Complainant replied and inquired whether there would be an opportunity to present his case at a hearing. In that reply email, Complainant represented that he had previously asked the State for communications by telephone call or letter because he had "issues being able to timely respond to electronic communication," apparently related to migraines "due to eye strain via computer monitor." Despite that representation, Complainant responded to ALJ Kehoe's email within 24 hours, but did not previously timely request an extension of the deadline to respond to the order to show cause. Complainant's July 22, 2022, email does not change our conclusion that these claims should be dismissed.

submitted by or on behalf of Complainant (on May 9 and May 24) indicates that Complainant was incapacitated beginning May 23 through June 22 or was otherwise unable to respond or to participate in the litigation of these cases. The Complainant's failure to pursue his claims, including by failing to appear at the hearing, failing to respond to the May 23 motions to dismiss, and failing to respond to the ALJ's show cause order, warrants dismissal.

ORDER

The complaints are dismissed.

DATED: July 25, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

*Shirin Khosravi, Member

*Member Khosravi did not participate in the deliberations in this matter.

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-046-20

(UNFAIR LABOR PRACTICE)

HILLSBORO PROFESSIONAL FIREFIGHTERS, IAFF LOCAL 2210, Complainant, v. CITY OF HILLSBORO, Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On May 4, 2022, this Board issued an order holding that the City of Hillsboro (City) did not violate ORS 243.672(1)(e) by refusing to bargain, unilaterally changing the status quo, or engaging in surface bargaining over the impact of Senate Bill 1049 on employees holding the rank of Battalion Chief. The appeal period under ORS 183.482 has run without either party filing an appeal. Consequently, this Board now issues this order for representation costs. OAR 115-035-0055(2)(a).

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

1. The City is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1)(a). The prevailing party is "the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(d).

2. This case required one day of hearing, which was held on May 18, 2021.

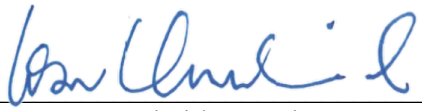
3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case that requires one day of hearing (which need not last a full day) is $3,000. OAR 115-035-0055(1)(b)(C).

ORDER

Hillsboro Professional Firefighters, IAFF Local 2210 shall remit $3,000 to the City within 30 days of the date of this order.

DATED: July 25, 2022.

Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-005-22

(REPRESENTATION)

MARION COUNTY DEPUTY DISTRICT ATTORNEY'S ASSOCIATION, Petitioner, v. MARION COUNTY DISTRICT ATTORNEY'S OFFICE, Respondent.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE

On June 3, 2022, Marion County Deputy District Attorney's Association (Association) filed a petition under ORS 243.682(2) and OAR 115-025-0030 to certify (without an election) the Association as the exclusive representative of certain Marion County District Attorney's Office (MCDAO) employees. Specifically, the petition sought to certify the Association as the exclusive representative of all Deputy District Attorney 1, 2, 3, 4 and Trial Team Lead/Supervisors. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating the Association as the exclusive representative of the proposed bargaining unit.

On June 3, 2022, and again on June 15, 2022, the Board's Election Coordinator caused a notice of the petition to be posted. Pursuant to the terms of the revised 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 revised notice posting (*i.e.*, by July 6, 2022). On July 6, 2022, MCDAO filed objections.

The case was referred to the Board's Hearings Division and assigned to Administrative Law Judge B. Carlton Grew. Thereafter, the parties agreed to a modified bargaining unit description that would allow for the certification of the modified unit, so long as the showing of interest was sufficient. Consistent with that agreement, the Association filed an amended petition on July 22, 2022, to certify (without an election) the Association as the exclusive representative of all Deputy District Attorneys, except supervisory and managerial employees, and specifically excluding Trial Team Lead/Supervisors. The matter was then referred back to the Board's Election Coordinator to determine the sufficiency of the showing of interest in light

of the modified unit description. The Election Coordinator confirmed that a majority of eligible employees in the modified bargaining unit signed valid authorization cards designating the Association as the exclusive representative of the bargaining unit.

ORDER

Accordingly, it is certified that Marion County Deputy District Attorney's Association is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> All Deputy District Attorneys, except supervisory and managerial employees, and specifically excluding Trial Team Lead/Supervisors.

DATED: July 27, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-010-21

(UNFAIR LABOR PRACTICE)

OREGON SCHOOL EMPLOYEES ASSOCIATION, Complainant, v. SILVER FALLS SCHOOL DISTRICT 4J, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 2, 2022, this Board heard oral arguments on Respondent Silver Falls School District 4J's objections to a January 10, 2022, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe, after a hearing on July 28 and 29, 2021. The record closed on October 1, 2021, upon receipt of the parties' post-hearing briefs.

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

Brian Hungerford and Nancy Hungerford, Attorneys at Law, The Hungerford Law Firm, Oregon City, Oregon, represented the Respondent.

On March 8, 2021, the Complainant, Oregon School Employees Association (OSEA or Union), filed an unfair labor practice complaint with the Employment Relations Board (Board) against the Respondent, Silver Falls School District 4J (District). On April 16, 2020, OSEA filed an amended complaint. The issue is: Did the District violate ORS 243.672(1)(e) by engaging in bad faith surface bargaining with OSEA during interim bargaining over the impacts of Senate Bill (SB) 1049? As set forth below, we conclude that the District did violate the statute.

RULINGS

All rulings by the ALJ were reviewed and are correct.

FINDINGS OF FACT[1]

Background

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

2. The District operates 13 separate schools. It currently has around 3,700 students in kindergarten through the twelfth grade.

3. Since July 2020, the District's superintendent has been Scott Drue. Andy Bellando was the District's previous superintendent. Steve Nielsen is the District's business manager. Since July 2019, Dan Busch has been the District's assistant superintendent. Before that, Busch served as acting superintendent for a time. Busch's primary responsibility is human resources.

4. OSEA is a "labor organization" within the meaning of ORS 243.650(13).

5. OSEA is "the exclusive representative, as defined in ORS 243.650, of classified employees excluding licensed teachers, supervisory, confidential, work experience, temporary, and substitute workers." That bargaining unit of "classified employees," which consists of approximately 180 to 200 or more employees in total, includes the District's teachers' assistants, educational assistants, custodians, groundskeepers, and food service workers, among other positions. OSEA's unit does not include the District's "administrative" employees.

6. A separate labor organization represents the District's 235 or so "licensed" employees. That bargaining unit includes the District's licensed teachers.

7. OSEA's current local president is Vance Taylor (a role that Taylor had held for over two years before the hearing). Taylor also works for the District as the employer's only HVAC Technician (a position represented by OSEA). Taylor was previously OSEA's local vice president for one year. Hobe Williams is an OSEA field representative and serves as the chief negotiator for OSEA's bargaining teams.

8. The District and OSEA are currently parties to a collective bargaining agreement (CBA) that runs from July 1, 2020 to June 30, 2023.

9. Article 3 of the current CBA addresses salary. Article 3.3 of that CBA provides, "**PERS Pickup.** The District will continue paying the 6% PERS pickup for all bargaining unit members." (Emphasis in original.) Article 3.3 is the only part of Article 3 that specifically addresses PERS.

10. PERS is an acronym for Oregon's Public Employees Retirement System. It is a retirement-benefit program for District employees and retirees as well as other state and local government employees and retirees in Oregon. PERS is a separate government entity from the District.

[1]All of the parties' exhibits were admitted without objection.

11. In accordance with Article 3.3 of the CBA, the District contributes ("picks up") six percent of each of its employees' "gross wages" to PERS "on behalf of employees." Before SB 1049 (described below) went into effect, each of those contributions was ultimately placed in an "Individual Account Program" (IAP) for each PERS member, and all of the funds in a member's IAP were eventually paid to the member.

Chronology of Events

12. On June 11, 2019, Governor Kate Brown signed SB 1049 into law, causing "significant changes" to PERS. The comprehensive legislation was "intended by the Oregon Legislature to address the increasing cost of funding Oregon PERS, by providing relief to public employers for escalating PERS contribution rate increases."

13. Under SB 1049, a specific percentage of the six percent of a PERS member's wages that was previously contributed to the member's IAP is now "redirected" to an "Employee Pension Stability Account." For "Tier One" and "Tier Two" PERS members, 2.5 percent is redirected (with the remaining 3.5 percent going to their IAPs). For Oregon Public Service Retirement Plan (OPSRP) members, .75 percent is redirected (with the remaining 5.25 percent going to their IAPs). Whether a member is Tier One, Tier Two, or OPSRP depends on their start date with their public employer. PERS members who earn less than $2,500 a month do not have any funds redirected. SB 1049's redirects will continue until PERS is 90 percent fully funded. In short, until that funding level is reached, PERS members' retirement benefits (including those of the employees in OSEA's bargaining unit) will be reduced.[2]

14. In addition to the aforementioned redirects, SB 1049 also made changes to simplify PERS' "work back" rules. The term "work back" essentially refers to a person who has retired being allowed to come back to work for a specific period of time.

15. SB 1049 did not modify the language of the parties' CBA. Moreover, as of the hearing, the District was still contributing six percent of each employee's wages to PERS.

16. On July 3, 2019, an OSEA field representative named Gabe Ortega sent a letter to then-Superintendent Bellando demanding to bargain the impact of SB 1049. The letter specified that the demand was made pursuant to ORS 243.698, which details Oregon's expedited bargaining law (which includes a 90-day timeline for bargaining), and ORS 243.702, which concerns renegotiation of invalid provisions in agreements.

17. The District's bargaining unit of licensed employees never made a demand to bargain the impact of SB 1049.

18. On July 10, 2019, the District responded to OSEA's demand to bargain via a letter and stated that it did not have an obligation to bargain the change. On August 2, 2019, OSEA sent the District a letter in which OSEA alleged that the District's refusal to bargain was an unfair labor practice. In the same letter, OSEA also offered to enter into a memorandum of understanding (MOU) that would allow the parties additional time to evaluate the legal landscape of SB 1049.

[2] *See* Or Laws 2019, ch 355. A copy of SB 1049 is also included in the record as Exh. C-58.

19. On January 8, 2020, the parties signed an MOU concerning OSEA's demand to bargain. It stated, in relevant part,

> "The District acknowledges that it received a demand to bargain the impacts of Senate Bill (SB) 1049 from OSEA on June 25, 2019.[3] Due to the likelihood that clarification of the obligation to bargain will be provided by the Oregon Employment Relations Board and/or Oregon courts prior to SB 1049's effective date of July 1, 2020, the parties agree that OSEA and the district will hold any bargaining obligation in abeyance until July 1, 2020. On or before July 1, 2020, OSEA may renew its demand to bargain in writing to the district.
>
> "If OSEA renews its demand to bargain in writing to the district on or before July 1, 2020, the district will not argue that the demand to bargain was untimely or that OSEA did not pursue bargaining. The district will then notify OSEA within fourteen (14) days as to whether the district will agree to bargain or refuse to bargain the impacts of SB 1049. If OSEA renews its demand to bargain, as provided for herein, and the district refuses to bargain the impacts of SB 1049, OSEA reserves its right to take legal action in response to the district's refusal to bargain.
>
> "Neither OSEA nor the district waive or release any legal rights or claims it may have under Oregon's Public Employee Collective Bargaining Act (PECBA) or any other applicable law except as provided for in this agreement and said rights shall survive termination of this Agreement.
>
> "This agreement is allowed this time only as a result of the specific circumstances concerning this matter and shall not be construed or argued in any action, litigation or suit, including without limitation, a grievance, arbitration or unfair labor practices complaint, to be precedent setting by any party to this agreement and will not be asserted by the parties to this agreement in the future as the basis for any particular procedure, outcome, or contractual language interpretation.
>
> "Except as specifically set forth herein, nothing in this agreement impacts the rights, obligations and benefits provided in the collective bargaining agreement between the parties. This MOU shall remain in force until the date listed above. If the legal case has not been resolved by the above date, the above date will roll over to the following first of each following month as the new date until the legal case is decided. Once the legal case is decided, OSEA must issue another demand to bargain within thirty (30) days if it wishes to proceed."

20. By the time the District signed the January 2020 MOU, the District was aware that addressing the impacts of SB 1049 was a "significant priority" for OSEA and the employees in its bargaining unit.

[3] A copy of this June 25, 2019, demand letter, is not included or otherwise addressed in the record.

21. On March 10, 2020, the parties signed ground rules for successor CBA bargaining. One of the ground rules provided, "2. Any article unopened by either party on the March 19, 2020, bargaining session will remain so unless mutually agreed otherwise. If either party opens an article, the entire article is open for bargaining."[4] Subsequently, the parties changed the March 19, 2020 date to May 18, 2020.

22. Near the end of May 2020, the parties started successor bargaining in earnest. During that successor bargaining, the District's bargaining team included Busch, Nielsen, Nancy Hungerford (the District's attorney), and others.

23. On August 6, 2020, the Oregon Supreme Court upheld SB 1049 in *James v. State of Oregon*, 366 Or 732, 471 P3d 93 (2020). At the time, the parties were still engaging in successor bargaining.

24. On August 20, 2020, the parties tentatively agreed on the terms of the successor CBA. That tentative agreement (TA) included a 3.5 percent cost-of-living adjustment (COLA), some changes to employees' salary schedules, and increases to "longevity stipends." Busch later recommended to the District's Board of Directors that the TA be ratified. Neither party attempted to bargain the PERS changes during this successor bargaining.[5]

25. The August 20, 2020 TA was for a three-year CBA. However, the parties also agreed that they would reopen "economics" in the spring of 2021. Further, at that time, each party would be allowed to reopen two additional articles.

26. On August 24, 2020, Williams (the OSEA field representative) sent another demand to bargain letter to Busch. That letter stated, in relevant part,

> "As you are aware, we had an agreement to wait until the law suit involving the PERS diversion was completed before we bargained over its affects. On August 6th the Oregon Supreme Court denied the unions case to have the law overturned. This date starts the clock on a thirty (30) day window in which OSEA has to respond if it wishes to bargain, per our letter. Please accept this letter as a demand to bargain over this issue.
>
> "Please reach out to me with dates and times you are available to start to bargain over this issue after August 31st, 2020. I will contact the President of the chapter to see which date[s] work for us and then let you know. We look forward to having productive discussions over this issue soon."

---

[4]A copy of the signed ground rules is included in the record under the filename "20210729_Ground Rules for Collective Bargaining Between Silver F.pdf" and, along with an updated version of the ground rules, is included in the record as Exh. R-10.

[5]The District objected to the recommended order's findings here and in Finding of Fact 32 because the findings do not include details about how much the District improved its offer at the final bargaining session. We note that, but also find no fault with the recommended order not including collateral findings on the details of the successor negotiations.

Williams sent the same demand to bargain again on August 26, 2020.

27. On September 8, 2020, Busch sent an email to Drue and Nielsen. It stated,

> "FYI- I wanted to make sure you were both aware that OSEA sent us a demand to bargain as a result of SB 1049. Lisa Freiley will be representing us in bargaining with Hobe [Williams] and Vance [Taylor]. Unless you feel otherwise, we do not plan to offer any retirement compensation to employees because of SB 1049. I'll keep you informed on this process."

The alluded-to plan to not offer any retirement compensation for SB 1049 was made by Busch. However, the District also agreed to negotiate with OSEA as it had demanded.

28. Lisa Freiley is an attorney employed by the Willamette Education Service District, which provides legal services for the District and other school districts.

29. During the PERS bargaining meetings that followed, OSEA's bargaining team always included Williams and Taylor (the local president), and Williams served as OSEA's chief negotiator. Meanwhile, the District's bargaining team always included Busch and Freiley (the District's chief negotiator).

First PERS Bargaining Meeting (1 of 5)

30. On September 10, 2020, the parties had their first PERS bargaining meeting. An hour or two before that meeting started, Williams gave the District its first PERS proposal. It stated,

> "1) Beginning July 1, 2020 all bargaining unit members shall have contributions made into a 403 (b) Tax Deferred Annuity plan by the District in the following monthly amounts for their years of service:
>
> "a) Five (5) years or less will be $25
> "b) Six (6) to ten (10) years will be $50
> "c) Eleven (11) to fifteen (15) years will be $75
> "d) Sixteen (16) to twenty (20) years will be $100
> "e) Over twenty (20) years will be $150
>
> "2) The plan shall operate within the parameters of section 403(b) of the Internal Revenue Code."

31. The District did not come to the September 10, 2020, PERS bargaining meeting with a proposal. However, during that meeting, Freiley pointed out that the District was still paying six percent of employees' wages to PERS, stated that the District needed more time to review OSEA's proposal, and asked Williams why OSEA had not raised the PERS issue during successor bargaining. The District's team also stated that it could not afford OSEA's first proposal, and pointed out that the proposal improperly benefitted those employees who were not impacted by the PERS change (*i.e*, those who did not earn $2,500 a month). Williams explained that he did not raise the PERS issue during successor bargaining because he was concerned that doing so would

have "derailed" the negotiations "at the eleventh hour," because he did not want to appear to be "regressive bargaining," because he did not want to violate the spirit of parties' ground rules, and because of the parties' SB 1049 deferral agreement. During the same meeting, Williams also asked the District for information regarding which employees were impacted by the PERS change.

32. The parties talked about a COVID-19 MOU for the majority of the parties' September 10, 2020, meeting. The portion of the meeting that specifically concerned PERS lasted ten to 30 minutes.

33. On September 12, 2020, Busch sent another email to Drue and Nielsen. It stated,

> "Just a quick update on this. Lisa [Freiley] and I discussed this briefly with Hobe [Williams] and Vance [Taylor] on Thursday. Lisa called Hobe out for not including this in the successor bargaining that we just completed. I'm going to give Hobe the benefit of the doubt that he thought this conversation would have derailed the completion of reaching an agreement. He's probably right, but the problem is that we do not have any more financially to give at this point.
>
> "I told him that until we stabilize our operations (post-fires), we will not be in a position to bargain this. Lisa is great at understanding the law around this PERS ruling and had Hobe on his he[e]ls. This was incredibly helpful because he became very willing to hold off this conversation until we get back to normal.
>
> "Ultimately, my goal will be to postpone any compensation to offset the impact of SB 1049 until we bargain financials in the spring.
>
> "I'll keep you posted on this."

Second PERS Bargaining Meeting (2 of 5)

34. On September 15, 2020, the parties had their second PERS bargaining meeting. Before the meeting, OSEA gave the District its second PERS proposal, which stated,

> "1) Beginning July 1, 2020 all bargaining unit members shall have contributions made into a 403 (b) Tax Deferred Annuity plan by the District in the following monthly amounts for their years of service:
>
> "a) Five (5) years or less will be $25
> "b) Six (6) to ten (10) years will be $50
> "c) Eleven (11) to fifteen (15) years will be $75
> "d) Sixteen (16) to twenty (20) years will be $100
> "e) Over twenty (20) years will be $150
>
> "2) The plan will operate within the parameters of Section 403(b) of the Internal Revenue Code. Bargaining unit members will not be vested until the third anniversary of their hire date. At that time they will become 100% vested in their employer 403 (b) Tax Deferred Annuity Plan.

"3) The district may be allowed to use retired former employees to work back under the SB 1049 law through 2024. They will be treated as a new employee under the CBA (with the exception of their pay rate). It is understood that these work back employees shall be the first to be furloughed or laid off. No work back employee shall be allowed to work while a regular employee is furloughed, laid off, or has reduced hours." (Emphasis omitted.)

35. During the September 15, 2020, bargaining meeting, Williams asked the District if it had a counterproposal, and asserted that the Board had ruled that the PERS change was a mandatory bargaining subject. Freiley responded that the District's only proposal was to continue with the current CBA language, that the Board had ruled incorrectly on this issue, and that the District did not need to bargain the PERS change.[6] Williams also asked the District to bring information regarding which employees were impacted by the PERS change to the next meeting. Busch responded that he did not know that information.

36. The September 15, 2020, PERS bargaining meeting lasted ten to 30 minutes.

37. The next PERS bargaining meeting was scheduled for September 30, 2020. On September 28, 2020, at 2:00 p.m., Busch sent an email to Williams and Taylor. In the email, Busch cancelled the September 30, 2020 meeting in its entirety after "[a]n unforeseen situation came up." No further explanation for the cancellation was provided at the time. However, at some point after September 28, 2020, Busch contacted Taylor and explained why the meeting had to be cancelled.[7] Around this time, the parties agreed to meet for additional PERS bargaining on October 5, 2020.

38. On September 29, 2020, at 3:34 p.m., Busch sent an email to Nielsen and Kim Doud, the District's payroll specialist, asking how many OSEA-represented employees made more than $30,000. On September 30, 2020, at 9:52 a.m., Doud gave Busch the requested information. The District did not share the requested information with OSEA at that time.[8]

Third PERS Bargaining Meeting (3 of 5)

39. On October 5, 2020, the parties met as scheduled for further PERS bargaining. Earlier that same day, Busch emailed Williams, stating that Nielsen could not attend the meeting

[6]During this PERS bargaining meeting and the next, Freiley asserted that the Board had ruled incorrectly in the *Multnomah County* case. Freiley may have been referring to one of the Board's three orders affiliated with *Multnomah County Corrections Deputy Association v. Multnomah County*, Case No. UP-003-19, *affirmed*, 317 Or App 89, 505 P3d 1037 (2021).

[7]Busch testified that the cancelation of the September 30 bargaining session was due to a "major personnel shift", and that he later notified Taylor this was the reason for the cancelation after the personnel change was announced publicly.

[8]The District objected to the recommended order's findings because it did not include facts detailing the District's and OSEA's successful negotiations of MOU's regarding COVID-19 and the area wildfires occurring at that time. We note here (and elsewhere in the conclusions of law) that the District and OSEA executed such MOUs.

due to "an unexpected event," and that Doud would be taking Nielsen's place during the meeting in hopes that the parties could "begin the conversation." The same email also stated that Nielsen was "critical" to the District bargaining PERS. However, before October 5, 2020, Nielsen had not yet attended a PERS bargaining meeting.

40. During the October 5, 2020, PERS bargaining meeting, OSEA shared a third PERS proposal.[9] In response, the District indicated that it would continue following the CBA. In addition, Freiley once again stated that the Board had ruled incorrectly on the issue, and that the parties did not need to bargain the PERS change. Freiley also asked Williams, in what Williams testified was "a dismissive manner," if he had ever bargained before. During the same meeting, OSEA once again asked the District for information regarding which employees were affected by the PERS change (OSEA's third such request). Busch responded that he did not have that information but Nielsen might. Williams also asked the District to bring a counterproposal to the next PERS bargaining meeting.

41. The portion of the October 5, 2020, meeting involving PERS lasted 15 to 20 minutes. Freiley also arrived late to the meeting.

42. On October 6, 2020, at 12:56 p.m., Taylor sent an email to Busch, asking the District for (1) "The number of employees affected by the PERS redirect," (2) "The tier they fall into (ie. .75, 1.5, or 2.5%)," and (3) "Their annual contract hours." At 4:28 p.m. on October 6, 2020, Busch responded with an email that provided the requested information in an attachment. According to the attachment, which was drafted by District employee Doud (and differed from that which Doud gave Busch on September 30, 2020), between 46 and 53 District employees would be impacted by SB 1049's redirect.

43. On October 8, 2020, the parties agreed to meet again on October 14, 2020, at 3:00 p.m.

44. On October 14, 2020, at 12:21 p.m., Busch sent an email to Williams and Taylor, cancelling the day's PERS bargaining meeting because one of Nielsen's sons was in a car accident that morning and, as a result, Nielsen would not be in that day and available to bargain PERS. As indicated, Nielsen had not yet been part of any PERS bargaining meetings. At some point on October 14, 2020, the parties agreed to meet on October 28, 2020, at 2:30 p.m. for further PERS bargaining.

Fourth PERS Bargaining Meeting (4 of 5)

45. On October 28, 2020, the parties met again for PERS bargaining as scheduled. During the meeting, Taylor (again, OSEA's local president), Michelle Livingston (OSEA's secretary), and Williams represented OSEA, while Busch, Doud, Freiley, and Nielsen represented the District. The October 28, 2020, meeting lasted for approximately an hour.

[9]The record does not include a copy of OSEA's October 5, 2020, PERS proposal. Testimony indicates that the proposal sought some sort of financial compensation for the PERS change.

46. During the October 28 meeting, OSEA gave the District around "three to five" distinct written PERS proposals and again asked the District to make its own proposal.[10] The District rejected all of OSEA's October 28 proposals (ostensibly because of the "costs" involved), and stated that it was continuing with the current CBA language.

47. At some point during the October 28 meeting, Nielsen shared that the District could only consider a "cost neutral approach," and Williams responded that OSEA would accept that challenge then worked on doing so for 20 minutes. Nielsen similarly expressed that the District was concerned about shrinking student enrollment, which could affect the District's funding.

48. At a different point in the October 28 meeting, the District's team also explained that simply giving time off (*e.g.*, through "floating days") was unacceptable to the District because it overly impacted production/operations, because the District had recently given employees extra days off as part of other, unrelated agreements, and because even days off could ultimately cost the District money.

49. During the same October 28, 2020, meeting, Freiley stated that, even if OSEA made a cost neutral proposal for this issue, the District would still have to reject it because the District would inevitably have to make the same deal with the District's other labor organizations (*e.g.*, the teachers union). However, the District is not legally required to do so. Moreover, in practice, the District has often reached different agreements with its multiple bargaining units.

50. OSEA's first October 28, 2020, proposal stated,

"1) Any employee that makes more than $2,500 each month shall have the following amounts deposited monthly into a 403b account in their name:

"• Employees that have a redirect of 2.5% shall have __% deposited for each month.

"• Employees that have a redirect of .75% shall have __% deposited for each month.

"2) <u>The plan will operate within the parameters of Section 403(b) of the Internal Revenue Code. Bargaining unit members will not be vested until the third anniversary of their hire date. At that time they will become 100% vested in their employer 403 (b) Tax Deferred Annuity Plan.</u>

"3) <u>The district may be allowed to use retired former employees to work back under the SB 1049 law through 2024. They will be treated as a new employee under the CBA (with the exception of their pay rate). It is understood that these work back employees shall be the first to be furloughed or laid off. No work back employee shall be allowed to work</u>

[10]Exh. C-43 ostensibly contains seven different OSEA proposals from October 28, 2020. However, select testimony indicates that fewer proposals were actually presented in written form on that date.

while a regular employee is furloughed, laid off, or has reduced hours." (Emphasis in original.)

51. Another of OSEA's October 28 proposals (which OSEA shared after a caucus, and intended to be cost neutral) stated,

"1) Any employee that is affected by the PERS redirect shall have the following:

"• Employees that have a redirect of 2.5% shall have two (2) floating personal days to use any time this school year.

"• Employees that have a redirect of .75% shall have one (1) floating personal day to use any time this school year.

"2) The Union and the district shall discuss and come to final resolution for this issue when they meet to re-open the contract next year."

52. A third October 28 OSEA proposal stated,

"1) Any employee that makes more than $2,500 each month shall have the following:

"• Employees that have a redirect of 2.5% shall have 2.5% COLA added to their wage.

"• Employees that have a redirect of .75% shall have .75% COLA added to their wage.

"2) The plan will operate within the parameters of Section 403(b) of the Internal Revenue Code. Bargaining unit members will not be vested until the third anniversary of their hire date. At that time they will become 100% vested in their employer 403 (b) Tax Deferred Annuity Plan.

"3) The district may be allowed to use retired former employees to work back under the SB 1049 law through 2024. They will be treated as a new employee under the CBA (with the exception of their pay rate). It is understood that these work back employees shall be the first to be furloughed or laid off. No work back employee shall be allowed to work while a regular employee is furloughed, laid off, or has reduced hours." (Emphasis in original.)

53. The parties did not meet to bargain over PERS in November 2020. Nevertheless, on November 4, 2020, at 10:56 a.m., Williams sent Busch another OSEA proposal via email. Busch never shared or discussed the November 4 proposal with Freiley, the District's chief negotiator.

54. OSEA's November 4 proposal stated,

"1) Any employee that makes more than $2,500 each month shall have the following:

"• Employees that have a redirect of 2.5% shall have 1.25% COLA added to their wage.

"• Employees that have a redirect of .75% shall have .38% COLA added to their wage.

"2) The plan will operate within the parameters of Section 403(b) of the Internal Revenue Code. Bargaining unit members will not be vested until the third anniversary of their hire date. At that time they will become 100% vested in their employer 403 (b) Tax Deferred Annuity Plan.

"3) The district may be allowed to use retired former employees to work back under the SB 1049 law through 2024. They will be treated as a new employee under the CBA (with the exception of their pay rate). It is understood that these work back employees shall be the first to be furloughed or laid off. No work back employee shall be allowed to work while a regular employee is furloughed, laid off, or has reduced hours." (Emphasis in original.)

55. On November 5, 2020, at 1:30 p.m., Williams sent another email to Busch that included another proposal. Busch never shared or discussed that November 5 proposal with Freiley, either.

56. OSEA's November 5 proposal (which was also intended to be cost neutral) included the following language:

"1) Any employee that is affected by the PERS redirect shall have the following:

"• Employees shall receive their birthday off with pay for their normal shift. If the employee's birthday falls on a weekend, the employ[ee] shall be allowed to designate either the Friday or Monday to be taken off.

"2) The Union and the district shall discuss and come to final resolution for this issue when they meet to re-open the contract next year."

57. On November 11, 2020, at 9:03 p.m., Busch sent an email to Taylor and Williams that stated, in relevant part,

"We would like to have our next PERS bargaining session be on Tuesday, December 8th. We have our monthly Classified Communications meeting at 3:00.

> We can begin bargaining immediately following all the agenda items. Will that work for you?"

58. On November 12, 2020, at 12:02 p.m., Williams responded to Busch's email, writing,

> "I am open that day to meet a[t] 3pm. I see that you are pushing this meeting out almost a month. This would fit with the district[']s strategy to run out the 90 days on bargaining without meaningfully bargaining anything over this topic. Having said that, I am willing to meet on 12/03 or sooner, if you're willing. In the meantime here is yet another proposal for you to consider. I would appreciate a counter proposal if you are not agreeing to this one. Thanks."

59. OSEA's November 12 proposal, which was attached to the foregoing email, simply stated, "1) The Union and the district shall discuss and come to final resolution for this issue when they meet to re-open the contract next year retroactive to 7-01-20." It was OSEA's final PERS proposal. Unlike OSEA's other November 2020 proposals, Busch did share a copy of the November 12 proposal with Freiley.

60. At 3:28 p.m. on November 12, 2020, Busch responded to Williams' email. In that email, Busch wrote, in part, "At your request, we will send you a counter proposal prior to December 8th. Thank you." At some (unknown) point after receiving OSEA's November 12 proposal, Busch briefly discussed the proposal with Freiley and Nielsen. Busch and Freiley determined that the "retroactivity clause" of OSEA's November 12 proposal to defer bargaining could be "financially problematic" or "a deal breaker" in future bargaining.

Fifth PERS Bargaining Meeting (5 of 5)

61. On December 8, 2020, at 2:35 p.m. (around an hour and a half before the December 8 PERS bargaining meeting started), Busch emailed Williams and Taylor the District's counterproposal. The District's December 8 counterproposal, which was the District's first and only written PERS proposal, stated,

> "The District is proposing to continue the current contract language in Article 24, Section 3.
>
> "The parties agree this issue can be included as a bargaining proposal by either side during the upcoming negotiations for a successor agreement.
>
> "Each party retains its rights under PECBA when engaging in negotiations regarding this topic."

62. In the body of Busch's December 8 email, Busch wrote, "I apologize that you did not get this sooner." Although it was not written in the email, according to Busch, the District did not provide the District's proposal in writing earlier because, in Busch's view, doing so would have been "insulting" to OSEA. According to Freiley, the District did not provide a written

proposal earlier because the District's only proposal was so simple and the language of the proposal already existed in the CBA.

63. On December 8, 2020, at 4:00 p.m., the parties met as scheduled for additional PERS bargaining. During the meeting, the District rejected OSEA's latest proposal. Subsequently, after a 20-minute caucus, OSEA rejected the District's written counterproposal because OSEA needed the resolution to be retroactive.

64. In a December 16, 2020, email, Williams expressed that OSEA was willing to continue bargaining the PERS change despite the fact that the 90-day window for bargaining had passed. On January 5, 2021, Williams sent Assistant Superintendent Busch an email, writing, "Based on our last phone discussion, now that the 90 day bargaining window is up, the district is planning to implement its last offer and follow current contract language. Do I have that correct?" On January 6, 2021, at 6:07 p.m., Busch replied, "That is correct. The District will continue to provide the same benefit amount to PERS as it did prior to SB 1049."[11]

Course of Negotiations Overall

65. During the parties' PERS bargaining, OSEA made a significant number of proposals.[12] OSEA also continually attempted to reduce the costs of its proposals in order to reach a deal with the District. Meanwhile, the District's December 8, 2020 counterproposal was the District's only proposal or idea regarding the PERS change. Further, the District's sole proposal did not address or offset the impacts of SB 1049.

66. Outside of the five PERS bargaining meetings detailed above, the District's bargaining team never meaningfully discussed how to address the impacts of SB 1049. The District also never asked for or took a caucus in any bargaining meeting to discuss any of OSEA's PERS proposals. Moreover, the District never carefully or formally analyzed the costs involved with any of OSEA's proposals.

67. According to Freiley, the District would have rejected *any* proposed increase in cost—even if OSEA's proposal cost just "one cent." Furthermore, according to Assistant

[11]The District objected to the recommended order because it failed to include a finding that the District did not refuse to continue bargaining beyond this point. Such a finding, however, is not particularly relevant, given that the District had already determined that it was not going to make or accept any proposal other than the status quo.

[12]The District objected to the recommended order's factual conclusion that OSEA made between 20-30 proposals. According to the District, OSEA only made eight proposals, three of which the District contends were not sent to Freiley. OSEA counters that the estimate of 20-30 proposals is not unreasonable, particularly given that it was difficult to track the exact number of proposals because OSEA altered its proposals numerous times in response to the District's announced objections to the proposals. It is unnecessary for us to determine the precise number of proposals offered by OSEA. It is sufficient for our purposes that OSEA made numerous proposals, and attempted to modify those proposals to address concerns announced by the District, and that the District never seriously considered or entertained any of those proposals.

Superintendent Busch, the District was always going to reject any OSEA proposal concerning SB 1049 unless OSEA proposed simply following the existing CBA language.

68. In OSEA's view, the parties' PERS bargaining was far more "hostile," "combative," and "personal" than the organization's other negotiations with the District. In Freiley's view, the "tone and tenor" of the PERS bargaining meetings were "always pleasant" and "polite."

CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(e) by engaging in bad faith surface bargaining with OSEA over the impact of SB 1049.

Standards of 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." One form of "bad faith" bargaining that is unlawful under ORS 243.672(1)(e) is "surface bargaining," which essentially means merely going through the motions of collective bargaining with no sincere desire or real intent of reaching agreement. *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85 at 37-43, 8 PECBR 8160, 8196-202 (1985).

For surface bargaining claims, the Board examines the totality of the District's conduct during negotiations. Typically, the factors we consider include (1) whether dilatory or overly hasty tactics were used, (2) the content of a party's proposals, (3) the behavior of a party's negotiator, (4) the nature and number of concessions or counterproposals made, (5) whether a party failed to explain or reveal its bargaining positions, and (6) the course of negotiations overall. We also consider other factors that might be relevant in any given case. *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-77-11 at 10-13, 25 PECBR 506, 516-17 (2013) (citing *Dallas Police Employees Association v. City of Dallas,* Case No. UP-33-08 at 14, 23 PECBR 365, 378 (2009); *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95 at 26-29, 16 PECBR 559, 584-87, *recons*, 16 PECBR 707 (1996)); *Oregon School Employees Association v. Clatskanie School District*, Case No. UP-9-04 at 5-6, 21 PECBR 599, 603-04 (2007), *affirmed without opinion*, 219 Or App 546, 183 P3d 246 (2008). The factors are not a mechanical checklist, but rather a way of assessing whether a party had a real intent to reach an agreement.

Notably, ORS 243.650(4) specifically provides that the PECBA obligation to meet and negotiate "does not compel either party to agree to a proposal or require the making of a concession." Thus, this Board cannot force an employer to make a concession on any specific issue or to adopt any particular position. *Medford School District #549C*, UP-77-11 at 15, 25 PECBR at 520 (quoting *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-37-08 at 22, 23 PECBR 895, 916 (2010)). Nevertheless, the employer is obligated to make *some* reasonable effort in *some* direction to compose its differences with the union. *McKenzie School*

District #68, UP-14-85 at 37, 8 PECBR at 8196 (citing Morris, *The Developing Labor Law* (BNA, 2d Edition) at 583 and cases cited therein). Furthermore, the lack of concessions or counterproposals by a party may be evidence of bad faith. *School Employees Local Union 140, SEIU, AFL-CIO, CLE v. School District No. 1, Multnomah County*, Case No. UP-44-02 at 13-14, 20 PECBR 420, 432-33 (2003) (citing *McKenzie School District #68*, UP-14-85 at 39, 8 PECBR at 8198). In the end, a party may lawfully take a hard line on an issue, so long as its conduct in negotiations, as a whole, reflects a willingness to reach an agreement. *Lincoln County Employees Association v. Lincoln County and Glode, District Attorney*, Case No. UP-42-97 at 25, 17 PECBR 683, 707 (1998).

The burden of proof in an unfair labor practice case is on the complainant, while the respondent has the burden of proving affirmative defenses. *See* OAR 115-010-0070(5)(b).

Discussion

Here, OSEA asserts that the District, after agreeing to collectively bargain in good faith over the impacts of SB 1049, merely went through the motions of bargaining, without any real intent of reaching an agreement. Specifically, OSEA avers that, despite agreeing to bargain over the impact of SB 1049, the District made a predetermination at the outset of bargaining, that it would not agree to any proposal offered by OSEA, or advance any proposal, other than maintaining current contract language. Additionally, OSEA argues that the District continued to schedule and appear at multiple bargaining sessions, thereby giving the impression that it was bargaining, all the while knowing that it (the District) had no real intention of reaching an agreement with OSEA. For the following reasons, we find OSEA's assertions substantiated. Consequently, we find that the District violated ORS 243.672(1)(e).

As set forth in the findings of fact above, after the parties had negotiated a successor agreement, the parties agreed to bargain over the impacts of SB 1049.[13] Two days before the first bargaining session, District Assistant Superintendent Busch sent an email to Superintendent Drue and Business Manager Nielsen stating "[u]nless you feel otherwise, we do not plan to offer any retirement compensation to employees because of SB 1049."

On September 10, 2020, the parties held their first bargaining session, with Freiley and Busch representing the District, and Taylor and Williams representing OSEA. Before the bargaining session, OSEA submitted its first proposal—monthly contributions by the District into a 403(b) Tax Deferred Annuity plan for employees based on years of service (ranging from $25 to $150). The District responded at the table that (a) it needed more time to review OSEA's proposal; (b) it could not afford that proposal; and (c) the proposal improperly benefitted some employees who were not affected by SB 1049. OSEA asked the District to provide information on which employees were affected by the bill.

[13]This finding of fact was not objected to by the District, although the District objected to approximately 19 other findings. Additionally, as described below, in its post-hearing brief, the District never disputed, but expressly acknowledged, that it had agreed with the Union to bargain over the impacts of SB 1049.

After the session, Busch updated Drue and Nielsen by recounting that District spokesperson Freiley had SEA's Williams "on his heels" during the bargaining session, which resulted in Williams expressing a willingness "to hold off this conversation until we get back to normal." Busch then summarized his bargaining objective as follows: "Ultimately, my goal will be to postpone any compensation to offset the impact of SB 1049 until we bargain financials in the spring."

True to that statement, the District appeared at four future bargaining sessions, but did not offer a single proposal (other than maintaining the status quo).[14] To be sure, as noted above, a party is not required to agree to a proposal or to make a concession. See ORS 243.650(4). The record here, establishes, however, that the District had no intention to even attempt to undertake any reasonable effort in *some* direction to compose its differences with the union, as required by PECBA. *See McKenzie School District #68*, UP-14-85 at 37, 8 PECBR at 8196 (citing Morris, *The Developing Labor Law* (BNA, 2d Edition) at 583 and cases cited therein). Rather, the record establishes that the District intended to offer no proposal (other than the status quo), and to reject any OSEA proposal, no matter how modest and regardless of whether there was any cost to the District. Busch also acknowledged that the District's bargaining team never held any strategy session or caucus to think about making a proposal or to even discuss in any meaningful way any of OSEA's multiple proposals. The District's actions are at odds with PECBA's requirement that a party have a serious intent to adjust differences and to reach an acceptable common ground. *Lincoln County and Glode, District Attorney*, UP-42-97 at 23, 17 PECBR at 705; *Hood River Employees Local Union No. 2503-2, AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94 at 19-23, 16 PECBR 433, 451-55 (1996); *NLRB v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 485, 80 S Ct 419, 424 (1960). Instead of possessing that intent, the District continued to show up to bargaining sessions to give the appearance that it was engaged in good faith bargaining—*i.e.*, that the District would undertake a reasonable effort to compose its differences with the OSEA—while having predetermined that it would not undertake any such effort. This is prototypical surface bargaining.[15]

---

[14]We do not agree with the dissent that the District made a "concession" when it acknowledged that either party could include SB 1049 bargaining in the spring reopener negotiations. The reopener agreement explicitly covered economics, and further provided that either party was entitled to reopen two additional articles in the CBA. We do not consider it a concession for one party to say that they would agree to bargain something that the other party already has the right to bargain in the reopener. Moreover, immediately after the SB 1049 bargaining sessions, Busch confirmed with the District's bargaining team that "[his] goal will be to postpone any compensation to offset the impact of SB 1049 until we bargain financials in the spring." We do not view the District proposing its own "goal" as a "concession" to OSEA.

[15]As noted above, we examine the totality of the District's conduct during negotiations, typically considering multiple factors that will help us determine through inference, whether a party engaged in surface bargaining. However, it warrants repeating that these factors are not a mechanical checklist, and we find it unnecessary to discuss each factor where, as in this case, there is direct evidence in the form of testimony and exhibits, that the District had no intention of ever reaching an agreement, and never meaningfully considered any proposal other than the status quo. *See, e.g.*, *Lane Unified Bargaining Council v. McKenzie School District #68*, Case No. UP-14-85 at 42, 8 PECBR 8160, 8201 (1985) (we only need to look to circumstantial factors "where there is no direct evidence of a party's willingness to bargain in good faith with the desire to reach an agreement").

In addition to the District's admission that it had no intention of agreeing to anything other than the status quo (which is sufficient to find a violation of ORS 243.672(1)(e)), other factors also support that conclusion, including how the District responded to OSEA's information request. *See Morrow County Education Association v. Morrow County School District*, Case Nos. UP-68/69-89 at 18, 11 PECBR 695, 712 (1989) (an employer's statutory duty to bargain in good faith includes a duty to timely provide relevant information to the exclusive representative upon request). Here OSEA requested, at the first bargaining session, that the District provide a list of bargaining unit employees affected by SB 1049. When the District did not provide that information, OSEA repeated that request at the next two bargaining sessions. The record establishes that the District did not even actively seek out the requested information until Busch emailed Doud about it on September 29, 2020 (around 19 days after OSEA's initial information request). On September 30, 2020, Doud emailed a report to Busch and estimated that 46 bargaining unit employees would be affected monthly, another eight might be affected monthly, and that 137 employees would be affected by the redirect in June, but not on a monthly basis thereafter. Despite having the information on September 30, 2020, Busch told OSEA that he did not have the information at their October 5, 2020, bargaining session. OSEA then made a written request for the information on October 6, and Busch responded that day. When he did respond, however, he gave OSEA a spreadsheet indicating that 46 bargaining unit employees would be affected by the PERS redirect, seven might be affected, and that *137 would not be affected*. Bush did not provide Doud's earlier assessment that those 137 *would be affected*, but not on a monthly basis. We do not need to determine whether the District deliberately decided to omit Doud's more expansive response in an effort to downplay the number of affected employees because, at a minimum, the District's delayed and then inaccurate response showed a cavalier approach to the negotiations that is inconsistent with good faith bargaining. When added to the broader suite of District conduct, the information response bolsters our conclusion that the District did not have a meaningful desire to reach a negotiated agreement with OSEA.

OSEA also points to the District's cancellation of two bargaining sessions because Nielsen, its Business Manager, was unable to attend. The District responds that those cancellations were due to emergency situations, including Nielsen's home being affected by the wildfires and his son's involvement in an auto accident. According to the District, it was essential that Nielsen be at the bargaining table, and those emergencies are reasonable explanations for cancelling the bargaining sessions. To be sure, those reasons are legitimate explanations for Nielsen's unavailability at the bargaining sessions. We are less persuaded, however, of the District's assertion that Nielsen's presence was essential or even important in these sessions. According to Busch, Nielsen was an essential participant in the bargaining sessions as the member of the District's bargaining team who could calculate the costs of proposals. However, Busch and the District acknowledged that it never calculated a cost proposal and had no intention of calculating a cost proposal, or agreeing to any proposal regardless of cost. Thus, we are not persuaded that Nielsen's presence was necessary at the bargaining sessions; therefore, the District's asserted reason for cancelling the sessions does not hold up to scrutiny.

In asserting that it was bargaining in good faith over the impacts of SB 1049, the District asks that we take a broader view of its conduct. Specifically, the District notes that, at the time of bargaining, it was operating in the midst of the COVID-19 pandemic, and that nearby forest fires threatened the school buildings and the homes of school employees. The District adds that the parties had also just finished reaching agreement on the parties' underlying CBA, which was

accomplished "only after a significant financial concession by the District to close the deal." The District also notes that it had reached good-faith MOUs with OSEA related to impacts caused by COVID-19 and the wildfires.

We acknowledge these contextual factors as potentially mitigating. It is easy to imagine, for example, that the District's focus on opening a school in the midst of the pandemic and while fires raged nearby could have shifted the District's priorities during the SB 1049 bargaining, such that the District was not as fully engaged in that bargaining as it had been in negotiating the MOUs that the District identifies, or the recent successor agreement. The difficulty with this argument is that there is no evidence that these other factors temporarily shifted the District's focus, thereby giving the appearance of surface bargaining, even though the District was fully committed to reaching a good-faith agreement with OSEA on the impacts of SB 1049. Rather, as set forth above, the record establishes that the District had no intention of reaching such an agreement, but instead had precommitted to only continuing the status quo and pushing off any discussion of the impacts of SB 1049 until the spring. Accordingly, these additional factors do not establish that the District intended to reach a good-faith agreement with OSEA on the impacts of SB 1049 during the bargaining at issue.

Finally, we address the District's argument, endorsed by the dissent, that it did not violate ORS 243.672(1)(e) because it was not obligated to bargain with OSEA regarding the impacts of SB 1049 in the first place. In advancing that argument, the District relies on *Hillsboro Professional Firefighters, IAFF Local 2210 v. City of Hillsboro*, Case No. UP-046-20 (2022). In that case, we determined that, based on those parties' collective bargaining agreement, the employer did not violate ORS 243.672(1)(e) by refusing to reopen the parties' agreement and negotiate new retirement benefits because SB 1049 affected those benefits. We also determined that the employer did not make a unilateral change in violation ORS 243.672(1)(e) when it had maintained the status quo, and that the employer did not engage in surface bargaining in violation of the statute because the employer had steadfastly declined to bargain.

Hillsboro is inapt. Here, the District acknowledged its obligation to bargain at the outset of OSEA's demand, based in part on a previously negotiated MOU. In its opening statement and post-hearing brief, in fact, the District emphasized that it had agreed to bargain the impacts of SB 1049 and that it had engaged in good-faith negotiations throughout. The District did not raise the assertion in this proceeding that it had no duty to bargain at all until the oral argument stage before the Board.[16] That assertion is at odds, however, with the record evidence in the case establishing that the District agreed to bargain, and with the District's arguments throughout the hearing that it agreed to bargain with OSEA regarding the impacts of SB 1049. That assertion is also inconsistent with the District's arguments throughout the hearing that it was engaged in good-

[16]The District initially raised as an affirmative defense in its answer that it had no obligation to bargain. As noted above and demonstrated by the record, however, the District never pursued or argued that affirmative defense in the hearing. The District's objections to the recommended order also did not include an assertion that the order was remiss by not addressing that affirmative defense. Therefore, we find that defense unpreserved and waived. In any event, even if the District had preserved that defense, we would find that the District had an obligation to bargain in good faith here because the record establishes that the parties agreed to bargain the issue and commenced collective bargaining over the issue.

faith collective bargaining with OSEA on the impacts of SB 1049. To the extent that the District is arguing that it can acknowledge and accept a demand to bargain, then merely go through the motions of bargaining with no real intention of reaching a good-faith agreement, and then defend against a surface bargaining claim on the ground that it did not have to accept the demand to bargain in the first instance, we categorically reject such an argument. We see no place in PECBA that would award such conduct.[17]

The District argues that a decision finding a violation of ORS 243.672(1)(e) would have a negative policy implication on public employers because, when faced with a demand to bargain, employers will err on the side of refusing to bargain, rather than risk a surface bargaining violation. To begin, as noted above, the text of PECBA does not create a policy exception in these circumstances that would allow a public employer to (a) acknowledge and undertake a bargaining obligation in response to a demand to bargain; (b) engage in bad-faith bargaining; and (c) avoid liability for bad-faith bargaining by attempting to prove in litigation that it did not have to bargain

[17]The dissent would find that the District did not engage in surface bargaining because the District's agreement to bargain the impacts of SB 1049 was "entirely voluntary" and, according to the dissent, "a party cannot violate ORS 243.672(1)(e) if it had no duty to bargain at all." In support of this position, the dissent relies on *AFSCME Council 75 v. State of Oregon, Executive Department, Demusiak, and Fairview Hospital and Training Center*, Case No. UP-8-86 at 10, 9 PECBR 9284 (1987) and *St. Barnabas Medical Center and New Jersey Nurses Union, Local 1091, CWA,* 341 NLRB 1325, 1325, 175 LRRM 1048 (2004). We find reliance on these cases misplaced.

In *Fairview Hospital and Training Center*, this Board held, in relevant part, that two offers made by the employer to settle a contract pending interest arbitration did not unlawfully condition settlement on the withdrawal of an unfair labor practice complaint, because the offers simply stated the obvious fact that arbitration would be unnecessary if the parties reached agreement. The Board then added that one of the offers could not serve as the basis for a (1)(e) charge, because it was restricted to the dispute that was proceeding to arbitration, and once arbitration is initiated to resolve a labor dispute, there is no duty to bargain over the matters at issue in that dispute. *Fairview Hospital and Training Center*, Case No. UP-8-86 at 9-10, 9 PECBR 9284, at 9292-9293 (citing *AFSCME Local 1246 v. Fairview Training Center, et al.,* Case No. C-137-84 at 7, 8 PECBR 8011, 8017 (1985), *affirmed*, 81 Or App 165, 724 P2d 895 (1986)). Simply put, the matters at issue in *Fairview Hospital and Training Center* are not the matters at issue in this case.

In *St. Barnabas Medical Center*, the National Labor Relations Board (NLRB) held that the employer unlawfully implemented wage increases during a contract term without the union's consent. In reaching that conclusion, the Board rejected the employer's argument that it did not violate the Act because the union had requested that the employer meet to "discuss the 'feasibility of a wage reopener' * * *." 341 NLRB at 1325. That scenario is decidedly distinct from this case, where the union formally demanded to bargain the impacts of SB 1049, and the employer formally acknowledged its bargaining obligation and proceeded to engage multiple formal bargaining sessions. In *St. Barnabas Medical Center*, the NLRB explicitly declined to decide whether the result would be different "if, during a contract, both parties clearly agree, in writing, to reopen part or all of the contract." *Id.* at 1325 n 2.

Thus, neither of the cases relied on by the dissent address the issue currently before us in this case, where the employer expressly agreed to bargain with a union after that union issued a demand to bargain a mandatory subject. To the extent the dissent agrees with the District's argument that even once a party agrees to bargain that it may nevertheless do so in bad faith, that position is at odds with PECBA, as discussed in this order.

in the first instance. Moreover, once accepting a demand to bargain, all PECBA requires is that a public employer have an earnest willingness to reach a good-faith agreement with a labor organization. In other words, the answer to avoiding a substantiated surface-bargaining charge is not engaging in surface bargaining, not to simply refuse all demands to bargain, which would likely result in its own spate of unfair labor practice charges. On that point, we note that if we adopted the approach advocated by the District and endorsed by the dissent, a public employer could simply avoid PECBA liability and deprive a labor organization of its ability to bring a timely unfair labor practice claim by (1) agreeing to a demand to bargain (thereby nullifying a potential refusal to bargain claim); (2) engaging in surface bargaining; and then (3) defending the subsequent surface bargaining charge by asserting that it never had to agree to bargain in the first place. We find no policy or principle in PECBA that would encourage or endorse such conduct. In short, we are not persuaded by the District's "policy" argument as a reason for dismissing this complaint.

Conclusion

For the reasons outlined above, we conclude that the totality of the District's conduct constitutes bad faith surface bargaining in violation of ORS 243.672(1)(e).

Remedy

Because the District violated ORS 243.672(1)(e), a cease-and-desist order is required. ORS 243.676(2)(b). We also order appropriate additional relief to effectuate the purposes of PECBA. ORS 243.676(2)(c). Typically, when a party has engaged in bad-faith surface bargaining, we order the offending party to return to the bargaining table and negotiate in good faith. Here, as noted above, the parties had previously agreed to reopen economics, as well as two additional articles per party, in the spring of 2021. It is unclear on this record whether that reopening included bargaining over the impact of SB 1049. If so, no further bargaining order would be required. If not, the District is ordered to bargain in good faith with OSEA over the impact of SB 1049. Any dispute over this remedy may be addressed in a subsequent compliance proceeding.

We may also order an employer to post a notice of its violation. We generally order an employer to post an official notice when its unlawful actions were (1) calculated or flagrant, (2) part of a continuous course of illegal conduct, (3) perpetrated by a significant number of the employer's personnel, (4) affected a significant number of bargaining unit members, (5) significantly or potentially impacted the functioning of the exclusive representative, or (6) involved a strike, lockout, or discharge. Not all of these criteria need to be satisfied for us to order a posting. *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05 at 53, 22 PECBR 108, 157 (2007) (citing *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05 at 110, 21 PECBR 673, 782 (2007)); *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82 at 12, 6 PECBR 5590, 5601, *affirmed without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den,* 296 Or 536, 678 P2d 738 (1984).

Outside of the PERS bargaining, the parties have generally had a very amicable, productive relationship. We likewise conclude that the District's actions were not perpetrated by a significant number of the employer's personnel and did not involve a strike, lockout, or discharge. However,

as detailed above, the District's decision to only bargain at a surface-level was calculated at the outset and affected a significant portion of OSEA's bargaining unit, and occurred over a span of several months. Additionally, the District's actions had the potential to significantly impact the functioning of OSEA by requiring OSEA to spend meaningful time and resources to craft proposals that would never be seriously considered by the District. Under these circumstances, we order the posting of the attached notice in physical locations and by email to the employees in OSEA's bargaining unit.

ORDER

1. The District has violated ORS 243.672(1)(e).

2. The District shall cease and desist from refusing to bargain in good faith with OSEA.

3. The District shall bargain in good faith with OSEA regarding the impact of SB 1049 consistent with this Order.

4. All relevant timelines for completing this bargaining shall be reset as of the date of this Order.

5. The District shall post the attached notice for 30 days in prominent places to maximize notice to affected employees. The District shall also email the notice to bargaining unit employees within seven days of the date of this Order.

DATED: August 4, 2022.

Adam L. Rhynard, Chair

*Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Lisa M. Umscheid, Dissenting:

I dissent. There is no legal or factual basis for finding that Silver Falls School District 4J violated ORS 243.672(1)(e). The District had no duty to bargain midterm with the Association about retirement benefits at all and, even if it somehow did, its conduct complied with the good faith bargaining principles the Board has reiterated in many cases over decades.

I first address the threshold legal issue presented by this case—whether a party who has no duty to bargain midterm can engage in midterm "surface" bargaining at all—and then address the merits of the Association's claim.

The Threshold Legal Issue

This case presents a threshold issue that, in my view, we can and should consider: Whether a labor organization can state a claim for surface bargaining under ORS 243.672(1)(e) when it demands to bargain midterm about a mandatory subject expressly covered by the parties' collective bargaining agreement and the employer agrees to bargain despite having no duty to bargain about the subject midterm.[18]

To begin, a party cannot violate ORS 243.672(1)(e) if it had no duty to bargain at all. The Board has long held that "[w]here there is no duty to bargain, there can be no violation of (1)(e)." *AFSCME Council 75 v. State of Oregon, Executive Department, Demusiak, and Fairview Hospital and Training Center*, Case No. UP-8-86 at 10, 9 PECBR 9284, 9293 (1987). In *Fairview Hospital and Training Center*, the Board held that the employer's proposal "could not serve as the basis for a valid (1)(e) charge under any circumstances," UP-8-86 at 10, 9 PECBR at 9293, because interest arbitration had been ordered, and "[o]nce arbitration is initiated to resolve a labor dispute, neither party is *required* by the PECBA to bargain collectively over the matters at issue." *Id*. at 8, 9 PECBR at 9291 (citing *AFSCME Local 1246 v. Fairview Training Center et al.*, Case No. C-137-84 at 7, 8 PECBR 8011, 8017 (1985), *aff'd*, 81 Or App 165, 724 P2d 895 (1986) (emphasis in original)). A precise parallel exists here: An employer's proposals and other actions in response to a union's demand to bargain midterm about a subject expressly covered by the parties' collective bargaining agreement cannot serve as the basis for a (1)(e) claim because the employer has no duty to bargain midterm as to that expressly covered subject. *See Hillsboro Professional Firefighters, IAFF Local 2210 v. City of Hillsboro*, Case No. UP-046-20 at 13 (2022) ("the obligation to bargain over mandatory subjects of bargaining during the term of the contract does not include an obligation to reopen or bargain over subjects expressly covered by the contract"); *Multnomah County Corrections Deputy Association v. Multnomah County*, Case No. UP-003-19 at 3 (2020) (Reconsideration Order), *aff'd*, 317 Or App 89, 505 P3d 1037 (2022) (public employer has a duty to bargain when a union "requests midterm bargaining over a mandatory subject *not* specifically covered by the parties' agreement") (emphasis added)).

[18]The Association contends in this case that the District was prohibited from proposing changes to the relevant CBA language during the parties' midterm bargaining. This is not a case, in other words, where the relevant collective bargaining agreement article was reopened midterm for mutual assessment and negotiation.

These parties' CBA expressly covers the subject of retirement benefits, and in particular the employer's contribution of six percent of wages to PERS on each employee's behalf. The Association demanded to bargain midterm about the subject of retirement benefits. Because that subject was expressly covered in the contract, the District had no duty to bargain midterm about that subject, including the consequences for employees of the Oregon legislature's enactment of SB 1049, which modified how PERS credits employee contributions to employees' defined contribution accounts. *See City of Hillsboro*, UP-046-20 at 13; *Multnomah County*, UP-003-19 at 3 (Reconsideration Order). Because the District had no duty to bargain midterm about retirement benefits, "there can be no violation" of ORS 243.672(1)(e) arising from the District's proposals or actions in response to the Association's demand to bargain midterm about retirement benefits. *See Fairview Hospital and Training Center*, UP-8-86 at 10, 9 PECBR at 9293.

Further, the District did not impose a legal duty on itself by voluntarily agreeing to meet and confer with the Association about SB 1049. The bargaining here was entirely voluntary. If it had concluded in an agreement, it would have resulted in amendments to the parties' CBA. A party that "seeks or engages in voluntary negotiations does not thereby incur a duty to bargain over such changes." Higgins, *The Developing Labor Law* 13-246 (7th ed 2017) (collecting cases). In those circumstances, "[e]ither party may refuse to discuss the matter or may break off negotiations at any time." *Id*.; *see also St. Barnabas Medical Center and New Jersey Nurses Union, Local 1091, CWA,* 341 NLRB 1325, 1325, 175 LRRM 1048 (2004) ("the parties do not incur traditional bargaining obligations by meeting and discussing proposals for a midterm modification").[19]

I would dismiss the complaint because the District had no duty to bargain, and therefore could not have violated ORS 243.672(1)(e) under the circumstances of this case, and I would do so irrespective of whether the parties briefed and raised the issue. Whether the District assumed a legal duty arising from its agreement to bargain with the Association is a threshold legal issue

[19]The majority sees peril in my approach and posits that it would enable a public employer to deprive a labor organization of an unfair labor practice claim by (1) agreeing to a demand to bargain, (2) engaging in surface bargaining, and (3) defending against the charge by asserting that it never had a duty to bargain in the first place. I see the opposite peril. By finding that the District violated ORS 243.672(1)(e) even though it had no duty to bargain midterm over the subject raised by the Association, the majority creates a disincentive for public employers to voluntarily bargain when they have no legal duty to do so. In this state, public employers and labor organizations commonly engage in bargaining even though they may not have a legal duty to do so, a custom we should seek to encourage, not discourage. Moreover, there is no indication of any pattern or history of public employers engaging in cynical, litigation-tactic-driven conduct simply to avoid bargaining about SB 1049 (or any other subject). Rather, cases brought to us indicate that many public employers have been willing to bargain about SB 1049 when successor bargaining is underway or imminent, but not otherwise. *See, e.g*., *In the Matter of the Declaratory Ruling Petition Filed by Albany Fire Fighters, IAFF Local 845 et al*., Case No. DR-001-20 at 2 (2020) (in petition seeking a declaration about employers' midterm bargaining obligations regarding SB 1049, the petitioning labor organizations asserted that when successor bargaining was underway or imminent, "'many employers have agreed to bargain over the impacts of SB 1049[,]'" but "'where public employers and unions were in the middle of a collective bargaining agreement with no successor negotiations imminent, employers generally refused to bargain over the impacts of SB 1049'"); *City of Hillsboro*, UP-046-20 at 13 (employer refused to bargain midterm about SB 1049 and did not violate ORS 243.672(1)(e) in doing so because "the subject of retirement benefits is specifically covered by the parties' contract").

inherent in the Association's claim.[20] In my view, we have the discretion to consider this threshold issue where the section (1)(e) claim itself is undisputedly before the Board, and we should do so. *See Lincoln County Education Association v. Lincoln County School District*, 187 Or App 92, 98, 67 P3d 951 (2003) ("the Legislative Assembly has delegated broad discretion to ERB in interpreting and deciding how to implement ORS 243.672(1)(e)"); *see also District Council of Trade Unions et al. v. City of Portland*, Case No. UP-023-14 at 13 n 7, 26 PECBR 525, 537 n 7 (2015) (Board "reserves the right" to address an alternate legal theory regarding an issue "undisputedly before the Board").

The District Did Not Engage in Surface Bargaining

Even if ORS 243.672(1)(e) applies here, a conclusion I would not reach, the District bargained in good faith. When all the evidence in this case is carefully weighed and assessed, it simply does not support a reasonable inference that the District never intended to negotiate to agreement with the Association.

Before considering the evidence, it is important to remember what surface bargaining is and what it is not. Surface bargaining is merely going through the motions. It is pretending to bargain while having no intent to listen or to attempt to compromise. Hard bargaining is not surface bargaining. Bargaining that aggravates the other party is not surface bargaining. Bargaining that does not satisfy the interests of the other party is not surface bargaining. *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division* 757, Case Nos. UP-035/036-20 at 73 (2020) (duty to bargain in good faith "does not require the parties to adopt an interest-based or collaborative approach to bargaining"). Bargaining in which an employer declines to (or cannot) fund a new monetary benefit, simply because that benefit is requested, is not in and of itself surface bargaining. *Clackamas Intermediate Education District Education Association v. Clackamas Intermediate Education District*, Case No. C-141-77 at 8, 3 PECBR 1848, 1855 (1978) ("a party may not be compelled to agree on any particular contract term"). To find surface bargaining, we must find that the respondent had an actual, subjective intent not to bargain.

The contours of the duty to bargain in good faith are also key to our assessment. It is a fundamental principle of PECBA that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." ORS 243.650(4); *see also Portland Fire Fighters Association, Local 43, IAFF v. City of Portland*, 305 Or 275, 284 n 6, 751 P2d 770 (1988) (duty to bargain "does not mean that the employer or union must yield or compromise its position on the matter"). That principle has special force in single-issue bargaining, where the give-and-take on multiple topics is not possible. *Oregon School Employees Association v. Clatskanie School*

[20]The District made this basic point in its objections by asserting that Findings of Fact 65 and 66 in the recommended order were not facts, but instead were statements of opinion about the merits of the parties' bargaining positions. The District wrote, "These paragraphs, part of the 'Findings of Fact,' reflect a fundamental assumption of the ALJ—that the District was obligated to do something to avert the consequences of SB 1049 on its classified employees. Given the likelihood that local and state governments continue to adopt legislation that has a direct or indirect financial impact upon public employees, ERB needs to recognize this assumption as a significant deviation from the previous legal interpretations of the obligations of a public employer under ORS 243.672(1)(e)."

District, Case No. UP-9-04 at 16-17, 21 PECBR 599, 614-15 (2007), *aff'd without opinion*, 219 Or App 546, 183 P3d 246 (2008) (the principle that PECBA does not require a party to make concessions "is particularly true when the parties engage in one-issue bargaining, and do not make proposals or counterproposals in other areas"). The duty to bargain collectively means that parties must "discuss their differences in a good faith effort to resolve them." *City of Portland*, 305 Or at 284 n 6. "At a minimum," the parties must "come together in good faith and acknowledge the legitimate interests of the other." *Federation of Or. Parole & Probation Officers v. Department of Corrections*, 132 Or App 406, 412, 888 P2d 597, *rev'd on other grounds*, 322 Or 215, 905 P2d 838 (1995).

In this case, as in virtually all surface bargaining cases, there is no direct evidence of the respondent's subjective intent not to bargain.[21] We must resort to the difficult work of drawing inferences from the circumstantial evidence, being careful not to impute ill-will or bad faith where there is a more plausible alternative explanation. We look at the totality of the circumstances. *Lane Unified Bargaining Council v. McKenzie School Dist. #68*, Case No. UP-14-85 at 37-43, 8 PECBR 8160, 8196-8202 (1985). 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 School District #68*, UP-14-85 at 37, 8 PECBR at 8196.

To guide our assessment, 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) the failure to explain a bargaining position; and (6) the course of negotiations. *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95 at 26, 16 PECBR 559, 584, *recons*, 16 PECBR 707 (1996). This is not an exclusive list. 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.

The midterm bargaining in dispute in this case occurred during two historic crises and immediately after the parties settled their 2020-2023 collective bargaining agreement. That context informs our entire inquiry. Because the parties' other bargaining and these crises constrained the District's options regarding how it could respond to SB 1049, I begin with the course of negotiations factor. I then assess the proposals and concessions, consider the Association's accusation that the District engaged in dilatory tactics, evaluate the Association's allegations regarding the District's chief negotiator's conduct, assess the District's explanations of its bargaining positions, and discuss the other relevant factors.

---

[21]Based on an assessment that this record includes direct evidence of bad faith, the majority omits some of the Board's traditional surface bargaining factors from its analysis. I disagree that there is direct evidence, and therefore assess all the applicable factors. Moreover, in my view, assessing the totality of the circumstances, including all the traditional factors, is particularly important here because this public employer was engaged in roughly simultaneous bargaining with the Association on multiple other issues, including the impacts of the COVID-19 pandemic and the catastrophic 2020 wildfires, and just weeks earlier had concluded successor bargaining with the Association. Surgically excising the midterm bargaining about SB 1049 from all the other bargaining and analyzing it without considering all the factors results in an inaccurate impression of the District's intent and conduct.

The Course of Negotiations

To determine whether there is evidence from which to infer bad faith, we consider the overall course of negotiations, including such factors as whether the employer rushed through negotiations or sought mediation before bargaining in any meaningful way. In other words, we examine whether an employer treated bargaining as a mere formality to be rushed through on the way to implementation or, if applicable, interest arbitration. A party is not permitted to "*get through* rather than *use*" the bargaining process required by PECBA. *Clatskanie School District*, UP-9-04 at 11, 21 PECBR at 609 (quoting *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94 at 23 n 30, 16 PECBR 433, 455 n 30 (1996), *aff'd without opinion*, 146 Or App 777, 932 P2d 1216 (1997)) (emphasis in original). Such conduct "would indicate that the employer never intended to reach an agreement, but rather, from the beginning, planned to implement its proposals." *McKenzie School District #68*, UP-14-85 at 42, 8 PECBR at 8201.[22]

To understand the bargaining in dispute in this case, we must begin at the beginning: the parties' successor bargaining for their July 2020 to June 2023 collective bargaining agreement. That bargaining and the concessions the District made to secure agreement provide the context necessary to understand the District's actions regarding the bargaining about the impact of SB 1049.

The parties' successor bargaining for the 2020-2023 collective bargaining agreement

At the end of May 2020, only several months into the COVID-19 pandemic, the parties began bargaining in earnest for their 2020-2023 CBA. While that bargaining was ongoing, on August 6, 2020, the Oregon Supreme Court ruled that SB 1049 was lawful. For each District employee, that meant that part of the six percent contribution the District paid to PERS on the employee's behalf would be credited by PERS to an individual Employee Pension Stability Account (EPSA), rather than be credited to the employee's IAP account. Because more than a year had passed since the enactment of the law, both labor and management understood well that PERS's allocation to EPSA accounts of portions of employee contributions would potentially have some impact on employees' PERS retirement benefits.

Two weeks after the court's decision, on August 20, 2020, the parties met for a successor bargaining session that would turn out to be the last session. During that session, the District increased its proposed pay increase for the 2020-2021 school year from 2.25 percent to 3.5 percent. Both parties were aware of the Oregon Supreme Court's decision about SB 1049, but neither party raised the issue. When asked at hearing why the District did not offer an economic proposal in successor bargaining to offset the impact of SB 1049, Dan Busch testified, "The union was focused on wages, and so, you know—a little bit on insurance, but primarily on wages. We wanted to support giving our classified employees as best offer as we could" and to provide "an economic benefit to all employees and not just a small subset of that group, I think was our focus." In other

[22]The inquiry regarding whether the employer rushed to implement its proposal is somewhat inapt here because the District was not proposing a change to the terms and conditions of employment and, in the Association's view, was precluded from counter-proposing any modifications to the relevant collective bargaining agreement article in response to the new benefits the Association sought.

words, the Association had signaled in bargaining that its priorities were wages first and insurance second, and the District substantially increased its proposed pay raise to meet that interest and obtain agreement. When asked at hearing why *the Association* did not raise SB 1049 during successor bargaining, Hobe Williams first testified that he thought the ground rules precluded raising it, but ultimately conceded that the Association did not want to "derail" bargaining. In other words, the Association did not want to endanger the 3.5 percent wage increase. In addition to that wage increase, the Association had also secured other substantial concessions, including increased longevity stipends and a new Step 8 in the salary schedule for employees who were "topped out."[23]

The Association accepted the District's proposals on August 20, and the parties settled the 2020-2023 CBA with an "economic" deal for only the first year. They agreed that no later than April 2021 and April 2022, they would bargain "salary and insurance" for year two and three of the three-year contract. They also agreed that at each of those "reopener bargaining" points, in addition to salary and insurance, each party could "open up to two (2) additional articles" for bargaining.

Four days later, on August 24, the Association demanded to bargain over the impact of SB 1049.

The parties' bargaining on multiple topics, including SB 1049, throughout fall 2020

Despite having no duty to bargain, the District agreed to meet with the Association to discuss its demand. At this time, the parties were bargaining about the return to school after COVID-19 had prematurely ended in-person instruction during the previous school year. Specifically, on September 10, the parties bargained throughout the morning and into the afternoon about the return to work at the beginning of the 2020-2021 school year with COVID-19 still affecting work.[24] Their first meeting about SB 1049 took place at the end of that day-long bargaining about COVID-19.

At the end of that long bargaining meeting, the parties briefly discussed the Association's demand to bargain about the impact of SB 1049. Lisa Freiley attended on behalf of the District. She explained that the District would continue to pay six percent of wages to PERS on employees' behalf, just as the parties had agreed several weeks earlier on August 20. Williams responded that the Association "still wanted to bargain." The Association gave the District a written proposal that would give every Association-represented employee (irrespective of whether they were affected each month by SB 1049) a new monthly retirement benefit based on years of service, ranging from $25 to $150 per month. Freiley conveyed that the District would need time to look at the District's proposal.

[23]The parties agreed to the following longevity stipends: for eight years of service, $125; for ten years of service, $250; for 15 years of service, $500; for 20 years of service, $750; for 25 years of service, $1,000; and for 30 years of service, $1,500.

[24]Ultimately, four days later, they agreed to an MOU, which the parties refer to as the "Fall COVID-19 MOU."

That first meeting on September 10, in other words, was the District's first opportunity to hear from the Association about its position that it could demand to bargain midterm about the impact of SB 1049. By all accounts, this initial meeting was brief.

On September 15, the parties met again. This time, Freiley explained in more detail the District's position that it had no duty to bargain. According to Association President Vance Taylor, Freiley took 15 minutes describing why the District had no duty to bargain. She explained that the District's legal obligation was to follow the contract that it had agreed to the month before and to continue to pay the six percent PERS contribution on employees' behalf. When Williams asked for a proposal, Freiley replied that the District's proposal was to continue the current contract language. Williams responded that a proposal to continue current contract language was not "a proposal"—essentially communicating that the District was obligated to add to the concessions it had just made to settle the contract, including the 3.5 percent raise, a new top step on the salary schedule, and increased longevity pay. Freiley explained that PECBA permits a party to propose to continue the current contract language as long as it remains open to other ideas. The Association made another proposal that would give all classified employees a new monthly retirement benefit even if they were not affected by SB 1049 every month, as well as proposing how retirees who return to work pursuant to SB 1049 would be handled.[25]

The parties subsequently planned to meet on September 30, but the District was unable to attend that meeting and cancelled it.[26] The parties promptly rescheduled the meeting for October 5. That day, Williams emailed Busch, and wrote, "I know you have agreed to bargain over the PERS redirect. We have even given you some ideas on how we could deal with this. However, the actual start of this bargaining has been delayed a number of times now. I understand that things happen, but we really need to start this bargaining very soon." The parties met that day on a number of topics and discussed SB 1049 again. Steve Nielson was not able to attend the October 5 session, but Busch had Kim Doud join in his place "in hopes that we can begin this conversation." At the meeting, the District reiterated its proposal to continue the current contract language. The discussion again centered on whether bargaining was required, with Freiley reiterating the District's position that midterm bargaining on SB 1049 was not required. She also conveyed twice, according to Williams's notes, that District was willing to look over any proposals the Association had.

The parties planned a meeting on October 14 to discuss multiple topics. The District wanted to have Nielsen present for the SB 1049 portion of the meeting to discuss the District's financial concerns, but his son was in car accident, so Nielson was unable to attend. Consequently, the SB 1049 discussion was deferred, but the parties met and discussed a number of issues that needed to be resolved. They discussed the language related to an MOU that resolved issues related to the very first week of the COVID-19 pandemic (March 16 to 20, 2020), language for an email to

[25]It is undisputed that the District did not have any classified retirees who wanted to return to work pursuant to the terms of SB 1049.

[26]Busch testified that the District was unable to meet as planned because of a significant personnel action underway. In addition, Business Manager Steve Nielson's house was affected in September and October by the catastrophic wildfires in the region. During this period, because his home was affected by the fires, Nielson was required to move multiple times and was actively working with FEMA.

classified employees about the floating holidays the District agreed to in the Wildfire MOU, how to handle employees who worked partial shifts during the wildfire closure, and possible dates to discuss the CBA reformatting that the Association wanted. Williams and Busch later talked by phone about scheduling and agreed to a meeting on October 28 to discuss the impact of SB 1049.

The parties met on October 28 for approximately one hour. The Association's agenda for the bargaining session indicates that four topics were on the table: (1) a food service presentation; (2) discussion of a one percent versus two percent differential for employees who worked during school breaks; (3) non-union meetings; and (4) the impact of SB 1049.[27] The Association's agenda for the meeting called this meeting the "first" bargaining session "for PERS."

At this meeting, the Association made several proposals related to SB 1049, including one in which employees would receive a cost-of-living adjustment to their wages equal to the amount of the contribution to their EPSA account—*i.e.*, employees with a 2.5 percent EPSA contribution would receive a 2.5 percent cost of living adjustment. Nielson explained how the proposals would create new costs for the District. Nielson also explained that the District could afford only a cost-neutral approach, and Busch and Freiley agreed. Williams somewhat jokingly said that he would take the District up on that challenge. The parties then took a 15 to 20-minute break. The Association returned with a proposal for either two or three floating paid days off during the 2020-2021 school year, with the parties to bargain in the spring 2021 reopener about future years. Williams testified that he got the idea of floating holidays from the District in other negotiations, such as those regarding the parties' Wildfire MOU. Williams believed that floating days were "largely" cost neutral.[28]

Nielson responded that the Association's idea was innovative, but that it would still carry cost for the District. Nielson also explained that the District's student enrollment was down by 300 students at that point, which would reduce the District's funding by approximately $2.6 to $2.8 million, but its personnel costs would remain fixed even when its funding decreased. Freiley agreed with Nielson's assessment. Freiley added that if the District were to agree to the proposal then it would also potentially have to extend the benefit to other District employees, which also created cost. Freiley reiterated that the District would follow the contract language the parties had agreed to in August and continued to be willing to look at any proposals the Association had.

---

[27]The issue with the one percent versus two percent pay differential involved the two percent differential night-shift janitorial employees earned. Those employees traditionally worked during the day shift when school was not in session, and concerns arose about whether they could, under Oregon's pay equity statutes, retain their two percent differential when working days. After discussing this issue, the parties ultimately agreed to postpone bargaining about a resolution until the April 2021 reopener negotiations. Williams testified that they agreed to bargain about the issue during the April 2021 reopener negotiations because by the time the holidays would have transpired, "it was almost time to bargain again."

[28]The District had explained in the Wildfire MOU negotiations that floating paid days off made it, in Williams's words, "easier" for the District "to manage the cost." Williams acknowledged that the District tended not to use substitutes for classified employees, so additional floating holidays would have "less cost" for the District "because they could schedule around and have coverage with the people they have there, potentially." In other words, Williams understood that floating paid days off created cost for the District.

After the October 28 meeting, Williams decided to circumvent Freiley, the District's chief negotiator. He sent a proposal directly to Busch on November 4. That day, Williams met with Busch on another, non-PERS issue, but Williams brought up PERS, even though Freiley, the chief negotiator was not present. When asked by Williams about the proposal, Busch did not respond on the substance, but said that he would review the issue with Freiley.

The next day, November 5, Williams emailed Busch again, suggesting that they use their scheduled November 5 meeting (related to the CBA language reformatting) to discuss SB 1049. "Since we are not going to use our full time for contract review today I thought we might discuss another PERS proposal," wrote Williams. "If you choose to not discuss it today I would still like a proposal from the district." Williams attached a proposal that employees affected by SB 1049 would receive a paid day off for their birthday for the 2020-2021 school year, with the impact of SB 1049 for future years to be negotiated at the spring reopener bargaining.[29] This time, Busch said that he did not want to discuss PERS at that time, and that he would review the Association's proposal. At hearing, Williams conceded that he knew the District wanted Freiley present at PERS-related bargaining sessions.

On November 11, Busch emailed Williams and Taylor proposing to have the next SB 1049 bargaining session on December 8, after the parties' monthly classified communications meeting. In response to Busch's attempt to schedule a meeting for December 8, Williams emailed another proposal (again circumventing Freiley) on November 12 and offered to meet on December 3 or sooner. That written proposal provided that the parties would discuss the impact of SB 1049 during the April 2021 reopener with the resolution retroactive to July 1, 2020. Busch forwarded this proposal to Freiley. Ultimately, the parties were unable to find a mutually available meeting date before December 8 because of multiple calendar conflicts, including a brief period when Williams was out of town. They agreed to meet on December 8.

The parties met for what became their final session on December 8. The District provided the Association with a written proposal.[30] It proposed to continue to perform the current contract language (contributing six percent of employees' pay to PERS on employees' behalf). Its proposal also stated that the impact of SB 1049 could "be included as a bargaining proposal by either side" during the spring 2021 reopener negotiations. In other words, the District's proposal mirrored portions of the Association's previous proposals to negotiate about SB 1049 during the spring 2021 reopener negotiations, except that any agreement would not be retroactive to July 1, 2020. The District did not want to agree to the retroactive application of a new, unknown benefit because of the funding impact of potentially declining student enrollment. The District was also concerned that any agreed retroactivity would constrain the District's ability to meet other Association bargaining priorities during the April 2021 economics reopener. Freiley was also concerned that a

[29]The Association asserts that its proposals for additional paid days off had no cost. Paid days off cause the District to incur cost for the wages and payroll taxes for that time even though the District receives no services in exchange for the compensation.

[30]The Association faults the District for not providing all its proposals in writing. However, the parties had no ground rules or other agreement requiring written proposals, and the District's first proposal—that it would continue to follow the contract language—was simple and did not require written communication. It is common in bargaining such as this for a straightforward proposal to be communicated orally.

retroactivity agreement would create an expectation by employees that the District would certainly offer a financial benefit when in fact it might not be able to do so, which she believed was unfair.

The parties took a 20-minute break. During that break, Williams talked with the entire union leadership about the proposal. After what Williams described as a "lengthy" discussion, the Association concluded that it could not agree if the benefit was not retroactive.

There were no other bargaining sessions. The Association did not request any further meetings to discuss the impact of SB 1049.

This overall course of bargaining, beginning with successor bargaining and continuing through the fall 2020 bargaining on multiple topics, demonstrates that the District made concessions and offered new economic and other benefits on multiple topics. It increased employees' pay and longevity stipends, and it added new paid days off in response to the historic crises. In addition, it is undisputed that the District's student enrollment, which had previously remained stable or even increased, was substantially declining. It is also undisputed that the decline would affect the District's funding, threatening the loss of about $2.6 to $2.8 million. This backdrop provides the necessary context for assessing the District's responses to the Association's demand to bargain midterm about SB 1049. The District was not merely being intransigent; it had already made substantial concessions in successor and MOU bargaining.

Against this backdrop, it was not bad faith, or even unusual, for the District to explain its legal position that it had no duty to bargain midterm about the impacts of SB 1049. The evidence demonstrates that the parties devoted most of their first two meetings—on September 10 and September 15—to this very topic. The District asserted that the Board's decision in *Multnomah County*, UP-003-19 (Reconsideration Order), did not impose a duty to bargain midterm about SB 1049. The District was correct. *See City of Hillsboro*, UP-046-20 at 13 ("the obligation to bargain over mandatory subjects of bargaining during the term of the contract does not include an obligation to reopen or bargain over subjects expressly covered by the contract"). The District also correctly asserted that it was not required to make a concession or any particular proposal as long as it remained willing to bargain. *See* ORS 243.650(4). There is nothing unusual about parties disagreeing about and debating scope of bargaining issues, and the fact that the District (correctly) asserted its legal rights does not indicate bad faith.

Likewise, the District's proposal that it would adhere to the contractual obligation that it had just bargained, to contribute six percent of employees' pay to PERS on employees' behalf, is also explained by the context in which this bargaining took place. Throughout all the parties' bargaining during this relatively short period, the District had already made substantial concessions on compensation and days off to secure agreements. Considering the recency of the successor bargaining, and the fall bargaining about COVID-19 and the wildfires, the District's decision not to make further economic concessions was explained by the uncertainties that it faced and the economic benefits it had already agreed to give. As the District observed in its briefing, if we construe the duty to bargain to require a public employer to add new benefits during midterm bargaining to benefits already expressly covered by the contract simply because new benefits are demanded, we will create "a never-ending escalation of employee benefits and compensation." The District's perception is correct, and particularly so here, where the Association contends that

the District was precluded from counter-proposing to modify the wages and benefits already in the contract.

In addition, viewed in the context of all the parties' bargaining, the District's proposal that the parties bargain over SB 1049 impacts during the April 2021 reopener negotiations is understandable and does not indicate bad faith. At its core, the Association's argument asserts that the District never really bargained, but only wasted time and ultimately proposed delaying bargaining. However, the record indicates that *both* parties viewed consolidating economic issues in the April 2021 bargaining as reasonable. They both agreed to defer bargaining over the two-percent differential issue to April 2021. And it was *the Association*, not the District, that first raised the idea that SB 1049 impacts, in part, be bargained in April 2021. The fact that the District adopted that concept as part of its proposed response to SB 1049 is not evidence of bad faith. Rather, it is evidence that the District was listening to the Association's proposals and attempting to respond to them in a manner that took into account the Association's desire for an offsetting benefit to SB 1049, while also fulfilling its own obligations to manage the consequences of possibly declining student enrollment. In fact, when the Association received the December 8 proposal, it did not dismiss it outright, as one would expect if the proposal were an obvious delaying tactic or completely unacceptable. Rather, the Association took a 20-minute caucus, and the entire Association leadership considered the District's proposal carefully before rejecting it—the best evidence that the Association, while at the table, viewed the proposal as substantive response that warranted serious consideration.

Finally, the duration of the parties' bargaining is typical of public sector bargaining, indicating that the District was not rushing through the process. PECBA prescribes a 150-day bargaining process for union-initiated midterm bargaining. *See Multnomah County*, UP-003-19 at 12 (Reconsideration Order). Assuming the 150-day bargaining period began on September 10, 2020, when the parties first discussed SB 1049, the bargaining period expired on February 7, 2021. The District's December 8 proposal fell well within that period, and there was substantial time remaining, even allowing for the holiday break, for the Association to make a counterproposal. Instead, the Association simply abandoned the issue, with two months left in the bargaining period. That course of bargaining does not suggest that the District rushed to the end of bargaining with no intent to agree.

The Content of Proposals and the Concessions and Counterproposals

To assess whether a party acted with good or bad faith intent, we also consider the content of proposals and counterproposals. Unduly harsh or unreasonable proposals can be evidence of bad faith. *McKenzie School District #68*, UP-14-85 at 39, 8 PECBR at 8198. Importantly, when we assess a claim that a proposal is unduly harsh or unreasonable, we do not look at it in isolation; we examine the totality of the circumstances. *See Ass'n of Or. Corr. Emples. v. State*, 213 Or App 648, 660, 164 P3d 291, *rev den*, 343 Or 363, 169 P3d 1268 (2007) (assessing wage freeze proposal in light of budget 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) (wage cuts are always "predictably unacceptable," but the Board looks to the totality of the circumstances to assess proposals). Here, as described above, in the context of the total bargaining circumstances, the District's proposal to continue to pay employees' six percent contribution to PERS on employees' behalf was reasonable, considering that the District had only recently agreed to settle the successor

contract by agreeing to a substantial wage increase and the six-percent PERS contribution and nothing had changed since that agreement. Although it is accurate that the District did not propose a new, midterm economic benefit for employees, as the Association wanted, that fact does not indicate bad faith. Freiley testified that the District's bargaining team met privately and tried to generate a proposal that would meet the Association's interests but they were unable to think of anything. Having just agreed to a wage increase in August 2020 and to other benefits in the fall 2020 MOUs (including paid time off), the District's inability to generate a proposal that would meet the Association's interests is not, in and of itself, sufficient evidence to infer bad faith given the total bargaining context. It more plausibly indicates that the District had nothing left to give.

We also examine the "nature and number of concessions" the respondent made. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-37-08 at 21, 23 PECBR 895, 915 (2010). Significantly, the 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[.]" *Id*. at 22, 23 PECBR at 916; *Clackamas Intermediate Education District*, C-141-77 at 8, 3 PECBR at 1855 ("This Board has stated many times that a party may not be compelled to agree on any particular contract term."). Here, as described above, the District made a number of concessions in the successor bargaining and MOU bargaining, including a significant wage increase and paid days off. Those concessions are relevant to the analysis of the District's conduct in the SB 1049 bargaining because they corroborate the District's position, explained at the table and in this case, that it could not agree to anything related to SB 1049 that carried a cost. Further, even though the District had made concessions in that roughly simultaneous bargaining, on December 8, it made another concession. It proposed that SB 1049 impacts could "be included as a bargaining proposal by either side during the upcoming negotiations" in April 2021. The reopener provision in the CBA provided that the contract would "be open to bargain salary and insurance in April of 2021 and 2022[,]" and that the parties could "open up to two (2) additional articles each to bargain." The District's December 8 proposal *added* retirement benefits to the issues the Association was contractually permitted to reopen (consisting of salary, insurance, plus up to two articles chosen by the Association), and thus was a concession. Moreover, even if we disregard all the District's concessions in the other bargaining, and do not consider the December 8 proposal a concession, that does not mean that the District had a subjective intent not to bargain. This Board "has never based a finding of surface bargaining solely on a party's refusal to make concessions at the bargaining table[,]" *Oregon AFSCME Council 75, Local 2936 v. Coos County*, Case No. UP-15-04 at 36, 21 PECBR 360, 395 (2006), and we should not do so here.

The Association relies on two of Busch's emails to the superintendent, and argues that they provide evidence sufficient to infer bad faith from the District's proposals. In its post-hearing brief, the Association asserts that "Busch told the Superintendent that he had no intention of *agreeing to anything* that would offset the financial impacts of SB 1049." (Emphasis added.) The Association mischaracterizes those emails. In the relevant portion of the first email, Busch wrote to the superintendent, "Unless you feel otherwise, we do not plan to offer any *retirement compensation* to employees because of SB 1049." (Emphasis added.) In Busch's second email, he wrote, "Ultimately, my goal will be to postpone *any compensation* to offset the impact of SB 1049 until we bargain financials in the spring." (Emphasis added.) These emails describe Busch's plan to hold the line on offering additional compensation during midterm bargaining. The District had just settled retirement compensation and had just granted substantial compensation increases in its contract only several weeks earlier, so the emails are hardly smoking guns. They do not say,

"We do not plan to offer anything" or even "We do not ever plan to offer any compensation." They are not evidence of intransigence; they are merely a description of a reality of public administration—having just agreed to increased wages, increased longevity stipends, and a new top wage step only weeks before, the District's "goal" and "plan" was to bargain in a way that did not result in granting more *compensation* midterm. Employers are permitted to have bargaining goals and plans, just as they are permitted to engage in hard bargaining when required to manage budgets. That is not evidence of bad faith.[31]

Dilatory tactics

We also consider dilatory tactics because tactics "that tend to unreasonably impede negotiations" can indicate bad faith. *McKenzie School District #68*, UP-14-85 at 38, 8 PECBR at 8197. There were no dilatory tactics here. The Association would have us believe that the District's cancellation of bargaining sessions on September 30 and October 14 was intended to unreasonably impede negotiations. The District canceled those sessions for legitimate business reasons, including because its business manager, Steve Nielson, was unable to attend. There is no evidence that the reasons the District gave for rescheduling those meetings was false. According to the Association, the cancellations were contrived because the District asserted that it needed Nielson to participate in bargaining, yet it had not brought him to previous meetings. But it is undisputed that Nielson is the business manager with the appropriate background and information to provide the financial data at the table. It is also undisputed that on October 28, Nielson explained the District's concern about potentially declining student enrollment and the effect on the District's funding. The District's rescheduling of the two sessions was merely routine rescheduling. We do not infer bad faith intent from such routine events caused by calendar conflicts. *See id*.; *Blue Mountain Community College Faculty Association v. Blue Mountain Community College*, Case No. C-179-77 at 8, 3 PECBR 2025, 2032 (1978) (delays attributable to schedule of chief negotiator "insufficient to warrant a conclusion of bad faith bargaining").

[31]The Association also asserts that the District admitted that it had no intent to bargain. That assertion is not supported by a balanced reading of the evidence. Certainly, the District had a goal to avoid incurring any additional cost as a result of this midterm bargaining. But it has never been the law that simply because a labor organization demands to bargain about a new monetary benefit, the public employer is required to *agree* to a new benefit. *See, e.g*., ORS 243.650(4); *Clackamas Intermediate Education District*, C-141-77 at 8, 3 PECBR at 1855. Here, the District was focused on cost, and understandably so. Freiley testified, for example, "We were looking for proposals that were cost-neutral, and so when a proposal came up that had any cost attributed to it, we were looking at that and saying that wasn't going to satisfy or work within the parameters that we had set for this round of bargaining." When asked whether the District would have rejected a proposal if it cost only "one cent," Freiley responded, "Technically, under the criteria we had, because then that one cent becomes significantly more cents when it rolls over to the licensed and administrative group." This bargaining goal, however, is not an "admission" of lack of intent to bargain. When asked directly whether the District wanted to communicate to the Association that it was "never ever" going to agree to anything to address the impacts of SB 1049, Freiley disputed that characterization, responding, "No, I don't think that's what their intention was at all. I think their intention was to say, if we can find some way to address the issue…But the problem with this is that, by its definition, it's a financial issue so the solutions *that make the Association feel like the issue's been addressed* all have some cost attributed to them, and we're bargaining it as a kind of one-off after just settling a collective bargaining agreement." (Emphasis added.)

To the extent that the Association argues that the District's proposals to follow current contract language and then to handle SB 1049 bargaining as part of the April 2021 negotiations were themselves dilatory tactics, that argument is unsupported by the actual evidence. The District did not cynically rely on adherence to "current contract language" as a reason not to bargain. Rather, as discussed above, the District was legally correct: it had no duty to bargain midterm about the subject of retirement benefits because the parties' CBA already covered that subject, but it nonetheless agreed to meet and confer and did so. Moreover, Freiley correctly stated that the District was not required to make a concession. That assertion was correct as both a general matter, *see* ORS 243.650(4), and in these particular circumstances, where the District had just weeks earlier made substantial concessions to secure agreement to the 2020-2023 CBA. Correctly stating a legal position is not a dilatory tactic.

Further, the District's positions did not "unreasonably impede" negotiations. *See McKenzie School District #68*, UP-14-85 at 38, 8 PECBR at 8197. Although the Association seems resistant to acknowledging it, the District *did* modify its position in response to the meetings and exchange of information with the Association. The Association offered a number of ideas over the course of bargaining. It began with a proposal for a new monthly retirement contribution for all employees, even those who were not affected every month, and modified its proposals to provide for a new contribution only for affected employees during months they earned more than $2,500; an offsetting cost of living increase only for affected employees; floating personal days for affected employees for 2020-2021 with additional bargaining in the April 2021 reopener; and a paid birthday-based day off for 2020-2021 with additional bargaining in the April 2021 reopener. In response, on December 8, the District adopted a concept from several of the Association's proposals and proposed that the parties bargain the impact of SB 1049 in their April 2021 reopener negotiations. Although that proposal was ultimately not acceptable to the Association, the parties, through their discussions, refined the scope of the issue, revealed and refined the Association's interests, discussed the District's financial constraints, and ultimately put competing proposals on the table that were quite similar. These are the kinds of discussions and refinement of positions that PECBA encourages in the bargaining process.

Behavior of the District's Spokesperson

The behavior of the party's spokesperson can indicate that the party had no intent to bargain. 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). We examine factors such as whether the negotiator had no apparent authority to negotiate, was non-responsive to inquiries, or tinkered with contract language away from the table. *Id*. (citing *Hood River County*, UP-92-94 at 22, 16 PECBR at 454). Recognizing the realities of table bargaining, where strong emotion and vigorous debates are common, we grant wide latitude to negotiators. "Emily Post-approved deportment is not a requirement of good faith bargaining, even though discourteous or otherwise-offensive behavior is not necessarily desirable." *McKenzie School District #68*, UP-14-85 at 39, 8 PECBR at 8198.

The Association contends that the conduct of Freiley, the District's chief spokesperson, supports an inference that the District never intended to bargain.[32] In the Association's view, Freiley asserted legal arguments rather than bargain in good faith. It is accurate that on September 10 and 15, Freiley challenged the Association on its claim that it had a right to require the District to bargain midterm over retirement benefits. She pointed out that Williams had withheld the SB 1049 issue from successor negotiations where the parties could have bargained about it in the context of other economic issues. As Busch's emailed report to the superintendent described it, Freiley "called [Williams] out" for not including the SB 1049 issue "in the successor bargaining that we just completed."[33] Freiley's accurate description of the legal principles was not inappropriate or somehow evidence of bad faith.

The Association also faults Freiley for being "openly hostile" and "aggressive" during bargaining, despite having no evidence to support the accusation. The Association's witnesses testified only that Freiley crossed her arms and looked over her glasses. But such gestures are hardly evidence of unprofessional or inappropriate conduct. There is no evidence of inappropriate physical conduct, insults, door or table slamming, profanity, or anything unprofessional. The Association claims that Freiley was "dismissive" toward Williams, but the record is devoid of actual evidence to support that accusation other than Williams's perception. Busch and Freiley both testified that Freiley was merely presenting the District's arguments thoroughly and her tone was professional. It is undisputed that none of the Association's representatives complained to Busch or anyone else at the time that Freiley's conduct was somehow inappropriate. The facts indicate only that Freiley engaged in strong advocacy. In my view, the Association's challenge to Freiley's conduct at the table, in the absence of evidence to substantiate it, undermines the Association's remaining arguments.

Failure to Explain or Reveal Bargaining Positions

We also require, as part of good faith bargaining, "that a party explain its proposals so that the other party may respond in an intelligent manner." *McKenzie School District #68*, UP-14-85 at 40, 8 PECBR at 8199. A party's explanations "should be candid and claims made should be honest ones." *Id*. However, a "party need not articulate a justification which the other party deems sufficient in order to be able to pursue a contract proposal." *Rogue Valley Transportation District*, UP-80-95 at 28, 16 PECBR at 586.

[32]Freiley is an attorney who has specialized in labor relations in public education in Oregon for more than 30 years. She has negotiated more than 350 collective bargaining agreements over her career. She was assisting the District during the fall 2020 COVID negotiations while the SB 1049 discussions were also taking place, and had bargained with Williams on other topics, including the Workshare MOU associated with the COVID-19 pandemic.

[33]The District did not assert a bad faith bargaining claim against the Association for intentionally withholding SB 1049 impact bargaining from successor bargaining in order to obtain an advantage, so that issue is not before us. *See Multnomah County*, UP-003-19 at 9-10 (Reconsideration Order) (intentionally withholding an issue from successor bargaining to take tactical advantage of midterm bargaining "would be inconsistent with [PECBA's] requirements of good faith collective bargaining, and if such conduct ever occurs, it can be dealt with accordingly").

Here, the District adequately explained its positions. Freiley explained correctly that the District did not have a duty to bargain midterm about SB 1049, that the District would continue to adhere to the contract language, which required it to pay six percent of compensation to PERS on employees' behalf, and that the District was nonetheless open to hearing the Association's ideas. As explained above, on October 28, Nielson explained that the District's enrollment had declined by 300 students, which would, if it persisted, reduce the District's funding by approximately $2.6 to $2.8 million. Freiley also explained that the District was concerned that agreeing to a new offsetting benefit for classified employees would lead to a demand for the same benefit from the certified bargaining unit. There is no evidence that any of these explanations were inaccurate. These explanations permitted the Association to "respond in a 'more realistic' manner." *See McKenzie School District #68*, UP-14-85 at 40, 8 PECBR at 8199. Stated differently, the District clearly informed the Association that the District could not respond to the impacts of SB 1049 with a new monetary benefit or other proposal that carried a cost.

Further, the District's explanations were consistent. The Association argues that the District's reasons were "shifting" because, late in bargaining, the District explained that it could not accept the Association's proposals for new paid days off because, if it did, the certified bargaining unit would likely want such concessions. The Association believes that this explanation was false because certified and classified employees do, in fact, have different terms and conditions of employment. PERS retirement benefits, however, are established by the Oregon legislature and are consistent across both the classified and certified groups. Likewise, the EPSA account contributions required by SB 1049 are consistent across those groups. The differences in EPSA account contributions arise only from an employee's PERS "tier." In other words, there is no real reason to doubt the veracity of the District's stated concern that it could expect to receive from its certified bargaining unit a demand for any compensation or benefit that the District agreed to provide the classified staff to offset the impact of SB 1049. And that demand, in turn, would ultimately have a cost. The District's explanations fell well within the range of normal bargaining explanations and do not support a reasonable inference that the District was bargaining in bad faith. *See McKenzie School District #68*, UP-14-85 at 41, 8 PECBR at 8200 ("a 'theoretical' rationale does not indicate bad faith").

Additional Relevant Factors

Finally, there are several additional factors that we must consider here. The historic events that frame this bargaining are relevant to assessing the District's conduct. As we have previously observed, "we cannot overlook" the impact of the COVID-19 pandemic on bargaining. *Amalgamated Transit Union, Division 757*, UP-035/036-20 at 89-90 (declining to construe communications in which the parties "talked past" each other as evidence that the respondent did not intend to reach agreement with the union where "the parties were simultaneously responding both to the extreme demands of a historic crisis and to the renegotiation of a complex collective bargaining agreement."). These parties, and Busch in particular, were likewise responding to the extreme impacts of COVID-19 on public schools. In addition, during fall 2020, these parties were also dealing with the equally extreme demands resulting from the historic wildfires that threatened the District's region. Those fires canceled school for part of September 2020 and threatened the homes of some District employees, including Nielson. The parties were bargaining about the impacts of both those historic crises at the same time they were bargaining about the impact of SB

1049. We must take into account the demands of both these crises when we assess the actions of the District's representatives.[34]

In particular, these crises provide context that explains why District representatives may not have responded to communications from the Association as quickly or as thoroughly as they might have under more normal circumstances. *See Amalgamated Transit Union, Division 757*, UP-035/036 at 90 ("given the urgency and novelty of the pandemic, it is understandable that the parties' focus and energies were diverted from successor bargaining"). The impact of the fires also explains in part why the District canceled the September 30 bargaining session; Nielson's house was in the fire evacuation zone.

These crises also provide context to Busch's response to the Association's request for information about employees affected by SB 1049. Initially, Freiley asked the District to compile a list of employees who earned more than $30,000 per year (and therefore would be affected by SB 1049). Doud prepared the information. In her email to Busch transmitting it, she explained that that there was not "a cut and dry answer" to which employees were affected because some employees would only earn enough money in June to trigger an EPSA contribution and would need to make an EPSA contribution only for that single month.

Later, the Association asked for a list of employees affected, their annual contract hours, and their PERS "tier." When Busch forwarded to Taylor a spreadsheet listing the affected classified employees, Busch did not include Doud's caveat that there was not a "cut and dry" answer. He simply forwarded a summary of the information and invited Taylor to let him know "if something is missing." At the time, Busch was involved in multiple issues arising from COVID-19, the catastrophic wildfires, the two-percent differential issue, and the impact of SB 1049, and was the sole District administrator responsible for labor relations. Overwork and an understandable lapse in attention, not a subjective intent not to bargain, are the most likely explanations for Busch's oversight when he transmitted the information.

Inattention or overwork are also the most likely explanation why Busch did not forward Williams's emailed proposals on November 4 and 5 to Freiley. Williams knew that Freiley was the District's chief spokesperson. There is no reason to infer that Busch did not forward the emails to Freiley because he was deliberately withholding information to impede negotiations. If that were the case, he would not have forwarded the November 12 email and the District would not have formulated its own proposal and provided it to the Association on December 8.

Totality of the Circumstances

Our assessment of the evidence in a surface bargaining case must take into account the totality of *all* the circumstances. We must look at the party's cumulative actions to determine

[34]This context may also explain the unconventional actions of the Association's representative. On November 4, 5, and 12, Williams circumvented Freiley and sent written proposals to Busch, rather than Freiley, even though he knew Freiley was the District's chief negotiator. Williams and Busch were used to bargaining with each other on multiple pressing topics and their bargaining relationship had developed a level of informality, which Busch described as "free-flowing." That familiarity may explain Williams's actions, just as it explains Busch's actions.

whether they indicate a sincere willingness to reach a negotiated agreement. In this case, as explained below, the cumulative actions of the District, considering the totality of the circumstances, indicate that the District had a sincere willingness to reach a negotiated agreement.

To begin, the overall course of the negotiations, the proposals, and the District's ultimate concession all weigh in favor of a finding that the District had a sincere willingness to reach a negotiated agreement. The parties met briefly on September 10 after their full day of bargaining about the COVID-19 MOU. The purpose of that short meeting was, essentially, to begin the discussions by each side expressing its position. A brief initial meeting is not uncommon in midterm bargaining of this type. The parties refined that exchange of positions on September 15 in a longer discussion of the District's bargaining obligations. Freiley explained in greater detail why the Association's demand to bargain midterm about retirement benefits was different than the union's demand to bargain in *Multnomah County*. Freiley testified that Williams and she seemed to be "missing" each other, with Williams continuing to assert (incorrectly) that the District was required to offer something other than performing the contract language—in other words, that it was required to make a concession. Notably, at the time of this bargaining, there was substantial uncertainty among some collective bargaining representatives about whether an employer is required to bargain midterm about the impact of SB 1049. In April 2020, this Board declined to hear a petition for declaratory ruling about whether employers were required to bargain midterm about SB 1049 because "the question of whether there is a midterm duty to bargain regarding a particular change (or impact of a change), depends in part on the parties' existing contract." *In the Matter of the Declaratory Ruling Petition Filed by Albany Fire Fighters, IAFF Local 845 et al.*, Case No. DR-001-20 at 2 (2020). In light of that uncertainty, Freiley's explanation of the District's position at the September 10 and 15 meetings is not somehow evidence of intransigence or bad faith. "It is fairly common for labor and management to have different perspectives on scope of bargaining issues, and for both sides to articulate and preserve their respective legal positions while nonetheless engaging in good-faith negotiations over those issues." *Multnomah County*, UP-003-19 at 15 n 9 (Reconsideration Order).

The parties moved away from that initial debate on September 10 and September 15 into more typical bargaining on October 5, October 28, and December 8. On October 28, the District maintained its position that it would perform the contract the parties had just agreed to in August 2020, but wanted to hear any ideas the Association had. That too was not only permissible, but understandable in light of the recent settlement of the successor agreement. The District made it clear that it needed a cost-neutral solution after the compensation increases granted during successor bargaining. That message finally was received by the Association, and for the first time, on October 28, it stopped proposing new monetary benefits and instead proposed new paid days off. The District could have decided simply to decline the Association's proposal, and once again assert that it would simply perform the contract language. PECBA did not require the District to make concessions. Instead, on December 8, the District formulated its own proposal, incorporating, in part, the Association's concept that some impacts of SB 1049 be negotiated in the April 2021 reopener negotiations. Rather than offer that only prospective SB 1049 impacts be negotiated then (as the Association had proposed), the District proposed that all SB 1049 impacts be negotiated during reopener bargaining. There was no meaningful delay inherent in that proposal. The parties had agreed to also attempt to address the concerns related to the night-shift two percent differential issue during those April 2021 negotiations, which Williams testified made sense because bargaining over that issue in April 2021 did not create undue delay.

Ultimately, after that December 8 session, the Association dropped the issue. It did not request any other bargaining sessions. Williams seemed to believe that there was only a 90-day period for the negotiations, but that is incorrect. Union-initiated midterm bargaining occurs pursuant to the standard 150-day bargaining process, meaning that the bargaining period extended to at least February 7, if not later. None of these facts related to the course of bargaining, or the District's proposals and concession, indicate that the District's mind was irrevocably closed and that it never intended to bargain.

The Association infers from this course of negotiations and the District's proposal that the District intended to avoid bargaining altogether by merely proposing delay. Even if that inference—that consolidating bargaining about SB 1049 during spring 2021 reopener bargaining indicates only that the District never intended to bargain—might be reasonable in another situation, it is not reasonable in this case. Here, the Association itself had proposed that the parties bargain future-year impacts of SB 1049 in April 2021, the proposed bargaining in April 2021 was only a few months away, the Association had agreed to resolve another issue during the reopener negotiations, and the District had just agreed to a substantial wage increase and other economic benefits in the just-concluded successor bargaining.

It is true that the District could have offered a non-economic proposal to ameliorate the impacts of SB 1049 and did not. For example, it is undisputed that the District already had in place a deferred compensation Section 403(b) retirement plan that all classified employees could use. The District could have proposed to offer in-house education on how to access that plan and its benefits, or it could have offered to facilitate training by PERS staff on retirement planning or related topics. The fact that the District did not generate such proposals does give some weight to the Association's argument. In this particular bargaining, however, the District's choice not to make such proposals does not indicate bad faith. All the Association's signals during bargaining communicated that the Association wanted a new cash retirement benefit, a wage increase, or paid days off. There was no reason to believe that a proposal by the District for a cost-neutral benefit, such as retirement-related education, would have been acceptable to the Association.

In sum, the weight of the evidence related to the course of bargaining, the content of proposals and counterproposals, and the District's concession all support an inference that the District participated in this bargaining with the subjective intent to reach an agreement.

Further, other factors also support the inference that the District subjectively intended to bargain in good faith with the Association. The District asked Freiley, an outside negotiator, to represent it at some expense. Freiley asked the District to compile information to aid in the bargaining. It is unlikely that she would have requested information simply to create the false appearance that the District intended to bargain. The District's representatives attended five meetings with the Association from September through December to discuss SB 1049, even though the District was also simultaneously contending with two historic crises and bargaining with the Association on numerous other topics. At the October 28 meeting, the District explained its concerns about a potential substantial decline in student enrollment, and the effect it would have on the District's funding. That explanation is the type of information sharing that PECBA requires and encourages. Although the District cancelled two sessions, substitute sessions were quickly scheduled and meeting cancellations due to calendar conflicts or the unavailability of a

representative are common, and in and of themselves do not indicate bad faith. There is no evidence that meetings were cancelled so that the District could avoid or hinder bargaining. The Association criticizes Freiley's conduct at the table, but as explained above, there is no actual evidence substantiating that criticism.

It is also important to consider what the District did *not* do. It did not outright dismiss the prospect of ever agreeing to any new benefit or compensation. It did not make ultimatums or walk away from the table. It did not drown out, cut off, or avoid discussion. It did not inhibit or discourage the generation of ideas.

On the other hand, the District took some actions that fell short of ideal collective bargaining conduct. Busch did not forward Williams's proposals on November 4 and 5 to Freiley. Busch's abbreviated explanation for the spreadsheet provided to the Association created the inaccurate impression that 137 classified employees were not affected by SB 1049, whereas at least some of them were affected, even if only modestly, during the final month of the year. If viewed in isolation, these facts would provide some support to the Association's view that the District did not bring to this bargaining the level of seriousness and focus typically associated with formal bargaining. However, we should not view these facts in isolation. Considered in the context of all the circumstances, Busch's actions regarding the November proposals and the information request are more likely a product of the extreme demands of responding to COVID-19 and the catastrophic wildfires, as well as all the other bargaining that was underway. Considered carefully, the evidence about Busch's actions is not enough to outweigh all the other facts indicating that the District had the subjective intent to bargain to agreement but was foiled because it had already given so much in the successor and other midterm bargaining.

For all these reasons, a balanced and careful weighing of the evidence, considering the totality of all the bargaining circumstances, demonstrates that the District bargained with the Association in good faith about the impact of SB 1049 despite having no duty to bargain midterm about that subject. The District was boxed in, to some degree, by the many concessions it had already made in successor and MOU bargaining, but it nonetheless met with the Association, listened to its proposals, conferred privately to attempt to generate its own proposal to meet the Association's interests, and ultimately made a proposal that built on a concept introduced by the Association. PECBA regulates bargaining processes, not outcomes, and the District bargained in good faith as PECBA requires.

In sum, I would dismiss this complaint because the District had no duty to bargain midterm about the impact of SB 1049, *see City of Hillsboro*, UP-046-20 at 13, and did not assume a duty by agreeing to bargain; therefore, its actions cannot serve as a basis for a violation of ORS 243.672(1)(e). Even assuming that the Board's surface bargaining framework does apply here, a conclusion I would not reach, a careful assessment of all the evidence indicates that the District bargained with the intent to attempt to reach an agreement with the Association.

*Lisa M. Umscheid, Member

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board (Board) in Case No. UP-010-21, *Oregon School Employees Association v. Silver Falls School District 4J*, 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 Silver Falls School District 24J (District) committed unfair labor practices in violation of ORS 243.672(1)(e).

The Board concluded that the District violated ORS 243.672(1)(e) by refusing to bargain in good faith with OSEA.

To remedy this violation, the Board ordered District to:

1. Cease and desist from violating ORS 243.672(1)(e).

2. Post this notice for 30 days in prominent places where District employees are employed.

3. Distribute this notice by email to all bargaining unit employees within seven days of the date of this Order.

Silver Falls School District 4J

Dated: _____, 2022

By:_____

Title:_____

****

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

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

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-001-22

(MANAGEMENT SERVICE REMOVAL AND DISMISSAL)

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

Tony L. Aiello, Jr., Attorney at Law, Tyler Smith and Associates, PC, Canby, Oregon, represented the Appellant.

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

On July 15, 2022, 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 appeal is dismissed.

DATED: August 5, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-001-22

(MANAGEMENT SERVICE REMOVAL AND DISMISSAL)

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

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on March 22, 2022, via videoconference. The record closed on April 25, 2022, upon receipt of the parties' post-hearing briefs.

Tony L. Aiello, Jr., Attorney at Law, Tyler Smith and Associates, PC, Canby, Oregon, represented the Appellant.

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

On January 25, 2022, the Appellant, RM (whose initials are used herein to maintain his anonymity), filed an appeal with the Employment Relations Board (Board) against the Respondent, State of Oregon (State), Department of Corrections (DOC). The issue presented in this case is: Did the DOC violate ORS 240.560(4) when it terminated RM and dismissed him from state service?[1] As set forth below, we conclude that the DOC did not violate the statute as alleged in the appeal.

[1]Neither party objected to this framing of the issue before or during the hearing. Furthermore, in the appeal (at 13), RM specifically concludes that the DOC violated ORS 240.560(4) by removing RM from his management service position without good faith or cause. Nevertheless, the DOC's post-hearing

RULINGS

All rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

Background

1. The DOC is an agency of the State and is part of the Executive Branch.

2. The Department of Administrative Services (DAS) is another State agency and is also part of the Executive Branch. DAS is responsible for implementing the polices and financial decisions made by the Governor of Oregon and the Oregon Legislative Assembly. To do so, DAS frequently makes its own policies. (9:15-9:16 a.m.)[2]

3. RM first worked for the DOC as a Correctional Officer from May 15, 1995 until he resigned on July 30, 1996. On June 23, 1997, RM was rehired as a Correctional Officer. On November 8, 1998, RM promoted to Correctional Corporal. On July 1, 1999, RM promoted to Correctional Sergeant. On December 23, 2018, RM promoted to Correctional Lieutenant. On December 27, 2021, while still a Correctional Lieutenant, RM was dismissed. (4:12 p.m., Exh. A-25, Exh. R-1 at 1, Exh. R-2.)[3] While a Correctional Lieutenant, RM specifically worked for the Oregon State Penitentiary, a maximum-security prison in Salem, Oregon. (Exh. A-14, Exh. R-3 at 1.)

---

brief (at 2) frames the issue as, "Did the Respondent remove Appellant from management service (terminating his employment) consistent with ORS 240.570(3) and ORS [240.]560(4)?" We address both statutes below, but also note that ORS 240.570(3) was not specifically referenced in RM's appeal or post-hearing brief.

[2]When this order cites a particular time of day (*e.g.*, 9:30 a.m.), the order is referring to the time that a statement was made during the March 22, 2022 hearing as indicated by the For the Record (FTR) audio recording of the same (in the *.trm file format that is normally used by the Board). When the order simply cites a time without an a.m. or p.m. (*e.g.*, 3:26:41), the order is referring to the (*.m4a) backup recording that was generated by Zoom. That distinction is necessary here because, due to an unfortunate technical issue, two portions of the FTR audio recording are unavailable. The first gap in the FTR audio ranges from 9:35 a.m. (the break before Dr. Melissa Sutton's testimony) to 10:42 a.m. (near the very end of Dr. Sutton's testimony). The second gap ranges from 1:02 p.m. (the break before Kennith Jeske's first round of testimony) to 1:11 p.m. (near the beginning of Jeske's initial direct examination). In the Zoom backup recording, the first of those FTR gaps corresponds with approximately 00:34:17 to 01:31:47, while the second corresponds with approximately 03:26:27 to 03:30:26. Regrettably, significant portions of the Zoom backup recording are also fairly difficult to understand, so we cannot exclusively rely on the Zoom recording. However, the two alluded-to portions of the Zoom recording (though less than ideal) are sufficiently clear and understandable. Accordingly, when the FTR and Zoom recordings are combined as detailed above, it amounts to a complete and intelligible recording of the entire March 22, 2022 hearing. Both recordings were made available to the parties shortly after the hearing.

[3]All of the parties' exhibits were admitted. (9:03-9:04 a.m., 3:12 p.m., 5:48 p.m.) On or around March 28, 2022, the DOC uploaded a full copy of Exh. R-7 to the Board's online case management system as requested by RM during the hearing.

4. In total, RM worked for the DOC for nearly 26 years before his dismissal. (4:11 p.m., Exh. R-7 at 1.) During that period, RM consistently received positive annual performance evaluations from his superiors and repeatedly exceeded their expectations. (4:54-4:59 p.m., Exhs. A-14 through A-25.) Further, outside of RM's failure to fully comply with Executive Order (EO) 21-29 and the related policy (which are detailed below), RM did not engage in any other misconduct or insubordination. (9:04 a.m., 2:01-2:03 p.m.)

5. The Correctional Lieutenant position is a "Management Service – Supervisory" position, and is not represented by a labor organization. (3:26 p.m., Exh. R-7 at 7.)

6. The primary responsibilities of a Correctional Lieutenant "are to assign, supervise, direct and instruct subordinate Security staff in the completion of required duties, responsibilities, and tasks and to assist in the management of the total security operation." A Correctional Lieutenant is also "expected to recognize their responsibility to act ethically at all times in accordance with the highest standards of integrity." (Exh. R-1 at 1.) Additionally, all DOC managers are responsible for upholding the law and the policies and procedures of the State and the DOC, and for ensuring that their subordinates do the same. (5:22-5:23 p.m.)

7. DOC employees must comply with the DOC's Code of Conduct. Among other things, that Code of Conduct requires employees to follow the DOC's Code of Ethics, which RM signed on multiple occasions during his tenure. (2:01 p.m., 3:40 p.m., 4:16-4:18 p.m., Exh. A-6.) The Code of Ethics states, in relevant part, that each DOC employee will protect "the safety and welfare of the public." (Exh. A-1.) That reference to "the public" includes, among others, the adults in custody who live in the DOC's facilities. (1:16-1:17 p.m.) The Code of Ethics also states, "I will be honest and truthful. I will be exemplary in obeying the law, following the regulations of the department, and reporting dishonest or unethical conduct." (Exh. A-1.) Those "laws" alluded to in the Code of Ethics include, among other things, a Governor's EOs. (1:16-1:18 p.m., 1:22 p.m., 1:52 p.m.) Submitting "false documentation" to the DOC would also have violated the Code of Ethics. (3:40-3:41 p.m.)

Chronology of Events

8. During the COVID-19 pandemic, which started in/around early 2020, DOC employees (including RM) have regularly used facemasks and other protective equipment and practiced social distancing when possible. Further, DOC employees have regularly had to work with adults in custody with COVID-19. (4:25-4:32 p.m., 5:44-5:45 p.m.)

9. In March 2020, RM contracted COVID-19 and promptly informed the DOC of that fact. (4:23-4:25 p.m., Exhs. A-8 through A-10.)

10. On October 20, 2020, RM was awarded 40 hours of leave in recognition of the service that he provided the DOC during 2019 and 2020. (4:55-4:56 p.m., Exh. A-16.)

11. On December 17, 2020, RM completed online training concerning COVID-19 and how it impacted the DOC. (Exh. R-4 at 1.)

12. On August 10, 2021, Governor Kate Brown sent an email to all of the State's Executive Branch employees. In that email, Governor Brown announced that all Executive Branch employees were being required to be fully vaccinated against the COVID-19 virus "by six weeks from the date that the U.S. Food and Drug Administration (FDA) fully approves a vaccination against COVID-19, or by October 18, whichever is later." The email also stated, "Employees unable to be vaccinated due to disability or sincerely held religious belief will be able to qualify for an exception, as required by state and federal law." After that, the email stated, "Those who do not comply with the vaccination requirement will face personnel consequences up to and including separation from employment." (Exh. R-8.)

13. On August 13, 2021, Governor Brown signed EO 21-29, which went into effect the same day and, by its terms, would remain so "until terminated by the Governor." (Exh. R-5 at 6.) In sum, the EO required all Executive Branch employees to either: (1) be "fully vaccinated" against COVID-19 on or before October 18, 2021, or six weeks after a COVID-19 vaccine received full approval from the US [FDA], whichever is later; or (2) request an exception from the vaccine requirement by October 18, 2021 based on the employee's disability, qualifying medical condition, or sincerely held religious belief.[4] Under the same EO (in its "Prohibitions" section), employees who did not get vaccinated or request an exception by the time prescribed in the EO were prohibited from engaging in work for the Executive Branch, and the Executive Branch was likewise prohibited from permitting such employees from engaging in work for the Executive Branch. The EO also stated, "Employees who fail to comply with this directive will face personnel consequences up to and including separation from employment." (Exh. R-5 at 3-5.) The EO did not compel adults in custody to be vaccinated. (1:38 p.m.)

14. The DOC can use a variety of disciplinary tools to manage its employees, including verbal coaching, a letter of expectation, a written reprimand, and dismissal/termination. The DOC generally uses progressive discipline when deemed appropriate. Under that approach, the level and severity of discipline that the DOC uses should generally depend on a variety of factors such as whether an employee has previously been disciplined and the egregiousness of an employee's action. In addition, the DOC considers how similarly situated employees were treated. (2:05-2:06 p.m., 2:39-2:40 p.m., 2:49-2:51 p.m., 3:03-3:04 p.m.)

15. When RM first read the part of EO-21-29 that warned of "personnel consequences up to an including separation from employment," RM assumed that the DOC would "look at the totality of the circumstances" as usual, and believed that there was "no way" that the DOC would "even consider" firing him. At the time, RM also thought that Governor Brown was "trying to push the envelope to get people as vaccinated as possible," and he assumed that, once a high enough percentage of employees were vaccinated, Governor Brown would "go back" on her mandate. (4:33-4:34 p.m., 5:19 p.m.)

[4]The EO specified that being fully vaccinated "means 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." (Exh. R-5 at 3.) It also stated that nothing in the EO prohibited entities within the Executive Branch from implementing requirements that exceeded the EO's requirements. (Exh. R-5 at 5.)

16. On August 23, 2021, the FDA fully approved the Pfizer COVID-19 vaccine. (Exh. R-9 at 1, Exh. R-10, Exh. R-11 at 5.)

17. On August 24, 2021, State Chief Operating Officer and DAS Director Katy Coba sent an email to all Executive Branch employees. The email noted the recent FDA approval, and then explained that, because of that approval and the timeline outlined in the EO, the deadline for employees to be fully vaccinated was October 18, 2021. The email also urged employees to "take urgent action in order to meet this deadline." (Exh. R-9.)

18. DAS, like all other Executive Branch agencies, was responsible for implementing EO 21-29. (9:17 a.m., 2:18-2:19 p.m.) To that end, on August 25, 2021, Chief Human Resources Office (CHRO) Policy 50.000.03 went into effect. (Exh. R-6 at 1.) In essence, CHRO Policy 50.000.03 reiterated the directives of EO 21-29. (9:20-9:21 a.m., 9:31-9:32 a.m.) Among other things, the Policy stated, "Individuals not fully vaccinated, or who do not have a written request for or approved exception for medical or religious reasons after October 18, 2021, will face personnel consequences up to and including separation of employment." (Exh. R-6 at 1.) The Policy was developed directly from the EO. (9:21 a.m.)

19. On August 25, 2021, Director Coba sent another email to all Executive Branch employees. Among other things, the email detailed the process for providing proof of vaccination or requesting an exception via Workday (the State's online human resources [HR] information system) and provided a number of related weblinks. The email also described three "Tasks." Task One required employees to acknowledge reading EO 21-29 and the related CHRO Policy 50.000.03. Task Two involved uploading vaccine card information or requesting an exception to the vaccine mandate. Task Three involved uploading a proof of vaccination document. (10:54 a.m., 2:31-2:34 p.m.) The end of the email stated, "If you have questions about this process please contact your agency [HR] professionals." (Exh. R-10.)

20. On August 26, 2021, DOC Deputy Director Heidi Steward sent an email to all DOC employees as a follow-up to Director Coba's August 25, 2021 email. In sum, Steward's email clarified the DOC's expectations for employees regarding the COVID-19 vaccination process and gave related guidance and weblinks. The email also specifically asked employees to send an email to DLDOCCOVIDVaccinationTeam@doc.state.or.us if they had any questions. (2:20-2:25 p.m., Exh. R-11.) Afterward, a number of employees did send emails to that address with a variety of questions and comments. Many of those emails included identical language (that was also identical to the "Comment" that RM submitted via Workday on October 17, 2021, which is described below). In general, the DOC's responses to those emails referred employees back to EO 21-29, clarified that the DOC had to adhere to and implement the EO, and referred workplace safety questions to OSHA and SAIF (a workers' compensation provider). (2:25-2:29 p.m.)

21. On September 21, 2021 (after the State bargained the impacts of EO 21-29's vaccine mandate with a number of labor organizations), DAS Chief HR Officer Madilyn Zike issued a memorandum stating that CHRO Policy 50.000.03 was being updated via an addendum. One aspect of that addendum allowed employees who experienced adverse reactions to being vaccinated and were unable to work to use paid leave for that. The memorandum also indicated that the amendment would be "in effect through June 30, 2022 or until [EO] 21-29 is lifted,

whichever is later." As originally issued, CHRO Policy 50.000.03 did not include a termination date. The memorandum was later updated on October 1, 2021. (9:15 a.m., 9:23 a.m., Exh. R-6 at 3-5.)

22. On September 30, 2021, DAS Director Coba sent another email to all Executive Branch employees that included a variety of additional information and weblinks concerning the COVID-19 vaccine mandate. (Exh. R-12.) On October 6, 2021, Coba sent a follow-up email to Executive Branch employees. Among other things, the October email noted that employees should contact CHRO.covid-19@oregon.gov with any questions. (Exh. R-13 at 1.) Carol Williams, a HR Consultant 2 for DAS' Chief HR Office, was responsible for monitoring the inbox for that email address. (10:50-10:51 a.m., 10:58-11:00 a.m.)

23. Robert Corey Fhuere is currently the Superintendent of the Oregon State Penitentiary. He has had that role since February 1, 2022. Fhuere was previously appointed Acting Superintendent in mid-August 2021. (12:32 p.m.) When Fhuere started working for the Oregon State Penitentiary in 2021, RM was working "first shift" (which is outside of normal business hours) as the "officer-in-charge" and RM indirectly reported to Fhuere through the chain of command. (12:33-12:34 p.m.)

24. At some point in mid-September to early October 2021, RM, then-Acting Superintendent Fhuere, and others attended a "captains and lieutenants meeting." During that meeting, attendees discussed their thoughts and feelings about "the validity" and "the pros and cons" of EO 21-29's COVID-19 vaccine mandate. RM expressed to the attendees that he was concerned about the EO's mandate. During the same meeting, Fhuere made it clear that the attendees needed to follow the EO whether someone agreed with it or not. (12:34-12:38 p.m., 12:43-12:45 p.m., 12:46 p.m., 1:01 p.m.)

25. In general, whenever then-Acting Superintendent Fhuere discussed EO 21-29 with managers, Fhuere directed them to be empathetic, respectful, and supportive with staff concerning their personal beliefs and choices, and to share the EO mandate. (12:41-12:42 p.m.) When RM's subordinates approached RM with questions about their obligations under the EO's COVID-19 vaccine mandate, RM walked them through the three Workday Tasks. (5:21-5:22 p.m.) RM never encouraged an employee not to submit any documentation. (5:43-5:44 p.m.)

26. On October 6, 2021, then-Acting Superintendent Fhuere wrote a letter of recommendation on RM's behalf. (Exh A-27.) When Fhuere wrote the letter, Fhuere assumed that RM would voluntarily seek other employment if RM decided not to get vaccinated. (12:39-12:40 p.m., 12:43 p.m., 1:02 p.m., 3:53 p.m.) In addition, when RM discussed this matter with Fhuere (before Fhuere wrote the letter), RM told Fhuere that he did not intend to be vaccinated against COVID-19 until there was significant evidence that the vaccines were safe. (5:02 p.m.) At the time, however, RM did not yet know whether he would be looking for work elsewhere. (5:39 p.m.)

27. On October 15, 2021, DOC Assistant Director of Operations Rob Persson (who did not testify) wrote RM another letter of recommendation upon request. When RM asked Persson to write this letter, Persson was aware that RM did not intend to get vaccinated against COVID-19.

RM asked Persson for a letter of recommendation around the same time that RM asked Fhuere for the same. (5:00-5:01 p.m., Exh. A-28.)

28. At some (unknown) point, RM discussed COVID-19 vaccines with his doctor, conducted his own research, and considered the experiences of some of his family members. Eventually, RM decided that the vaccines were inappropriate and unsafe for him. However, RM did not believe that he had a qualifying medical exception that would allow him to be exempt from the vaccine mandate. RM also did not have a religious reason for not being vaccinated. (4:15-4:16 p.m., 4:20 p.m., 5:28 p.m., 5:38 p.m.) (The record does not specify when or how frequently RM spoke with his doctor.)

29. RM has "grave concerns" about COVID-19 vaccines and their medical impact on him. According to RM, a COVID-19 vaccine is a "risky," "experimental medication" that will permanently change his DNA "in an unknown way," and does not stop him from getting or transmitting COVID-19. Another concern is that RM would develop myocarditis, which RM's sister developed within two weeks of receiving a vaccine. RM is also concerned by RM's father-in-law being diagnosed with four different types of cancer within 30 days of receiving a vaccine. Additionally, RM contends that, because of his age, he is in the second-highest risk category for "dying or having some type of adverse, serious reaction" that would affect him permanently and stop him from doing his job. (4:19-4:22 p.m., 4:39 p.m., 5:28-5:31 p.m.) RM also believes that a COVID-19 vaccine is a risk to a large majority of the public, DOC employees, and adults in custody. (5:24-5:25 p.m.)

30. On October 17, 2021 (the day before EO 21-29's vaccination deadline), at 9:44 p.m., RM indicated via an electronic signature in Workday that he acknowledged that he had read and understood the information in CHRO Policy 50.000.03, thereby completing Task One. However, RM never completed Task Two or Task Three. (2:31-2:34 p.m., 2:54 p.m., 4:19 p.m., 4:38-4:39 p.m., 5:22 p.m., Exh. R-7.) The same day, RM also submitted a lengthy "Comment" with questions and concerns via a "comment box" in Workday. Therein, RM wrote that he had completed Task One "under duress," noted that he did not "agree with" the EO or CHRO Policy 50.000.03, asked for a variety of information and assurances, and clarified that he was unvaccinated. (4:40-4:42 p.m., Exh. A-26.) Elsewhere in the Comment, RM specifically wrote,

> "7. Once I receive the above information in full and I am fully satisfied that there is no threat to my health, I will accept your offer to receive the vaccine, but with certain conditions, namely that:
> "1. You confirm, in writing, that I will suffer no harm.
> "2. Following acceptance of this, the offer must be signed by a fully qualified doctor whom will take full legal and financial responsibility for any injuries occurring to myself.
> "3. In the event that I should have to decline the offer of vaccination, please confirm that it will not compromise my position and that I will not suffer prejudice and discrimination as a result?"

(Exh. A-26 at 2.)

31. DAS also received concerns from other Executive Branch employees that resembled those in RM's Workday Comment. When DAS received such concerns from other employees, DAS generally referred the employees to the employee's medical provider or attorney. Further, in DAS' view, these concerns did not justify an exception to the EO's policies or process. (11:03-11:04 a.m.) However, neither DAS nor the DOC actually responded to or read RM's Workday Comment before RM's December 27, 2021 dismissal. (2:51-2:54 p.m., 4:42 p.m.)

32. On October 19, 2021, at 3:47 p.m., RM sent an email to DOC Assistant Superintendent of Security Brian Stephen (who oversaw the Captains and Lieutenants at Oregon State Penitentiary at the time) and DOC HR Manager Debbie Navarro. The beginning of RM's email stated, "Been a hell of a day for you all. For me, it has been terrific, freeing even." After that, RM wrote that he had not yet "received any official notice of being duty stationed at home or instructions on what to do or not to do." RM also wrote that he suspected that he would be duty stationed at home starting that day, and that accordingly he would not be reporting for duty that night. (Exh. A-11.) At the time, RM understood that he could be dismissed/terminated for failing to fully comply with the EO, but he still wanted to continue working for the DOC. (5:33-5:37 p.m., 5:45-5:47 p.m.)

33. At 4:50 p.m. on October 19, 2021, RM was placed on "administrative leave without pay pending an investigation" and duty stationed at home for his failure to comply with EO 21-29 and CHRO Policy 50.000.03. The letter informing RM of that action was signed by DOC Assistant Director of Employee Services Gail Levario, and was hand delivered to RM. (Exh. R-1 at 2, Exh. R-14.) The October 19, 2021 letter was a "template document" that was delivered to the multiple employees who allegedly were not in compliance with the EO by the October 18, 2021 deadline. (1:45 p.m., 2:34-2:35 p.m.)

34. On October 20, 2021, the DOC electronically posted a job opening for a Correctional Lieutenant position at the Columbia River Correctional Institution in Portland, Oregon. The posting itself did not specify that an applicant needed to be vaccinated against COVID-19. Nevertheless, at the time, all Executive Branch employees needed to be vaccinated or be granted a religious or medical exemption before starting employment. (2:44-2:47 p.m., 3:08-3:09 p.m., 4:52-4:53 p.m. Exh. A-13.) The job posting also stated, in part, "To apply you must be a current employee with the Oregon Department of Corrections, Oregon Corrections Enterprises, or Board of Parole." (Exh. A-13 at 2.) Relatedly, CHRO Policy 50.000.03 provides, "Individuals hired after October 18, 2021, are required to be fully vaccinated upon hire, unless granted an exception for medical reasons or a sincerely held religious belief." (Exh. R-6 at 2.)

35. On October 21, 2021, HR Investigator Alex Fox (of the DOC's HR Division) was assigned to conduct an "administrative investigation" into DOC employees, including RM, who had allegedly failed to comply with EO 21-29. (Exh. R-15 at 1.) Around that time, RM retained Tony L. Aiello, Jr. as an attorney and informed the DOC of that fact. (5:05 p.m.) RM was not given an "employee notification form" before Fox investigated him. However, that form is not strictly required by DOC policy. (3:30-3:32 p.m., 4:46-4:48 p.m.)

36. On October 25, 2021, an "investigatory meeting" was held, via a telephone call, to afford RM an opportunity to respond to the charges against him and provide additional

information. The meeting was attended by RM, Aiello, HR Investigator Fox, and Senior Assistant Attorney General Brena Lopez of the Oregon Department of Justice (DOJ). During the meeting, RM stated that he was aware of EO 21-29 and CHRO Policy 50.000.03, and that he had complied with Task One. RM also stated that he was not "refusing to be vaccinated," but otherwise clarified that he "was not willing to be vaccinated," that he did not feel that it was "appropriate" for him to be vaccinated at that time, that he was unvaccinated, and that he had not requested an exception to the vaccine mandate. In addition, RM stated that he had "natural immunity" to COVID-19, and was willing to continue wearing an N95 mask to perform his work duties "just as the unvaccinated and people with exemptions do." (11:20 a.m., 1:55 p.m., 4:32 p.m., 4:46 p.m., Exh. R-1 at 2-3, Exh. R-15 at 2.)

37. The term "natural immunity" generally refers to the kind of immunity that an individual acquires after surviving a COVID-19 infection. "Vaccine-related immunity" is specifically derived from being vaccinated against COVID-19. (00:54:30-00:57:41, 1:24:47-1:25:44.) The language of EO 21-29 and CHRO Policy 50.000.03 does not include an exemption for employees who have developed natural immunity. (5:17 p.m.)

38. On October 22, 2021, DOC HR Investigations Administrator Eric Jaroch (who had held that position since mid-May 2021) sent RM an email stating, in relevant part,

> "It is my understanding one of the HR Investigators called you a little bit ago and you stated you wanted a 24-Hour notice prior to speaking with him. As a lieutenant there is no contractual obligation to provide you with a 24-Hour notice.
>
> "You are currently under investigation to determine if you failed to comply with [EO] 21-29. Per DAS Policy 70.000.10, you are entitled to an attorney or management representative to be present with you during your interview. In order to give you time to arrange for one of those, if you desire, I am letting you know that an investigator will call you at 1030 AM on Monday, October 25, 2021."

(Exh. A-4.)

39. On October 25, 2021, HR Investigator Fox spoke with RM as part of his investigation of RM. Later the same day, Fox completed a written Investigatory Report in which Fox concluded that the DOC's allegation that RM had failed to comply with EO 21-29 was substantiated. The Report was signed by Fox as well as HR Investigations Administrator Jaroch, who approved the document. (Exh. R-15.)

40. On November 23, 2021, the DOC issued RM a letter providing him notice of a December 6, 2021 "pre-dismissal meeting." According to the letter, that meeting would provide RM with the opportunity to present information to refute the DOC's factual findings and/or present mitigating circumstances establishing that he should not be dismissed from state service. The letter also stated that the "grounds" for RM's potential dismissal were "misconduct, insubordination, or other unfitness to render effective service" under ORS 240.570(3). Elsewhere, in an area describing the "charges" being brought against RM, the letter stated, "You have failed to comply with the Governor's [EO] 21-29 and CHRO Policy 50.000.03 requiring you to provide proof of

vaccination and/or request an exception due to a medical condition or sincerely held religious belief on or by October 18, 2021." The letter further warned, "If true, the charge above may be grounds for dismissal from state service." (Exh. R-1.) The November 23, 2021 letter was ultimately signed and issued by the DOC's Westside Institutions Administrator, Kennith Jeske, after he conducted his own review. However, the letter was actually written by HR. (1:24-1:25 p.m., 1:50-1:51 p.m., 2:14 p.m., Exh. R-1 at 3.)

41. CHRO Policy 70.000.02, which addresses the procedures normally involved in "Management Service Discipline and Dismissal," specifically describes a pre-*disciplinary* meeting rather than a pre-*dismissal* meeting. (12:55-12:56 p.m., Exh. A-2.) The meeting mentioned in the November 23, 2021 letter was intentionally characterized as a pre-dismissal meeting to make it clear to RM that, at the time, dismissal was specifically being considered. However, before the pre-dismissal meeting occurred, no final decision regarding whether to dismiss RM had been made, and mitigating information could still have been presented and considered (*e.g.*, a vaccination card or documentation justifying an exception). In practice, when less severe discipline is being considered, the meeting is called a pre-disciplinary meeting. (1:13-1:14 p.m., 1:26-1:27 p.m., 2:37-2:39 p.m., 3:01-3:02 p.m.) CHRO Policy 70.000.02 otherwise states, "An Oregon state government employee in management service is subject to disciplinary action up to and including dismissal from state service if the employee is unwilling or unable to fully and faithfully perform the duties of the position." (Exh. A-2 at 1.)

42. On December 6, 2021, RM's pre-dismissal meeting was held as scheduled at the Oregon State Penitentiary. Present during that meeting were RM, Aiello (again, RM's attorney), then-Acting Superintendent Corey Fhuere, HR Manager Navarro, Assistant Superintendent of Security Brian Stephen, Senior Assistant Attorney General Lopez, and Westside Institutions Administrator Jeske. During the meeting, RM stated that he had worked for the DOC for 26 years and had had no discipline during that period, that it was inappropriate for him to be vaccinated, that he could prove that he had natural immunity, that the DOC had not addressed the concerns and questions that RM had brought forward regarding the vaccine, that dismissal was a disproportionate response when compared with other discipline issued under different circumstances, and that he felt that he was being discriminated against because he refused to lie. (Exh. R-2 at 2-3.) RM also expressed that he was concerned about the validity of the EO, told the attendees that he was willing and able to faithfully and perform the duties of his position satisfactorily, and claimed that he was willing to continue working and wearing an N95 mask. (1:12 p.m., 1:21-1:22 p.m., 1:53-1:54 p.m., 4:32 p.m., 4:49 p.m.) RM never indicated that he was willing to come into compliance with the EO "within a time certain" during the meeting. However, RM did state that he had not been provided any information that would change his mind about getting vaccinated. (5:40-5:41 p.m.) During the same meeting, Jeske told RM that the DOC was bound by what the EO says, and that the only barrier to RM continuing to work for the DOC was the EO. In addition, Jeske or another attendee suggested that, if RM got dismissed, RM's "employment file" would state that RM was terminated for RM's refusal to follow the EO. (1:19-1:21 p.m.) By the end of this meeting, RM believed that the DOC intended to dismiss him. (4:35 p.m., 4:48-4:50 p.m.)

43. On December 16, 2021, RM sent an email to HR Manager Navarro. The email stated, in part, "I am filing a formal workplace harassment complaint with you. The complaint,

Attachment 'A', and a witness statement are attached to this email." (Exh. A-3 at 3.) The attached complaint specifically concerned the numerous EO-related emails RM started receiving on August 10, 2021 (that RM now claims "intimidated, extorted, and harassed" him) as well as related manager meetings that RM attended. (5:19 p.m., 5:42-5:43 p.m.)[5] Later that day, Navarro forwarded RM's email and the attached complaint to HR Investigations Administrator Jaroch. (11:18 a.m., 11:22 a.m., Exh. A-3 at 2-3.)

44. On December 21, 2021, at 7:56 a.m., HR Investigations Administrator Jaroch sent an email to HR Consultant 2 Williams and Heath Lawson, stating, "I'm looking for some guidance on whether the attached complaint should be referred to CHRO, or whether you can help me craft an appropriate response." (Exh. A-3 at 2.) Lawson is also a HR Consultant 2, and works on the CHRO Investigations Team. (11:02 a.m.)

45. At 8:32 a.m. on December 21, 2021, Lawson responded to Jaroch's email, writing, in part,

> "I don't think there is an investigation to be done. The separation process related to the EO does not violate our harassment and discrimination policy. Unless he is saying he is being let go or told he mus[t] get the vaccine because of his protected class, which we know is not the case because it applied to all state employees. His complaint is against, at least in part against Katy Coba which we at CHRO report to through Madalyn [sic] Zike. It would be inappropriate for us to do the investigation. We would have to pass it to DOJ. But again I don't think one is warranted."

(Exh. A-3 at 1-2.)

46. At 8:58 a.m. on December 21, 2021, Williams sent a follow-up email to Lawson and Jaroch. It stated, "I don't for these types of complaints. It would probably be good to run by DOJ, though, since [Senior Assistant Attorney General] Brena [Moyer Lopez] is talked about in the attorney letter." Less than a minute later, Jaroch responded to Williams and Lawson, writing, "Thank you both for your input. I'll send it to DOJ to get their thoughts." (Exh. A-3 at 1.)

47. On December 27, 2021, RM was hand delivered a letter formally dismissing him from state service, effectively immediately, for the stated grounds of "misconduct, insubordination, or other unfitness to render effective service" under ORS 240.570(3). The same dismissal letter also concluded that RM had failed to comply with EO 21-29 and CHRO Policy 50.000.03. After that, the letter concluded that, in light of RM's representation that he did not intend to comply with the vaccine requirement, progressive discipline would not impact RM's compliance and would therefore be inappropriate. (Exh. R-2.)

---

[5]Copies of the alluded-to complaint and its affiliated witness statement are not included in the record. During the hearing, RM testified that he does not believe that people who are unvaccinated are a "protected class" under the State's "Harassment and Discrimination Free Workplace Policy" (a copy of which is not included in the record). However, RM also testified that he does believe that he should be free from being intimidated and forced to have to do something against his will. (5:18-5:21 p.m.)

48. Westside Institutions Administrator Jeske did not write RM's December 27, 2021 dismissal letter. However, Jeske did sign the letter and also made the "final decision" to dismiss RM after reviewing EO 21-29, the dismissal letter, the evidence presented, and the multiple disciplinary options available to him. (12:40 p.m., 12:46 p.m., 1:25 p.m., 1:56-1:59 p.m., 2:04-2:07 p.m., 2:10-2:11 p.m., Exh. R-2 at 4.)[6]

49. According to Jeske, when RM was dismissed, dismissal was the only level of discipline that could have been used given the language of EO 21-29 and the circumstances presented at that time. Furthermore, in Jeske's view, RM's lengthy employment with the DOC and RM's lack of prior discipline were not compelling factors because they were not "components" of EO 21-29. (1:14 p.m., 1:20 p.m., 2:04-2:09 p.m.) Nevertheless, as indicated, during RM's pre-dismissal meeting, Jeske did hear RM mention that he had worked for the DOC for 26 years without being disciplined, and that, in RM's view, dismissal was a disproportionate response. Moreover, Jeske "carefully considered" all of the reasons that RM gave for why RM did not want a COVID-19 vaccine (including RM's assertions that RM had natural immunity) as well as RM's perception that he was being dismissed for refusing to lie. (2:07-2:11 p.m., 3:42 p.m., Exh. R-2 at 3.)

50. Jeske did not review RM's Workday Comment before RM's dismissal, and did not review any audio of the October 21, 2021 investigatory meeting (which Jeske did not attend) or read the affiliated Investigatory Report. Nevertheless, before RM's dismissal, Jeske did learn about what happened during the investigatory meeting through a discussion with an "HR manager." (1:53-1:56 p.m., 2:09-2:10 p.m.)

51. On January 18, 2022, HR Investigations Administrator Jaroch sent an email to RM. Among other things, Jaroch's email acknowledged receipt of RM's December 14, 2021 workplace harassment complaint. (Exh A-5.) Jaroch intended the email to convey that the DOC would not be investigating RM's complaint further. But Jaroch's email did not actually state that because Jaroch forgot to include such language. (11:23-11:26 a.m., 11:32 a.m., 4:36 p.m.) The email also did not mention CHRO Policy 50.000.03 or RM's failure to submit documentation as required by EO 21-29. (3:28-3:29 p.m.) However, Jaroch's email did state,

> "As you know, ODOC employees[] were required to follow [EO] 21-29. We understand and appreciate that you have objections regarding the vaccination requirement outlined in the EO, but ODOC Employees were given clear directives regarding the vaccination requirement and the options for seeking permissible exceptions."

(Exh. A-5.)

52. Within one to two weeks after RM received Jaroch's January 18, 2022 email, RM spoke with Jaroch about that email on the telephone. During that call, RM asked Jaroch for clarification regarding the January email. In response, Jaroch confirmed with RM that the DOC

[6]Superintendent Fhuere testified that he believed that the final decision to dismiss RM was made by the "central office and [HR]," and that Westside Institutions Administrator Jeske is considered part of the "central office." (12:40 p.m., 12:46-12:47 p.m., 3:34-3:37 p.m.)

was not going to investigate RM's harassment complaint. Jaroch also suggested that RM speak with DAS and/or the DOJ. (11:26-11:28 a.m., 11:32 a.m., 4:37-4:38 p.m.)[7]

53. The level of discipline that the DOC used for employees who violated EO 21-29 was determined on a case-by-case basis. DOC has 4,600 to 4,700 employees in total. Of that total, 16 employees were dismissed/terminated for failing to comply with the EO. Of those, 2 were management service and 14 were represented by a labor organization. Other DOC employees who had started the process of compliance by getting the first vaccination, but had not yet received the second as of October 18, 2021, ultimately only received a letter of reprimand or a "salary sanction" for their violations. (12:49-12:52 p.m., 12:59 p.m., 1:19 p.m., 1:29-1:32 p.m., 2:05-2:06 p.m., 2:40-2:44 p.m., 2:55-3:00 p.m., 3:04-3:05 p.m.)

54. In the past, DOC employees have been terminated for failing to comply with the Code of Conduct and the Code of Ethics, and for insubordination and misconduct. Common reasons for terminating a DOC employee for insubordination include not following the directives of a supervisor, not showing up to work, and disobeying/refusing to comply with a lawful/valid order. Common reasons for terminating a DOC employee for misconduct include sexual relations with an adult in custody, violating a law, getting arrested, falsifying or lying about documentation, being hostile at work, excessive or unauthorized use of force, choosing to not come in to work, and bringing contraband to work. (2:01-2:02 p.m., 4:02-4:04 p.m.)

55. On January 25, 2022, RM appealed his dismissal with the Board. Subsequently, Governor Brown announced that she would be lifting EO 21-29, effective April 1, 2022. (9:24 a.m., 12:56 p.m.) Within a week or two before the March 22, 2022 hearing for this case, DAS issued instructions regarding the re-employability of individuals who were terminated pursuant to EO 21-29. According to current DAS policy, individuals who were terminated for failing to comply with the EO did not leave in "good standing" and, for that reason, cannot be reemployed. (9:25-9:26 a.m., 12:56-12:58 p.m., 2:03-2:04 p.m., 2:48-2:49 p.m., 3:09-3:11 p.m.)[8]

CONCLUSIONS OF LAW

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

2. The DOC did not violate ORS 240.560(4) when it removed RM from management service and dismissed him from state service.

---

[7]Jaroch testified that he did not recall telling RM during this telephone call that the DOJ had instructed Jaroch not to investigate RM's workplace harassment complaint. (11:27-11:28 a.m.) Later, RM testified that, during the call, Jaroch told RM that the DOJ had told Jaroch not to investigate RM's harassment complaint. (4:37-4:38 p.m.) Resolving that dispute is not critical to our analysis.

[8]The record does not indicate that RM has reapplied. Relatedly, in his post-hearing brief (at 22) RM contends that the State is currently hiring unvaccinated applicants. However, the evidence provided does not establish that fact.

Legal Standards

RM's appeal of his simultaneous termination and dismissal from state service was filed pursuant to ORS 240.560, which outlines the appeal procedure for Oregon's State Personnel Relations Law, all of which falls under ORS Ch 240. Before RM's dismissal, he was a management service employee. ORS 240.570(3) (which RM's dismissal letter listed as its "statutory grounds") provides that, after completing a trial service period, such an employee "may be disciplined by reprimand, salary reduction, suspension, or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." In relevant part, ORS 240.560(4) provides that, "if the Board finds that the [State's] action was not taken in good faith for cause, it shall order the immediate reinstatement and the reemployment of the employee in the position without the loss of pay." Under ORS 240.555, the employer "may suspend, reduce, demote or dismiss an employee thereof for misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service."

The employer has the burden of proof regarding both a dismissal from state service and a removal from management service. OAR 115-010-0070(5)(c); *Zaman v. State of Oregon, Department of Human Services*, Case No. MA-21-12 at 12 (April 2013) (citing *Greenwood v. Oregon Department of Forestry*, Case No. MA-3-04 at 28 (July 2006), *recons den* (September 2006)). To defend a dismissal from state service, the employer must establish that its action was taken "in good faith for cause." *Greenwood* at 28-29, 37; *Plank v. Department of Transportation*, Case No. MA-17-90 at 29 (March 1992). For an appeal of either a dismissal from state service or a removal from management service, the employer meets its burden if this Board determines, under all of the circumstances, that the employer's actions were "objectively reasonable." *W.M. v. State of Oregon, Oregon Youth Authority*, Case No. MA-003-21 at 14 (April 2022) (citing *A.D. v. State of Oregon, Department of Transportation*, Case No. MA-011-17 at 9 (March 2019)). In the appeal, RM ultimately argues that his removal from management service was not taken in good faith for cause. He also argues that the discipline imposed was unreasonable.

We have defined a reasonable employer as one that disciplines employees in good faith for cause, imposes sanctions that are proportionate to the offense, and considers the employee's length of service and service record. *Zaman* at 12 (citing *Smith v. State of Oregon, Department of Transportation*, Case No. MA-4-01 at 8-9 (June 2001)). A reasonable employer also administers discipline in a timely manner, clearly defines performance expectations, provides those expectations to employees, and tells employees when those expectations are not being met. In addition, a reasonable employer applies progressive discipline, except where the offense is so serious or unmitigated as to justify dismissal, or where the employee's behavior probably will not be improved through progressive measures. *Blank v. State of Oregon, Construction Contractors Board*, Case No. MA-007-14 at 12 (March 2015) (reconsideration order), *aff'd without opinion*, 277 Or App 783, 376 P3d 304 (2016) (citing *Nash v. State of Oregon, Department of Human Services*, Case No. MA-008-14 at 23 (December 2014)); *Petersen v. Department of General Services*, Case No. MA-9-93 at 10-12 (March 1994). Additionally, an employer may hold a management service employee to high or even very strict standards of behavior so long as those standards are not arbitrary or unreasonable. *Zaman* at 15 (citing *Jones v. Department of Transportation Highway Division*, Case No. MA-6-87 at 17 (May 1989)); *Lucht v. State of*

Oregon, Public Employees Retirement System, Case No. MA-16-10 at 24 (December 2011) (citing *Helfer v. Children's Services Division*, Case No. MA-1-91 at 22 (February 1992)).

When reviewing management service disciplinary appeals, we apply a two-step process. First, we determine if the employer has proven any of the charges that are the basis of the discipline. Notably, the employer need not prove all of the charges on which it relied in disciplining a management service employee or removing that employee from management service. If the employer proves some or all of the charges, then we apply the reasonable employer standard to determine whether the employer was justified in taking the disciplinary action that it did. If the employer's actions are not objectively reasonable, we will rescind or modify the discipline. *Nash* at 24-25; *Greenwood* at 30; *Patrick v. Department of Agriculture*, Case No. MA-2-91 at 12-14 (June 1991); *Reidy v. Oregon Government Ethics Commission*, Case No. MA-6-85 at 10 (August 1986).

DISCUSSION

Has the DOC proven any of its charges?

RM's dismissal letter, in a section describing the "charges" against him, specifically stated, "You have failed to comply with the Governor's [EO] 21-29 and CHRO Policy 50.000.03 requiring you to provide proof of vaccination and/or request an exception due to a medical condition or sincerely held religious belief on or by October 18, 2021." (Exh. R-2 at 3.) During the hearing for this case, RM repeatedly testified that he was not vaccinated and did not provide proof of a vaccination. He also repeatedly testified that he did not have a qualifying medical condition or relevant religious belief and did not request an exception under either category. (9:07 a.m., 4:13-4:14 p.m., 4:50 p.m., 5:22-5:23 p.m., 5:38 p.m., RM brief at 2.) Moreover, according to RM's appeal, RM "did not submit the required documentation within the proscribed time frame set for the by [EO] 21-29," and "chose not to be vaccinated." Under those circumstances, the DOC's central "charge" has been proven, and the first step of the Board's two-step analysis has been met.

RM's dismissal letter also stated that the "grounds" for his discipline were "misconduct, insubordination, or other unfitness to render effective service" under ORS 240.570(3). (Exh. R-2 at 1.) Upon review, we conclude that the DOC has proven those grounds as well. We have defined "misconduct" as "a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, unlawful behavior, *willful in character*, improper or wrong behavior. . . For purposes of ORS 240.555 'misconduct' involves intentional wrongdoing." *Greenwood*, at 30 (quoting *Schellin v. Department of Veterans' Affairs*, Case Nos. 1381/1384 at 13-14 (March 1981) (emphasis in original, citation omitted). We have defined "insubordination" as the refusal of an employee to obey the lawful order of a superior which the latter had the right to give. Moreover, the employee's refusal must be in willful defiance of authority. *Greenwood* at 31-33 (internal citations omitted); *Schellin* at 13-14 (1981) (internal citations omitted). Here, it is plain that, after much consideration, RM intentionally chose not to fully comply with EO 21-29. Further, as noted in his appeal, RM "is not disputing the constitutionality or validity of EO 21-29." To that extent, it is clear that RM willfully refused to obey a lawful rule/order, and accordingly engaged in

misconduct and insubordination. As explained below, we also conclude that RM was unfit to render effective service.

RM repeatedly argues that, in order to follow EO 21-29 and provide the required documentation, he would have had to lie and thereby violate the DOC's Code of Ethics that required him to "be honest and truthful." (9:07-9:10 a.m., 9:12-9:13 a.m., 4:14-4:16 p.m., 5:23 p.m.; RM brief at 2, 7-8.) Relatedly, in his appeal (at 10), RM also contends that, because RM agreed to the Code of Ethics 26 years ago, the Code of Ethics "is entitled to more respect than a newly enacted [EO]." We disagree. Notably, the EO specifically states, "Legal Effect. Pursuant to ORS 401.192(1), the directives set forth in this [EO] 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 [EO]." (Exh. R-5 at 5, emphasis in original.) Furthermore, the Code of Ethics required that RM be "exemplary" in following the law, which, according to the testimony provided, includes a Governor's EOs.

In the appeal, RM contends that he was actually terminated by his superiors "for their own personal objectives." Further, according to RM's testimony, RM does not "at all" believe that he was dismissed for the reasons stated in his dismissal letter. Instead, RM believes "that Governor Brown and the politicians around her had a very clear and specific mission to force everyone in state government that they could… in the executive body… to get the COVID-19 vaccine." RM also believes that unnamed individuals were "harassing" him and "headhunting, blackballing, and retaliating," and that Governor Brown, the State, the DOC were openly biased against unvaccinated people. (9:09-9:12 a.m., 01:23:07, 12:57 p.m., 5:03-5:06 p.m., 5:13-5:14 p.m., 5:45 p.m.) As examples of the alleged harassment, RM points to the November 23, 2021 letter giving RM notice of a pre-dismissal meeting, as well as the EO itself and the various emails related to it. In sum, we conclude that those positions are unsupported by the record.

RM's own testimony confirms that he was dismissed (at least in part) because, as RM put it, he "did not comply" and "was fighting this." (4:50 p.m., 5:04 p.m., 5:14 p.m., 5:16 p.m.) Regarding RM's allegation of widespread bias, other than RM's own testimony on the subject (5:12-5:14 p.m.), the rest of the record consistently disputes RM's position. *Inter alia*, that includes the relevant testimony of HR Investigations Administrator Jaroch, Chief HR Administrator Buffy Rider, Superintendent Fhuere, and Westside Institutions Administrator Jeske (who actually made the final decision to dismiss RM, not Governor Brown or a politician), all of whom flatly denied that there was any bias. (2:14-2:16 p.m., 2:23-2:24 p.m., 3:33 p.m., 3:56-3:59 p.m.) Moreover, it is undisputed that the DOC continues to employ unvaccinated employees, despite its alleged bias. (5:25 p.m.) We also note that, while objecting to Dr. Melissa Sutton (the Medical Director for Respiratory Viral Pathogens in the Public Health Division of the Oregon Health Authority) providing any testimony at all during the hearing, RM's attorney specifically argued that the reasoning behind CHRO Policy 50.000.03 and EO 21-29 is "immaterial to this case." (9:33-9:34 a.m.) Separately, we do not view Governor Brown's vaccine mandate or the related emails in the record (which notably were sent to all Executive Branch and/or DOC employees) as harassment. In addition, the pre-dismissal letter RM takes issue with was required by standard policy. Beyond that, it is not this Board's task to consider RM's harassment claim (which, in any event, was not included in the record).

RM separately provides a number of reasons why, in his view, full compliance with the EO was unnecessary in his case. For example, RM points out that he acquired natural immunity when he contracted COVID-19 in March 2020, and that he was using the appropriate protective equipment and social distancing around the time when he was dismissed and could continue to do so if reemployed. RM also contends that he would pose no greater risk than unvaccinated adults in custody or the unvaccinated people the DOC still employs who requested either a religious or medical exception. (9:31-9:32 a.m., 5:26 p.m.) However, natural immunity is appreciably different than vaccine-related immunity. Likewise, the two permitted exceptions were "required by state and federal law." (Exh. R-8.) The Governor's relationship with adults in custody is also categorically different than her relationship with DOC managers, who can always opt out as RM did. More fundamentally, neither RM nor this Board can simply rewrite or ignore the plain language of the EO or the related CHRO Policy 50.000.03 after an independent analysis (particularly when the validity of the two are purportedly not in question). Again, all DOC managers are responsible for following the law and the policies and procedures of the State and the DOC, including those at issue here. In the end, the EO and CHRO Policy 50.000.03 do not designate natural immunity or using protective equipment or social distancing as valid exceptions. (5:17 p.m.)

In his post-hearing brief, RM concludes that he was legally permitted to disobey EO 21-29 because it was "unsafe." (RM brief at 20-21.) However, given the limited evidence presented for that issue (essentially the testimony of Dr. Melissa Sutton and RM), we cannot reach the same conclusion. Critically, it is also unclear that RM made the same type of argument to the DOC's decision-makers before his dismissal. RM otherwise argues in his brief that he was "excused" from complying with EO 21-29 because RM was advised by his physician to not get the COVID-19 vaccine. (RM brief at 8, 14, 16, and 21). If that was indeed the case, it is unclear why RM could not have at least "requested" a medical exception in Workday as permitted by the EO (especially in light of RM's age and alleged risk level). We must also note that, during the hearing, RM specifically testified that he "discussed" the vaccine with his doctor, that he got an antibody test from his doctor (that showed that he did have antibodies), and that RM's doctor told RM "that the information is not complete yet to be able to identify the markers in each individual to be able to show who is at risk," that it is up to RM to make a "personal decision" about the vaccine's safety, and *that he did not recommend that RM get the vaccine because RM had natural immunity at the time*. (4:15 p.m., 5:17 p.m., 5:27-5:29 p.m.) More importantly, there is no clear indication that, before RM's dismissal, RM ever told the DOC's decision-makers about the specific medical advice alluded to in his brief.

Did the DOC act reasonably?

As indicated, in considering the appropriate level of discipline, we determine whether a level of discipline is objectively reasonable in light of all the circumstances. *Rodriguez v. State of Oregon, Department of Human Services*, Case No. MA-14-11 at 9 (July 2012) (quoting *Belcher v. State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. MA-7-07 at 20 (June 2008)). In dismissal cases, this Board has attempted to strike a balance between the severity of the discipline imposed and any extenuating circumstances, such as prior discipline, length of state service, whether the employee was warned, the magnitude of the action(s), and the likelihood of repeated misconduct. *Rodriguez* at 9 (citing *Smith* at 8-9); *Garrett v. Department of Human*

Services, Case No. MA-02-11 at 8 (December 2011). For the reasons detailed below, we conclude that the dismissal and removal at issue here were reasonable.

In this case, we recognize that, for RM, the DOC selected the most severe form of discipline available to it. We also recognize that RM worked for the DOC for nearly 26 years without any other discipline whatsoever, and that he has repeatedly exceeded his superiors' expectations during his tenure. On their own, and in other cases, those details might give us pause, given our expectation of progressive discipline. However, a removal from management service may be based on a single proven charge. *Plank* at 30 (citing *Shepherd v. Oregon Liquor Control Commission*, Case No. 1457 at 11 (June 1985)). Moreover, a "persistent refusal to obey legitimate orders" is considered one type of offense that may appropriately subject an employee to discharge, as it strikes at the fabric of the employer-employee relationship. *See Demaray v. Department of Environmental Quality*, Case No. MA-2-88 at 14 (February 1989) (citing Elkouri and Elkouri, *How Arbitration Works*, pp. 670-71 (4th Ed. 1985)). We conclude that RM's willful inaction in this case is analogous to such an offense. We also conclude that the DOC's decision-makers were made aware of RM's length of service and service record before the dismissal, that lesser forms of discipline were considered, and that RM understood EO 21-29 and CHRO Policy 50.000.03.

RM argues that, under EO 21-29 and CHRO Policy 50.000.03, a less punitive form of discipline could have been imposed (such as a temporary suspension) but that option was disregarded. He also argues that the DOC had decided from the beginning that termination was the only possible action for failing to follow the vaccine mandate. (9:10 a.m., 9:12 a.m.) However, significantly, under EO 21-29 (which remained in force when RM was dismissed), employees who did not get vaccinated or obtain an exception were *prohibited from engaging in work in the Executive Branch*, and *the Executive Branch was prohibited from permitting such employees from engaging in work for the Executive Branch*. In that way, the requirements of EO 21-29 and CHRO Policy 50.000.03 are more appropriately compared to, for example, the basic employment requirement that a Correctional Lieutenant be certified by the Oregon Department of Public Safety Standards and Training. (Exh. A-12 at 5, Exh. A-13 at 2.) Furthermore, because RM failed to comply with the EO, he could no longer pass an HR/background check, and to that extent was "unfit" to serve as a Correctional Lieutenant. (2:03-2:04 p.m., 3:10-3:11 p.m.) We also recognize that other employees who clearly indicated that they were willing to come into full compliance with EO 21-29 and CHRO Policy 50.000.03 received "an array" of lesser forms of discipline. (2:40-2:42 p.m.) That establishes that the DOC took a more nuanced approach to this issue than that which RM describes. Otherwise, there is no indication that the DOC treated other, similarly situated employees any differently than RM.

RM is correct that the language of EO 21-29 does not specifically state that noncompliant employees are prohibited "from being employed but not performing work." (9:26-9:27 a.m.) But it strikes us as unreasonable to require the DOC to continue to employ someone who cannot perform any work for the foreseeable future. Arguably, the DOC could have put RM on unpaid administrative leave until the emergency referenced in the EO ended. In our view, however, it does not make sense for the DOC to have done so here. Importantly, when the decision to dismiss RM was being made, there was no clear indication (at least according to the evidence presented in this case) that the EO would be lifted soon, or that RM was going to get vaccinated or request an exception in the foreseeable future. (9:18-9:20 a.m., 9:27 a.m.) To the extent that remote work

might have been an option, according to RM, a person in his former position cannot work from home. (4:31 p.m.) The Correctional Lieutenant position description likewise states, "Regular attendance is an essential function required to meet the demands of this job and to provide necessary services." (Exh. R-3 at 2.) Furthermore, working remotely would still be engaging in work for the Executive Branch, which was prohibited.

We also conclude, without difficulty, that lesser discipline probably would not have changed RM's behavior, as RM was put on clear notice that failing to comply with EO 21-29 and CHRO Policy 50.000.03 could result in termination and he opted not to do so anyway. *See Petersen* at 10-12 (employee reasonably terminated for absenteeism without prior formal discipline because employer had previously discussed issue with him and orally warned him that he could be terminated if absenteeism continued, which amounted to an oral reprimand). As noted above, RM initially believed that there was "no way" that the DOC would "even consider" firing him. But to read "up to and including dismissal" as anything other than a warning of dismissal strains credulity. Moreover, RM's own testimony confirms that RM was aware that the DOC intended to dismiss him for failing to comply as of his December 6, 2021 pre-dismissal meeting, and that RM was aware that he could be dismissed as of October 19, 2021. (4:45 p.m., 4:48-4:50 p.m.) RM's harassment claim likewise relies on the fact that the numerous messages that he received purportedly threatened him with termination. (9:09 a.m.) Further, as of the time of RM's termination, and even as of the hearing, RM clearly remained unconvinced of any COVID-19 vaccine's safety, and continued to conclude that he does not have a qualifying medical or religious exemption. Those circumstances give this Board no reason to believe that RM's behavior would change if we were to lower the level of discipline used here.

In his post-hearing brief (at 10), RM asserts that he would have been vaccinated if the questions in his Workday Comment had been answered. However, that assertion is unsupported by the evidence presented, and does not change the undisputed fact that RM did not fully comply with the EO or CHRO Policy 50.000.03 or begin the vaccination process by the October 18, 2021 deadline. Beyond that, in addition to asking questions, the Comment demands a number of significant assurances and extra steps in the process. It also appears that RM's questions were submitted just before the deadline, and that those questions were not sent to the specific email addresses that RM was directed to send them to in August and September 2021.

We further note that RM has never meaningfully shown any accountability for his failure to fully comply with EO 21-29 or CHRO Policy 50.000.03. During the hearing, RM testified that it was "asinine" and "crazy" that he had to appeal a dismissal, and described a COVID-19 vaccine as a "stupid shot." (4:39 p.m., 5:36-5:37 p.m.) In addition, RM has unambiguously stated that he does not "agree with" the EO or CHRO Policy 50.000.03, and testified that he "publicly" questions the Governor's motives on social media. (5:13-5:16 p.m., Exh. A-26.) As highlighted above, RM also claims that the Governor's EO is entitled to less "respect" than the DOC's Code of Ethics. Some level of skepticism about COVID-19 vaccines is acceptable, particularly if paired with full compliance with the EO. But such details, paired with noncompliance, leave little room for the State or the DOC to trust and have confidence in RM concerning this type of EO or similar mandates that may be issued in the future. *See E.A. v. Department of Corrections*, Case No. MA-006-19 at 29 September 2020) (in which a DOC manager twice referred to the DOC's investigatory interview as "asinine"); *Clinton v. State of Oregon, Oregon Military Department*, Case No. MA-

016-11 at 14-16 (June 2013) (in which properly dismissed manager did not accept responsibility for his actions or demonstrate that he was willing or able to make meaningful changes); *Poage v. State of Oregon, Department of Corrections*, Case No. MA-17-10 at 48-49 (April 2012) (progressive discipline not required where the DOC reasonably lost trust and confidence in a DOC manager who did not seem to understand the nature and seriousness of the misconduct and insisted that his actions should be excused or were not serious); *Lucht* at 24.

Conclusion

We conclude that the DOC proved all of its charges against RM. We also conclude that, in light of RM's actions and all other circumstances, the DOC acted reasonably in removing RM from management service and dismissing him from state service. Accordingly, the DOC did not violate ORS 240.560(4) as alleged in RM's appeal, and the removal and dismissal are affirmed. To the extent necessary, and for the same reasons, we also conclude that the DOC did not violate 240.570(3).

PROPOSED ORDER

The appeal is dismissed.

SIGNED AND ISSUED on July 15, 2022.

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. UP-005-20

(UNFAIR LABOR PRACTICE)

AFSCME COUNCIL 75, LOCAL 2503, Complainant, v. HOOD RIVER COUNTY (PUBLIC WORKS), Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On February 11, 2021, this Board issued an order holding that Hood River County (County) violated ORS 243.672(1)(g) when it terminated County employee CV without just cause in violation of the parties' collective bargaining agreement. On March 2, 2021, the County filed a petition for judicial review. Thereafter, the County and AFSCME Council 75, Local 2503 (AFSCME) filed a stipulated motion to dismiss the case. The court granted the motion and dismissed the appeal, with the appellate judgment effective on June 8, 2022. 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. AFSCME is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d); OAR 115-035-0055(1)(a). The prevailing party is "the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(d).

2. This case required one day of hearing, which was held August 21, 2020.

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 (the hearing need not last a full day). OAR 115-035-0055(1)(b)(C).

ORDER

The County shall remit $3,000 to AFSCME within 30 days of the date of this order.

DATED: August 8, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-003-20

(DUTY OF FAIR REPRESENTATION)

GAULT, Complainant, v. PORTLAND FIREFIGHTERS' ASSOCIATION, LOCAL 43 AND CITY OF PORTLAND FIRE AND RESCUE BUREAU, Respondents.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On June 1, 2022, this Board issued an order dismissing the complaint filed by Craig Gault (Complainant) against Respondents Portland Firefighters' Association, Local 43 (Association), and the City of Portland Fire and Rescue Bureau (City).[1] In doing so, we held that the Association did not violate ORS 243.672(2)(a) and its duty to fairly represent Complainant, when it refused to pursue Complainant's grievance to change his job classification's eligibility for certain overtime opportunities. 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. The Association 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). 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

[1]On September 24, 2020, the City moved to dismiss Complainant's claims against it; Complainant's response to the City's motion stated that he agreed with the City's motion, and, on October 9, 2020, the ALJ dismissed the City from this action before the hearing. 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 the Association, and did not make any such finding on the claims against the City, which were dismissed before hearing. Accordingly, we issue representation costs only to the Association.

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 Portland Firefighters' Association, Local 43 within 60 days of the date of this Order.

DATED: August 8, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-030-20

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION, Complainant, v. CLACKAMAS COUNTY, Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On June 6, 2022, this Board issued an order holding that Clackamas County violated ORS 243.672(1)(a) and (b) when it restricted the president of Clackamas County Employees' Association (Association) from accessing his employee email account. The appeal period under ORS 183.482 has run without any party filing an appeal. Consequently, 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 Association is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d); OAR 115-035-0055(1)(a). The prevailing party is "the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(d).

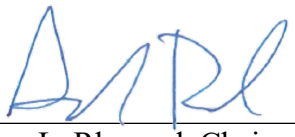
2. This case required one day of hearing, which was held on April 14, 2021.

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 (the hearing need not last a full day). OAR 115-035-0055(1)(b)(C).

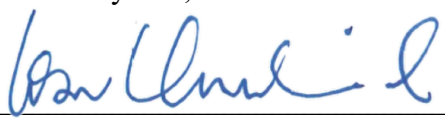
ORDER

Clackamas County shall remit $3,000 to Clackamas County Employees' Association within 30 days of the date of this order.

DATED: August 12, 2022.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-001-22

(DUTY OF FAIR REPRESENTATION)

SHARVY, Complainant, v. OREGON EDUCATION ASSOCIATION, MESD EDUCATION ASSOCIATION and MULTNOMAH EDUCATION SERVICE DISTRICT, Respondents.	)	DISMISSAL ORDER

Peter Sharvy, Complainant, Portland, Oregon, represented himself.

Julie D. Reading, Bennett Hartman LLP, Portland, Oregon, represented Respondent Oregon Education Association, MESD Education Association.

On May 5, 2022,[1] the Complainant (Sharvy) filed an unfair labor practice complaint against the Oregon Education Association, MESD Education Association (Association) and Multnomah Education Service District (District). This case was assigned to Administrative Law Judge (ALJ) Jennifer Kaufman. The complaint alleges that the Association breached its duty of fair representation and therefore violated ORS 243.672(2)(a). The complaint also alleges that the District violated ORS 243.672(1)(g).

ALJ Kaufman investigated the complaint to determine if an issue of fact or law exists that warrants a hearing, as required by OAR 115-035-0005. On May 20, the Association filed an informal response and moved to dismiss the complaint without hearing, or have ALJ Kaufman

[1]All events referenced in this order took place in 2022 unless otherwise noted.

issue an order to make the complaint more definite and certain.[2] On May 26, ALJ Kaufman shared the Association's informal response with Sharvy and issued an order directing Sharvy to make the complaint more definite and certain. The order specifically directed Sharvy to (1) address the arguments presented in the Association's informal response, (2) provide a concise statement of the allegations as to how the Association breached its duty of fair representation to Sharvy, and (3) set forth the facts supporting the allegations. On May 30, Sharvy filed a response to the order.[3] On June 10, the Association filed a supplemental response and reiterated its request that the complaint be dismissed. On June 17, Sharvy filed a revised version of his response, treated thereafter as the first amended complaint.

On June 15, ALJ Kaufman issued an order to show cause why the complaint should not be dismissed without a hearing, as the complaint did not appear to meet the threshold pleading requirements. Sharvy filed a response to the order to show cause on June 16. The Association filed a response on June 21, again requesting dismissal of the complaint. On June 24, Sharvy filed an unsolicited document containing additional arguments in support of the amended complaint. On June 24, ALJ Kaufman recommended to this Board that the complaint be dismissed.[4]

In considering whether the amended complaint presents an issue of fact or law that requires a hearing, we assume that the well-pleaded facts alleged are true. *Schroeder v. State of Oregon, Department of Corrections, Oregon State Correctional Institution and Association of Oregon Correctional Employees*, Case Nos. UP-49/50-98 at 2, 17 PECBR 907, 908 (1999). However, we do not consider merely conclusory statements or allegations that lack sufficient specificity. *Melendy v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. FR-3-08 at 18, 22 PECBR 975, 992 (2009); *Teamsters Local 57 v. City of Brookings/dba Brookings Police Department*, Case No. UP-85-92 at 1-2, 13 PECBR 677, 677-78 (1992). We may also rely on undisputed facts discovered during our investigation of the complaint. *Upton v. Oregon Education Association/Uniserv*, Case No. UP-58-06 at 2, 21 PECBR 867, 868 (2007).

---

[2]The District did not submit an informal response to the complaint. Because duty of fair representation cases are bifurcated, with the claim against the public employer proceeding only if the complainant first prevails on its duty of fair representation claim against the labor organization, it is not unusual for a public employer not to file an informal response (although when they are filed, they are helpful to the ALJ's fact gathering as part of the informal investigation).

[3]In his response, Sharvy raised whether Julie Reading's representation of the Association in this matter created a conflict of interest for this agency because Reading previously worked for the agency as an ALJ. It is not uncommon for agency ALJs to have prior advocacy experience before the Board or for advocates (for both labor organizations and for public employers) to have previously worked for the Board. Thus, the fact that Reading was previously an ALJ for the Board does not present any conflict for this agency to hear the matter. Moreover, this agency has exclusive jurisdiction over unfair labor practice complaints under the Public Employee Collective Bargaining Act, including the complaint in this matter.

[4]Sharvy submitted a subsequent submission on July 12, containing additional arguments based on his impressions of notes received from the Association on July 1, which were from a Grievance Review Committee (GRC) hearing of his grievance. Sharvy did not attend the GRC hearing and did not accept the Association's offer to represent him at the hearing. Regardless, the letter does not provide additional relevant well-pleaded facts that would warrant a hearing, and otherwise raises arguments beyond the scope of Sharvy's amended complaint.

Here, having considered the facts alleged in the complaint and the amended complaint, as well as the facts discovered by the ALJ, we summarize the alleged or undisputed facts as follows:

1. The Association represents a bargaining unit of teaching personnel employed by the District. Sharvy is a teacher employed by the District and a member of the Association's bargaining unit.

2. The Association and the District are parties to a collective bargaining agreement (CBA). Article 13.A.1 of the current 2021-2024 CBA defines "grievant" as "a member or group of members or the Association who initiated a grievance and was adversely affected by the conduct complained of in the grievance." Article 13 of the CBA allows for a bargaining unit member to represent themselves throughout the grievance process until requesting arbitration, at which point written agreement from the Association is required.

3. In November 2021, Sharvy's supervisor issued him a written disciplinary warning containing two charges. Soon after receiving the discipline, Sharvy told Association Representative Alan Moore that he wanted to file a grievance. Moore requested information relating to the discipline from the District and obtained the District's consent to suspend grievance timelines pending receipt of the requested information.

4. On December 14, 2021, Moore provided Sharvy with the disciplinary file that he received from the District. On December 21, 2021, Sharvy filed a grievance with HR Director Deon Logan and informed Logan that he wanted to represent himself. Logan responded in late January that the District would not honor the grievance as he believed it was untimely, but retracted his response a few days later.

5. In late January, Sharvy asked Moore to represent him again. After some negotiation with the District, Sharvy's discipline was revised to contain one charge instead of two.

6. On January 27, Sharvy asked Moore how he (Sharvy) could move the grievance to the Grievance Review Committee (GRC).[5] The next day, Moore emailed HR Director Logan and proposed that Sharvy be allowed to appeal to the GRC. Sharvy sent additional emails to Moore inquiring about the GRC on February 18, 23, 25, and 27. On March 1, Moore responded that he would send an appeal to the GRC, and on March 4, Moore emailed HR Director Logan about scheduling a hearing with the GRC. On March 7, Logan confirmed receipt of the grievance and stated that he would work with Moore to schedule the GRC hearing.

7. On March 7, Sharvy emailed Moore asking what materials the District sent to Moore regarding the grievance. Moore responded, "You've seen everything [the District] sent."

[5]Article 13.D.1 of the CBA provides that the GRC is a joint committee comprised of three members of the Association and three members of the District. If a grievance is not resolved at level 1, step 1 of the grievance process, a grievant may request the grievance be heard by the GRC. According to the Association, this was a new committee developed by the parties in negotiations for the 2021-2024 CBA, and the GRC had not been set up before Sharvy's grievance.

8. On March 9, Moore emailed Sharvy that the GRC had not yet been established and that the Association was working on it. That same day, Sharvy emailed Association Assistant Executive Director Angela Dileo requesting a new representative. Sharvy also asked, "What are members' rights regarding the union? * * * All I get is marketing material." Dileo did not respond.

9. In a March 18 email, Association Representative Nancy Lee informed Sharvy that she was his new representative and that she had "received [Sharvy's] file." Lee stated that she thought the GRC had been selected, training for the GRC members was scheduled, and that she expected a hearing to be scheduled in mid-April. Sharvy subsequently requested that Lee send him the file she referred to in her email.

10. On March 28, Lee emailed Sharvy stating that Moore had informed her that the GRC had not yet been selected. Lee also confirmed that Sharvy already had the file that she had referenced in her email. Sharvy asked why the GRC had not been set up and stated that there was a 30-day deadline (referring to the timeline in the parties' CBA).

11. On March 31, Sharvy emailed Lee, and again requested the file that Lee had previously told Sharvy he had already been provided. Sharvy also stated that he did not want to be told that he already had the file. Sharvy also requested "written communication to or from the administration."

12. That same day, March 31, Sharvy emailed Association Assistant Executive Director Dileo requesting that the Association tell him that there were no conflicts of interest between he and the Association regarding his grievance, or any other matters. On April 1, Sharvy sent Dileo another email stating, "Again, please review my current grievance with MESD for conflicts of interest, and disclose any that the union may have." On April 5, Dileo responded, requesting additional information. Sharvy shared "educated guesses" as to potential conflicts with Dileo.

13. On April 6, Association Representative Lee emailed Sharvy regarding the email to Dileo about potential conflicts of interest, stating she did not understand what Sharvy was referring to. Sharvy responded to Lee that same day and referenced a document he called an "informal narrative" that Sharvy had provided to HR, which described Sharvy's experience at the District.

14. Between April 1 and April 12, Sharvy sent several emails to Association Representative Lee about his appeal, including a request that his grievance be moved to the Superintendent level because of the District's non-response.[6] Sharvy also stated that he was wondering about his rights regarding union representation and whether there was a contract between him and the Association; Lee referred him to the CBA. Sharvy also asked to see a written agreement to postpone timelines; Lee did not respond to that request.

15. On April 12, Lee emailed Sharvy stating that she was inquiring with the Association's legal department about his request to skip the GRC and move his grievance to the Superintendent level. On April 13, Lee emailed Sharvy that counsel had advised to follow the

[6]Under Article 13.D.2 of the CBA, if a grievance is not resolved at the GRC level, then an appeal may be filed with the Superintendent.

grievance process step by step, and that the reason the GRC had not responded was because it had not yet been formed. Sharvy continued to argue that his grievance should advance to the Superintendent level. On April 14, Lee emailed Sharvy that they would notify the District that he wanted to move the grievance to the Superintendent level.

16. On April 20, Sharvy emailed Lee requesting an update, and Lee responded that she had not had any communication with the District.

17. During March and April, Sharvy made multiple complaints to Association President Reed Scott-Schwalbach about the Association's handling of his grievance. On March 30, Sharvy emailed Scott-Schwalbach stating that he was concerned about the Association's delays in the processing of his grievance and that timelines had been extended without his agreement. He further stated that he suspected the Association could have a conflict of interest in representing him, and that he wanted to know what his rights were regarding disclosure of any conflict of interest. On April 5, Scott-Schwalbach responded that he would reach out to local leadership. Sharvy emailed Scott-Schwalbach again on April 11 and asked to file a formal complaint about his right to good faith representation, and he included a link to a National Labor Relations Board webpage with information about the duty of fair representation. On April 13, Scott-Schwalbach responded that he would follow up with the Association's Executive Director. On April 20, Sharvy responded that he needed an update, and that his requests for a check of a conflict of interest had been ignored, as had his requests to be furnished with copies of all communications with the District regarding his grievance.

18. On April 23, Sharvy again elected to represent himself in his grievance.

19. A GRC hearing was held on June 15. The Association offered to represent Sharvy at the hearing, but Sharvy did not accept the offer. Sharvy did not attend the GRC hearing because it was scheduled on a day that he had a medical appointment. Because Sharvy did not present his case at the hearing, it appears that the GRC only considered information provided at the hearing by Sharvy's supervisor. The GRC unanimously voted to uphold Sharvy's discipline.

DISCUSSION

Complainant alleges that the Association violated ORS 243.672(2)(a), which makes it an unfair labor practice for a labor organization to "[i]nterfere with, restrain or coerce any employee in or because of any rights guaranteed under ORS 243.650 to 243.806." This Board has interpreted subsection (2)(a) as imposing a "duty of fair representation" on a labor organization when it acts as the exclusive representative of a bargaining unit of employees. That duty is breached only where a labor organization's actions are arbitrary, discriminatory, or taken in bad faith. *R.M. v. Portland Association of Teachers and Multnomah County School District No. 1J (Operating as Portland Public Schools)*, FR-001-18 at 5 (2019) (citing *Chan v. Leach and Stubblefield, Clackamas County Community College; Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05 at 12, 21 PECBR 563, 574 (2006)). A union's action is arbitrary if it lacks a rational basis. *Id.* A union's conduct is discriminatory if there is "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Id.* at 6. A union's conduct is in bad faith if it intentionally acts against a member's interest and does so for an improper reason. *Id*. Thus, in order to proceed to a hearing, a complainant must allege facts

that, if proven, would establish that the union acted arbitrarily, discriminatorily, or in bad faith. If such factual allegations are not alleged, the complaint will be dismissed without a hearing for failure to state a claim for relief. *See Putvinskas v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO, and Southwestern Oregon Community College,* Case No. UP-71-99 at 12, 18 PECBR 882 at 893 (2000).

To allege a claim for breach of the duty of fair representation, a complainant must plead three elements: (1) the union had a duty to represent the employee in the manner alleged; (2) the union breached that duty; and (3) the employee was injured by the breach. *See Melendy*, FR-3-08 at 16, 22 at 990.

First, we will determine whether the amended complaint alleges sufficient well-pleaded facts to demonstrate that the Association had a duty to represent Sharvy in the manner alleged. Whether a union has a duty of fair representation depends on the particular circumstances of the case. *Id*. Here, the amended complaint alleges that the Association breached its duty of fair representation to Sharvy after he was disciplined by his supervisor. Specifically, Sharvy contends that the Association: 1) failed to check for potential conflicts of interest and provide a policy relating to conflicts of interest; 2) failed to advise him regarding his right to fair representation and to have an internal procedure for resolving member complaints about the duty of fair representation; 3) delayed the processing of his grievance; and 4) failed to provide correspondence between the District and the Association regarding his grievance.[7]

The allegations that a potential conflict of interest existed that could impact the Association's representation are vague and speculative, despite Sharvy being provided multiple opportunities to amend his complaint. This Board has previously dismissed fair representation allegations where the complaint lacks adequate specificity. *See E.K. v. Benton County and Benton County Sheriff's Office and Benton County Deputy Sheriff's Association*, FR-005-18 at 6 (2019). Regardless, even if Sharvy were able to establish a potential conflict of interest, he was provided the opportunity to work with two different Association representatives and was also expressly permitted by the collective bargaining agreement to represent himself. Given these options, it is unclear what other measures the Association could have taken to address Sharvy's concern if there was a conflict, and Sharvy has not articulated any. We have determined that, "at a minimum, a member must be clear about the nature of the action requested" in order for a union to have a duty to act. *See Melendy*, FR-3-08 at 16, 22 PECBR at 990. Here, there are no well-pleaded facts that the Association had a duty to undertake further specific action regarding a purported conflict of interest.

[7]Sharvy's allegation regarding the Association's failure to provide requested information relevant to the grievance is inconsistent and vague. There is no dispute that Sharvy was provided the disciplinary file. Sharvy appears to believe that there is another file that he was not provided; however, the Association has repeatedly confirmed that he has the information received from the District, and Sharvy presents no well-pleaded facts suggesting otherwise. The only other information requested was correspondence between the Association and the District. Beyond this, the complaint does not sufficiently present the necessary facts to warrant further consideration.

Additionally, "PECBA does not prescribe specific rules for the conduct of a union's internal affairs." *See 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). Thus, there is no requirement under PECBA, as Sharvy contends, that unions conduct audits regarding potential conflicts of interest upon request, maintain a policy or procedure outlining what steps it will take in the event of a conflict of interest, and disclose such information to members. Likewise, unions are not under a legal obligation to educate represented employees about the duty of fair representation, or to provide a dispute resolution mechanism to save those employees the trouble and cost of filing unfair labor practice complaints.

As for Sharvy's remaining allegations that the Association delayed the processing of his grievance and failed to share requested communications between the District and the Association, both stem from the Association's processing of his grievance. As noted above, unions are entitled to substantial discretion when processing grievances, and are further entitled to a wide range of reasonableness in deciding how to exercise their discretion. *See Putvinskas,* Case No. UP-71-99 at 14, 18 PECBR at 895. Sharvy fails to plead any facts that would establish that the Association was acting beyond its wide range of discretion when it postponed timelines while awaiting information (the discipline file) relevant to assessing the grievance, and pending the formation of the newly negotiated GRC. Similarly, there are no facts articulated in the complaint or a legal requirement under the duty of fair representation that the Association was required to furnish Sharvy with all correspondence with the District. Furthermore, and significantly, Sharvy was entitled to pursue a grievance on his own under the CBA, and therefore has not relinquished his rights to the Association. This key fact calls into question whether the Association had a duty at all in this context, let alone a duty to act in the very specific ways that Sharvy contends. *See Melendy*, FR-3-08 at 16, 22 PECBR at 990 (this Board held that where an individual employee was able to pursue a grievance without union assistance, the duty of fair representation, "if it existed at all, is minimal").

But even assuming, *arguendo*, that the duties alleged existed, Sharvy must plead facts sufficient to support a determination that the Association breached those duties by acting arbitrarily, discriminatorily or in bad faith. To this end, Sharvy argues that the Association breached its duty because PECBA "requires a union to cooperate" with its members' requests, and therefore, the Association's failure to respond to his requests for internal policies and communications between the District and the Association fell short of its obligations. Sharvy further asserts that the Association's lack of response relating to potential conflicts were "in bad faith because–by definition–it is against the employee's interest." Sharvy also avers that the Association's lack of internal process for DFR complaints requires an employee go to this Board as a first resort, which imposes costs and infringes on privacy. However, beyond these conclusory allegations, Sharvy does not allege any facts demonstrating that the Association's lack of responsiveness or lack of internal procedures was arbitrary, discriminatory, or in bad faith. *See Melendy*, FR-3-08 at 18, 22 PECBR at 992 (to establish a breach of the duty of fair representation, "complainant must do more than make conclusory allegations that the labor organization acted in a proscribed manner").

With regard to the Association's representation of Sharvy in the grievance process, Sharvy asserts that the Association's representation was "a façade" and that the Association's conduct amounted to "playing games."[8] In support of this allegation, Sharvy refers to an exchange where Lee emailed Sharvy on April 18 that she would follow up with the District regarding the grievance, but admittedly had not yet done so by the time that Sharvy requested an update on April 20. Sharvy does not cite to other specific facts beyond this one example, but rather asserts that the communication with the Association speaks for itself. Sharvy further indicates that the Association's agreement to extend timeliness and subsequent failure to comply with the specified timelines provided in the CBA were inherently unlawful. We disagree. Again, this Board has long afforded broad discretion and substantial deference to unions when it comes to processing grievances. It is not sufficient that a complainant is upset with or disagrees with the way a union addressed their concerns. *See Whitacre v. Benton County and Oregon AFSCME, Council 75,* Case No UP-47-89 at 3, 12 PECBR 55, 57 (1990) (this Board dismissed the complaint, without a hearing, where Complainant "alleged facts that would show a disagreement with the Union about how to handle his problems on the job" because such "allegations do not establish the elements necessary for a DFR complaint"). Thus, allegations that the Association did not act as quickly or as effectively as Sharvy wanted, whether related to responding to his demands or the processing of his grievance, is not enough to establish that the Association's actions were arbitrary, discriminatory, or in bad faith. *See Gault v. Portland Firefighters' Association, Local 43 and City of Portland Fire and Rescue Bureau*, Case No. FR-003-20 (2022) (in the absence of evidence of discriminatory treatment, an eight-month period to determine whether to take grievance to arbitration did not amount to a violation of ORS 243.672(2)(a)).

Turning to the third element of a claim for breach of the duty of fair representation, Sharvy has also failed to plead facts sufficient to establish that he was seriously injured by any of the Association's conduct. Sharvy contends that the violation of his rights, including an alleged right to have his grievance processed according to the timelines in the CBA, is sufficient to show injury. As discussed above, we do not find that the Association's postponement of grievance timeliness was a breach of the duty of fair representation, or that the Association breached any duty as alleged in the complaint. Regardless, a complainant in a duty of fair representation case *must* show that the union's act or omission *seriously prejudiced* the rights of the injured employee. *Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91 at 16, 14 PECBR 409, 424 (1993) (emphasis added). Conclusory allegations that Sharvy's rights were violated are not sufficient to constitute well-pleaded facts showing serious prejudice and the complaint does not otherwise state any well-pleaded facts that would show he has been injured by the conduct alleged in the complaint.

Consequently, for the reasons discussed in this order, we conclude that the amended complaint does not adequately allege a claim for breach of the duty of fair representation.

[8]Sharvy does not articulate in his first amended complaint exactly what he means by "playing games." However, in his response to the order to show case, Sharvy theorized that the Association was attempting to actively conceal a conflict of interest, which he says was retaliatory because the alleged conflict of interest was "due to whistleblowing." Sharvy did not point to any facts in support of this allegation.

Finally, where a complainant alleges both a duty of fair representation claim against the union and a breach of contract claim against the employer, the complainant must first prove a breach of the duty of fair representation by the union before it can pursue the contract claim against the employer. *See Seehawer v. American Federation of State, County and Municipal Employees, Council 75, and State of Oregon, Department of Corrections*, Case No. FR-02-11 at 7-8, 25 PECBR 47, 53-54 (2012); *see also Stotler v. Teamsters Local 223 and City of Medford*, Case No. FR-03-12 at 4, 25 PECBR 70, 73 (2012). Thus, because we dismiss the duty of fair representation claim against the Association, we automatically dismiss the breach of contract claim against the District.

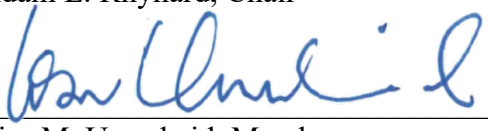
For all of the reasons stated above, there is no issue of fact or law that merits a hearing, and we dismiss the amended complaint. *See* ORS 243.676(1)(b).

ORDER

The amended complaint is dismissed.

DATED: August 17, 2022.

Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-006-21

(UNFAIR LABOR PRACTICE)

SALEM KEIZER EDUCATION ASSOCIATION, Complainant, v. SALEM-KEIZER SCHOOL DISTRICT, Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On June 8, 2022, this Board issued an order holding that Respondent Salem-Keizer School District (District) violated ORS 243.672(1)(e) by unilaterally changing its past practice of calculating full-time equivalency for its educators, and by failing to timely provide the Salem Keizer Education Association (Association) with relevant requested information related to the District's calculations. The appeal period under ORS 183.482 has run without either party filing an appeal. Consequently, 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 Association is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d); 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, which were held on October 19, 20, and 21, 2021.

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 (neither hearing day need last a full day). OAR 115-035-0055(1)(b)(D).

ORDER

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

DATED: August 19, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-006-22

(REPRESENTATION)

GENERAL TEAMSTERS LOCAL UNION 324, Petitioner, v. CITY OF AUMSVILLE, Respondent.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE

On July 20, 2022, General Teamsters Local Union 324 (Teamsters) filed a petition under ORS 243.682(2) and OAR 115-025-0030 to be certified (without an election) as the exclusive representative of certain City of Aumsville (City) employees. Specifically, the petition sought to certify Teamsters as the exclusive representative of all full-time and part-time employees in the positions of Police Officer/Sergeant, Records/County Clerk, and Support Specialist, excluding all other employees, including supervisors and managers. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating Teamsters as the exclusive representative of the proposed bargaining unit.

On July 21, 2022, 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 9, 2022). On August 9, 2022, the City filed objections.

The case was referred to the Board's Hearings Division and assigned to Administrative Law Judge Jennifer Kaufman. Thereafter, the parties agreed to a modified bargaining unit description that would allow for the certification of the modified unit, so long as the showing of interest was sufficient. The bargaining unit definition agreed to is all full-time employees in the classifications of Police Officer and Support Specialist/Court Clerk, excluding temporary, supervisory, and confidential employees. The matter was then referred back to the Board's Election Coordinator to determine the sufficiency of the showing of interest in light of the modified unit description. The Election Coordinator confirmed that a majority of eligible employees in the

modified bargaining unit signed valid authorization cards designating Teamsters as the exclusive representative of the bargaining unit.

ORDER

Accordingly, it is certified that General Teamsters Local Union 324 is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> All full-time City of Aumsville employees in the classifications of Police Officer and Support Specialist/Court Clerk, excluding temporary, supervisory, and confidential employees.

DATED: August 23, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-001-21

(UNFAIR LABOR PRACTICE)

PRATKA, Complainant, v. LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 483, Respondent.	)	RULING ON MOTION TO STAY

In an order dated July 21, 2022, this Board ordered Scott Pratka (Complainant) to pay $3,000 in representation costs to Respondent Laborers International Union of North America, Local 483, the prevailing party in this case, within 30 days of the date of the order. On August 22, 2022, Complainant filed a motion to stay the representation costs order pending appeal, although no appeal has yet been filed. For the following reasons, we deny Complainant's motion to stay.

ORS 183.482(3) sets forth the requirements for a party to obtain a stay of an agency order pending judicial review. It states, in relevant part:

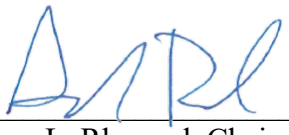
> "(a) The filing of the petition shall not stay enforcement of the agency order, but the agency may do so upon a showing of:
> "(A) Irreparable injury to the petitioner; and
> "(B) A colorable claim of error in the order."

Here, Complainant's motion did not assert either an irreparable injury or a colorable claim of error. Rather, Complainant's motion only states that ordering a stay would "streamline the payment process should [Complainant] succeed in his challenge to the fee award." That is not a sufficient basis under ORS 183.482(3) to stay our order.

ORDER

Complainant's motion to stay is denied.

DATED: August 24, 2022.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-024-21

(UNFAIR LABOR PRACTICE)

SEIU LOCAL 503, OPEU,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
ST,	)	AND ORDER
	)	
Respondent.	)	
	)	

On July 8, 2022, this Board heard oral argument on Complainant's and Respondent's objections to a March 8, 2022, recommended order issued by Administrative Law Judge (ALJ) Jennifer Kaufman, after a hearing on November 3, 4, and 5, 2021.[1] The record closed on December 17, 2021, following receipt of the parties' post-hearing briefs.

Stacey Leyton and Zoe Palitz, Attorneys at Law, Altshuler Berzon LLP, San Francisco, California, represented Complainant.

Rebekah Millard, Attorney at Law, Freedom Foundation, Salem, Oregon, represented Respondent.

In 2009, Respondent ST signed a membership agreement and dues deduction authorization with Complainant SEIU Local 503, OPEU (SEIU). In December 2020, ST sought to revoke that authorization, effective immediately. On December 28, 2020, SEIU received ST's revocation request and informed her that the revocation would be processed effective February 6, 2021, under the terms of a 2016 dues deduction authorization signed by ST. ST disputes that she signed the 2016 membership agreement, meaning that she would be entitled to a refund for dues deducted between December 28, 2020, and February 6, 2021.

[1]Member Khosravi recused herself and did not participate in the deliberations or issuance of this order.

In 2019, the Oregon Legislature enacted HB 2016. As part of that bill, the legislature created a comprehensive scheme regulating dues payments for public employees, public employers, and labor organizations representing public employees. As part of that scheme, the legislature provided that "[i]f 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 [of dues], the dispute shall be resolved through an unfair labor practice proceeding under ORS 243.672." ORS 243.806(10)(a). In this case, it is undisputed that SEIU and ST had a dispute as to whether her 2016 authorization for dues deductions existed and was valid, as well as whether and how she could revoke it. SEIU sought resolution of that dispute through an unfair labor practice proceeding pursuant to ORS 243.806(10)(a). ST sought resolution of that dispute through various state law and federal law claims in federal court.

The issues are:

(1) Does this Board have jurisdiction to hear the dispute regarding ST's and SEIU's dues dispute?

(2) In 2016, did ST authorize dues deductions to be withheld from her paycheck, and if so, was that authorization valid? If ST did not sign the 2016 authorization agreement, what damages is she entitled to under the Public Employee Collective Bargaining Act (PECBA)?

(3) Do any of ST's actions, including revoking her dues deduction authorization in December 2020, and filing a lawsuit against SEIU for state law claims (rather than filing a complaint with this Board), amount to an unfair labor practice under PECBA?

(4) Should ST be required to pay a civil penalty under ORS 243.676(4)(a)?

As explained below, we conclude that (1) this Board has jurisdiction to hear the dispute; (2) ST signed a valid authorization in 2016 to have dues to SEIU withheld from her paycheck; (3) ST did not violate ORS 243.806(10) or ORS 243.672(2)(c) by attempting to revoke that authorization in December 2020 or by filing a lawsuit in federal court; and (4) no civil penalty under ORS 243.676(4)(a) is warranted.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. SEIU is a labor organization within the meaning of ORS 243.650(13).

2. Oregon Department of Transportation (ODOT) is a public employer within the meaning of ORS 243.650(20).

3. ST has been employed by ODOT since October 2009. ST currently works as a transportation specialist II.

4. SEIU is the exclusive representative of the bargaining unit in which ST is employed.

5. ST signed an SEIU membership application in October 2009, which provided for the monthly deduction of dues from her paycheck to be paid to SEIU.

6. In March 2016, SEIU engaged in a general membership drive for public sector employees. During the 2016 membership drive SEIU organizers engaged in a campaign known as the "public sector blitz," in which organizers visited employees at their homes and asked them to join SEIU or renew their SEIU memberships.

7. SEIU organizers carried iPads with them during the public sector blitz. Organizers utilized a Salesforce application on the iPads to document their contacts with represented employees. Organizers also utilized a Salesforce application on the iPads to present employees with membership applications and to obtain employees' digital signatures on the membership applications.

8. Under the protocols in place in 2016, when a new SEIU membership application was submitted using a Salesforce application, a notification was sent to SEIU's membership department. An SEIU membership auditor then accessed the membership application, printed it, scanned it, and uploaded it into SEIU's electronic membership database, known as the "SQL" database. This process generally happened within a few days of the membership application being submitted, after which point the paper copies of the membership applications were moved to offsite storage.

9. The SQL database contains a record for every employee represented by SEIU. Documents maintained in the SQL database include scanned copies of membership applications (including applications submitted electronically and those completed on paper), and scanned copies of membership cancellation requests. SEIU organizers do not have access to the SQL database, or to SEIU's document storage facility.

10. On March 22, 2016, SEIU organizer Erik Horeis was assigned to complete home visits to represented employees in the Bend, Oregon area. Horeis logged his home visits on an iPad using a Salesforce application. Between March and May of 2016, Horeis logged 31 home visits in connection with the public sector blitz.

11. On the evening of March 22, 2016, Horeis visited ST at her home. Horeis asked ST to sign a new membership agreement (the 2016 membership agreement or 2016 dues deduction authorization agreement). Utilizing a Salesforce application on an iPad, Horeis presented the 2016 membership agreement to ST for her review and signature.[2] ST signed the electronic 2016

[2]The 2016 membership agreement presented to ST was prepopulated with information from SEIU's records. The membership agreement incorrectly lists ST's position as "Transportation Maint Coord 2," and contains an outdated telephone number and email address for ST.

membership agreement using either a stylus or her finger, and Horeis submitted the completed membership application at 7:28 p.m.[3]

12. On March 22, 2016, at 7:34 p.m., Horeis logged his visit to ST's home utilizing a Salesforce application on an iPad. Horeis recorded the result of the visit as "CONTACTED – SIGNED Membership."

13. The 2016 membership agreement provides, in relevant part:

> "I hereby designate SEIU Local 503, OPEU (or any successor Union entity) as my desired collective bargaining agent. I also hereby authorize my employer to deduct from my wages all Union dues and other fees or assessments as shall be certified by SEIU Local 503, OPEU (or any successor Union entity) and to remit those amounts to such Union. This authorization/delegation is unconditional, made in consideration for the cost of representation and other actions in my behalf by the Union and is made irrespective of my membership in the Union. This authorization is irrevocable for a period of one year from the date of execution and from year to year thereafter unless not less than thirty (30) and not more than forty-five (45) days prior to the end of any annual period or the termination of the contract between my employer and the Union, whichever occurs first, I notify the Union and my employer in writing, with my valid signature, of my desire to revoke this authorization. Union dues may be tax deductible as a work related expense subject to Federal and/or State tax rules."

14. On July 25, 2018, ST sent an email to SEIU stating that she "would like to opt out of paying union dues" and asking SEIU "what information" it needed to process that request. Because that email did not include a signature, it did not comply with the requirements to be a valid revocation. SEIU informed ST of that (and what was necessary to revoke her dues authorization). ST did not send another request to revoke her 2016 authorization until December 2020.[4]

15. In December 2020, ST sent SEIU a signed letter dated March 15, 2020, resigning her SEIU membership and requesting that SEIU notify her employer to stop deducting dues. SEIU received the letter on December 28, 2020. The letter states:

> "Effective immediately, I resign membership in all levels of the Service Employees International Union, including Local 503.
>
> "As a nonmember, I request that you immediately notify my employer to cease the deduction of union dues, fees equivalent to dues, and/or political action committee contributions from my pay in accordance with the U.S. Supreme Court's decision

[3]The conflicting record evidence underlying the factual determinations in this paragraph is discussed below.

[4]SEIU's Membership Coordinator credibly testified that she reviewed Salesforce records to confirm that SEIU responded to ST's July 2018 email.

in *Janus v. AFSCME* (2018). I further request a full refund of any dues or fees that have been deducted from my pay without my express written authorization.

"Please let me know when the deductions will cease."

16. On December 28, 2020, SEIU Member Assistance Representative Robin Fisher sent an email to ST stating:

"We've received your letter in regards to canceling your union membership. The letter that you've sent in is from the Freedom Foundation, an organization that exists to try to eliminate and privatize publicly funded services like the ones you provide, and to hurt workers' collective power to win better wages and benefits.

"Your membership at SEIU 503 is one important way that you have a voice on the job, and with your coworkers, the power to make the changes that you want to see happen. We would love to answer any questions you have, go over how dropping your union membership will affect your benefits, and when your dues would end should you choose to cancel your membership now."

The letter also states, "If you have more specific questions, or just want to know more about your worksite and SEIU 503, we can also connect you with a leader in your sublocal, and/or your organizer."

17. In response, on December 29, 2020, ST emailed SEIU Representative Fisher stating, "If I had any questions, I would [have] asked. I have requested to drop my membership. Either you will honor my request, or not. Hopefully you do not choose the lat[t]er."

18. In response, on December 29, 2020, SEIU Representative Fisher emailed ST stating:

"Thank you for your response. When you sign up to be a member of the union, you are agreeing to pay dues in a one year contract that renews unless cancelled by the renewal period. The end of your contract period is February 6th, 2021, and you will continue to see due deductions from your paycheck until that time. After your February paycheck, you should no longer have dues deducted from your check."

19. In response, on December 29, 2020, at 10:29 a.m., ST emailed SEIU Representative Fisher stating:

"I didn't realize Oregon was a RTW state – yet another sneaking business dealing from you. I will be verifying the fine print to confirm this is what I agreed to, and if it is so – my February dues should be pro-rated since I will only be 'represented' 6 days of the month.

"I will definitely recommend future members to read the fine print PRIOR to agreeing to be a SEIU union member."

20. On December 29, 2020, at 10:41 a.m., ST emailed a second response to SEIU Representative Fisher stating, "Actually, please provide a copy of this portion of the contract, with my signature of course. So I can verify what you are stating is… accurate."

21. On December 31, 2020, SEIU Representative Fisher emailed ST a digital copy of the 2016 membership agreement and stated that she believed a physical copy would also be sent. ST responded, "That would be great if they could send me a physical copy – not sure that is my signature – be a lot easier to confirm with an original. Also please send me a copy of my original membership application from 10/05/2009." Fisher responded that ST would receive copies of both signed membership forms in the mail.

22. On January 13, 2021, SEIU Executive Director Melissa Unger sent a letter to ST acknowledging receipt of ST's resignation of her SEIU membership. The letter states, in pertinent part, "under the terms of the dues checkoff authorization form you signed, dues deductions cannot be terminated except in the periods set forth in the authorization * * * In your case, that date is February 6, 2021."

23. No SEIU membership dues have been deducted from ST's paychecks since February 2021.

24. On March 29, 2021, ST filed a federal lawsuit against SEIU and the Oregon Department of Administrative Services. That complaint alleges violations of ST's civil rights, common law fraud, and violations of state and federal Racketeering Influenced and Corrupt Practices Acts (RICO).

CONCLUSIONS OF LAW

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

We begin with ST's jurisdictional challenge. ST asserts that this Board does not have jurisdiction to hear the matter because no unfair labor practice occurred. SEIU asserts that ORS 243.806(10) vests this Board with exclusive jurisdiction to hear dues-deduction disputes between Oregon public employers, public employees, and labor organizations that represent public employees. For the following reasons, we agree with SEIU.

When construing a statute, our goal is to determine and give effect to the legislature's intent. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). In doing so, we apply the analysis in *PGE*, 317 Or 606, as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). The words chosen by the legislature are the best evidence of its intent; accordingly, we first review the text and context of the statute in question. *Gaines*, 346 Or at 171-72. Context includes other provisions of the same and related statutes, *Multnomah Cty. Corr. Deputy Ass'n v. Multnomah Cy.*, 257 Or App 713, 720-21, 308 P3d 230 (2013), as well as the enactment history and any statutory predecessors, *Long v. Farmers Ins. Co*., 360 Or 791, 797, 388 P3d 312 (2017). We construe statutes to give effect to all relevant provisions and not to insert what has been omitted or to omit what has been inserted. *AFSCME, Local 2043 v. City of Lebanon*, 360 Or 809, 821, 388 P3d 1028 (2017); *see also* ORS 174.010. We then review any relevant

legislative history. *City of Lebanon*, 360 Or at 819. If we are still unable to determine the legislature's intent, we then apply maxims of statutory construction. *Gaines*, 346 Or at 165.

ORS 243.806(1) provides that "[a] public employee may enter into an agreement with a labor organization that is the exclusive representative to provide authorization for a public employer to make a deduction from the salary or wages of the public employee, in the manner described in [ORS 243.806(4)], to pay dues, fees and any other assessments or authorized deductions to the labor organization or its affiliated organizations or entities." ORS 243.806(4) describes how a public employee may provide a dues-deduction authorization and provides that the authorization "is independent of the employee's membership status in the labor organization * * *." ORS 243.806(2) then requires a public employer to "deduct the dues, fees and any other deduction authorized by a public employee under this section and remit payment to the designated organization or entity." ORS 243.806(10)(a) states that "[i]f 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 [ORS 243.806(1) and (2)], the dispute shall be resolved through an unfair labor practice proceeding under ORS 243.672." Finally, ORS 243.806(10)(b) provides the remedy for instances in which a public employer has made unauthorized deductions or a labor organization has received payments in violation of ORS 243.806. Specifically, the public employer or labor organization "is liable to the public employee for actual damages in an amount not to exceed the amount of the unauthorized deductions." ORS 243.806(10)(b).

Here, the jurisdictional dispute concerns ORS 243.806(10)(a). The text of the statute provides that "[i]f 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 [ORS 243.806(1) and (2)], the dispute shall be resolved through an unfair labor practice proceeding under ORS 243.672." As set forth above, ORS 243.806(1) and (2) authorize a public employee and an exclusive representative to enter into a dues deduction agreement, and require a public employer to make deductions in accordance with that agreement. Thus, the plain language of ORS 243.806(10)(a) provides that an unfair labor practice proceeding "shall" be the mechanism to resolve any dispute between a public employee and a labor organization regarding the existence, validity, or revocation of a dues-deduction authorization. There is no dispute that this Board has exclusive jurisdiction under PECBA to conduct unfair labor practice proceedings. Thus, the plain language of the statute directs all dues-deduction-authorization disputes between public employees and labor organizations to be resolved by this Board by way of an unfair labor practice proceeding.

Despite this plain language, ST contends that this Board lacks any jurisdiction to resolve the parties' dispute in this case. ST concedes, and we see no reasonable argument otherwise, that the parties in this case have "a dispute * * * regarding the existence, validity, or revocation of an authorization for the deductions and payment described under [ORS 243.806(1) and (2)]." ORS 243.806(10)(a). ST also does not dispute that "PECBA is a comprehensive regulatory scheme for resolving labor disputes in the public sector," and "[a]t the center of that statutory scheme, ERB is authorized to investigate, hear, and resolve claims of unfair labor practices (ULPs), whether committed by public employers, individuals, or labor organizations." *George-Buckley v. Medford Sch. Dist. 549C*, 318 Or App 821, 828, 509 P3d 738 (2022) (citing *Ahern v. Or. Pub.*

Emples Union, 329 Or 428, 434, 988 P2d 364 (1999)). ST contends, however, that, despite ORS 243.806(10) being part of PECBA's "comprehensive regulatory scheme," and despite that provision's sweeping application to any "dispute * * * regarding the existence, validity or revocation" of a dues-deduction authorization, we have jurisdiction to hear the matter only if an unfair labor practice were committed. That is so, according to ST, because ORS 243.806(10) provides that "the dispute shall be resolved through an unfair labor practice proceeding under ORS 243.672."

The difficulty with ST's position is severalfold. Primarily, ST's position conflates this Board's jurisdiction with the outcome of a proceeding that unquestionably falls within this Board's jurisdiction. The court has made clear that "ERB has 'exclusive jurisdiction to determine *whether* an unfair labor practice has been committed.'" *George-Buckley*, 318 Or App at 829 (quoting *Ahern*, 329 Or at 434) (emphasis added). To make that determination, we use "an unfair labor practice proceeding." *See* ORS 243.806(10)(a). In other words, the proceeding is the manner by which we determine "whether an unfair labor practice has been committed." *See George-Buckley*, 318 Or App at 829. Without jurisdiction to conduct the unfair labor practice proceeding, we could not make the determination about whether an unfair labor practice was committed. Thus, even though no unfair labor practice might have been committed, we have exclusive jurisdiction to make that determination, and are required to do so when an unfair labor practice complaint is filed. *See* ORS 243.676(2)(b), (3)(a).

Moreover, by its terms, ORS 243.806(10) specifically identifies any "dispute * * * between the public employee and the labor organization regarding the existence, validity or revocation" of a dues-deduction authorization to be resolved by this agency "through an unfair labor practice proceeding under ORS 243.672." When we conduct that proceeding in the context of ORS 243.806(10), we make findings of fact and conclusions of law on the "existence, validity, or revocation" of the disputed authorization; that conclusion may include a determination that an unfair labor practice was committed, in which case we would issue a cease and desist order. Additionally, if we concluded that a labor organization received unauthorized payments (or a public employer made unauthorized deductions), we would resolve the dispute in the public employee's favor and our remedy would order "actual damages in an amount not to exceed the amount of the unauthorized deductions." ORS 243.806(10)(b). Thus, the plain text of the statute gives this Board jurisdiction over this dispute, and directs that we use an unfair labor practice proceeding to resolve the dispute.

Further, the particular phrase used by the legislature to convey the grant of jurisdiction bolsters this conclusion: a dues deduction authorization dispute shall be resolved "*through* an unfair labor practice *proceeding* under ORS 243.672." The words "through" and "proceeding" emphasize procedure ("through" a "proceeding") rather than a substantive violation of the statute (an unfair labor practice). The word "through" is a preposition used to indicate passage from one end or boundary to another. The words "proceeding" and "proceedings" are used throughout PECBA to refer to the procedures used to resolve disputes. *See, e.g.*, ORS 243.672(6) ("The board may allow any other person to intervene *in the proceeding* and to present testimony"); ORS 243.676(2)(e) (requiring the Board to award attorney fees to the prevailing party on appeal, "including *proceedings* for Supreme Court review, of a board order"); ORS 243.766(3) (listing as a duty of this Board "*[c]onduct[ing] proceedings* on complaints of unfair labor practices by

employers, employees and labor organizations and tak[ing] such actions with respect thereto as it deems necessary and proper"); ORS 243.766(7) (requiring the Board to adopt rules "to govern *the proceedings* before it in accordance with ORS chapter 183."). Thus, the phrase selected by the legislature indicates that this agency shall resolve dues deduction authorization disputes through the procedures used in unfair labor practice cases. Significantly, the legislature did not provide that a dispute between a public employee and a labor organization regarding a dues deduction authorization be resolved before this Board only if the conduct at issue constitutes "an unfair labor practice," which would have been a more straightforward way to describe the interpretation that ST advocates. To avoid the common sense interpretation, ST essentially asks us to construe the words "through" and "proceeding" as surplusage, but that is a result the courts and this Board seek to avoid. *City of Lebanon*, 360 Or at 821 (declining to construe statute in a way that would relegate the language at issue "to mere surplusage"); ORS 174.010.

Although the text and context of the statute is sufficient to resolve the matter, we note that legislative history further confirms our conclusion. Specifically, the legislative history of HB 2016 establishes that the bill was passed in response to *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), a decision that rendered various state law provisions regarding fair share fees, including provisions in PECBA, unconstitutional. The bill included multiple amendments to PECBA, including a comprehensive scheme regarding dues deductions in the post-*Janus* era for public employees, labor organizations representing those employees, and public employers. Part of that comprehensive scheme is the provision before us in this case, Section 8 of HB 2016, which is codified at ORS 243.806(10). Although much of the legislative history concerned other sections of the bill, what is available regarding the at-issue section shows that proponents of the bill explained to the legislators that the purpose of the section was to "provide[] a clear and efficient dispute resolution process, through [ERB], for employees and unions to resolve disagreements over the status of deduction authorizations." Testimony, House Committee on Business and Labor, HB 2016, March 11, 2016 at 00:14:06 (statement of Noah T. Barish), available at https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2019031228&fbclid=IwAR0KPFUz-XFzzNAQs0XCegu903uAVgeTOFb5svpZdsdQGmYti6_x9atHsdU.

The proponents of the bill specifically noted the proliferation of civil lawsuits over dues disputes between public employees and labor organizations:

> "There's also a dispute resolution provision in this bill and that's a benefit to all parties involved. We see that currently disputes are being litigated in civil court over deduction issues and this bill will allow those disputes to be processed through the [ERB] through a[] [ULP] proceeding which is much more prompt and cost effective."

Audio Recording, House Committee on Business and Labor, HB 2016, March 11, 2019 at 00:14:04 (comments of Noah T. Barish).[5] Those sentiments were echoed by another proponent of the

[5]In written testimony, Barish explained that HB 2016 "provides a clear and efficient dispute resolution process, through the Employment Relations Board, for employees and unions to resolve (Continued . . .)

bill before the Senate Committee on Workforce. *See* Testimony, Senate Committee on Workforce, HB 2016, April 18, 2019 at 00:32:00 (comments of Adam Arms), available at https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=201904113. Testimony of nonlegislator witnesses is relevant evidence of legislative intent. *See, e.g., State v. Zolotoff*, 354 Or 711, 717-18, 320 P3d 561 (2014) (statements of nonlegislator proponents of bill); *State v. Marshall*, 350 Or 208, 223-24, 253 P3d 1017 (2011) (statements of bill proponents and opponents). Adding the legislative history to the text and context of the statute only reinforces our conclusion that the legislature intended to create a uniform system and single forum (this agency) to resolve any dispute regarding dues-deduction authorizations between public employees and labor organizations representing those employees.

ST objects that our conclusion might be detrimental to her claims in federal court because that court may give preclusive effect to our conclusion or to other findings of fact necessary to our decision on the merits (as set forth below). We cannot base our statutory interpretation, however, on how that interpretation may affect any preclusive effect being granted in her federal court claims.

2. SEIU and ST entered into a valid dues deduction authorization agreement on March 22, 2016.

We now turn to the dispute over ST's authorization card. SEIU asks us to conclude that ST signed a valid membership agreement in 2016, authorizing the deduction of dues from her paycheck to be paid to SEIU. ST asserts that the 2016 membership agreement is not valid because her signature was forged. For the following reasons, we conclude that a preponderance of the evidence establishes that ST signed the 2016 membership agreement, and that it was not forged.

At the outset, it is worth noting that ST does not allege that she never authorized dues to be deducted from her paycheck. To the contrary, ST acknowledges signing a membership agreement and authorizing dues to be deducted to SEIU in 2009. It was not until December 2020 that ST formally and properly requested to revoke her dues authorization.[6] On December 28, 2020, SEIU received ST's revocation request and informed her that same day that, under the terms of the 2016 membership agreement, her revocation request would be effective February 6, 2021.

If we credit ST's testimony, she believed that her 2009 membership agreement was still in effect, and that the agreement was "month-to-month." Presumably, ST believed that dues would not be deducted from her January 2021 paycheck, and she testified that she was "flabbergasted that [SEIU said] that [she] had to pay until February [2021]." In other words, this dispute, as well

---

(Continued . . .)
disagreements over the status of deduction authorizations." (March 11, 2019, Written Testimony, House Committee on Business and Labor). Letters submitted by bill proponents are relevant legislative history. *State v. Partain*, 349 Or 10, 20, 239 P3d 232 (2010) (letter submitted by nonlegislator proponents of bill).

[6]As set forth in the findings of fact, in 2018, ST did send an email to SEIU stating that she "would like to opt out of paying union dues" and asking SEIU "what information" it needed to process that request. SEIU responded to the email and informed ST of what was necessary to revoke her dues authorization. ST admittedly did not send another request to revoke her dues authorization until December 2020.

as the claims that ST has filed in federal court, concern at most approximately one month of improperly withheld dues (if we credit ST's account). Under ORS 243.806(10)(b), ST would be entitled to the "actual damages in an amount not to exceed the amount of the unauthorized deductions" for that one month. Based on the record in this case, the dispute over what is potentially owed to ST concerns approximately $95.[7] And, if ST is correct that she did not sign the 2016 agreement, and prevails on this dispute regarding her dues deduction, SEIU would be liable for those actual damages. *See* ORS 243.806(10)(b).

We are convinced, however, that ST signed the 2016 membership agreement. During the hearing, SEIU presented numerous Salesforce records, including a log of 31 home visits that Horeis documented between March 7, 2016 and May 20, 2016. That log establishes that at 7:34 p.m. on March 22, 2016, Horeis logged a visit to the home of ST. SEIU also presented a Google calendar for Horeis reflecting that Horeis was scheduled to be in the Bend area making house calls on March 22, 2016.

Salesforce records introduced into evidence by SEIU also establish that the following events took place in a Salesforce application on March 22, 2016: (1) at 7:26 p.m., Horeis generated a membership form using the contact record for ST; (2) at 7:28 p.m., Horeis generated an electronic signature file; and (3) at 7:28 p.m., Horeis pressed the "submit" button and a PDF of a signed membership form was created by merging the signature image with the membership form. The Salesforce records reflect that membership form was last modified by Horeis at 7:28 p.m. on March 22, 2016.

SEIU Information Systems Coordinator John Foster testified that it would have been impossible for someone from SEIU to take ST's signature from another document and copy it into the membership form because the signature image and the PDF event record[8] were created within two minutes of each other. Foster further explained that it is not possible to submit a membership form in Salesforce with a blank signature box, nor is it possible to modify a membership form after the fact without there being a record of the modification in Salesforce. We credit Foster's testimony.

We find the evidence compelling and convincing that ST signed the 2016 membership agreement. Furthermore, we conclude that it would not have been possible for Horeis to have simulated ST's signature during the two-minute window between which he created the membership form and when he submitted the completed form, because there is no evidence that Horeis had access to any exemplars of ST's signature when he created the membership form. Moreover, Horeis testified without contradiction that members and workers decline to sign new membership agreements on a regular basis, and he is neither penalized nor financially rewarded in connection with the number of new membership agreements that he obtains. Accordingly, there was no compelling motivation for Horeis to forge ST's signature. Consequently, we dismiss ST's accusation that Horeis may have forged her signature, which is wholly unsupported by the record.

[7]The record is unclear as to whether the employer deducted two full months of dues from ST's paychecks (January 2021, and February 2021). If so, then the potential damages would be approximately $190.

[8]A PDF event is the process through which a signature image and a membership form are merged.

ST does not specifically allege who else may have been responsible for forging her signature, a theory that is also unsupported by the record evidence.[9]

Additionally, the record evidence regarding the forensic examinations of the questioned signature provides additional support for our conclusion that ST's signature was not forged on the 2016 membership agreement. During the hearing, both parties presented forensic document examiners to testify about their conclusions regarding the authenticity of the questioned signature. For the reasons explained below, we find the opinion of SEIU's witness, forensic document examiner Kathleen Nicolaides, to be more persuasive than that of ST's witness, forensic document examiner Michael Wakshull.[10]

Nicolaides, a certified forensic document examiner with over 20 years of experience, opined that the signature on the 2016 membership agreement was "probably written" by the same person who authored the known signatures of ST that Nicolaides used for comparison. Nicolaides's conclusion utilizes the industry standard "Standard Terminology for Expressing Conclusions of Forensic Document Examiners" scale, and conforms to a level of seven on the nine-point scale.[11] Nicolaides explained that fundamentally the steps are the same with the examination of digitally-captured signatures and wet ink signatures, although there may be extra steps performed with a digital signature if the examiner has the raw data associated with the signature.[12] In this case Nicolaides was not provided the raw data and her examination was limited to the signature image, which she compared to 11 exemplars of ST's signatures (none of which were digital signatures). In her report, Nicolaides found that the questioned signature is comprised of a similar stroke and movement pattern to the 11 known signatures. Nicolaides testified that she would have been able to render her opinion with a greater level of certainty if she had been provided the raw data and examples of other digitally captured signatures. Nonetheless, she opined

[9]ST asserts that she has not specifically asserted that Horeis forged her signature, but that there is a "union-wide conspiracy" at SEIU to forge signatures of unwilling public employees. The conspiracy accusation is just that—merely an accusation. ST presented no reliable evidence justifying such an accusation.

[10]During the hearing, the ALJ denied SEIU's motion to exclude Wakshull's testimony on the basis that he was not qualified to testify as an expert witness. SEIU now argues that Wakshull's opinion should be accorded less weight based on his lack of expert credentials. Although Wakshull is not a certified forensic document examiner, he has obtained a certificate in document examination from an accredited university; he has authored three books on forensic document examination, including "The End of the Zodiac Mystery: How Forensic Science Helped Solve One of the Most Infamous Serial Killer Cases of the Century"; and he has testified as a qualified expert witness in over 50 hearings. Consequently, although we ultimately agree that the opinion provided by Nicolaides is more persuasive than the opinion provided by Wakshull in this case, we decline to discount Wakshull's opinion on the basis that he is unqualified.

[11]On the nine-point scale, the conclusions are defined as: identification (definite conclusion of identity), strong probability (highly probable, very probable), probable, indications (evidence to suggest), no conclusion (totally inconclusive, indeterminable), indications did not, probably did not, strong probability did not, and elimination.

[12]Raw data includes information such as where pen lifts occurred, how long it took to create certain parts of the signature, and time between pen strokes.

that the questioned signature shared "significant similarities" with the known signatures (including letter formations, intra-letter and inter-letter proportions, direction of movement, and inter-letter spacing); and that "there are no significant differences." Nicolaides' conclusion was peer-reviewed, meaning that a second handwriting analyst reviewed the evidence, and the second examiner's conclusion conformed with that of Nicolaides.

Wakshull, a forensic document examiner with over 10 years of experience, opined that the signature on the 2016 membership agreement was "probably not" written by ST. Wakshull based his opinion on a comparison to six known signatures, all of which were created within a few months of the questioned signature. Wakshull acknowledged that there were similarities between the questioned signature and the known signature but noted that he would expect to find similarities even if they were not authored by the same person because the person who was trying to simulate the signature would probably have a model to emulate.[13] Wakshull opined that there were consistent differences between the questioned signature and the known signatures, including a change in direction of the writing and a difference in the shape of the "S" in ST's first name. Wakshull opined that those differences indicated that the signatures were drafted by different writers, and that signing on a tablet as opposed to a wet ink signature would not account for all the differences. Like Nicolaides, Wakshull testified that he would have been able to render a stronger opinion if he had exemplars of other digitally captured signatures that were written on a tablet.

In weighing the opinions of Nicolaides and Wakshull, we considered the following factors. First, Nicolaides' conclusion was peer-reviewed by a second handwriting expert who agreed with her conclusion. Furthermore, Nicolaides' analysis was based on 11 exemplars while Wakshull's comparison was based on 6. And finally, we note that Nicolaides has been a forensic examiner for approximately twice as many years as Wakshull. For these reasons, we find Nicolaides' opinion more persuasive than that of Wakshull. This opinion by Nicolaides provides even more evidence that ST signed the 2016 agreement.

In arguing for a contrary conclusion, ST asks us to rely on her testimony as to why the document was a forgery. According to ST, "there is a union-wide conspiracy to forge membership cards for unwilling public employees." ST's testimony, however, is largely unreliable, in part because her assertion of a forgery conspiracy requires specificity and details, particularly given the volume of credible evidence that she signed the agreement. ST acknowledged that she was not particularly good with dates and lacked recall over certain key details of the 2016 membership card signing. Much of that may be due to the passage of time, which is understandable. However, in light of the overwhelming and compelling documentary and technical evidence that ST signed the membership agreement in 2016, ST's testimony is far from sufficient to refute that evidence, much less substantiate her claims of a conspiracy.

For example, ST testified that when she received a copy of the 2016 membership agreement in question (on December 31, 2020), "immediately, I knew that wasn't my signature." That testimony, however, is inconsistent with her initial response after receiving the agreement when she stated that she was "not sure that [it was her] signature – be a lot easier to confirm with an original."

[13]As indicated above, there is no evidence that Horeis had access to exemplars of ST's signature when the 2016 membership agreement was submitted.

ST also testified that she believed the document was a forgery because it contained outdated contact information and blank spaces, and that she would not have signed a document that had either inaccurate information or blank spaces. That testimony is contradicted by ST's 2009 membership card, which also had spaces that were left unfilled.[14]

ST further acknowledged that a union representative, likely Horeis, visited her property in either 2014 or 2015. ST's belief that the visit occurred in 2014 or 2015, and not 2016, was based on her recollection that her mother was at the home at the time of the visit, and that her mother had moved away in 2014. ST, however, admitted that her mother had visited her after 2014, but could not recall when that was; likewise, ST's sister testified that their mother visited twice after 2014. Neither ST nor her sister could recall when those visits occurred.

ST also testified that Horeis could not have visited her home in 2016 because by that time she had installed a gate on the gravel road leading to her house that was always kept closed because her animals were allowed to roam loose. ST testified that Horeis could not have walked down her driveway in the evening in 2016 because "he would've been greeted with a gun," and that her dogs (a pit bull and Chesapeake Bay dog) would have deterred him from entering her property "before he even got through the gate." Also roaming the property were two miniature donkeys, and a guard llama who would "hum and spit" at anybody who came on the property.[15] But ST's partner, RM, who lives with ST, testified that although the gate was typically locked when they were not at home, when they were at home it would be "hit and miss" whether the gate was locked. Furthermore, an aerial photograph of ST's property taken on July 15, 2016, does not show a gate blocking access to ST's home. RM's testimony and the aerial photograph both contradict ST's claim that during 2016, a gate was kept closed at all times in order to contain her animals.

In sum, there is considerable compelling evidence that ST signed the 2016 agreement. In contrast, ST's testimony, which asserts otherwise, is not reliable or persuasive. Accordingly, we conclude that ST signed the 2016 agreement, and that the agreement is valid. Therefore, we resolve the dispute brought under ORS 243.806(10) in SEIU's favor.

3. ST did not violate ORS 243.672(2)(c) by attempting to repudiate her dues deduction authorization agreement or by filing a lawsuit against SEIU alleging various federal and state law claims.

---

[14]The spaces left unfilled on ST's 2009 membership agreement include ST's employee ID number, her work email, and her work shift. The spaces left unfilled on the 2016 membership agreement include ST's date of birth, ethnicity, cell phone number, and work shift. ST asserts that we should disregard the contradictions in her testimony because the information left blank in her 2009 membership agreement is different in kind than the information left blank in her 2016 membership card. Some of the information left blank, however, is the same. Moreover, we are not persuaded that ST had a practice of leaving certain types of information blank while always completing other types of information.

[15]ST recalled that when the person who was probably Horeis visited her in 2014 or 2015, her animals were put away and she did not approach him with a gun. ST did not satisfactorily explain why Horeis visiting her in 2015 versus 2016 would have resulted in such drastically different scenarios.

ORS 243.672(2)(c) states that it is an unfair labor practice for a public employee to "refuse or fail to comply with any provision of ORS 243.650 to 243.806." ORS 243.806 prescribes rules related to agreements authorizing public employers to make dues deductions from the salary or wages of public employees. As explained below, SEIU alleges that ST refused to comply with certain provisions of ORS 243.806, and consequently violated ORS 243.672(2)(c).

We start with SEIU's allegation that ST refused or failed to comply with ORS 243.806(6) when she attempted to repudiate her dues deduction authorization. Under ORS 243.806(1), a public employee and a labor organization that represents the employee may enter into an agreement to provide authorization for a public employer to deduct dues, fees, and any other assessments from the public employee's wages or salary. That "authorization 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." ORS 243.806(4)(b). The authorization "shall remain in effect until the public employee revokes the authorization in the manner provided by the terms of the agreement." ORS 243.806(6).

Here, in relevant part, the authorization provided that the authorization renewed annually unless the employee notified SEIU and the employer of the "desire to revoke [the] authorization" between 30-45 days before "the end of any annual period or the termination of the contract between [the] employer and [SEIU], whichever occurs first." ST's annual contract period ended February 6, 2021. The window period for revoking her authorization was December 20, 2020 (45 days from the contract period end date) through January 7, 2021 (30 days from the contract period end date). SEIU received ST's revocation on December 28, 2020, which fell within the agreed-on period, and was therefore a valid and timely revocation under the terms of the agreement.[16]

We decline to conclude that ST's December 28, 2020, revocation violated the agreement. To the contrary, ST notified SEIU during the appropriate window period that she wished to revoke her dues authorization. SEIU asserts, however, that ST violated the agreement (and therefore ORS 243.806(6) and ORS 243.672(2)(c)), because she requested that SEIU notify her employer to cease her dues deductions "immediately." We do not construe ST's request to cease dues deductions "immediately" as an improper revocation of the agreement, particularly when it is undisputed that dues continued to be deducted from ST's paychecks through February 2021, consistent with the terms of her membership agreement. The mere request to have dues deductions stop "immediately" does not constitute a breach of the agreement or a violation of PECBA in these circumstances.

We also disagree with SEIU's assertion that ST violated ORS 243.806(6) (and thereby ORS 243.672(2)(c)) by "falsely denying that she entered into the 2016 agreement and demanding a refund of dues owed under her voluntary agreement." Although the statute states that dues

[16]The timing of the December 2020 revocation also suggests that ST may have been aware of the terms of the 2016 authorization agreement and its window period. ST dated the revocation March 15, 2020, but did not mail it until the window period in late December 2020. ST did not satisfactorily explain why she waited a little over nine months to mail the revocation. Although it could be coincidental that ST decided to mail the revocation during the window period, it is also reasonable to infer that ST waited until the window period to mail the revocation.

deduction authorizations shall remain in effect until they are revoked "in the manner provided by the terms of the agreement," that language does not preclude employees from challenging the validity of their authorizations. On the contrary, the statute provides a mechanism for parties to resolve such disputes. Consequently, we disagree with SEIU's claim that ST failed to comply with ORS 243.806(6) by merely denying the validity of her agreement. We dismiss this allegation.

We turn next to SEIU's allegation that ST failed to comply with ORS 243.806(10) by filing preempted state law claims in federal court against SEIU. ORS 243.806(10)(a) states,

> "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."

SEIU contends that ST refused to comply with this provision by filing a lawsuit regarding her dispute over the validity of the 2016 membership agreement, rather than seeking to resolve the matter through an unfair labor practice proceeding. For the reasons stated below, we disagree.

As previously discussed, ORS 243.806(10)(a) states that disputes regarding the "existence, validity or revocation" of a dues deduction authorization "shall be resolved through an unfair labor practice proceeding." We have already explained that, in enacting this provision, the legislature intended that disputes regarding the existence, validity, or revocation of a public employee's dues deduction authorization be resolved solely by this Board through an unfair labor practice proceeding. The statute, however, does not state that it is an unfair labor practice for a public employee to file legal claims beyond this Board's jurisdiction in federal (or state) court. SEIU asks us, however, to imply such an unfair labor practice, relying on *Bill Johnson's Rests. v. N.L.R.B.*, 461 U.S. 731, 737 n 5, 103 S Ct 2161 (1983). SEIU argues that under *Bill Johnson's*, we should conclude that, by filing claims in court that the legislature committed to ERB's jurisdiction, ST "fail[ed] to comply" with ORS 243.806(10) and violated ORS 243.672(2)(c).

As acknowledged by SEIU, this Board has no previous holding analogous to that of the NLRB in *Bill Johnson's*. Noting that this Board often looks to the NLRB when interpreting PECBA, and citing *Black v. Coos Cty.*, 288 Or App 25, 34, 405 P3d 178 (2017), for the proposition that PECBA "preempts other state law causes of action where the 'gravamen of plaintiff's complaint was that the union had committed a ULP,'" SEIU urges us to hold that ST's claims filed in federal court violate ORS 243.806(10). Given the almost 50 years of PECBA without this Board issuing such a ruling, we are reluctant to do so in this case, particularly because in enacting a comprehensive scheme regarding dues deductions, the legislature did not expressly include a provision that would make such conduct an unfair labor practice.[17] Rather, as described above, the legislature only

[17]Notably, the legislature did not make filing a civil claim regarding dues disputes an unfair labor practice, even though it added two new unfair labor practices to ORS 243.672(1), which applies to public employers. *See* ORS 243.672(1)(j) (making it an unfair labor practice for a public employer to attempt "to influence an employee to resign from or decline to obtain membership in a labor organization"); ORS 243.672(1)(k) (making it an unfair labor practice for a public employer to encourage "an employee to revoke an authorization for the deductions").

required that we use an unfair labor practice proceeding as the mechanism to resolve disputes between public employees and labor organizations regarding the deduction of dues.

Moreover, we find *Bill Johnson's* inapt. In *Bill Johnson's*, the NLRB issued "a cease-and-desist order to halt the prosecution of a state-court civil suit brought by an employer to retaliate against employees for exercising federally protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law." 461 U.S. at 733. The Supreme Court ultimately determined that the NLRB could only undertake such action if the state court lawsuit (1) was "improperly motivated"—*i.e.*, was motivated to retaliate against a party for engaging in protected activity; and (2) lacked a "reasonable basis." *Id.* at 744. Here, even if we were to adopt the NLRB's position under the NLRA and hold that a federal court lawsuit could constitute an unfair labor practice under PECBA, the record in this case does not establish that ST's federal court lawsuit was filed with a retaliatory motive. Accordingly, we disagree with SEIU's assertion that *Bill Johnson's* warrants a conclusion that ST violated PECBA by filing her lawsuit in federal court, and we dismiss SEIU's claim on that issue.[18]

ORDER

1. ST signed a valid authorization in 2016 to have dues to SEIU withheld from her paycheck, until she revoked that authorization effective February 6, 2021. The dispute regarding that authorization is resolved in SEIU's favor under ORS 243.806(10). Therefore, SEIU is not liable for any damages concerning ST's deducted dues.

2. ST did not violate ORS 243.806(10) or ORS 243.672(2)(c) by attempting to revoke her authorization in December 2020 or by filing a lawsuit in federal court, and that claim is dismissed.

DATED: August 31, 2022.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

*Shirin Khosravi, Member

*Member Khosravi recused herself and did not participate in the deliberations or issuance of this order.

This Order may be appealed pursuant to ORS 183.482.

[18]Because no unfair labor practice violation has been established, a civil penalty is not warranted. *See* ORS 243.676(4)(a)(A).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DR-002-22

(DECLARATORY RULING)

IN THE MATTER OF THE PETITION FOR A DECLARATORY RULING FILED BY UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 555.	))))))	DECLARATORY RULING

John Bishop and Caitlin Kauffman, Attorneys at Law, McKanna Bishop Joffe, LLP, Portland, Oregon, represented Petitioner United Food and Commercial Workers Union, Local 555.

On June 2, 2022, United Food and Commercial Workers Union, Local 555 (UFCW or Union) filed a petition for a declaratory ruling pursuant to ORS 183.410 and OAR 137-002-0010 to 137-002-0060. Petitioner requested a declaratory ruling from this Board answering two questions regarding the Public Employee Collective Bargaining Act (PECBA):

(1) Can a party insist, over the other party's objection, that some of its bargaining committee members will participate in bargaining sessions virtually or via telephonic means, if the other party requests that bargaining should occur only via face-to-face, in-person meetings?[1]

(2) Can an employer insist, over the union's objection, that bargaining unit employees, who are not part of either party's chosen bargaining team, must be allowed to attend negotiation sessions as observers?

On June 6, 2022, this Board granted the request to issue a declaratory ruling. On June 9, 2022, the Board issued a notice of invitation to submit *amicus curiae* briefs, with any such

[1]Based on the stipulated facts in the petition, the briefing, and the oral argument, we understand petitioner's question to inquire about bargaining via videoconferencing technology, and our ruling addresses that inquiry. In this opinion, we use "videoconference" to mean a virtual meeting in which the participants attend the meeting by video, and "hybrid" bargaining to mean bargaining in which some participants are together in person, and at least one participant is participating virtually by videoconference.

briefs being due by July 15, 2022. The Board received *amicus* briefs from Oregon Education Association; attorney Seth Davis of Fenrich & Gallagher, P.C.; Linn County; and the University of Oregon, Eastern Oregon University, and Southern Oregon University (collectively, the Public Universities).[2] On July 22, 2022, petitioner filed a reply brief.

On August 5, 2022, this Board held a declaratory ruling hearing, at which petitioner presented oral argument.[3]

For the reasons explained below, we conclude that a party's insistence, over the other party's objection, that some of its bargaining members participate in bargaining sessions virtually or via a hybrid format is not a *per se* violation of ORS 243.672(1)(e) or (2)(b). We also conclude that an employer violates ORS 243.672(1)(e) when it insists, over the labor organization's objection, that bargaining unit employees who are not part of the union's bargaining team attend bargaining sessions.

FINDINGS OF FACT[4]

1. UFCW is a labor organization within the meaning of ORS 243.650(13) and represents a bargaining unit of over 500 workers employed by Bay Area Hospital (the Hospital).

2. The Hospital is a public employer within the meaning of ORS 243.650(20). It is a is a public hospital in Coos Bay, Oregon, and operates as part of the Bay Area Health District, which was formed pursuant to ORS 440.320.

3. UFCW and the Hospital are parties to a collective bargaining agreement (Agreement), which governs the terms and conditions of employment for Hospital employees represented by UFCW. The term of the Agreement is July 1, 2018 to June 30, 2022. The Agreement automatically renews from year to year unless either party sends timely notice of its intent to modify or terminate it. As of the filing of the petition, UFCW had timely notified the Hospital of its intent to enter into negotiations to modify the Agreement.

4. On March 10, 2022, UFCW emailed the Hospital to initiate bargaining over a successor contract for their current Agreement.

5. On March 22, 2022, the Hospital responded that it would attempt to get back to UFCW about possible bargaining dates, and that the Hospital "will want to bargain about whether bargaining will take place in person or through video conference or maybe a mix of both."

---

[2]The brief filed by Seth Davis of Fenrich & Gallagher, P.C. did not identify a particular *amicus curiae* on whose behalf the brief was filed. The Fenrich & Gallagher law firm is widely known as a law firm that represents labor organizations; it describes its legal practice as "providing full spectrum legal representation to labor organizations throughout the West Coast."

[3]Bay Area Hospital, the public employer involved in the dispute that prompted the petition, declined to participate in the declaratory ruling process.

[4]The Findings of Fact are based on the facts set forth in the petition. *See* OAR 137-002-0040(2).

6. On March 31, 2022, UFCW responded that it had "no interest in virtual meetings" and noted that the Hospital previously indicated that it wanted to hold negotiations in person. As per the parties' customary bargaining practices, the Union listed the bargaining unit employees who would be on the Union's bargaining committee and identified 26 dates in April, May, June, and July 2022 when it was available for negotiations.

7. In an April 1, 2022, message responding to the Union, the Hospital proposed a "hybrid meeting process" for the parties' negotiations, wherein "bargaining team members may participate in-person, or they may participate through video conferencing."

8. In an April 6, 2022, response, UFCW reiterated that it would not agree to virtual or hybrid negotiations as proposed by the Hospital. The Union asserted that nothing obligated the parties to meet virtually or in a hybrid format and "those participating in the bargaining process at the bargaining table need to be physically present."

9. On April 12, 2022, the Hospital responded stating that the Union's refusal to accept participation by the Hospital's bargaining team members via video conference was an "example of bad faith bargaining." Additionally, the Hospital said that it intended to provide "a hospital wide invitation" to all UFCW bargaining unit employees to be present at bargaining sessions "especially during pension discussions, wages, union dues-checkoff, etc."

10. On April 21, 2022, the Union interpreted the Hospital's stated plan to invite all UFCW bargaining unit employees to observe negotiations as a proposal that negotiations would be conducted as "open public meetings." The Union therefore requested that bargaining occur at a location that would accommodate such potentially large public meetings better than the hospital facility. The Union restated its rejection of the Hospital's proposal for a "hybrid" virtual and in-person bargaining format. It argued that the Hospital's efforts to condition commencement of negotiations on the Union's agreement to such a proposal was unlawful.

11. In an April 25, 2022, response, the Hospital demanded that the Union "immediately stop its unlawful efforts to unilaterally force bargaining to occur only on its terms." With respect to the Hospital's plan to invite all employees in the Union's bargaining unit to negotiations, the Hospital declared that, from its perspective, "bargaining unit employee attendance at upcoming sessions would be permitted during lunch and break periods, before or after bargaining unit members' shifts or on times that employees are not scheduled to work." The Hospital said that it did not agree that bargaining sessions will be conducted as "executive sessions." The Hospital again asserted that it intended to have some of its bargaining team members attend bargaining sessions via video or telephone conference and stated that "the Union will then be presented with a choice to attend those sessions or not." The Hospital asserted that the Union's refusal to attend negotiation sessions where its bargaining team members participated virtually, rather than in-person, would amount to "an unlawful refusal to bargain."

12. On April 26, 2022, UFCW continued its refusal to agree to any negotiations ground rule permitting virtual or "hybrid" bargaining. The Union reiterated that it was "only interested in traditional, in-person, face-to-face negotiations." With respect to the Hospital's plan to invite individuals other than bargaining team members to negotiation sessions as observers, the Union

maintained that neither party was allowed to dictate to the other that they must permit individuals who are not on either party's bargaining team to attend negotiation sessions. The Union offered, however, that it would be willing to discuss a ground rule allowing the negotiation sessions to be open to the public.

13. On April 28, 2022, the Hospital restated its position that bargaining sessions "are open to all bargaining unit members during their breaks, lunch periods, before and after their shift and on their days off." The Hospital stated it would not accept any ground rule to the contrary. It asserted that "there is a very significant legal and practical difference between bargaining unit members attending bargaining sessions and members of the public, the press, or others attending such sessions." It claimed: "Different rules apply to non-bargaining unit individuals and the Hospital will not waive its statutory right to exclude these individuals from observing the bargaining process." The Hospital also restated its position that its bargaining committee has a right to participate in bargaining "by video conference or other remote means if necessary" unless there is "caselaw or ERB administrative rule to the contrary[.]" The Hospital declared that it "may find it necessary to exercise its right to decline to bargain over any Union proposed ground rule(s)."

14. The Union responded that it would be canceling previously scheduled bargaining so that it could seek a declaratory ruling from the ERB on the issues the parties had been debating. The Union asked the Hospital if it wished to join in the filing of that petition. Initially, the Hospital responded by arguing that the Union's cancellation of bargaining sessions amounted to "bad faith bargaining." The Hospital rejected the Union's request to join in petitioning the Board, but said that it would agree to refrain from having its bargaining team members participate in negotiations virtually if the Union would agree to continue with previously scheduled negotiations. The Hospital did not say in its response to the Union whether it would refrain from inviting bargaining unit employees to bargaining sessions as observers while the Union petitioned the Board.

15. The Union responded to the Hospital by asking again if the employer wished to join in petitioning the ERB for a declaratory ruling. The Union told the Hospital that it would agree to continue with previously scheduled negotiations so long as the Hospital agreed that while the Union's petition for a declaratory ruling was pending, the Hospital would, among other things: 1) cease insisting on "hybrid" negotiations; and 2) cease any and all attempts or intentions of inviting bargaining unit employees to attend bargaining sessions as observers.

16. On May 27, 2022, the Hospital notified the Union that it would agree that if the Union promptly filed a declaratory ruling request to ERB on the issues, the Hospital would "temporarily agree to not insist that some of its bargaining team members may occasionally attend negotiations through video conference technology and the Hospital would temporarily agree not to make any overt efforts to invite bargaining unit employees to observe the collective bargaining process during [upcoming bargaining sessions] . . . and other scheduled dates before a decision is made on the Union's declaratory request ruling."

QUESTIONS PRESENTED BY PETITIONER

(1) Can a party insist, over the other party's objection, that some of its bargaining committee members will participate in bargaining sessions virtually or via telephonic means, if the other party requests that bargaining should occur only via face-to-face, in-person meetings?[5]

(2) Can an employer insist, over the union's objection, that bargaining unit employees, who are not part of either party's chosen bargaining team, must be allowed to attend negotiation sessions as observers?

CONCLUSIONS AND RULINGS

A Party's Insistence on Bargaining by Videoconference or In a Hybrid Format

We begin with petitioner's request for a ruling that a party violates the duty to bargain in good faith when it insists, over the other party's objection, that some of its bargaining team members attend bargaining sessions by videoconference or hybrid means. ORS 243.672(1)(e) prohibits a public employer from refusing "to bargain collectively in good faith with the exclusive representative." Under ORS 243.672(2)(b), the "mirror" provision to section (1)(e), 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 the exclusive representative. PECBA does not expressly require in-person bargaining or prescribe a particular bargaining format, but defines "collective bargaining" as

> "[T]he performance of the mutual obligation of a public employer and the representative of its employees *to meet at reasonable times and confer in good faith* with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining, to meet and confer in good faith in accordance with law with respect to any dispute concerning the interpretation or application of a collective bargaining agreement, and to execute written contracts incorporating agreements that have been reached on behalf of the public employer and the employees in the bargaining unit covered by such negotiations."

ORS 243.650(4) (emphasis added). Notably, this section is not merely a definition; it also "operates as a substantive provision creating rights and obligations concerning collective bargaining." *Multnomah Cty. v. Multnomah Cty. Corr. Deputy Ass'n.*, 317 Or App 89, 93 n 3, 505 P3d 1037 (2022).

---

[5]As noted at the outset, even though petitioner's question also used the term "telephonic means," which arguably could include bargaining only by traditional telephone, this ruling addresses the question of bargaining by videoconference, As discussed in detail below, we will use a totality of the circumstances approach to answer that question. We note that, given the widespread availability of videoconferencing technology, including the availability of free videoconferencing technology, it is doubtful that a party's insistence, over the other party's objection, that it bargain only by telephonic means (and not in-person or by videoconference) would ever satisfy the good-faith bargaining requirement.

We recognize two distinct types of bad faith bargaining violations: "totality of conduct" and *per se* violations. *Salem Police Employees Union v. City of Salem*, Case No. UP-121-87 at 8, 11 PECBR 282, 289 (1989). A party violates its duty to bargain in good faith when the totality of its conduct during the period of negotiations "indicates an unwillingness to reach a negotiated agreement." *Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95 at 25, 16 PECBR 559, 583 (1996); *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94 at 19-20, 16 PECBR 433, 451-52 (1996), *aff'd without opinion*, 146 Or App 777, 932 P2d 1216 (1997). A *per se* violation occurs when a party's conduct is "so inimical to the negotiations process" that it is sufficient to establish a violation even absent a showing of subjective bad faith. *Federation of Oregon Parole and Probation Officers, Multnomah County Chapter v. Multnomah County*, Case No. UP-032-12 at 7, 25 PECBR 629, 635 (2013); *Oregon School Employees Association v. Medford School District #549C*, Case No. UP-77-11 at 10, 25 PECBR 506, 515 (2013) (citing *International Association of Firefighters Local #1431 v. City of Medford*, Case Nos. UP-32/35-06 at 9-10, 22 PECBR 198, 206-07 (2007)). For example, a party commits a *per se* violation when it submits, in a final offer or in mediation, a new proposal that has not been subject to bargaining; we reach that conclusion because that conduct "effectively bypasses the entire collective bargaining process, a core element of [PECBA]." *Medford School District #549C*, UP-77-11 at 11, 25 PECBR at 516; *see also Jackson County v. Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. UP-002-20 at 5 (2020) (including a permissive subject of bargaining in a final offer over the other party's objection violates the obligation to bargain in good faith within the meaning of ORS 243.672(2)(b)). As another example, an employer commits a *per se* violation of section (1)(e) when it unilaterally implements a change to a mandatory subject of bargaining because such conduct "fundamentally undermines and destabilizes the relationship between an employer and the exclusive representative." *Medford School District #549C*, UP-77-11 at 11, 25 PECBR at 516.

Most pertinent to this case, this Board has held that ground rules are a permissive subject of bargaining. *City of Salem v. International Association of Fire Fighters, Local 314*, Case No. C-152-80 at 6, 5 PECBR 4237, 4242 (1980). Because parties are not required to bargain over permissive subjects of bargaining (such as ground rules), it is a *per se* violation of the obligation to bargain in good faith if a party "condition[s] its participation in collective bargaining on the other party negotiating or agreeing to ground rules * * *." *Id.*; *see also Washington County Dispatchers Association v. Washington County Consolidated Communications Agency*, Case Nos. UP-015/27-13 at 8, 26 PECBR 35, 42 (2014) (*Washington County CCA*); *Lane County v. AFSCME Local 626, AFL-CIO*, Case No. C-59-80 at 3, 5 PECBR 4042, 4044 (1980). Based on that precedent, petitioner argues that virtual or hybrid bargaining is a technical precondition for negotiations and, as such, is a permissive ground rule subject. Therefore, petitioner urges us to rule that a party commits a *per se* violation of the duty to bargain in good faith if it insists, over the other party's objection, that some of its bargaining team members will be attending bargaining sessions by videoconference or hybrid means.

At the outset, we note that nothing in the text of ORS 243.650(4) (defining "collective bargaining") or ORS 243.672(1)(e) or (2)(b) (making bad-faith bargaining an unfair labor practice) identifies the format in which bargaining must take place. Rather, relevant to this petition, the text of the statutes only requires that parties bargain in good faith, and that, as part of that good-faith

obligation, they "*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). Petitioner also does not dispute that when parties bargain by way of videoconference or in a hybrid format, they are "meeting" within the terms of the statute. Thus, the statute itself does not provide that only in-person meetings (as opposed to meeting by videoconference or in a hybrid format) constitute good-faith bargaining. Nor does the statute designate a preference for the format in which parties meet.

Nevertheless, petitioner argues that the statute effectively provides that in-person bargaining is the default for "meeting," and that a party that insists that it will appear at a bargaining session by videoconference (or hybrid means) violates ORS 243.672(1)(e) or (2)(b). In arguing for that interpretation of ORS 243.672(1)(e) and (2)(b), petitioner advances several arguments. First, it contends that the virtual or hybrid format of bargaining is akin to electronic recording of bargaining sessions, which the Board viewed as a technical precondition to bargaining in *Washington County CCA*, UP-015/27-13, 26 PECBR 35. There, the Board held that the labor organization violated ORS 243.672(2)(b) by insisting, over the employer's objection, that the parties' bargaining sessions be electronically recorded. In reaching that result, the Board followed *Bartlett-Collins, Co. v. NLRB*, 237 NLRB 770 (1978), *enf'd*, 639 F2d 652 (10th Cir), *cert den*, 452 US 961, 101 S Ct 3109 (1981). In *Bartlett-Collins*, the NLRB held that audio recording bargaining sessions is a permissive subject of bargaining, relying in part on expert opinion that "the presence of a reporter during contract negotiations has a tendency to inhibit the free and open discussion necessary for conducting successful collective bargaining." *Bartlett-Collins, Co.*, 237 NLRB at 773 n 9. In *Washington County CCA*, the Board reasoned that electronic recording of bargaining sessions had negative consequences, including parties talking "for the record" rather than to obtain agreement and formalizing bargaining to the detriment of the "spontaneity and flexibility often necessary to successful negotiations[.]" *Washington County CCA*, UP-015/27-13 at 9, 26 PECBR at 44 (quoting *Bartlett-Collins*, 639 F2d at 656). The Board also acknowledged that audio recording could contribute to a bargaining atmosphere in which negotiation begins "on a discordant note," and could create the appearance that "one party lacks confidence in the collective bargaining process, anticipating litigation rather than agreement." *Id.* Because these negative consequences continued to be "detrimental and deleterious to successful collective bargaining[,]" *id.* at 10, the Board adopted the NLRB's conclusion that recording bargaining sessions is a permissive subject of bargaining, meaning that a party may not insist, over the other party's objection, that bargaining sessions be recorded. *Id.* at 12. Petitioner here avers that these harms are posed equally by bargaining conducted by videoconferencing or hybrid means.

Washington County CCA is inapt. First, *Washington County CCA* did not address the fundamental question raised in this petition—namely, what it means to "meet" within the meaning of ORS 243.650(4) and PECBA generally. Rather, *Washington County CCA* concerned whether one party could insist on a procedure to be used in the meeting (audio recording) that was not inherent or essential to the meeting itself. Here, the question concerns whether one party can ultimately dictate or determine whether the meeting takes place at all. What is at issue in this petition (the subject of bargaining format) is categorically different from the procedures attendant to bargaining itself (*e.g.*, whether a meeting should be recorded). We disagree that virtual or hybrid bargaining is merely a technical precondition to bargaining. Rather, virtual bargaining is not merely a format, but constitutes the very bargaining "meeting" itself. *See* ORS 243.650(4)

(collective bargaining is 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").

Ground rules, in contrast, are generally "designed to facilitate bargaining by establishing certain procedures that the parties will follow." *International Association of Fire Fighters, Local 314*, C-152-80 at 6, 5 PECBR at 4242; *see also Washington County CCA*, UP-015/27-13 at 4 n 5, 26 PECBR at 38 n 5 (describing ground rule topics, including the composition of bargaining teams, the presence of observers, and the commencement of the 150-day bargaining period). To be sure, bargaining in a virtual or hybrid format *encompasses* certain procedural questions. Those questions include, for example, how a proposal should be passed "across" the table (such as by electronically sharing a document via screen sharing with a file simultaneously transmitted via email), how all individuals present at a virtual session should participate (such as by keeping their cameras on so that they are visible to other participants), how and when bargaining team members should use "chat" functions within the videoconference technology, and similar procedural issues. But petitioner's question is not truly grounded in such procedural issues. Rather, petitioner asks whether one party may insist on virtual or hybrid bargaining as the "meeting" itself. That question is distinct and separate from the procedures associated with that meeting. For these reasons, we do not view virtual or hybrid bargaining format as merely a technical precondition to bargaining akin to the audio recording discussed in *Washington County CCA.*

Second, petitioner urges us, as the Board did in *Washington County CCA*, to follow authorities from the private sector—specifically, those finding that in-person bargaining is essential to effective collective bargaining. In particular, petitioner relies on NLRB cases (and a General Counsel memo) under the National Labor Relations Act (NLRA), on which PECBA was modeled. Specifically, citing *Aaron Newman et al. d/b/a Colony Furniture Company*, 144 NLRB 1582, 1589 (1963), petitioner avers that "the NLRB has long held that 'face-to-face negotiations' between the 'bargaining principals' is 'an elementary and essential condition of bona fide bargaining.'" Petitioner also cites *Success Village Apartments*, 347 NLRB 1065, 1068 (2006), for the proposition that "face-to-face meetings are the bargaining norm." Finally, petitioner relies on a General Counsel memorandum recommending that Region 19 should issue a complaint alleging that an employer's insistence on videoconference bargaining violated its statutory duty to meet and confer in good faith with the union. *United Restoration, d/b/a United Air Comfort*, Case No. 36-CA-9318, 2003 NLRB GCM LEXIS 103 (October 30, 2003).

We turn first to the General Counsel Memo on which petitioner relies because it is the only NLRB document that speaks to the issue of one party insisting that it will bargain via videoconference. At the outset, we note that a General Counsel Memo is not NLRB precedent. The General Counsel's office is the prosecutorial arm of the NLRB and is organizationally and functionally distinct from the five-member Board, which is the adjudicatory arm of the NLRB. Thus, it is not uncommon for a General Counsel to have a different legal perspective than that of the five-member Board. It is the five-member Board, however, that issues precedential orders. Thus, a General Counsel Memo may or may not align with NLRB precedent on a number of issues.

In this GC Memo, the General Counsel opined that an employer could not lawfully insist on bargaining by using its videoconference system. The General Counsel began by observing that the Board had consistently interpreted the NLRA's requirement to "meet at reasonable times and confer in good faith * * * to require that parties negotiate face-to-face."[6] The GC Memo noted, however, that the NLRB had "never articulated its rationale in this regard." The GC Memo then set about providing a rationale as to why, in the General Counsel's view, the NLRA prohibited an employer (in 2003) from insisting on bargaining via its videoconference system.

The GC Memo began by stating that the Board had previously "determined, albeit without discussion, that an employer violates Section 8(a)(5) [the duty to bargain in good faith] when it insists on negotiating by telephone or mail; implicit in that determination is the Board's conclusion that 'face-to-face' bargaining is necessary for an effective negotiating process." The memo acknowledged that videoconferencing is more like "face-to-face" bargaining than bargaining by phone or mail, but then added that "there are ways in which [videoconferencing] is clearly inferior to in-person negotiations." The GC Memo went on to identify those ways:

> "Collective-bargaining negotiations necessarily involve communicating difficult messages, and strong differences of opinion are to be expected. Only in true face-to-face bargaining can parties contemporaneously exchange draft language and submit written proposals (which in many instances are likely to be prepared or revised spontaneously during the course of a bargaining session), sign-off on tentatively agreed-upon terms in the midst of bargaining, or hold sidebar conferences with members of the other side's negotiating committee. Furthermore, only in face-to-face bargaining can the parties observe nuances of eye contact and body language, not only on the part of the individual speaking but also on the part of those observing. Finally, the Union's apprehensions about speaking candidly when it cannot be certain as to who is in the room and as to whether the sessions are being recorded are not unreasonable. For all of these reasons, and consistent with established Board precedent, we conclude that the parties will most effectively reach consensus by negotiating in person rather than via the Employer's videoconference system."

Petitioner avers that most of those differences between videoconferencing and face-to-face negotiations are still relevant today, despite advances in technology since 2003, and despite most public employers using some form of videoconferencing to negotiate with labor organizations throughout the COVID-19 pandemic. Therefore, in petitioner's view, we should rule that in-person bargaining is the default for collective bargaining in the public sector, and that a party's insistence on bargaining in another format violates the duty to bargain in good faith.

---

[6]The GC memo cited several cases (*Fountain Lodge*, 269 NLRB 674, 674 (1984); *United States Cold Storage Corp*., 96 NLRB 1108, 1108 (1951), *enf'd,* 203 F2d 924 (5th Cir 1953), *cert den,* 346 U.S. 818 (1953); *Tower Books*, 273 NLRB 671, 672 (1984), *enf'd,* 772 F2d 913 (9th Cir 1985) ; *NLRB v. P. Lorillard Co.*, 117 F2d 921, 924 (6th Cir 1941); *Redway Carriers, Inc.*, 274 NLRB 1359, 1377 (1985); and *Colony Furniture Co.*, 144 NLRB 1582, 1589 (1963)), but none of those involved the question of bargaining by videoconference.

We reiterate that the GC Memo is not binding NLRB precedent, and, despite the memo issuing in 2003, we are unaware of any NLRB case or precedent adopting the view expressed in that memo. That is particularly important given that the memo itself also noted that the NLRB had not provided much analysis or rationale in cases that discussed the importance of "face-to-face" negotiations. Additionally, although many of the premises set forth in the 2003 memo may have been accurate at the time, many of them have been undermined or are no longer accurate in light of technological developments and recent labor-management experience with bargaining by videoconferencing.

Specifically, the technology that currently enables parties to meet virtually has changed dramatically over the last several years. In particular, the videoconferencing platforms available now have the technical capability to enable parties to interact in ways fundamentally different than the telephone or mail-based negotiating at issue in NLRB cases or the videoconferencing available in 2003. As long as the participants have adequate internet connections, their facial expressions and body language (to the extent they are in frame) are viewable by others in the meeting.[7] With the new technology, parties can generally make the content on their computer screens visible to other participants by using "screen sharing" features. Such "screen sharing" allows virtual document sharing and real-time document editing. Participants can also adjourn to private virtual break-out rooms, allowing virtual caucuses and sidebars. Password-protection for video meetings helps to ensure that only invited participants are present during the meeting. These current technological capabilities are dramatically different than the technology that existed in 2003, when the *United Restoration* GC Memo was issued. Because of the technology available 19 years ago, the General Counsel opined that only "in true face-to-face bargaining can parties contemporaneously exchange draft language and submit written proposals (which in many instances are likely to be prepared or revised spontaneously during the course of a bargaining session), sign-off on tentatively agreed-upon terms in the midst of bargaining, or hold sidebar conferences with members of the other side's negotiating committee." *United Restoration*, 2003 NLRB GCM LEXIS 103 at 6. With the videoconferencing technology currently available, that statement is simply no longer accurate.

Further, the videoconferencing technology available today is provided by multiple independent vendors. In contrast, in *United Restoration*, the General Counsel considered the employer's insistence on the use of *the employer's own* videoconferencing system. Today, there are multiple, independent platforms available, so that if one party is less comfortable or adept at using a particular platform, an alternative is generally available. In addition, since the onset of the pandemic, video meeting platforms have been widely used by *both* sides, so that both sides have had repeated opportunities to become accustomed to their use. In other words, we do not believe that one side or the other will have a natural advantage or inherently more power by using a particular vendor-provided videoconferencing platform. Certainly, the use of videoconferencing

[7] *See Morrison Healthcare and SEIU United Healthcare Workers East*, 369 NLRB No. 76, slip op. at 1 (May 11, 2020) (recognizing that "the use of modern videoconference technology 'enable[s] the observation of the witness at all material times.'") (quoting *EF International Language Schools*, 363 NLRB No. 20, slip op. at 1 n 1 (2015)).

platforms is still novel compared to approximately 50 years of in-person collective bargaining experience under PECBA. But any disadvantage for one side or the other resulting from that relative novelty is ameliorated by the fact that the social distancing and remote work mandates caused by the COVID-19 pandemic resulted in *both* labor organizations and public employers quickly adopting and commonly using virtual meeting platforms.[8]

Despite the advances in technology since the 2003 GC Memo, meeting by videoconference technology does have some disadvantages, which we also consider. At times, internet connections or other technological problems can interfere with reception, making it more difficult to have the seamless interpersonal interaction than would be possible in person. Participants in some communities may not have ready access to a reliable internet connection, meaning that participants in some areas, typically urban areas, may be able to more easily bargain virtually than participants in other, often rural, areas where high-speed internet access may not be as readily available. In addition, in a videoconference, generally only one person can talk at a time, which can lead to awkward interruptions and more stilted, formal communication, which could in some cases detract from effective or efficient negotiation. Participants in video meetings can also be distracted by other programs or information on that participant's computer screen, such as notifications for incoming emails. As *amicus curiae* Linn County acknowledges, it is easier for someone to "sneak into" a virtual bargaining session than into an in-person, face-to-face bargaining session, which can detract from the trust necessary for effective collective bargaining. We also consider the concerns expressed by *amicus curiae* Oregon Education Association that public employers could misuse videoconference technology to gain a strategic advantage, such as by having the employer representative with important information, such as an employer's business manager, participate in bargaining only by videoconference. That tactic—using virtual bargaining formats for strategic purposes—could be employed by both sides.

In assessing these disadvantages, however, we must also consider the fact that some disadvantages of virtual bargaining are also present during in-person meetings. For example, just as participants in virtual bargaining can be distracted by email arriving on their computer screens, so too can participants in face-to-face bargaining can be distracted by incoming messages on cell

[8]Representatives from both sides of the table were also required to use videoconferencing for contested case hearings, oral argument, and mediation before this agency from March 2020 through April 2022. In March 2022, this agency sent surveys to 560 users of the agency's services that inquired about parties' satisfaction with virtual versus in-person services. The agency received 101 responses (an 18 percent response rate), with 45 percent of responses from employers and 55 percent of responses from labor organizations. When asked their anticipated format for direct collective bargaining after the COVID-19 pandemic, 54 percent replied that they anticipated bargaining in-person "most or all of the time," 34 percent replied that they anticipated an equal mix of virtual and in-person bargaining, and eight percent replied that they anticipated bargaining virtually most or all of the time. The remaining four percent did not know. Relatedly, when asked to rate their satisfaction with the virtual format provided by this agency for contested case hearings, oral argument, mediation, agency-provided training, and agency-facilitated interest based bargaining, more than 70 percent of respondents indicated that they were either highly or somewhat satisfied with a virtual format for all services except contested case hearings. More than 60 percent were highly or somewhat satisfied with the virtual format of contested case hearings. *See* Oregon Employment Relations Board, Customer Survey Results: Virtual and In-Person Service Delivery Options (March 2022), available at https://www.oregon.gov/erb/Pages/News.aspx (last visited September 9, 2022).

phones. Similarly, difficulty seeing facial expressions or body language, which can complicate virtual bargaining, can also occur during in-person meetings when a negotiator is blocked from view by another person or temporarily looking in another direction. And, just as a party can insist for strategic reasons on bargaining in a virtual or hybrid format, a party can likewise insist for strategic reasons on a particular location to be used for face-to-face bargaining.

We also take into account the fact that some disadvantages of virtual bargaining can be ameliorated by agreements between the parties, such as an agreement that all participants in the meeting disclose their presence and all participants keep their cameras on during the meeting. Further, as *amicus curiae* Linn County notes, most or all videoconferencing programs can be configured to enhance the security of sessions, such as by setting passwords, requiring registration before the meeting, and displaying a real-time meeting attendee list.

Finally, in our analysis, we also assess the advantages in some situations of parties bargaining by videoconference or in a hybrid format rather than in person. For example, meeting by videoconference may make participation by some individuals substantially more convenient or even possible, such as, for example, for people with continuing health concerns related to COVID-19, people with family caregiving responsibilities, or people for whom traveling to in-person bargaining sessions would be prohibitive because of cost, work schedules or demands, or other factors. Virtual bargaining, because it does not require travel and may be more easily convened, may also enable parties to have more bargaining sessions, which could lead to faster, more cost-effective resolution of some disputes. Similarly, on-screen document sharing and real-time document editing may aid the parties in resolving difficult contract drafting issues, compared to the cumbersome process that sometimes occurs when parties share electronic files. As *amicus curiae* Seth Davis points out, sharing documents during a videoconference can avoid difficulties that occur when parties attempt to share documents while in person and encounter digital file or device incompatibility.

In short, we recognize that current videoconferencing technology has some disadvantages and that it may not be the best option at every bargaining table. However, we also consider the fact that some disadvantages can be ameliorated by agreements or programming features (such as required passwords or attendee lists). We weigh the disadvantages as well as the fact that, in some situations, virtual bargaining provides advantages over in-person bargaining. On balance, in our view, the current technology has sufficient technical capability and benefits to enable parties to meet, interact, share information, exchange documents, discuss and narrow disputes, and hold private caucuses and sidebars to a sufficient degree that it is no longer accurate to say for every case that "the parties will most effectively reach consensus by negotiating in person" rather than by videoconference. *See United Restoration*, 2003 NLRB GCM LEXIS 103 at 7. Therefore, we do not believe that the NLRB authorities relied on by petitioner provide the best guideposts at this time to resolve the question presented.

We are not left, however, without any precedent to inform our analysis. We find useful guidance in *Oregon AFSCME Council 75 v. Housing Authority of Yamhill County*, Case No. UP-120-89, 12 PECBR 372 (1990) (*Housing Authority*). There, AFSCME sought to bargain during the workday, and the Housing Authority conveyed that it was willing to bargain only beginning at 4:30 p.m. on weekdays, with an early release from work of 4:00 p.m. for bargaining team members. AFSCME filed a bad faith bargaining claim under ORS 243.672(1)(e). The Board held that an

employer "violates ORS 243.672(1)(e)—concerning the times for bargaining sessions—only if it insists on meeting at a time *that is not reasonable under the circumstances of a case*, and that a proposed time is unreasonable only if meeting at that time would restrict the union's choice of negotiators or would otherwise tend to interfere with the bargaining process." *Id*. at 10-11, 12 PECBR at 381-82 (emphasis added).[9] Applying that standard in *Housing Authority*, the Board concluded that the employer did not violate ORS 243.672(1)(e) by proposing to meet on weekdays beginning at 4:30 p.m. because that proposal was not unreasonable under the circumstances of the case. *Id.* at 11, 12 PECBR at 382. The Board reasoned that the facts supported "AFSCME's contention that meeting entirely during the workday would be less burdensome for it and for the employees, but we do not find that circumstance to be sufficient to establish that the 4:30 p.m. time would tend to interfere with effective bargaining." *Id.*

In reaching that result, the Board rejected AFSCME's argument that in cases where the parties' burdens and conveniences regarding bargaining times "are relatively equal, the parties must compromise—for example, by alternating meeting times—in order to fulfill their joint obligation to meet at reasonable times." *Id*. at 8, 12 PECBR at 379. Acknowledging that argument had "an element of equity about it" that seemed lacking in the employer's position, the Board nonetheless declined to adopt the "formalized balancing of the parties' interests" that would be required to resolve disputes if AFSCME's interpretation were adopted. Rather, the Board found that "[t]his balancing has been done informally for years by negotiating parties themselves, apparently with satisfactory results." *Id.* at 12, 12 PECBR at 380; *see also Tri-County Metropolitan Transportation District of Oregon*, UP-001-13 at 22 n 16, 26 PECBR at 344 n 16 (declining to apply a *per se* analysis to a claim alleging that a party did not attend bargaining sessions because it believed that the Oregon Public Meetings Law applied and required bargaining sessions to be open to the public).

We find the reasoning and analysis in *Housing Authority* persuasive. Like the Board in *Housing Authority*, we recognize that there is an element of equity—or, at least, ease of application—in the petitioner's approach. Petitioner's requested ruling—that a party commits a *per se* violation of the duty to bargain in good faith if it insists on virtual or hybrid bargaining—would effectively make in-person bargaining the default format for collective bargaining under PECBA. But conversely, if it were a *per se* violation for a party to insist on *in-person* bargaining, virtual or hybrid bargaining would effectively become the default format. We do not think it is necessary or wise to adopt such a bright-line approach. The public sector in this state includes a wide diversity of employer types, sizes, resources, and workforces. Some public employers (such as cities or school districts) are located in one community. Those employers may have many, if not most, of their employees physically present in or near that single community. In contrast, other public employers, such as the State of Oregon and some institutions of higher education, have locations in multiple, sometimes very geographically dispersed,

[9] In *Housing Authority*, the Board cited *Borg-Warner Corp*., 198 NLRB 93, 80 LRRM 1790 (1972), in which the employer unilaterally decided that bargaining sessions would be held only after working hours. In *Borg-Warner Corp*., the NLRB noted that such conduct was not a *per se* violation, but was evidence of surface bargaining, "which was found based on the totality of the employer's conduct." *Housing Authority*, UP-120-89 at 10, 12 PECBR at 381. In *Housing Authority*, the Board agreed "that a refusal by an employer to consider any accommodation to a union's desires in scheduling meetings could be evidence of subjective bad faith under the totality of the circumstances test." *Id.* at 10 n 10, 12 PECBR at 381 at n 10.

communities. Those employers may have employees located throughout the state or in large regions. Likewise, labor organizations range from large organizations with statewide reach with representatives in many communities to small, independent associations. Given this diversity in the public sector, we do not think a one-size-fits-all "default" of any particular bargaining format would be most consistent with PECBA's policies to promote "the development of harmonious and cooperative relationships between government and its employees[,]" ORS 243.656(1), and to "encourag[e] practices fundamental to the peaceful adjustment of disputes." ORS 243.656(3).

In our view, the widespread adoption and use of videoconferencing technology by labor organizations and public employers since March 2020 indicates that a more nuanced, case-specific approach can effectively promote PECBA's policies. In reaching our conclusion, we take into account the valid concerns that virtual and hybrid bargaining may, in some cases, not be as effective or as efficient as in-person bargaining in reaching consensus and resolving disputes.[10] Those concerns are, to some degree, counterbalanced by the advantages of virtual or hybrid bargaining. In any event, we are confident that any disadvantages of virtual bargaining formats in a particular labor-management relationship can be addressed and resolved by the parties through negotiation to address the specific situation. Notwithstanding the disadvantages of virtual bargaining in some situations, for all the reasons explained above, we do not believe that a party's insistence on virtual or hybrid bargaining is inimical to the collective bargaining process such that it is akin to other *per se* violations recognized by the Board.

Rather than use a *per se* bright line approach, we conclude that a party violates its duty to bargain in good faith under ORS 243.672(1)(e) or (2)(b) if it insists on bargaining in a meeting format (whether in-person, by videoconference, or in a hybrid format) that is not reasonable under the totality of circumstances of a case. We further conclude that the proposed format is unreasonable only if it would restrict the other party's choice of negotiators or would, considering the totality of the circumstances, otherwise tend to interfere with the bargaining process. Three of the four *amicus curiae* briefs argued against adopting a new *per se* violation, which lends support to our judgment that parties are capable of resolving bargaining format disputes as appropriate for their specific geographic location; type of employer, workforce, and bargaining unit; labor relations history; and experience using videoconferencing and hybrid bargaining formats to resolve

[10]For example, *amicus curiae* Oregon Education Association described disadvantages it encountered when it participated in virtual bargaining "out of necessity" at the outset of the COVID-19 pandemic. For example, "[w]hen frustrations arose, participants could not employ more sophisticated communication styles that are vital for de-escalation, such as expressing empathy through facial or hand gestures, or having spontaneous, one-on-one sidebar conversations." It indicated that, at times, OEA negotiators struggled to assess the negotiating position of the employer, "which was often driven by a difficulty identifying the other team's lead negotiator." Specifically, "over videoconference, OEA negotiators could not observe how members of the other party were interacting with each other, which tends to reveal who is driving negotiations." It also noted that its lead negotiators had more difficulty assessing whether its own bargaining team members were fully engaged. We acknowledge that there may be disadvantages to bargaining by videoconference in some settings. For the reasons explained above, however, we have confidence that parties can address aspects of videoconference technology that present concern in their particular negotiations.

labor relations disputes.[11] Therefore, we answer the first question posed by the petition as follows: a party's insistence, over the other party's objection, that some of its bargaining members will participate in bargaining sessions virtually or via a hybrid format is not a *per se* violation of ORS 243.672(1)(e) or (2)(b), but rather will be assessed under the totality of the circumstances in each case, as explained in this ruling.[12]

Insistence by a Public Employer, Over the Labor Organization's Objection, that Bargaining Unit Employees Be Present to Observe Bargaining Sessions

Petitioner also requests a ruling that a public employer violates ORS 243.672(1)(e) when it insists, over the labor organization's objection, that bargaining unit employees who are not part of the union's bargaining team be allowed to attend bargaining sessions as observers. Petitioner argues that the presence of bargaining unit members as observers is a permissive ground rule subject, and that an employer's insistence on agreement over that subject violates section (1)(e). *Amici* Oregon Education Association and the Public Universities endorse petitioner's argument.[13]

Although this Board has never addressed this precise question, petitioner correctly points out that there is longstanding NLRB precedent in which the NLRB has repeatedly found that private employers who invited bargaining unit employees to attend bargaining sessions and insisted on their presence over a labor organization's objections commit an unfair labor practice under the NLRA. *See*, *e.g.*, *L.G. Everist, Inc*., 103 NLRB 308 (1953), *In re Jasper Blackburn Prods. Corp*., 21 NLRB 1240 (1940), and *Juvenile Mfg*., 117 NLRB 1513 (1957).[14] For example,

---

[11]If a party insists on virtual bargaining for the purpose of gaining a strategic advantage, a concern raised by *amicus* Oregon Education Association, that situation can be dealt with under ORS 243.672(1)(e) or (2)(b) as part of the totality of the circumstances assessment of bargaining conduct. *See, e.g.*, *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case No. UP-001-13 at 24, 26 PECBR 322, 345 (2014), *aff'd without opinion*, 279 Or App 811, 381 P3d 1096 (2016) (employing totality of the circumstances analysis to dismiss claim that respondent failed to show up for three bargaining sessions for alleged improper strategic reasons, including to maintain the status quo regarding wages and benefits for as long as possible, reasoning that "the parties' differences in that respect were rooted in good-faith positions, not out of a bad-faith desire to avoid negotiating a collective bargaining agreement").

[12]The petition did not ask the Board to assess whether the Hospital's actions thus far would constitute an unfair labor practice under the totality of the circumstances, and there are insufficient facts in the petition that would allow us to reach such a conclusion; therefore, we do not address it in this order.

[13]*Amici* Seth Davis and Linn County both declined to address the second question presented by the petition.

[14]An NLRB General Counsel memo concludes that the converse principle also applies—an employer does not violate the duty to bargain in good faith by refusing to bargain in the presence of observers unilaterally invited by the union. *See Canterbury Villa of Alliance*, 2004 NLRB GCM LEXIS 64 (2004) (a union's insistence on having "observers" attend bargaining sessions is a nonmandatory subject of bargaining). That GC Memo (which, as explained above, does not constitute a ruling of the NLRB or precedent itself) concluded that a union's insistence on having "observers" not on the bargaining team

(Continued . . .)

in *L.G. Everist, Inc*., 103 NLRB 308 (1953), the employer posted a notice on a workplace bulletin board "inviting all hands" to the parties' bargaining session, and insisted on that condition after the union objected. The NLRB held that the employer failed to bargain with the union in good faith in violation of Section 8(a)(5) of the NLRA, reasoning that the employer's

> "insistence that bargaining negotiations be conducted in the presence of the rank-and-file employees clearly was contrary to uniform industrial practice and was not conducive to the orderly, informal, and frank discussion of the issues confronting the negotiators necessary to reach a contract. It also constituted interference with the employees' right to bargain through the representatives of their own choosing, and evidenced the Respondent's absence of good faith in dealing with the statutory bargaining agent of the employees."

L.G. Everist, Inc., 103 NLRB at 309. *See also In re Jasper Blackburn Prods. Corp.*, 21 NLRB at 1250 (by summoning five bargaining unit employees to negotiations as "witnesses," employer unlawfully interfered "with the right of employees to select representatives of their own choosing"); *Juvenile Mfg*., 117 NLRB at 1521 (employer's "insistence on the privilege of inviting whomever it chose from among rank-and-file employees" to attend bargaining sessions "establishes beyond doubt its lack of good faith with respect to the negotiation of a contract").[15]

This Board has never considered whether an employer violates ORS 243.672(1)(e) when it insists, over the labor organization's objection, that represented employees not on the bargaining team attend bargaining sessions. In the absence of PECBA precedent, we rely for guidance on cases from the private sector. "Basically, in enacting PECBA, the legislature extended to public employees in Oregon the same benefits and protections that federal law had long afforded to employees under the National Labor Relations Act (NLRA)." *AFSCME Council 75 v. City of Lebanon*, 360 Or 809, 816, 388 P3d 1028 (2017). Because PECBA was modeled on the NLRA, the Board and Oregon courts treat as persuasive authority cases decided under the NLRA, particularly those decided before 1973, the year PECBA was enacted. *See, e.g., City of Lebanon*, 360 Or at 817, 825 (PECBA is modeled after the NLRA in many respects, and federal cases interpreting the NLRA can provide guidance in interpreting parallel provisions of PECBA);

(Continued . . .)
attend bargaining sessions, over the employer's objection, is analogous to a party insisting on the presence of court reporters or stenographers, citing *Bartlett-Collins Co*., 237 NLRB 770, 772-73 (1978), *enf'd*, 639 F2d 652 (10th Cir), *cert denied*, 452 US 961 (1981). The General Counsel reasoned, "Similar to having a written transcript, the presence of member-observers would tend to impede negotiations by chilling the candor and free exchange of ideas so important to successful, good-faith collective bargaining. The Employer, not knowing the identity of who is in the negotiating room on any given occasion, would be reasonably apprehensive about speaking candidly." *Canterbury Villa of Alliance*, 2004 NLRB GCM LEXIS 64 at 12-13 (2004).

[15]The NLRB also observed, "It would be difficult to imagine a proposal more likely to stir a veteran trade unionist to wrath than that management should usurp the right of the Union to make its own designation of rank-and-file employees from those it represented, to assist it in negotiating a contract. The reverse situation would be if the Union proposed to designate Respondent's officers and foremen to represent *it* at the bargaining table." *Juvenile Mfg*., 117 NLRB 1513, 1519 n 3 (1957) (emphasis in original).

Klamath Cty. v. Laborers Int'l Union, 21 Or App 281, 288, 534 P2d 1169 (1975) ("the similarity between parts of the [NLRA and PECBA] indicates that federal decisions interpreting the NLRA be given some weight in interpreting similar sections of the Oregon statute").

Consistent with that interpretive principle, the Board has relied on cases under the NLRA in construing other aspects of the duty to bargain in good faith under ORS 243.672(1)(e). *See Oregon State Employees Association v. Children's Services Division, Department of Human Resources, State of Oregon*, Case No. C-32-76, 2 PECBR 900 (1976) (adopting the NLRB's construction of Sections 8(a)(5) and (8)(d) of the National Labor Relations Act (NLRA) as applied to ORS 243.672(1)(e) and the duty to furnish information necessary to allow a labor organization to intelligently evaluate and pursue a pending grievance, citing *NLRB v. Truitt Manufacturing*, 351 US 149 (1956)); *Washington County School District No. 48 v. Beaverton Education Association & Nelson*, Case No. C-169-79, 5 PECBR 4398 (1981) (following NLRB precedent to conclude that the duty to furnish information applies to labor organizations as well as employers).

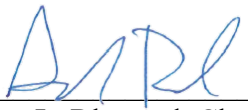
With that interpretive framework in mind, we find that a public employer's insistence on the presence at bargaining of represented employees who are not on the bargaining team would be deleterious and harmful to the productive collective bargaining that the statute aims to encourage. By insisting on the presence of bargaining unit members that the union itself has not selected for its bargaining team, a public employer engages in conduct that is not "conducive to the orderly, informal, and frank discussion of the issues" necessary to reach agreement on a collective bargaining agreement. *See L.G. Everist, Inc*., 103 NLRB at 309; *see also In the Matter of Jasper Blackburn Products Corporation*, 21 NLRB at 1250. There is nothing different about the public sector that makes these harms less detrimental than they are in the private sector. We have long said that a value of collective bargaining under PECBA is the parties' push of "complicated issues through the crucible of collective bargaining[,]" a process that "often results in creative, agreeable solutions" to bargaining issues, even when compromise seems difficult. *See 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); *Roseburg Education Association v. Roseburg School District No. 4*, Case No. UP-26-85 at 19, 8 PECBR 7938, 7956 (1985) (referring to the "crucible of the PECBA's dispute resolution process"). Public sector collective bargaining works best when the two bargaining teams communicate with candor, explain their bargaining positions, maintain their disciplined focus on issues rather than personalities or interpersonal dynamics, and make compromises even when those compromises may not be popular with everyone on a party's side. Those aspects of productive collective bargaining are less likely to occur if the union's bargaining team, over the union's objection, is required to negotiate in front of represented employees that the union has not chosen for its own bargaining team.

In sum, because PECBA was modeled on the NLRA, and because nothing in PECBA or our precedent indicates a contrary approach, we find it consistent with the policies and principles of PECBA to conclude that an employer violates its duty to bargain in good faith when it insists, over the labor organization's objection, that represented employees not on the bargaining team attend bargaining sessions. We consider the presence of observers at bargaining sessions as a ground rule subject, *see, e.g.*, *Washington County CCA*, UP-015/27-13 at 4 n 5, 26 PECBR at 38 n 5, and, under PECBA, ground rules are a permissive subject. *International Association of Fire Fighters, Local 314*, C-152-80 at 6, 5 PECBR at 4242. Therefore, a public employer that insists

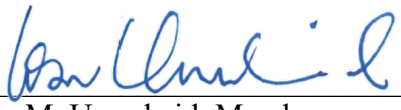
on that subject as a precondition to bargaining over mandatory subjects violates ORS 243.672(1)(e).[16]

The petitioner did not ask us to determine whether the Hospital's conduct so far (initially telling the Union that it intended to invite bargaining unit members to bargaining sessions) amounted to a violation of ORS 243.672(1)(e), and likewise we do not address that question. In doing so, we note that there no facts stated in the petition indicating that the Hospital actually informed represented employees not on the Union's bargaining team that they were "invited" to the parties' bargaining sessions.[17]

DATED: September 15, 2022.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.410, 183.480, and 183.482.

---

[16]Interpreting section (1)(e) consistently with section 8(a)(5) of the NLRA to answer petitioner's question is consistent with the Board's direct dealing cases under (1)(e). An employer violates its duty to bargain in good faith under PECBA when it attempts to negotiate directly *with* employees. *McKenzie School District #68*, UP-14-85 at 36, 8 PECBR at 8195 (citing *NLRB v. General Electric Co.*, 418 F2d 736 (2d Cir 1969), *cert denied*, 397 US 965 (1970)); *see also Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District*, Case No. UP-80-95 at 18, 16 PECBR 559, 576 (1996) (bypassing exclusive representative to bargain directly with employees is a *per se* violation of section (1)(e)); *911 Professional Communications Employees Association v. City of Salem*, Case No. UP-62-00 at 20, 19 PECBR 871, 890 (2002) (unless the exclusive representative agrees, an employer that seeks changes in mandatory subjects by dealing directly with employees violates section (1)(e)). Although an employer, by inviting bargaining unit members to bargaining sessions, is only negotiating in those employees' presence and not directly with them, the harm from such conduct is similar to the harm proscribed by section (1)(e). Like negotiating directly with employees, "inviting" bargaining unit members to bargaining sessions to negotiate before them is inherently divisive, and makes "negotiations difficult and uncertain" and "subvert[s] the cooperation necessary to sustain a responsible and meaningful union leadership." *See McKenzie School District #68*, UP-14-85 at 36-37, 8 PECBR at 8195-96.

[17]*Amicus curiae* Oregon Education Association argues that an employer's insistence on inviting bargaining unit members who are not on the labor organization's bargaining team violates ORS 243.672(1)(b), which makes it an unfair labor practice for an employer to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." The petitioner did not identify ORS 243.672(1)(b) as a subsection of the statute at issue in its petition, so we do not consider it. *See* OAR 137-002-0010(1); OAR 137-002-0060(2)(b)-(d).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-025-22

(UNFAIR LABOR PRACTICE)

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 75, Complainant, v. CLACKAMAS COUNTY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

Andrew Narus, Assistant County Counsel, Clackamas County Counsel, Oregon City, Oregon, represented Respondent.

On July 18, 2022, American Federation of State, County, and Municipal Employees, Council 75 (AFSCME or Union) filed this unfair labor practice complaint against Clackamas County (County). The complaint alleged that the County violated ORS 243.672(1)(e) and (g) by (1) failing to affirmatively recommend that the Clackamas County Board of Commissioners ratify tentative agreements (TAs) of successor contracts reached with AFSCME, and (2) failing to send a bargaining team that had the requisite authority to bargain with AFSCME.

The Union asked that this Board expedite the complaint under OAR 115-035-0060, and the County opposed that request. After considering the parties' submissions and the factors set forth in OAR 115-035-0060, the Board exercised its discretion to expedite the complaint by assigning the matter to Administrative Law Judge (ALJ) Martin Kehoe for purposes of conducting

a hearing.[1] That hearing was held on August 24, 2022, at which point the record closed. On August 30, 2022, ALJ Kehoe informed the parties that the matter would be assigned to this Board for the issuance of a final order.

The issues are: (1) Did the County violate ORS 243.672(1)(e) or (g) by failing to affirmatively recommend that the County commissioners ratify TAs reached with AFSCME; (2) Did the County violate ORS 243.672(1)(e) or (g) by failing to send a bargaining team with the requisite authority to bargain with AFSCME; (3) Is a civil penalty warranted?; (4) Is a reimbursement of the filing fee warranted?; and (5) Is the posting of a notice warranted?

For the following reasons, we conclude that the County violated ORS 243.672(1)(e) and (1)(g). We further conclude that a civil penalty and a notice posting are warranted in this case. We do not order reimbursement of AFSCME's filing fee.

RULINGS

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

FINDINGS OF FACT

The Parties and Relevant Individuals

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

2. The Union is a labor organization within the meaning of ORS 243.650(13).

3. The Clackamas County Board of Commissioners (Board of Commissioners) is the governing body for the County. The Board of Commissioners is comprised of five elected commissioners.

4. The Union represents three bargaining units of employees at the County: Local 350-0, which represents employees in the County's Department of Transportation and Development (DTD); Local 350-4, which represents employees in the Water and Environmental Services (WES); and Local 350-7, which represents the strike-prohibited employees in the Clackamas County Communications Center (C-COM).[2] Each bargaining unit has its own collective bargaining agreement with the County.

5. DTD and the County were subject to a collective bargaining agreement with a term from 2018 through June 30, 2021.

6. WES and the County were subject to a collective bargaining agreement with a term from 2018 through June 30, 2021.

[1]The County filed a timely answer on August 4, 2022. Both parties submitted prehearing briefs on August 22, 2022, and made oral closing arguments at the hearing.

[2]C-COM negotiations are not at issue in this case.

7. Since January 2018, Ross Kiely has served as the AFSCME Council Representative assigned to serve the County bargaining units. Kiely has served as the Chief Bargaining Representative for each bargaining unit in the successor negotiations that began in 2021. Kiely also served as Chief Bargaining Representative for both bargaining units during the successor negotiations for the 2018-2021 collective bargaining agreements.

8. Patrick Leach is a laboratory analyst and the Chapter President for the WES bargaining unit. Leach has been a member of the Union's WES bargaining team throughout the successor negotiations that began in 2021. Leach was also on the bargaining team for the successor negotiations for the 2015-2018 and 2018-2021 collective bargaining agreements for the WES bargaining unit.

9. Jonathan McDowell is a traffic signal electrician and the Chief Steward for the DTD bargaining unit. McDowell has been a member of the Union's DTD bargaining team throughout the successor negotiations that began in 2021. McDowell was not on the bargaining team for successor negotiations for the 2018-2021 collective bargaining agreement for the DTD unit.

10. Adam Collier is the Chief Bargaining Representative for the County. Collier is an attorney in private practice and was retained by the County for DTD and WES negotiations with the Union that began in 2021. Collier also served as the Chief Bargaining Representative for the County during the successor negotiations for the 2018-2021 collective bargaining agreements for the WES and DTD bargaining units.

11. Since 2017, Eric Sarha has served as the Deputy Human Resources (HR) Director for the County. In that role, he oversees employee and labor relations for the County. Sarha has been a member of the County's bargaining teams for the DTD and WES successor negotiations that began in 2021. Sarha was also on the bargaining team for the successor negotiations for the 2018-2021 collective bargaining agreements with the WES and DTD bargaining units.

12. Gary Schmidt is the County Administrator and one of two direct reports to the Board of Commissioners. Schmidt oversees County government and implements the policy direction of the Board of Commissioners.

Bargaining History

13. In the fall of 2020, the Union notified the County of its intent to open negotiations for modifications to the DTD and WES collective bargaining agreements. Successor negotiations for both CBAs began in June 2021 and July 2021, respectively.

14. During negotiations, the parties agreed to written ground rules for DTD and WES bargaining and signed both sets of ground rules on July 21, 2021. The ground rules were modeled after prior ground rules between the parties and were not updated to reflect the process around proposals and tentative agreements (TAs) that the parties used during these negotiations, which were conducted via videoconference because of the COVID-19 pandemic. Both DTD and WES ground rules include the following relevant paragraphs:

> "4. Each bargaining team shall have the authority to enter into tentative agreements subject to ratification or approval. Tentative agreements shall be initialed and dated by the Chief Negotiators. Once a tentative agreement is reached, it shall not be reconsidered except by mutual agreement.
>
> "* * * * *
>
> "16. During negotiations, tentative agreements shall be initialed by the Chief Negotiator of each of the parties. The final tentative agreement is subject to final ratification by the parties' respective principles. Each party will recommend approval of the final tentative agreement reached through bargaining to their respective principles."

15. All bargaining between the parties was conducted via videoconference due to the COVID-19 pandemic, which was a departure from long-established in-person negotiations. Due to the virtual format, proposals were exchanged by email and TAs, which were executed on individual contract articles throughout bargaining, were often reached by verbal agreement. Once the parties reached a TA during bargaining, County Chief Negotiator Collier and his office staff would put together a draft version of the TA, including any mutually agreed changes. Collier or his staff would then submit the TA to the Union's bargaining team for review and signature, via software with e-signature capabilities. This process created a delay between the verbal agreement on a TA and the TA being signed.

16. The bargaining teams for both sides appeared for bargaining sessions on time, behaved respectfully, and bargained without interruptions. There were no inappropriate "theatrics," and no participant on either team used a disrespectful or inappropriate tone. In addition, between sessions, the bargaining team members maintained respectful attitudes toward the opposing side while in the workplace.

17. Despite the generally collegial atmosphere during bargaining, the County's bargaining positions frustrated the Union's teams when the negotiations centered on issues that had an economic impact on employees. For those proposals, the County bargaining team indicated they "were not authorized" to agree to changes beyond what the County initially proposed, which was current contract language. The County bargaining teams otherwise had latitude to negotiate over other terms. The Union expressed frustration during bargaining due to the County bargaining team's apparent limited authority to negotiate over economic terms.

18. Between August 2021 and November 2021, WES and the County reached tentative agreements on changes to Articles 3, 7, 8, 10, 11, 15, 16, 18, 20, and the Safety Incentive Programs in the WES collective bargaining agreement. Most of the tentative agreements concerned changes to the wording in various provisions, although the tentative agreements also included adding a new paid holiday on June 19 (to commemorate Juneteenth) replacing the existing "floating" holiday, and increasing the amount of the individual participation award for "heroic deeds" from $100 to $500.

19. Between June 2021 and September 2021, DTD and the County reached tentative agreements on changes to Articles 1, 3, 4, 7, 9, 10, 11, 13, 20, and 21, as well as a new article on

equity, diversity and inclusion in the DTD collective bargaining agreement. Most of the tentative agreements concerned changes to the wording in various provisions, although the tentative agreements also included increasing the number of representatives from the bargaining unit on the joint labor-management committee from three to four people, and permitting employees to attend equity, diversity, and inclusion events on work time with supervisor approval.

20. In early 2022, the County and the Union entered mediation for both DTD and WES negotiations with Board Mediator Steve Irvin. All mediation sessions were conducted via videoconference.

21. On March 15, 2022, DTD and the County participated in a mediation session. During the mediation session, the parties focused on "big-picture" financial issues including wages. The County continued to propose current contract language on economics. The Union bargaining team was meanwhile concerned with high inflation rates, lack of "equality" with other bargaining units, and pending issues related to the County's ongoing pay equity analysis. These considerations and concerns resulted in the Union proposing a two-year contract, where prior contracts were typically for three years.

22. Upon receiving the Union's proposal for a two-year agreement, the County requested a caucus and Deputy HR Director Sarha emailed County Administrator Schmidt, requesting authorization to enter into a two-year agreement with DTD. Based on Sarha's description of the dynamics of the negotiations (which, as noted above, had been underway for nine months, since June 10, 2021), Schmidt perceived that the County might lose the opportunity to settle the contract if it did not take the opportunity to agree to a two-year agreement. Schmidt told Sarha that the County would prefer a three-year contract, but would accept a two-year contract if that was necessary to reach an agreement.[3]

23. After receiving Schmidt's approval, the County gave the Union what it referred to as a "what if" package counterproposal, which provided for a two-year agreement. In addition, the County's "what if" proposal addressed all outstanding articles, including proposing to add a new paid holiday for Juneteenth in addition to the existing "floating" holiday; continued County contributions of 95 percent of health insurance premiums (capped at 105 percent of the previous year's contribution); continued County contributions of 100 percent of dental insurance premiums; a 1.8 percent cost of living increase effective July 1, 2021; a cost of living increase equal to the US Consumer Price Index, CPI-W (capped at 4.5 percent), effective July 1, 2022; increased standby pay; and an increase from $200 to $400 for purchase or repair of protective clothing. In response, Kiely indicated that the bargaining team needed time to consider the package.

24. On March 16, 2022, WES and the County engaged in a second mediation session. As it did in the DTD negotiations, the Union proposed a two-year contract. Sarha again contacted Schmidt, and again explained that the negotiation dynamics—including the fact that the County had been negotiating with WES since July 19, 2021—weighed in favor of acting quickly. Sarha

[3]Schmidt testified that he believed he had authority to authorize a two-year agreement between the County and the Union, based on the economic parameters the Board of Commissioners had previously authorized. Sarha testified that he believed that Schmidt had authority based on his experience in previous negotiations and based on authority granted by prior Boards of Commissioners to the County Administrator.

obtained Schmidt's approval to propose a two-year contract term in conjunction with a proposal on the remaining outstanding issues.

25. The County then offered WES a "what if" proposal that included a two-year term of agreement. The County's "what if" proposal addressed all outstanding articles, including continued County contributions of 95 percent of health insurance premiums (capped at 105 percent of the previous year's contribution); continued County contributions of 100 percent of dental insurance premiums; a 1.8 percent cost of living increase effective July 1, 2021; a cost of living increase equal to the US Consumer Price Index, CPI-W (capped at 4.5 percent), effective July 1, 2022; and changes to the standby rotation provisions. In response, Kiely indicated that the bargaining team needed time to consider the package.

26. During both DTD and WES mediations, the County communicated to the Union that it had received authorization to offer and agree to a two-year contract.

27. On March 18, 2022, Union Chief Negotiator Kiely notified the County's bargaining team and Mediator Irvin by email that the Union was accepting the "what if" proposals that the County had submitted to the Union during mediation on March 15 and 16, which included the two-year contract terms for both DTD and WES collective bargaining agreements. Kiely requested that the County draft the final TAs so that the Union could begin the ratification process. County Chief Negotiator Collier responded to Kiely later that evening by email, confirming that he would prepare the final "overall TAs" when he returned from vacation.

28. After the Union accepted the County's proposals, DTD and WES bargaining team representatives, including WES Chapter President Leach and DTD Chief Steward McDowell, began to communicate to Union membership that the parties had reached final TAs and began discussing preparations for a ratification vote.

29. On March 21, 2022, Deputy HR Director Sarha's first day in the office since March 17, he emailed the County bargaining team, DTD and WES management representatives, and the Board of Commissioners with a subject line of "AFSCME-DTD and AFSCME-WES Bargaining - Full Tentative Agreement." Sarha's email stated, in relevant part:

> "The County and AFSCME-DTD and AFSCME-WES have reached full tentative agreement on successor contracts. These contracts will be 2 years in duration and will expire on 7/1/2023.
>
> "* * * * *
>
> "The [County bargaining] team will now be working to put all of the TA articles together into redlined and clean versions of the new contracts and sending them to AFSCME-DTD and AFSCME-WES for their final review and voting. Once the County is informed that the unions have voted to ratify the new contracts, the [County bargaining] team will be presenting the new contracts to the Board of County Commissioners for their review and approval."

30. Typically, after a final TA is reached, the County holds a series of meetings relating to ratification of the agreement. The first meeting is held between the Board of Commissioners and the County bargaining team, during which the County discusses the nuances of the agreement, and the bargaining team answers commissioner's initial questions. Thereafter, usually the following week, a public meeting is held where Deputy HR Director Sarha recommends that the Board of Commissioners ratify the agreement. A third public meeting is then held where the Board of Commissioners votes on whether to ratify the agreement.

Events After the Parties Reached Tentative Agreements

31. On March 21, 2022, after Sarha sent the email regarding the final TAs, County Administrator Schmidt was contacted by the commissioners individually, all of whom expressed concern that Schmidt had authorized two-year agreements without consulting them. Schmidt suggested that the matter be addressed at the Board of Commissioners executive session meeting the following day. Schmidt then contacted Sarha and relayed that the commissioners had informed him that he did not have authority to approve two-year contracts with DTD and WES. Schmidt requested that Sarha also attend the Board of Commissioners executive session meeting.

32. On March 22, 2022, the Board of Commissioners met in executive session. Schmidt, Sarha, County Counsel, and various members from the County administrator's office were also in attendance. During the meeting, the commissioners communicated that Schmidt did not have authority to authorize two-year agreements, and furthermore, that Schmidt and Sarha did not have authority to agree to any contract terms without the Board of Commissioners' approval.[4] Ratification was not expressly addressed in the executive session.

33. On March 22, 2022, after Sarha attended the executive session, he called County Chief Bargaining Representative Collier and informed him that the Board of Commissioners would not agree to two-year contracts. Collier called Union Chief Bargaining Representative Kiely that evening. In a brief conversation, Collier informed Kiely that the Board of Commissioners refused to ratify two-year agreements with DTD and WES. Collier acknowledged that the parties' ground rules required that both parties affirmatively recommend final TAs to their principals for ratification, however, the Board of Commissioners had made clear they would not agree to two-year contracts. The parties agreed that they would talk to their respective teams and then discuss the matter when Collier returned from vacation. Aside from Collier's mention of the parties' ground rules, ratification was not otherwise discussed.

[4]Although there is no evidence in the record about specific comments by individual commissioners, the record indicates that Schmidt and Sarha left the executive session with an understanding that they had acted without or beyond their authority by proposing two-year terms to settle both the DTD and WES agreements, and that they should not present those tentative agreements reached on March 18 to the Board for ratification.

34. The parties met for an additional mediated bargaining session with Mediator Irvin. During the session, the County negotiators communicated to the Union that it had no additional economic authority to bargain.[5]

35. On April 13, 2022, Collier emailed Kiely regarding the status of DTD and WES negotiations. Collier's email stated, in part:

> "As you know, the Board of Commissioners is not willing to ratify a two-year agreement. At the time we included the two-year language in our 'What If' mediation package proposal on March 15 (DTD) and March 16 (WES), we thought the Board [of Commissioners] would agree to a two-year contract, but we obviously were mistaken. We apologize for that. Unfortunately, we do not have any more economic authority than we previously did. Therefore, we have no new proposals to make, and we don't think another mediation session would be fruitful.
>
> "However, the County remains willing to agree to the same language that the EA groups accepted with regard to a reopener in year 3 of the agreement if the CPI comes in above 4.5%. As a reminder, that language is as follows:
>
> "*Effective July 1, 2023, employees shall receive a cost of living increase equal to the percentage increase in the US Consumer Price Index, CPI-W: West Urban Annual Average, as reported by the U.S. Department of Labor, with a minimum of 0% and a maximum of 4.5%. In the event the established CPI exceeds the 4.5% maximum for the third year of this Agreement, the parties will engage in bargaining limited to the difference between the established 4.5% maximum and the established CPI reported for that year. Negotiations are to start no later than February 1, 2023*." (Emphases in original.)

Collier further explained his own personal view that this language benefited employees more than a two-year contract because bargaining unit employees "would be assured of receiving a 4.5% increase effective July 1, 2023, without any delay, if the CPI comes in above 4.5%, and the Union would still have the opportunity to bargain for more than a 4.5% increase." Collier then stated that the County was not "necessarily opposed to another mediation session but just don't want to waste anyone's time" given the County's bargaining team did not have any "additional proposals to make."

36. On April 15, 2022, Mediator Irvin called Collier and shared that the Union had requested last best and final offers from the County for DTD and WES. The County then made last best and final offers for both contracts, which were shared with Kiely and Irvin. The Union put the final offers forward for ratification by the DTD and WES membership and both were overwhelmingly rejected.

37. On May 25, 2022, Kiely emailed Irvin and Collier, and summarized why the proposals were rejected by Union membership. Kiely stated that the Union bargaining teams had

[5]The record does not indicate the date of this mediated bargaining session or otherwise include additional facts regarding this session.

recommended a "no" vote to the membership, "out of frustration with the County's bargaining positions" and further specified two economic sticking points, including the lack of adjustment to the third-year wage reopener. Kiely proposed that the Union and the County schedule "at least two more mediated bargaining sessions." Later that day, Irvin emailed Collier and Kiely and offered various available dates to schedule mediation.

38. On June 2, 2022, Collier responded to Irvin's email regarding further mediation sessions. Collier indicated to Irvin and Kiely that the County was willing to meet for another mediation session for DTD and WES, but stated that their "economic authority remains the same." Collier explained that Sarha had met with the Board of Commissioners that week, on May 31, and the Board "did not increase our economic authority."

39. Mediator Irvin followed up with the parties by email on June 13, 2022, and provided updated availability for mediation. Collier responded that he was waiting on Kiely to respond before checking on dates. Collier repeated that the County was willing to participate in another mediation session, but that the bargaining team's economic authority remained the same.

40. On June 29, 2022, Collier responded to Irvin and Kiely by email again, and indicated that Kiely shared that the Union planned to file unfair labor practice complaints (ULPs) regarding DTD and WES negotiations. Collier requested clarification as to whether it was the Union's intent to schedule additional mediation sessions, to make additional offers, or wait to declare impasse pending resolution of the ULPs. Kiely responded that day and stated that he was coordinating with Union legal counsel regarding Collier's questions. Kiely further requested that the County provide information relevant to whether or not the County bargaining team sought and recommended ratification of the final TAs to the Board of Commissioners, and materials reflecting the Board of Commissioner's rejection of the TAs.

41. On July 18, 2022, the Union filed the complaint in this case, ULP Case No. UP-025-22.

42. On July 22, 2022, Counsel for the Union, Jason Weyand, submitted a follow up request for "information that shows any steps at all being taken to get the Board [of Commissioners] to ratify" the final TAs, as the County had not responded to Kiely's June 29, 2022, request.

43. On July 25, 2022, the County responded to the Union's information requests confirming that the Board of Commissioners had not voted on the final DTD and WES TAs and that the County's bargaining team had not taken any steps to recommend or obtain ratification of the TAs.[6]

44. The refusal by the Board of Commissioners to consider the WES and DTD tentative agreements for ratification has soured the relationship between the Union and the County. The Union believes that its trust in the County has been compromised. In response to its perception that the County has hardened its positions, the Union has hardened its positions.

[6]The County stipulated on the record at hearing that the County bargaining team took no steps to present or recommend the WES and DTD tentative agreements for ratification.

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 its bargaining team, at the suggestion of the Board of Commissioners, failed to seek and affirmatively recommend ratification of the tentative agreements.

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer or its designated representative to refuse to bargain in good faith with the exclusive representative of its employees. The duty to bargain in good faith does not require a party to agree to particular contract terms, but once the parties have reached agreement, "the parties must reduce their understandings to writing, and either sign the same or recommend ratification by their constituents." *School District 549C of Jackson County v. Oregon School Employees Association and Foster*, Case No. UP-102-86 at 9, 10 PECBR 304, 312 (1987) (quoting *Department of Higher Education, Portland State University v. Oregon State Employees Association*, *et al.*, Case No. C-192-78 at 10, 4 PECBR 2303, 2312 (1979) (citing *Redmond Education Association v. Redmond School District*, Case No. C-5-78, 4 PECBR 2086 (1978)). Further, mere *presentation* for ratification is not sufficient. This Board has long held that the duty to bargain in good faith requires that "[w]here the parties have completed a collective bargaining agreement subject only to ratification, the negotiators for both sides have a duty to present the agreement to their ratifying entities *and to support its approval*." *School District 549C of Jackson County*, Case No. UP-102-86 at 10, 10 PECBR at 313 (emphasis added). The negotiators also "may not act in a way that undermines the agreement or discourages ratification." *Hood River County v. Oregon AFSCME Council 75, Local 1082*, Case No. UP-09-08 at 19, 23 PECBR 583, 601 (2010) (*Hood River County II*) (citing *Baker Education Association v. Baker School District 5J*, Case No. UP-5-00 at 16, 19 PECBR 712, 727 (2002)). Finally, it is not enough to neutrally inform the ratification entity of the terms of the agreement and let that entity vote. Rather, "[t]he duty to bargain in good faith requires the bargaining team to make some affirmative effort to convince or persuade its constituency to vote for the agreement." *Hood River County II*, UP-09-08 at 22, 23 PECBR at 604. A failure to present an agreement for ratification and to affirmatively recommend its approval is a *per se* violation of ORS 243.672(1)(e) (or ORS 243.672(2)(b), the "mirror" provision regarding labor organization unfair labor practices). *See Lane Unified Bargaining Council v. Crow-Applegate-Lorane School District*, Case No. UP-28-97 at 9, 17 PECBR 328, 336 (1997) (*Lane Unified*); *see also Hood River County II,* UP-09-08 at 28, 23 PECBR at 610.

With that framework in mind, we turn to the County's actions in this case. As detailed above, the facts establish that after almost a year of bargaining, the County and the Union reached final TAs in WES and DTD negotiations. The parties then planned to proceed with the next steps of drafting and reviewing the final agreements, with the understanding that both parties would then present the agreements to their respective principals for ratification. However, before those next steps could occur, and rather than going through the proper and legally required process that would culminate in a ratification vote in a public meeting, County commissioners individually contacted County Administrator Schmidt and expressed concern about Schmidt agreeing to two-year agreements. County commissioners then met in executive session the following day and conveyed to Schmidt and Sarha that they would not approve the TAs that the County had reached with

AFSCME. Despite reaching TAs with AFSCME on full successor agreements, at no point did Schmidt and Sarha present the TAs to the Board of Commissioners and affirmatively recommend and attempt to persuade the Board of Commissioners to vote in favor of ratifying the agreements. Under longstanding precedent, that is a clear violation of ORS 243.672(1)(e).

It is perhaps understandable, practically speaking, that the County believed that it would be futile to go through the legally required process of presenting and recommending ratification to the Board of Commissioners given that the commissioners had, in an executive session, conveyed that they would not vote for ratification of the TAs. Regardless of whether the County negotiators deemed it futile, they were nevertheless required to present the TAs to the Board of Commissioners and affirmatively recommend ratification. Moreover, although an executive session of the Board of Commissioners may be held "[t]o conduct deliberations with persons designated by the governing body to carry on [labor] negotiations," ORS 192.660(1)(d), "[n]o executive session may be held for the purpose of taking any final action or making any final decision," ORS 192.660(4). For purposes of the Public Employee Collective Bargaining Act (PECBA), no ultimate decision on ratification of the TAs could be made in executive session; rather, any such decision must be made in a public meeting. Here, it is undisputed that no recommendation was made to ratify the TAs, and no public meeting was held by the Board of Commissioners to make a final decision on whether to ratify those TAs. The statutory process and ratification requirements under the Public Meetings Law and PECBA may not be ignored merely because a party deems them futile or unnecessary.

Despite a clear violation of the law, the County attempts to defend its actions by first arguing that there were no TAs. That argument is without merit. We begin by explaining how an agreement is formed under PECBA, even though, in this case, there is no credible dispute that these parties reached tentative agreements. Under well-settled PECBA precedent, a party's objective indication of assent (rather than subjective intent) is sufficient to form an agreement. *See Pendleton Firefighters Union, IAFF Local 2296 v. City of Pendleton*, Case No. UP-014-18 at 15 (2019) (agreement is formed when a party's "conduct was such as to objectively indicate that the parties had reached agreement," quoting *AFSCME Council 75 and Worthington v. City of Sweet Home*, Case No. UP-107-89 at 8, 12 PECBR 224, 231 (1990) (internal quotation marks omitted)). "Under the Act, collective bargaining is a good faith process in which each side must enter with a sincere desire to reach an agreement. It is a process of give and take, in which proposals may be advanced at one stage of negotiations, and withdrawn at another, depending upon their relationship to other proposals before the parties." *Redmond Education Association v. Redmond School District 2J*, Case No. C-5-78 at 6, 4 PECBR 2086, 2091 (1978), *aff'd,* 42 Or App 523, 600 P2d 943, *rev den*, 288 Or 173 (1979). Because of that customary good faith give-and-take at the bargaining table, the "indicia of offer and acceptance taken from contract law have only limited use" in determining whether an enforceable contract is formed under PECBA. *Id*. Rather, under PECBA, the question of "whether the parties have actually reached an agreement which must be embodied in a signed contract must be determined on the facts of each case[,]" and ultimately is determined by whether the parties "objectively indicate" that they have reached agreement. *Id*.; *see also Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-016-11 at 26, 24 PECBR 410, 439 (2011) ("an enforceable contract is typically formed when a party proposes language to be included in a collective bargaining agreement and the other party accepts it").

Here, there is no credible basis to question that the parties in fact reached tentative agreements on March 18, subject only to ratification. The unrebutted record evidence indicates that they did. Specifically, on March 15 and 16, the County conveyed to AFSCME "what if" package proposals for both bargaining units. In those package proposals, the County proposed a two-year term for both bargaining agreements, conditioned on AFSCME's agreement to the remaining provisions still in dispute. On March 18, after considering the County's "what if" proposals for several days, AFSCME accepted the County's proposals without amendment or reservation. At that point, both parties' objective behavior communicated assent to mutually agreed terms on all issues that remained in dispute as of March 15 and 16. Previously in negotiations, the parties had agreed on all other open issues and, under the terms of the ground rules agreements, those provisions could not be reconsidered except by mutual agreement. Therefore, on March 18, the parties reached agreement on all the terms of their collective bargaining agreements.

Moreover, although we assess, when determining whether an agreement has been formed, whether parties objectively communicated agreement, here the overwhelming evidence also indicates that both bargaining teams in fact *subjectively* believed that the parties had reached full tentative agreements on March 18. In particular, in his March 18 email, Kiely, AFSCME's chief spokesperson, asked the County to prepare documents so that AFSCME could "begin the ratification process." In response, Collier, the County's chief spokesperson, replied by email, "Thanks, Ross. I can prepare the final overall TAs when I return from vacation." At hearing, Collier affirmed that the parties' "had a TA subject to ratification." Further, on March 21, Sarha's first day in the office after AFSCME accepted the County's "what if" proposals on March 18, Sarha distributed a congratulatory email to County managers and commissioners, informing them that the "County and AFSCME-DTD and AFSCME-WES have reached *full tentative agreement on successor contracts*." (Emphasis added.) Moreover, the record is devoid of evidence that any member of either bargaining team believed there were contract provisions that remained in dispute or that the negotiations would continue. On this record, there is no question that the parties reached tentative agreements on March 18, subject only to ratification.

Once those tentative agreements were reached, under ORS 243.672(1)(e) both parties had a duty to present the agreements to their principals and affirmatively recommend ratification. *See School District 549C of Jackson County*, UP-102-86 at 10, 10 PECBR at 313. Sarha's March 21 email indicates that Sarha in fact planned to have the Employment and Labor Relations team, under his direction, begin that ratification process. Sarha wrote that his team would "be presenting the new contracts to the Board of County Commissioners for their review and approval" after the parties completed the ministerial work of preparing documents for presentation. However, before Sarha could take any further steps to do so, the Chair of the Board of Commissioners, followed by the other four commissioners, contacted Sarha's superior, Schmidt. In response, Schmidt and Sarha appeared the next day in an executive session before the Board of Commissioners. At that closed meeting, all or most of the commissioners conveyed that, if the tentative agreements were brought to a vote, all or most of the Board would reject the agreements. The commissioners also conveyed that they did not believe that Schmidt and Sarha had authority to agree to two-year

agreements.[7] The County stipulated at the hearing that it took no actions to present or recommend the agreements for ratification.

On these facts, we reject the County's assertion that it never reached TAs with AFSCME, and we conclude, without hesitation, that the County violated ORS 243.672(1)(e) when Sarha and Schmidt, acting at the apparent direction of the Board of Commissioners, failed to seek and recommend ratification of the tentative agreements reached on March 18, 2022.

We also reject the County's argument that it had no legal obligation to present the tentative agreements because the tentative agreements were not "initialed by the Chief Negotiator of each of the parties," as the ground rules required. As explained above, once the parties objectively communicated assent, an agreement subject to ratification was formed and the parties had a duty to recommend ratification. *See, e.g., City of Pendleton*, UP-014-18 at 15. Further, here, the negotiators did not hand-sign all the tentative agreements reached at the table for a practical reason—because they were negotiating via videoconference due to the COVID-19 pandemic. Under these circumstances, the lack of signatures cannot be construed to indicate lack of agreement. Further, the record amply demonstrates that Collier's statement that he would reduce the tentative agreements to "overall TAs" upon his return from vacation was merely a ministerial act. Nothing in the record indicates that either the County or AFSCME understood the preparation of those documents as a prerequisite to the formation of an actual agreement between the parties.

Relatedly, the County also asserts that it had no legal obligation to seek ratification until *after* AFSCME's members had first ratified the agreements. In previous years' bargaining, AFSCME had ratified tentative agreements before the County's negotiators sought ratification from the Board of Commissioners. The County cites no legal authority in support of this argument, and we have found none. Indeed, if accepted, the County's argument would undermine a bedrock principle of the PECBA bargaining process: When a governing body empowers its labor negotiators to reach an agreement with an exclusive representative, subject to that governing body's ratification, the exclusive representative's negotiators must be able to trust that the public employer's negotiators will recommend any agreement actually reached. Otherwise, bargaining would stall, if not fail at its inception. As we have long observed, "[t]he requirement of good faith bargaining imposed by the PECBA must include the obligation to seek ratification of a bargained agreement." *School District 549C of Jackson County*, UP-102-86 at 10, 10 PECBR at 313.

Finally, the County argues that AFSCME, through its conduct, waived the requirement that the County's negotiators present and recommend the tentative agreement for ratification. To establish waiver, a party must show (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. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE II*). When an asserted waiver "is not based on a contractual provision but is to be implied from conduct or circumstances," we determine "whether there

[7]Although the County's counsel objected to AFSCME's counsel's questioning about statements made during the executive session, and accordingly Sarha and Schmidt did not disclose specific statements by commissioners, it is evident from the record that Schmidt and Sarha left the executive session with clear direction from the Board of Commissioners to return to the bargaining table rather than pursue ratification of the agreements reached on March 18.

has been a 'clear, unequivocal, and decisive act of the party,' evidencing a 'conscious and voluntary abandonment of some right or privilege.'" *Portland Fire Fighters' Assn. v. City of Portland*, 321 Or App 569, 578 (2022) (quoting *Deschutes County v. Pink Pit, LLC*, 306 Or App 563, 576, 475 P3d 910 (2020) (citing *Great American Ins. v. General Ins*., 257 Or 62, 72, 475 P2d 415 (1970))).

Here, the County contends that Kiely waived the requirement that the County present the tentative agreements to the Board of Commissioners for ratification. Specifically, the County asserts that Collier called Kiely on March 22, 2022, and informed him that the Board of Commissioners refused to ratify the final TAs. The County asserts that, in response to Collier asking Kiely whether the parties should proceed with ratification, Kiely replied that there was no need and the parties would have to resume bargaining. The problem with this defense is that it is contradicted by the record evidence. Collier testified that, at the conclusion of the brief after-hours call to Kiely on March 22, 2022, they agreed that they would talk to their respective teams and go from there. Collier further testified that he "assumed," based on that conversation, that the parties would go back to the bargaining table. Collier also testified that, aside from his express acknowledgment that the ground rules required the parties to affirmatively recommend final TAs for ratification, the topic of ratification was not discussed during the conversation. This evidence falls fall short of a clear, unequivocal, and decisive act by AFSCME demonstrating a "conscious and voluntary abandonment" of the right to have the tentative agreements recommended to the Board of Commissioners for ratification. *See City of Portland*, 321 Or App at 578.

In sum, for all the reasons described above, the County violated ORS 243.672(1)(e) when its negotiators did not seek and affirmatively recommend ratification of the TAs by the Board of Commissioners.

3. The County violated ORS 243.672(1)(g) when its bargaining team, at the suggestion of the Board of Commissioners, violated the ground rules agreements by failing to present and recommend approval of the TAs for ratification by the Board of Commissioners.

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." A negotiated and executed ground rules agreement is a "written contract with respect to employment relations and is enforceable under ORS 243.672(1)(g)." *Oregon School Employees Association, Chapter 47 v. Central Point School District 6 and Marton*, Case No. UP-16-85 at 4, 9 PECBR 8773, 8776 (1986) (citing *City of Salem v. International Association of Fire Fighters, Local 314*, Case No. C-152-80 at 6, 5 PECBR 4237, 4242 (1980)).

In this case, the parties' executed ground rules agreements essentially incorporated the requirements under ORS 243.672(1)(e) described above. Specifically, the parties agreed:

> "4. Each bargaining team shall have the authority to enter into tentative agreements subject to ratification or approval. Tentative agreements shall be initialed and dated by the Chief Negotiators. Once a tentative agreement is reached, it shall not be reconsidered except by mutual agreement.
>
> "* * * * *

> "16. During negotiations, tentative agreements shall be initialed by the Chief Negotiator of each of the parties. The final tentative agreement is subject to final ratification by the parties' respective principles. Each party will recommend approval of the final tentative agreement reached through bargaining to their respective principles."

For all the reasons explained above, Sarha and Schmidt, at the suggestion of the Board of Commissioners, failed to present the tentative agreements to the Board and failed to affirmatively recommend ratification. By failing to do so, the County's negotiators failed to comply with the parties' agreement in the ground rules that they would "recommend approval of the final tentative agreement reached through bargaining," in violation of ORS 243.672(1)(g). *See School District 549C of Jackson County*, UP-102-86 at 10, 10 PECBR at 313 (labor organization's failure to submit tentative agreement to a ratification vote, as required by the parties' ground rules, violated ORS 243.672(2)(d)). Further, for all the reasons explained above, the defenses raised by the County are without merit.

4. The County violated ORS 243.672(1)(e) when it removed and restricted the authority of its bargaining team to carry on meaningful bargaining.

We turn to the claim that the County violated ORS 243.672(1)(e) by failing to vest its negotiators with sufficient authority to carry on meaningful bargaining. Under that statute, good faith bargaining requires that parties must send representatives with the requisite authority to "carry on meaningful bargaining" and "to enter into a contract or to advance binding contract proposals." *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, UP-92-94 at 22, 16 PECBR 433, 454 (1996), *aff'd without opinion*, 146 Or App 777 (1997) (*Hood River County I*) (quoting Hardin, The Developing Labor Law at 636 (3rd ed 1992)).

The Union argues that the County's negotiating team had insufficient authority to negotiate over economics throughout the bargaining. As evidence of that assertion, AFSCME relies on the County's refusal to move from current contract language. To begin, a party may lawfully take a hard line on an issue, so long as its conduct in negotiations, as a whole, reflects a willingness to reach an agreement. *Lincoln County Employees Association v. Lincoln County and Glode, District Attorney*, Case No. UP-42-97 at 25, 17 PECBR 683, 707 (1998). Furthermore, the facts establish that County negotiators had latitude to negotiate on non-economic matters, and that the parties were able to come to agreement on multiple issues during bargaining and multiple TAs were executed throughout bargaining. Significantly, the parties were able to reach final TAs in mediation after the County bargaining team received authorization from County Administrator Schmidt to offer two-year agreements. Both parties understood that the Union's acceptance of the County's mediation proposals meant that final agreements had been reached, subject to ratification. On the County's part, this understanding was largely based on the reasonable belief shared by Schmidt and Deputy HR Director Sarha, that Schmidt was able to provide the necessary authorization on the term of agreement, due to the authority he had previously been granted by the prior Board of Commissioners and the economic authority previously granted by the current Board. Thus, it appears that County negotiators had the authority to enter into tentative agreements subject to ratification, and that "meaningful bargaining" occurred leading up to the parties'

reaching final TAs on March 18, as evidenced in large part by the fact that the parties did indeed reach final TAs. Therefore, we find the evidence insufficient to conclude that the County's negotiating team lacked meaningful authority up to the time that the parties reached a TA.

However, as detailed above, once the parties reached TAs, County commissioners intervened and attempted to circumvent the ratification process. Specifically, the day after Sarha announced the TAs, the Board of Commissioners met in an executive session and told Sarha and Schmidt that, despite the authority previously granted to the County representatives, they had no authority to negotiate on any terms or make any concessions without the Board of Commissioners' pre-authorization. County witness testimony underscored the extent of the restricted authority, confirming that the County negotiators believed that they were relegated to act solely as a conduit between the Board of Commissioners and the Union.[8] As explained above, PECBA requires a party's bargaining team to be vested with more authority than merely shuttling information, which is ultimately what the County's Board of Commissioners relegated its bargaining team to after the Board of Commissioners scuttled the TAs that the bargaining team had successfully negotiated. After the commissioners' improper intervention and circumvention of the ratification process, the commissioners subsequently stripped the negotiators of the ability to carry on meaningful bargaining going forward. Therefore, we conclude that the County violated ORS 243.672(1)(e).

5. The County violated ORS 243.672(1)(g) when the Board of Commissioners removed and restricted the authority of its bargaining team.

We reach the same conclusion with respect to the (1)(g) claim, which is also based on the Board of Commissioners' post-TA conduct. As set forth above, a breach of a ground-rules agreement violates ORS 243.672(1)(g). Here, the parties' ground rules required that "[e]ach bargaining team shall have the authority to enter into tentative agreements subject to ratification or approval." For the reasons explained above, we conclude that, beginning March 21, the Board of Commissioners improperly intervened and stripped its bargaining team of "the authority to enter into tentative agreements subject to ratification." Rather, the Board of Commissioners limited its bargaining team to essentially shuttling information between the AFSCME bargaining teams and the Board of Commissioners. Under the circumstances of this case, that restriction violates ORS 243.672(1)(g).

REMEDY

We turn to the remedy. Having concluded the County violated ORS 243.672(1)(e) and (1)(g), we order it to cease and desist from the unfair labor practice conduct. ORS 243.676(2)(b). We may also order affirmative action necessary to effectuate the purposes of PECBA.

[8]Union Counsel: "If you don't have authority to enter into agreements or authorize bargaining proposals, does Mr. Sarha or the bargaining team have authority to agree to changes or terms?" County Administrator Schmidt: "What I am taking away from this, is that the Board of County Commissioners wants to give direction to [Sarha] or me, primarily [Sarha], before he goes to the negotiating table on what is or is not appropriate or allowable for the contract negotiations. So, the Board has to direct me and [Sarha], up front, yes." Union Counsel: "And that is on every issue, not just economic issues, but things like term of agreement and language pieces." Schmidt: "Apparently that is the case, yes." Union Counsel: "That relegates [Sarha's] role to being a communication – basically shuttle negotiations, he just hears from the union and goes to the commissioners" * * * "would I be wrong?" Schmidt: "Probably not, no."

ORS 243.676(2)(c). When the unlawful conduct is the refusal to present a tentative agreement for ratification, "the appropriate remedy is an order that the tentative agreement be submitted to a ratification vote." *Lane Unified,* UP-28-97 at 11, 17 PECBR at 338 (citing *School District 549C of Jackson County*, UP-102-86 at 11, 10 PECBR at 314). Further, when a public employer has failed to recommend a tentative agreement for ratification, we order the employer's negotiators to affirmatively recommend that the governing body ratify the tentative agreement, and we do so here. *See Lane Unified*, UP-28-97 at 11, 17 PECBR at 338. We also order the County's representatives, including its negotiators, to refrain from any conduct that may discourage ratification of the tentative agreement by the Board of Commissioners. *See id.* (the respondent's recommendation to ratify "must not be undermined by conduct that may discourage ratification").[9] In this case, we find that our traditional remedy is appropriate, and we decline to impose the Union's requested remedy that we bypass the ratification process and instead order the adoption of the TAs.

With respect to the proven claims regarding the commissioners unlawfully restricting the County bargaining team's authority, our cease-and-desist order means that the County shall immediately restore the authority of its bargaining team to engage in meaningful bargaining at the table.

AFSCME also requests a civil penalty. We may award a civil penalty when we find that the respondent "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); OAR 115-035-0075. Here, we find no evidence that the County has repetitively failed to present and recommend tentative agreements for ratification. To the contrary, the record demonstrates that, until the harm inflicted on the collective bargaining relationship by the events in this case, these parties previously shared a productive collective bargaining relationship.

We do, however, find that the County committed egregious violations. "'Egregious' violations are those that tend to undermine the very nature of the collective bargaining process." *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06 at 44, 22 PECBR 61, 104 (2007), *aff'd*, 234 Or App 553, 28 P3d 673 (2010) (citing *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-27-02 at 24, 20 PECBR 571, 594 (2004)). In addition, when a party's conduct shows "such a flagrant disregard for its PECBA duties, and [is] so far removed from the standards of good practice under PECBA," we have found egregious conduct justifying imposition of a civil penalty. *Hood River County I,* UP-92-94 at 23, 16 PECBR at 455. Actions are also egregious if they were "taken in knowing disregard of the law." *Association of Professors of Southern Oregon State College v. Oregon State System of Higher*

[9]The Union also requests that we require the County to reimburse it for any additional bargaining-related costs it incurs because bargaining has continued after March 2022. We decline this request. Even assuming that we have the authority to order such a remedy, we cannot say that any bargaining-related costs incurred by the Union were the result of the County negotiators' failure to recommend ratification. Even if, as PECBA requires, the Board of Commissioners had scheduled a hearing for ratification, the Board of Commissioners could nonetheless have voted against ratifying the tentative agreements, which would have required the parties to continue the PECBA dispute resolution process.

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), *rev'd on other grounds*, 312 Or App 377, 494 P3d 993 (2021).

Here, we easily conclude that the County's actions tend to undermine the very nature of the collective bargaining process. Specifically, for collective bargaining to function properly, each party must be able to trust that the other party's negotiators have meaningful authority to negotiate an agreement. In addition, when a tentative agreement is reached, each party must be able to trust that the other will actively recommend ratification of that agreement. Without both parties trusting each other, they are hindered from effectively seeking and making concessions and proposing creative solutions—the type of give-and-take that is the hallmark of productive collective bargaining. Here, because of its actions in response to Sarha's March 21 email and at the March 22 executive session, the Board of Commissioners damaged AFSCME's trust in the County. It did so by conveying to the County's negotiators that it would be futile for them to present the tentative agreements for ratification and explain why those agreements constituted the best agreements they believed they could secure after almost a year of negotiations. That conduct undermined the very nature of the bargaining between the County and its exclusive representative. Further, in so doing, the County showed a flagrant disregard for its duties under PECBA and departed from the standards of good practice under PECBA. In addition, because the County had executed two ground rules agreements that expressly incorporated PECBA's requirement that a party's negotiators recommend ratification of tentative agreements, the County's actions were taken in knowing disregard of the law. For all these reasons, we will order the County to pay a civil penalty of $1,000 to AFSCME.

AFSCME 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). We conclude that multiple factors are satisfied here. As explained above, the County's conduct in this case was flagrant. In addition, the County's conduct affected all employees in two separate bargaining units. Further, by undermining a core feature of PECBA—the requirement that a party's negotiators, once a tentative agreement is reached, actively attempt to obtain ratification by decision makers—the County's conduct also potentially impacted the Union's functioning in bargaining as the exclusive representative, by sowing doubt in the minds of bargaining unit members that tentative agreements reached at the table would be considered and evaluated by decision makers. Therefore, a notice posting is warranted. 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 electronic communication was 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, AFSCME requests reimbursement of its filing fee. ORS 243.672(6) imposes a $300 filing fee for each unfair labor practice complaint filed. The Board may, in its discretion, order fee reimbursement to a prevailing complainant where the "answer is found to have been frivolous or filed in bad faith." ORS 243.672(6). Our rules require that (1) a request for filing-fee reimbursement must be included in a complaint; and (2) the request "must include a statement as to why * * * filing-fee reimbursement is appropriate, with a clear and concise statement of the facts alleged in support of the statement." OAR 115-035-0075. Because reimbursement of the fee for filing a complaint is ordered only if an answer "is found to have been frivolous or filed in bad faith," ORS 243.672(6), it is premature to request reimbursement of a filing fee in the *initial* complaint because no answer has yet been filed. Therefore, we allow a party to move to amend its complaint to request reimbursement of a filing fee at any time after the answer is filed and "before the evidentiary hearing concludes." OAR 115-035-0075.[10]

Here, AFSCME included a request for filing-fee reimbursement in its *initial* complaint. That request was premature because no answer had been filed, so there would be no basis to assert (or for this Board to find) that the answer was "frivolous or filed in bad faith." ORS 243.672(6). Likewise, AFSCME did not (and could not) include the necessary statements as to why filing-fee reimbursement was appropriate, given that no answer had been filed. *See* OAR 115-035-0075. After the answer was filed, AFSCME did not subsequently move to timely amend its complaint and include the necessary statements as to why the answer was "frivolous or filed in bad faith." That is a sufficient basis for us to deny the request for filing-fee reimbursement.

Additionally, we note that in its prehearing brief, AFSCME argued that our remedy should include filing-fee reimbursement because this Board "has often required employers to pay a union's filing fees" in situations that involve unlawful conduct regarding ratification of a TA or not vesting a bargaining team with sufficient authority. AFSCME did not cite a case in support of that proposition and we have found none. Rather, the Board has assessed filing-fee reimbursement in those cases based on whether the answer was found to be frivolous or filed in bad faith. *Compare Lane Unified*, UP-28-97 at 12, 17 PECBR at 339 (ordering filing-fee reimbursement after finding that the answer was filed in bad faith) *with Hood River County II*, UP-09-08 at 29, 23 PECBR at 611 (declining to order filing-fee reimbursement because the answer was not found to be frivolous or filed in bad faith). Moreover, AFSCME at no point provided a statement connecting its request for filing-fee reimbursement to the County's answer. Accordingly, even if we were to consider the rationale proffered by AFSCME in its prehearing brief as to why filing-fee reimbursement should be awarded, we would not order reimbursement.

[10]ORS 243.672(6) also allows the Board, in its discretion, to order reimbursement of the filing fee paid by the respondent with its answer if the complaint "is found to have been frivolous or filed in bad faith." ORS 243.672(6). In contrast to a complainant, who cannot include in the initial complaint the required "clear and concise statement of the facts alleged in support of the statement" for filing-fee-reimbursement, OAR 115-035-0075, a respondent *can* include such a statement in its answer or, like a complainant, may move to amend its answer to include that statement of supporting facts "at any time before the evidentiary hearing concludes." *Id.*

ORDER

1. The County shall cease and desist from violating ORS 243.672(1)(e) and (1)(g).

2. The County shall vest County negotiators with requisite authority to conduct meaningful bargaining.

3. The County is directed to submit the DTD and WES TAs that were reached through mediation on March 18, 2022, including the two-year term of agreement, to the Board of Commissioners for a ratification vote to be held in compliance with the Oregon Public Meetings Law within 30 days of this order. The presentation and recommendation for ratification shall include (a) a copy of the tentative agreements, (b) an explanation that the agreements cannot become final agreements until they are ratified by the Board of Commissioners, and (c) a statement that the County's bargaining team strongly urges ratification.

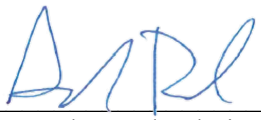
4. The County is further ordered to conduct the vote in a manner that complies with its obligation to bargain in good faith, and that does not undermine its recommendation for ratification.

5. The County shall post the attached notice for 30 days at all County facilities where AFSCME-represented employees in the DTD and WES bargaining units work.

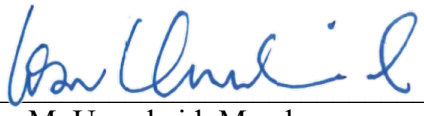
6. The County shall distribute the attached notice by email to all AFSCME-represented employees in the DTD and WES bargaining units, within 10 days of the date of this order.

7. The County is ordered to pay the Union a civil penalty of $1,000 within 30 days of this order.

DATED: October 5, 2022.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Shirin Khosravi, 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-025-22, *American Federation of State, County and Municipal Employees, Council 75 v. Clackamas 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 Clackamas County (County) committed unfair labor practices in violation of ORS 243.672(1)(e) and (g) by (1) failing to affirmatively recommend that the Board of Commissioners ratify the tentative agreements for successor contracts reached with AFSCME for Local 350-0, which represents employees in the Department of Transportation and Development (DTD), and for Local 350-4, which represents employees in Water and Environmental Services (WES), and (2) failing to send a bargaining team that had the requisite authority to bargain with AFSCME for those successor contracts.

To remedy this violation, the Board ordered:

1. The County shall cease and desist from violating ORS 243.672(1)(e) and (1)(g).

2. The County shall vest County negotiators with requisite authority to conduct meaningful bargaining.

3. The County is directed to submit the DTD and WES TAs that were reached through mediation on March 18, 2022, including the two-year term of agreement, to the Board of Commissioners for a ratification vote to be held in compliance with the Oregon Public Meetings Law within 30 days of this order. The presentation and recommendation for ratification shall include (a) a copy of the tentative agreements, (b) an explanation that the agreements cannot become final agreements until they are ratified by the Board of Commissioners, and (c) a statement that the County's bargaining team strongly urges ratification.

4. The County is further ordered to conduct the vote in a manner that complies with its obligation to bargain in good faith, and that does not undermine its recommendation for ratification.

5. The County shall post this notice for 30 days at all County facilities where AFSCME-represented employees in the DTD and WES bargaining units work.

6. The County shall distribute this notice by email to all AFSCME-represented employees in the DTD and WES bargaining units, within 10 days of the date of this order.

7. The County is ordered to pay the Union a civil penalty of $1,000 within 30 days of this order.

Clackamas County

Dated: _____, 2022

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, or email to Emprel.Board@ERB.Oregon.gov .

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-007-22

(REPRESENTATION)

FRONTIER REGIONAL DISPATCHERS' ASSOCIATION, Petitioner, v. FRONTIER REGIONAL 911, Respondent.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE

On September 15, 2022, Frontier Regional Dispatchers' Association (FRDA) filed a petition under ORS 243.682(2) and OAR 115-025-0030 to certify (without an election) FRDA as the exclusive representative of Dispatchers employed by Fronter Regional 911.[1] A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating FRDA as the exclusive representative of the proposed bargaining unit.[2]

On September 16, 2022, 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 6, 2022). There were no objections to the petition or a request for an election.

[1]Frontier Regional 911 also employs contracted part-time dispatchers with employment agreement contracts; FRDA does not seek to represent those positions, and they are not included in this petition.

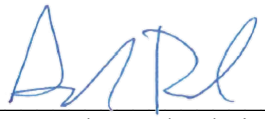
[2]The parties disagree on whether two dispatchers are statutory supervisors under ORS 243.650(23)(a). Because resolution of that question is not necessary in light of the petitioner's showing of interest, we make no determination on that question in certifying the petitioned-for unit. *See* OAR 115-025-0020(4). A petition clarifying public employee status may be filed at any time. OAR 115-025-0050(6).

ORDER

Frontier Regional Dispatchers' Association is certified as the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

Non-supervisory Dispatchers of Frontier Regional 911.

DATED: October 10, 2022.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-022-22

(UNFAIR LABOR PRACTICE)

CITY OF CASCADE LOCKS, OREGON, Complainant, v. IBEW LOCAL 125, Respondent.	)	DISMISSAL ORDER

Pierre Robert, Attorney at Law, Local Government Personnel Services at Lane Council of Governments, Eugene, Oregon, represented the Complainant.

Noah T. Barish, Attorney at Law, McKanna Bishop Joffe, LLP, Portland, Oregon, represented the Respondent.

On June 23, 2022, Complainant City of Cascade Locks (City) filed an unfair labor practice complaint against Respondent IBEW Local 125 (IBEW), alleging that IBEW violated ORS 243.672(2)(b), (c), and (d). Specifically, the City alleged that IBEW breached those provisions based on the behavior of a union representative during an investigatory meeting of an IBEW- represented employee.

The matter was assigned to Administrative Law Judge (ALJ) Jennifer Kaufman, who conducted an investigation of the complaint pursuant to ORS 243.676(1)(b) and OAR 115-035-0005. On July 15, 2022, ALJ Kaufman issued an order for the City to show cause why the complaint should not be dismissed without a hearing. In that order, ALJ Kaufman identified that the complaint alleged that (1) a Union representative improperly interfered with the City's questioning of an employee during an investigatory interview, and thereby engaged in bad faith bargaining in violation of ORS 243.672(2)(b); (2) the Union representative's conduct during the investigatory interview violated certain provisions of the parties' collective-bargaining agreement and therefore ORS 243.672(2)(d); and (3) the Union violated ORS 243.672(2)(c), but without identifying an independent violation in support of that allegation. The ALJ's order to show cause

stated that it did not appear that a hearing was warranted because, even accepting the well-pleaded allegations as true, (1) no provision in the Public Employee Collective Bargaining Act (PECBA) or the Board's caselaw provided that a labor organization violated ORS 243.672(2)(b) because a union representative was overzealous in an investigatory meeting; (2) the City had not adequately exhausted its contractual remedies for the alleged contract violation under ORS 243.672(2)(d); and (3) the ORS 243.672(2)(c) allegation lacked any well-pleaded facts or assertion of an independent violation of that statutory provision. The ALJ directed the City to show cause by July 29, 2022, as to why the complaint should not be dismissed.

The City filed a timely response to the show-cause order and, in doing so, abandoned all of its claims except the ORS 243.672(2)(d) claim for breach of the parties' agreement. With respect to that claim, the City asserted that it had exhausted its contractual remedies. In advancing that argument, the City acknowledged that it did not pursue grievance arbitration on the alleged contractual breach, but asserted that the parties' agreement did not permit the City to do so. Thereafter, IBEW submitted a response to the City's filing, in which it argued that the matter should be dismissed because (1) the City had not exhausted its contractual remedies; and (2) even putting aside the City's failure to exhaust its contractual remedies, there was no disputed issue of fact or law warranting a hearing because there is no contractual provision regarding the limitations of advocacy by a union representative in an investigatory meeting. The matter was subsequently referred to the Board with the recommendation that the Board dismiss the complaint.[1] For the following reasons, we find dismissal appropriate.

Under ORS 243.676(1)(b) and OAR 115-035-0005, an ALJ investigates a complaint to determine whether an issue of fact or law exists that warrants a hearing. If the investigation reveals that no issue of fact or law exists that warrants a hearing, the Board may dismiss the complaint. ORS 243.676(1)(b); OAR 115-035-0020. 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). However, we do not consider merely conclusory statements or allegations that lack sufficient specificity. *Melendy v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. FR-3-08 at 18, 22 PECBR 975, 992 (2009); *Teamsters Local 57 v. City of Brookings/dba Brookings Police Department*, Case No. UP-85-92 at 1-2, 13 PECBR 677, 677-78 (1992). We summarize the allegations as follows.

On November 10, 2021, the City conducted an investigatory interview of an IBEW-represented employee with an IBEW representative present. On December 28, 2021, the City conducted a second investigatory interview of that employee. IBEW-representative Rondeau attended the second interview.

> "Within minutes of the start of questioning, and continuing throughout the second interview, Rondeau interfered more than ten times with [the City's] questioning of the employee by, among other

[1]After IBEW's submission, the case was reassigned to ALJ B. Carlton Grew in a periodic reassignment of cases.

> things, interrupting to complain about the form of questions, telling [the questioner] how to ask questions, instructing [t]he employee to not answer a question, and threatening to end the interview entirely if [the questioner] persisted with questions that, as it appeared, the employee was reluctant to answer and was answering only vaguely and guardedly."

The City and IBEW are parties to a collective bargaining agreement that includes the following management-rights clause:

"[the] City retains all customary, usual and exclusive rights, decision-making prerogatives, function and authority connected with or in any way incidental to its responsibility to manage the affairs of the City or any part of it. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the City's direction and control."

The parties' agreement also includes a section concerning discipline, which states in relevant part that the

> "City reserves the right to discipline or to discharge any employee for just cause; however, prior to deciding whether to and the extent to which discipline a regular employee in a manner that directly lessens the employee's compensation or that ends their employment, the City shall inform the employee in writing of the reason(s) for such discipline or discharge. The City shall give the employee the opportunity for a hearing at which the employee and/or union may present defenses or other mitigating information. Only after the hearing has occurred or been waived by the employee shall the City decide the discipline or discharge."

Finally, the parties' agreement includes grievance and arbitration provisions. The agreement defines a grievance as "as an alleged violation of the terms of this Agreement, or a dispute regarding the meaning or interpretation of a particular clause of this Agreement." The agreement further provides that "[a] grievance initiated by the City shall be presented to the Union's Business Manager or authorized representative and a grievance initiated by any member of the Union shall be presented to the City Administrator." The agreement additionally states:

> "The parties hereto agree to make a diligent effort to settle, by direct negotiation and within thirty (30) days after the same are brought to the attention of the Executive Officers of both parties, all grievances arising under this Agreement. Failing in such direct attempt to effect settlement by direct negotiations, such controversies or differences as come within its jurisdiction may, upon mutual agreement of the parties, be referred to the Conciliator's Office for mediation. The cost of the mediator's services shall be borne equally by the parties.

> "If mediation does not resolve the grievance, then, within seven (7) calendar days after the last mediation session, the grievant or their representative may request from the Oregon Employment Relations Board a list of names of seven (7) arbitrators. The parties shall select an arbitrator from the list by mutually agreeing to one or by the parties alternately striking the names of arbitrators from the list, with the grievant or union striking first, until one name remains. The remaining arbitrator shall hear the grievance, the defenses thereto and issue a decision.
>
> "The arbitrator's decision shall be final and binding on the parties, but the arbitrator shall have no power to alter, modify, add to or subtract from the terms of this Agreement. Their decision and any award made therein may be retroactive to the date of the act that prompted the grievance. The arbitrator shall be asked to deliver their decision and any award within thirty (30) calendar days from the date of the hearing."

Assuming all the above well-pleaded facts are true, there is no issue of fact or law that warrants a hearing. None of the provisions above make any mention regarding the scope of advocacy or participation by a union representative in an investigatory meeting. There is no mention in the parties' agreement of any limitation on the right of a union representative to ask questions in an investigatory meeting, to instruct an employee not to answer a question, or to threaten to end the interview entirely if the questioner persisted with a certain line of questioning. Thus, even accepting, as we must at this stage, that the allegations as true, the City has not identified any contractual provision that IBEW breached. Therefore, dismissal of the complaint is warranted.

Although that basis is sufficient for dismissal, we also find that the City did not exhaust its contractual remedies. The City does not dispute that when a party brings an unfair labor practice claim for breach of contract under ORS 243.672(1)(g) or (2)(d), we generally require a party to exhaust any contractual remedies. *See*, *e.g.*, *Portland Police Association v. City of Portland*, Case Nos. UP-25/26/27-11 at 4, 25 PECBR 481, 484 (2013); *see West Linn Education Ass'n v. West Linn School Dist. No. 3JT*, Case No. C-151-77, 5-8, 3 PECBR 1864, 1868-1871 (1978) (it is inconsistent with the policy of PECBA for this Board to hear a contract violation unfair labor practice complaint without first requiring the complainant to have used the bargained grievance procedure).The City also acknowledges that, under the agreement, it has the same remedial right to file a grievance as IBEW. *See* Article 3.2 (discussing requirements of a "grievance initiated by the City").

The undisputed facts, however, establish that the City never availed itself of this initial remedy. The City argues that its February 1, 2022, letter to IBEW's business manager should be treated as filing a contractual grievance. In that February 1 letter, the City notified IBEW that the City construed the union representative's conduct as constituting "the unfair labor practices of refusing to bargain in good faith with a public employer and of violating Article 16 of the Collective Bargaining Agreement * * * Violations of both ORS 243.672(2)(b) and (d)." The City stated that it would file an unfair labor practice complaint unless IBEW agreed to certain

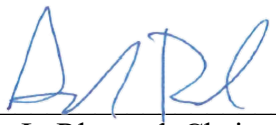
conditions, and upon verification of that agreement, "the City will, in writing, waive its right to file its complaint about the December 28 interview." The letter refers to the City's proposal as a "settlement offer."

We find no merit in the City's argument. There is no provision in the parties' agreement equating either the filing of an unfair labor practice complaint or the threat of such a filing with a contractual grievance. Moreover, the procedures and remedies for unfair labor practice complaints under PECBA are distinct from contractual rights negotiated and agreed to by parties. The City does not provide any persuasive authority that a party generally exhausts its contractual grievance remedies by threatening to file or filing an unfair labor practice complaint with this Board. And, as noted above, the parties' agreement likewise does not equate the two actions. Therefore, we find that the City did not exhaust its contractual remedies, which also warrants dismissal of the complaint.[2]

ORDER

The complaint is dismissed.

DATED: November 1, 2022.



Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

[2]IBEW raised additional arguments related to the City's failure to exhaust its contractual remedies, including that any grievance filed would be untimely, and that the City did not advance the matter to arbitration. Although those arguments might provide additional grounds warranting dismissal, we need not reach them in light of our conclusions above.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DC-002-22

(REPRESENTATION)

CERTAIN EMPLOYEES OF COLUMBIA COUNTY, Petitioner, v. AMALGAMATED TRANSIT UNION LOCAL 757, and COLUMBIA COUNTY, Respondents.	)	CERTIFICATION OF ELECTION RESULTS (PETITION FOR DECERTIFICATION)

On July 7, 2022, certain employees of Columbia County (County) filed a petition under ORS 242.682(1)(b)(D) and OAR 115-025-0045 to decertify Amalgamated Transit Union Local 757 as the exclusive representative of all public transit bus drivers, dispatchers, and bus washer/utility workers at the County.

On August 19, 2022, the Board's Election Coordinator asked the County 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 August 25, 2022. OAR 115-025-0060. Pursuant to the terms of the notice posting and OAR 115-025-0060, objections to the petition were due within 14 days of the date of the notice posting (*i.e.*, by September 8, 2022). No objections were filed.

Pursuant to the terms of a consent election agreement, the Election Coordinator sent ballots to eligible voters on September 29, 2022, and ballots were due on October 20, 2022, which constitutes the date of the election. *See* OAR 115-025-0072(1)(b)(A). The two choices on the ballot were (1) representation by Amalgamated Transit Union Local 757; or (2) No Representation. A tally of ballots was held on October 21, 2022, and a majority of valid returned ballots selected No Representation. The tally of ballots was provided to the parties on October 21, 2022.

Objections to the conduct of the election (or conduct affecting the results of the election) were due within 10 days of furnishing the ballot tally to the parties (*i.e.*, by October 31, 2022). OAR 115-025-0075. No objections were filed, and the Board accordingly issues this certification of the results of the election. OAR 115-025-0076.

ORDER

The result of the election is certified, and Amalgamated Transit Union Local 757 is decertified as the exclusive representative of Columbia County public transit bus drivers, dispatchers, and bus washer/utility workers.

DATED: November 1, 2022.

Adam L. Rhynard, Chair

*Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Umscheid unavailable to sign.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-003-21

(UNFAIR LABOR PRACTICE)

BAY AREA HOSPITAL, Complainant, v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 555, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On September 28, 2022, this Board heard oral arguments on Respondent United Food and Commercial Workers, Local 555's objections to a May 24, 2022, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe, after a hearing on February 9 and 11, 2022. The record closed on April 4, 2022, upon receipt of the parties' post-hearing briefs.

Richard J. Alli, Jr. and John M. Stellwagen, Attorneys at Law, Bullard Law, Portland, Oregon, represented the Complainant.

Noah T. Barish, Attorney at Law, McKanna Bishop Joffe, LLP, Portland, Oregon, represented the Respondent.

On February 1, 2021, Complainant Bay Area Hospital (Hospital) filed an unfair labor practice complaint against Respondent United Food and Commercial Workers, Local 555 (Union). On June 11, 2021, the Hospital filed an amended complaint after ALJ Kehoe granted the Hospital's motion to amend the complaint on June 10, 2021. On February 7, 2022, the Hospital filed an unopposed motion to file a second amended complaint, which ALJ Kehoe also granted. The Union filed a timely answer.

The issues in this case are: (1) Did the Union violate ORS 243.672(2)(a) by requiring its members to sign a yearlong, irrevocable agreement that conflicts with a six-month opt-out period included in Section 2.03 of the parties' (CBA)? (2) Did the Union violate ORS 243.672(2)(d) by violating Section 2.03 of the CBA? (3) Is a civil penalty warranted? (4) Is filing-fee reimbursement warranted?

As set forth below, we conclude that (1) the Hospital's complaint was untimely; (2) even assuming that the Hospital's complaint was timely, its claim that the Union violated ORS 243.672(2)(d) is speculative and premature; (3) even assuming that the Hospital's complaint was timely, the Hospital is not an injured party and cannot assert a claim that the Union violated ORS 243.672(2)(a); (4) the Union is entitled to a civil penalty, and (5) the Union is entitled to reimbursement of its filing fee.

RULINGS

1. On June 7, 2022, the Union filed timely objections to the ALJ's recommended order. The Hospital's cross-objections, if any, were due by June 14, 2022. *See* OAR 115-010-0090(2) (if one party has filed objections as set forth in subsection (1), but the other party has not, the party that has not objected may file cross-objections within seven days of the service of the objections). On June 21, 2022, seven days after that deadline, the Hospital filed a motion for an extension of time to file cross-objections and simultaneously filed its cross objections. That same day, the Union filed a response objecting to the Hospital's motion. On September 7, 2022, the Board informed the parties that the Hospital's motion was under advisement, the parties could devote such portion of the scheduled oral argument on September 28, 2022, as they deemed necessary to the motion, and the Board would incorporate its ruling on the motion into its final order. For the following reasons, we conclude that the Hospital's cross objections were untimely, and there is no good cause to permit the filing.

Under OAR 115-010-0090(1), "[u]pon good cause shown, the Board may extend the time for filing objections."[1] 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, 22 PECBR 422, 426 (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, 21 PECBR 891, 899 (2007) (finding good cause for a late answer-filing fee where respondent faxed answer to ERB and complainant before deadline and hired messenger to hand deliver answer with filing fee to ERB, but messenger arrived late). However, inadvertence, or a lack of awareness of a deadline, does not constitute good cause. *Multnomah County*, UP-58-05 at 5-6, 22 PECBR at 426-27. We also do not consider whether the opposing party was prejudiced by the late filing. *Id*. at 6.

[1]The Union argues that although the rules provide that the Board may extend the time for filing objections upon a showing of good cause, there is no analogous procedure in the rules for the Board to extend the time for filing cross-objections. *Compare* OAR 115-010-0090(1) *with* OAR 115-010-0090(2). We disagree with the Union's interpretation of the rule. The Board has the discretion to extend the time both for filing objections and for filing cross-objections. In any event, as we explain below, we find that the Hospital did not show good cause for its late filing.

Here, the Hospital argues that it has good cause for its late filing because one of its lawyers was out of the office from June 1 through June 15, 2022, for medical reasons. Another lawyer in the Hospital's law firm handled the matter during that time. Due to inadvertence, that lawyer did not timely file a motion to extend the deadline and did not timely file the cross objections. Mere inadvertence does not constitute good cause. We therefore strike and do not consider the Hospital's cross-objections.

2. On September 23, 2022, the Hospital filed a timely memorandum in aid of oral argument totaling 30 pages, excluding the table of contents. OAR 115-010-0095(2) provides that a memorandum in aid of oral argument may not exceed 25 pages. The Hospital did not seek approval from the Board to file an overlength brief. On September 27, 2022, the Union filed a motion to strike the Hospital's memorandum in its entirety. On September 27, 2022, the Hospital filed both an opposition to the Union's motion and a motion for leave to amend the memorandum to shorten it to 25 pages. The Hospital argued that it filed the overlength memorandum based on its erroneous reliance on the Board's general rule regarding briefs, rather than the more specific rule related to memoranda in aid of oral argument. The Union opposed the Hospital's motion to amend.

The Board generally does not consider those portions of a brief that exceed the page limit prescribed in the Board's rules. *See Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-032-11 at 2, 25 PECBR 525, 526 (2013) (declining to consider pages 31 to 40 of overlength closing brief); *East County Bargaining Council v. David Douglas School District*, Case No. UP-43-07 at 2, 23 PECBR 333, 334 (2009). However, where a case presents multiple claims and complex arguments, overlength briefs have been permitted. *See Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-04-06 at 3, 22 PECBR 323, 325 (2008) (the ALJ acted within her discretion in granting post-filing motion for overlength brief where the filing party relied on "the number of charges in the Association's complaint and the complexity of the arguments required to assert the District's position"); *Hillsboro Education Association v. Hillsboro School District*, Case No. UP-7-02 at 4, 20 PECBR 124, 127 (2002) (ALJ properly exercised discretion in permitting overlength brief where issues were complex and included an evidentiary objection). Here, considering the shifting legal arguments advanced by the Hospital throughout this case, including before the Board, and the Union's request for a civil penalty based in part on those shifting arguments, the Hospital's overlength brief is permitted.

3. All rulings of the ALJ were reviewed and are correct.[2]

[2]Neither party timely objected to or otherwise sought review of any rulings made by the ALJ.

FINDINGS OF FACT

Background

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

2. The Hospital is located in Coos Bay, Oregon, and is the largest hospital on the Oregon Coast. It has around 1,200 employees. The Hospital is licensed for 175 hospital beds, but currently only has about 130 "staffed beds."

3. The Union is a "labor organization" within the meaning of ORS 243.650(13). It is the exclusive representative of a bargaining unit of Hospital employees that includes a variety of job classifications. The bargaining unit does not include any supervisors, managers, nurses, doctors, or security personnel. In addition to the Hospital bargaining unit, the Union also represents numerous other units affiliated with other private and public sector employers in Idaho, Oregon, Washington, and Wyoming.

4. About 92 percent of the Hospital's employees are represented by a labor organization. Additionally, three different labor organizations represent separate bargaining units of Hospital employees. The Oregon Nurses Association represents about 250 employees, the Teamsters represents about 15 or 16 employees, and the Union represents about 550 employees. Each of those labor organizations has its own collective bargaining agreement with the Hospital, and each of those agreements has its own terms.

5. The Hospital and the Union are currently parties to a CBA that, by its terms, runs from July 1, 2018 through June 30, 2022. The parties signed that CBA in April 2019. The parties' previous CBA ran from January 1, 2016 through June 30, 2018.

Relevant Bargaining History

6. In mid-March 2018, the parties started bargaining what would eventually become the current CBA. In May or June 2018, Alli became the chief negotiator for the Hospital. During all of the 2018 bargaining, Michael Marshall acted as the Union's chief spokesperson. Marshall is also currently the Union's Executive Director.

7. Chief Human Resources Officer Clay England is currently the head of the Hospital's Human Resources Department. As of the hearing for this case, England had been in that role for about two and a half years. As a result, England did not participate in the 2018 bargaining. England has worked in human resources for about 28 years and was the Chief Human Resources Officer at four other hospitals before joining Bay Area Hospital. Before England, the Interim Chief Human Resources Officer was Angie Webster. Before Webster, the Chief Human Resources Officer was Suzie McDaniel, who served in that role for at least five years.

8. On June 27, 2018, the U.S. Supreme Court decided *Janus v. AFSCME*, 138 S Ct 2448, 201 L Ed 2d 924 (2018). Later that same day, Union President Dan Clay sent a letter to then-Chief Human Resources Officer McDaniel. The letter requested that the Hospital immediately "cease deducting fair share fees from any non-member's pay and cease remitting any

fair share fees from non-members to Local 555." At the end of the letter, Clay also demanded that, "pursuant to ORS 243.702," the Hospital bargain with the Union over aspects of the CBA that might be invalid because of *Janus*. ORS 243.702 specifically concerns "Renegotiation of invalid provisions in agreements."

9. Before *Janus*, every bargaining unit employee in the Union's unit had to pay the Union either dues or a fee, whether the employee wanted to be a union member or not. Article 2, Section 2.01(A) of the then-existing CBA required all bargaining unit employees to "either become members of the Union or * * * pay the Union a 'fair share' amount equal to the Union initiation fees and monthly dues * * *." Article 2 of the CBA did not address how or whether an employee could revoke a payroll deduction authorization.

10. As a result of *Janus*, bargaining unit employees do not need to become a Union member or pay dues to the Union to work at the Hospital. Furthermore, currently, some bargaining unit employees are non-members.

11. On July 26, 2018, the Hospital gave the Union a written proposal that was designed to bring the existing CBA into compliance with *Janus*. One element of the Hospital's proposal would have allowed bargaining unit employees to terminate their payroll deduction authorizations at any time by delivering a written and signed notice to the Hospital's Human Resources Department. The Union "strongly objected" to the proposal.

12. The Union gave the Hospital its own written proposal on July 26, 2018. One part of that proposal would have allowed bargaining unit employees to terminate a payroll deduction authorization by contacting the Union (rather than the Hospital). However, the same proposal would not have allowed employees to do so "until a period of at least twelve (12) months [had] passed since the payroll deduction authorization form on file [was] filled out." In response, Alli stated that the Hospital could not agree to the Union's proposed 12-month irrevocable period.

13. After the parties exchanged the two July 26, 2018, proposals, Alli and Marshall had a private "sidebar" conversation about the proposals in a meeting room away from the bargaining table. During that conversation, Alli indicated that the Hospital might accept an irrevocable period of six months instead of 12.

14. On July 27, 2018, back at the bargaining table, Alli verbally proposed that the irrevocable period of payroll deduction should be six months. Afterward, the Union verbally agreed to the six months proposal, resulting in a tentative agreement (TA) on that aspect of the negotiations.

15. While the parties were still discussing changes to Article 2, Alli asked Marshall for a copy of the Union's payroll deduction authorization/dues checkoff form. Subsequently, while the parties were still trading proposals, Marshall gave Alli a copy of the Union's standard membership application. As detailed below, that standard membership application includes a payroll deduction authorization form that states that, once the authorization is signed, the authorization is irrevocable for a 12-month period. At that time, the Hospital already had a stack of the same documents in its Human Resources office. The Union has provided the Human Resource office with membership forms on approximately a quarterly basis, for at least the past

seven years. The Union frequently provided copies of the membership applications to the Hospital's Human Resources Department so that the Hospital could give them to bargaining unit employees.

16. On August 13, 2018, Alli sent an email to Marshall and others. The email included a draft document that the email identified as the "Unanimously Recommended Last, Best and Final Contract Offer" (and was dated July 27, 2018).

17. On August 14, 2018, Marshall responded to Alli's email. In Marshall's email (which included Marshall's own draft document as an attachment), Marshall wrote, in relevant part,

> "In [S]ection 2.04, we never agreed that the member had to notify the hospital, or that hospital would cease deductions within 20 days. The language we agreed to is what we proposed changed from 12 months to 6 months. Technically we never agreed to language that said that the employee would sign the DCO form, however since we feel that was implied we are agreeable to that change. We also never agreed to send the hospital the DCO forms, however, since that is our current practice we are agreeable to that change. We are not agreeable to the other changes. This is what is reflected in the attached document."

18. During the 2018 bargaining, other than Alli asking for a copy of the Union's payroll deduction authorization form, the parties never discussed the Union's membership application forms, what the Union's membership applications could say regarding payroll deductions or the related authorizations, or a limited window of time in which an employee could rescind a payroll deduction authorization. In addition, the Union never indicated that it would change its membership applications in any way, and the Hospital never asked the Union to change its membership applications. The parties also had no discussions about a political deduction authorization form. As indicated above, the parties' discussions were focused on how many months employees would be bound by their payroll deduction authorizations.

19. The Hospital signed the current CBA on April 23, 2019, and the Union signed it on April 9, 2019.[3]

20. In or around July 2019, Chief Human Resources Officer England started his position with the Hospital. Around this time, England reviewed the parties' CBA and the Union membership application. England is very familiar with the terms of the CBA and administers the CBA regularly. In his role, England has access to the Union membership applications maintained in the Human Resource office.

[3]Exh. R-12 (titled "Fully Recommended Settlement Agreement") consists of a cover page and excerpts of the parties' final TA that would eventually be incorporated into the current CBA. On the four-page exhibit's first page, it inaccurately indicates that the final TA was reached on July 27, 2018. As detailed above, on that day, the parties still disagreed about some of the language of the CBA.

Current CBA Language

21. Article 2 of the current CBA generally addresses "dues checkoffs." In its entirety, Article 2, Section 2.03 of the current CBA states,

> "PAYROLL DEDUCTION. The Employer shall deduct from each member's wages the amount of Union dues, as specified by the Union, of all members covered by this Agreement who have voluntarily provided the Employer with a written agreement authorizing such deductions. A member wishing to terminate their payroll deduction may do so by contacting the [U]nion, but may not do so until a period of at least six (6) months has passed since the payroll deduction authorization form on file is filled out and signed by the employee. The Union will provide the Hospital a copy of each signed dues document form."

22. Article 16 of the current CBA outlines the parties' grievance and arbitration procedures. Article 16, Section 16.01 broadly defines a grievance as "a complaint relating to the application, enforcement or interpretation of the terms and conditions of this Agreement." However, the subsequent language of Article 16 describing the procedures for handling grievances and arbitrations does not overtly state whether the Hospital may or may not initiate a grievance, and instead exclusively describes how the Union can initiate and advance a grievance. In any event, the Hospital has not filed a grievance against the Union regarding Section 2.03, the Union's payroll deduction authorization form, or any other matter.[4]

23. Article 18 of the current CBA provides, in relevant part,

> "In the event that any provision of this Agreement shall become unlawful or non-complying with any applicable law or regulation or with a decision of a court having jurisdiction, or if such law or regulation shall prevent compliance with such provision or prevent effective operation of the Hospital, then the parties shall be obligated to bargain in good faith to eliminate, change or amend such provision so that it will be compatible with such law, regulation or decision; and it is intended that the remainder of the Agreement shall remain in full force and effect."

The Union's Standard Membership Application

24. Since 2015 or earlier, the Union has used the same standard membership application for all of its numerous bargaining units. Accordingly, the same membership application

[4]In this case, the Hospital asserts that it cannot file a grievance under the CBA. Exh. J-3 is a copy of a July 12, 2021, arbitration decision and award in which the arbitrator concluded, "[I]mplied in the [CBA's] grievance procedure is that only the Union, or to a limited extent an employee, may process a grievance. [The Hospital] does not have access to the grievance procedure to address concerns about Union conduct." Exhs. J-1 and J-2 are copies of the parties' post-arbitration briefs. In the Hospital's post-arbitration brief, it asserted that the Union violated the CBA (though the underlying grievance had been filed by the Union).

that is given to Hospital employees is also given to Union bargaining unit employees who work for other employers under different CBAs.

25. Physical copies of the Union's standard membership applications are printed in bulk and distributed to Union representatives and employers (including the Hospital). The application is also available online for anyone to download. Another version can be filled out and signed on a tablet computer.

26. When the Union changes its standard membership application, it updates its electronic versions of the application, directs its representatives to ensure that employers and stewards are not sharing old versions of the application, and gives new copies to representatives and employers.

27. The Union's standard membership application contains three separate "authorization" forms. Each of those authorization forms is optional, independent, and requires its own signature. Accordingly, bargaining unit employees can choose to sign any combination of those authorization forms, including signing none of them. One authorization form is for becoming a Union member, a second is for paying Union dues through a payroll deduction, and a third is for making payments to the Union's "Active Ballot Club Political Action Committee" through a payroll deduction. The second and third forms are both commonly referred to as "checkoffs."

28. In addition to the three authorization forms addressed above, the Union's standard membership application includes information about the Union and union benefits. It also includes a section in which a union member may choose a life insurance beneficiary, as well as contact information and a variety of "legal information."

29. To be a union member, a bargaining unit employee must pay union dues. As indicated, one way of doing that is through a payroll deduction authorization, which directs the Hospital to deduct funds from each of the employee's paychecks and remit it to the Union. However, a bargaining unit employee does not need to authorize a payroll deduction in order to pay dues or be a union member. A bargaining unit employee who wants to pay dues and be a union member but does not want to authorize a payroll deduction can alternatively opt to use the Union's "direct billing" option and pay the Union directly (without the Hospital's involvement). Under that direct billing option, the Union sends the employee a bill/invoice for union dues every three months. Currently, one Hospital employee uses the direct billing option. Additionally, non-members can voluntarily support the Union financially, and can do so through a payroll deduction or by sending a check in the mail.

30. As of the hearing, about 80 percent of Union bargaining unit employees had union dues deducted from their paychecks by the Hospital pursuant to a signed payroll deduction authorization. The remaining 20 percent includes non-members and members who pay their dues in some way other than through a payroll deduction.

31. If a bargaining unit member requests to stop a payroll deduction authorization, the Union checks to see if the request was made within the six-month timeline established by Section 2.03 of the current CBA. If the termination request complies with that timeline, the Union immediately grants the employee's request. If the termination request was made before six months

had passed since the authorization, the Union would not stop the payroll deductions until six months had passed. If the employee who terminated the payroll deduction authorization wants to continue to be a union member, the Union would switch the employee to the direct billing option. If the employee who terminated the payroll deduction authorization also wants to stop being a union member, the Union would immediately stop billing the person for dues.

32. The Hospital can only deduct dues for bargaining unit employees who have affirmatively given written authorization to do so via a signed payroll deduction authorization form. Moreover, the Hospital cannot rescind a bargaining unit employee's payroll deduction authorization on its own.

33. When an employee asks a Hospital representative about the Union's payroll deduction authorization form or related matters, the Hospital representative always directs the employee to the Union. A Hospital representative never gives the employee instructions regarding membership or payroll deductions, solicits signatures, or processes or reviews membership applications. The Union is generally solely responsible for collecting payroll deduction authorizations and submitting those to the Hospital's Payroll Department. Nevertheless, in practice, Hospital representatives do give membership applications and business cards to employees, fax completed membership applications to the Union, and answer certain questions about the CBA.

34. One part of the Union's standard membership application states,

> "This Check-off authorization and Agreement shall be irrevocable for a period of one year from the date of execution or until the termination date of the agreement between the Employer and Local 555, whichever occurs sooner, and from year to year thereafter, unless not less than ten (10) days and not more than (20) days prior to the end of any subsequent yearly period I give the Employer and the Union individually written notice, by certified mail, or revocation bearing my signature thereto."[5]

35. As indicated, the "not less than ten (10) days and not more than (20) days prior" language included in the standard membership application was not discussed during the parties' 2018 bargaining. Further, the application's "one year" period does not align with the six-month period included in the language of Section 2.03 of the current CBA.[6]

---

[5]This specific language was highlighted during the hearing and is reproduced in the Hospital's brief (at page 8). An alternate but highly similar version of this language can be found in Exh. R-19 at 5, and is quoted in the Union's brief (at page 5 of the .pdf). It is unclear which version was used when the complaint was filed or amended. Exhs. C-6, C-7, C-8, R-15, R-16, and R-19 are all examples of the Union's standard membership application. For purposes of this case, we generally treat the various iterations of the Union's payroll deduction authorization form and standard membership application as interchangeable. During the Hospital's opening statement, the Hospital asserted that the same payroll deduction authorization form has been "used for years if not decades."

[6]The record contains no evidence that the Union has ever enforced the standard membership application's one-year timeline or ten-day revocation window rule at the Hospital.

36. Since the current CBA was ratified in 2018, the Union has never provided any bargaining unit employee a membership application containing payroll deduction authorization agreement language stating that the agreement was irrevocable for a period of six months after execution. In addition, since the ratification, the Union has only provided bargaining unit employees a membership application containing payroll deduction authorization agreement language stating that the agreement was irrevocable for a period of one year after execution during a 10-day revocation window.

37. Since the 2018 ratification, the Union has never created a membership application containing payroll deduction authorization language stating that the authorization was irrevocable for a period of six months after execution. Furthermore, since the ratification, the Union has never created any documents, sent any communications, scheduled or held any meetings, or communicated generally to bargaining unit members specifically about the payroll deduction authorization language contained within the membership application, with the exception of new employee orientations and verbally responding to individual questions from Hospital employees.

38. Bargaining unit employees who do not become dues-paying members are unable to attend certain union member meetings, vote on certain union matters (including voting on whether to ratify a proposed CBA), or receive some member-specific benefits. Non-dues-paying members cannot attend "new member meetings" or "quarterly member meetings," for example. However, dues-paying members and non-dues-paying bargaining unit employees have the same rights and privileges under the CBA.

New Employee Orientations

39. The Union regularly conducts half-hour orientation meetings for new bargaining unit employees at the Hospital. The number of new employees who attend each of these orientations can range from two to 25 employees at a time. The Hospital does not have any representatives present during new employee orientations.

40. During new employee orientations, the Union presents bargaining unit employees with a standard membership application (containing a payroll deduction authorization form), a printed copy of the current CBA, other written communications about union benefits, and business cards with contact information. In addition, a Union representative describes the provided membership application and answers any questions the new employee attendees have about the documents the Union provides. As indicated in the CBA, a Union representative also "explain[s] the benefits of [U]nion membership and the benefits of the [CBA]."

41. When the Union representative provides a copy of the CBA during a new employee orientation, the representative encourages and recommends to the new employees that they read the entire CBA at least once. However, given the length of the CBA, it is unlikely that an employee will be able to read the entire CBA during the half-hour orientation.

42. When the Union's standard membership application is handed out during new employee orientations, the Union representative does not highlight that, despite the language of the application, Section 2.03 of the CBA allows employees to terminate their payroll deduction authorization after six months without any other qualifications. However, the Union representative

does encourage the new employees to read "all of the fine print." Furthermore, during new employee orientations that have taken place after *Janus*, employees are almost always told that they are under no legal obligation to become union members, pay union dues, or authorize payroll deductions.

43. At the end of a new employee orientation, employees can ask the Union representative questions and submit completed membership applications to the Union representative. Employees can also turn in applications after the orientation has ended. If a new employee chooses not to sign an authorization form during an orientation, the Union may follow up with the employee at a later time to determine whether the employee wants to sign an authorization or agree to direct billing.

Recent Events

44. Since the parties agreed on the new language of Section 2.03, only one (unnamed) Union member has asked to terminate his payroll deduction authorization. In that instance, the employee originally signed his payroll deduction authorization on January 6, 2020, during a standard new employee orientation. (He did not sign the political donation form.) On or around January 17, 2020 (which was "several days if not a week" after the member attended a separate "quarterly membership meeting"), the member spoke with a Union representative named Megan Starks in her office and told her that he wanted to terminate his payroll deduction authorization. In response, Starks told the member that, under Section 2.03 of the current CBA, the employee could not withdraw his payroll deduction authorization for six months after his authorization. Starks also told the employee that she could not make an exception just for him.

45. On June 9, 2020, the member returned to Starks' office and once again asked Starks to terminate his payroll deduction authorization. Later that same day, in a text message, Starks directed the employee to send his termination request to another Union employee named Mary Swan at the Union's main office in Tigard, Oregon. After that, during the same day, the employee's payroll deductions were stopped.

46. On July 2, 2020, Swan received a letter from the aforementioned bargaining unit employee stating that he no longer wished to pay Union dues.[7] Upon receipt of the letter, that same day, the Union changed the individual's membership status from "active member" (a dues-paying member) to a "no service fee payer" (someone who has chosen not to pay union dues and has chosen not to be a union member).

47. On December 14, 2020, the Union filed a factually unrelated unfair labor practice complaint against the Hospital, in Case No. UP-045-20. On December 29, 2020, Alli (again, the Hospital's attorney) sent an email to John Bishop, an attorney for the Union. In that email, Alli requested bargaining over Article 2 of the CBA to conform it to *Janus*. Alli also asserted that Section 2.03 of the CBA (which Alli bargained after *Janus* to bring the CBA into compliance with *Janus*) was unconstitutional and unlawful under *Janus*.

[7]The unnamed employee's letter indicates that it was written on June 1, 2020, but the letter was not actually sent or received on that date.

48. On February 1, 2021, the Hospital filed the underlying unfair labor practice complaint against the Union with the Board. As originally filed, the complaint similarly contended that Section 2.03 was unconstitutional and unlawful under *Janus*. The complaint also contended that the Union had failed to respond to the Hospital's December 29, 2020, request to bargain in violation of ORS 243.672(2)(b) and ORS 243.672(2)(d).

49. On May 27, 2021, the Union filed a motion to dismiss the complaint, in its entirety, arguing that (1) the complaint was untimely, (2) the complaint failed to state a claim under ORS 243.672(2)(b) or (d), and (3) the Hospital failed to exhaust the grievance process under the CBA for the ORS 243.672(2)(d) claim. In its motion, the Union argued that the Hospital had not cited to any authority as a basis for its position that Section 2.03 was unconstitutional or unlawful. The Union also presented various authority, including federal case law, supporting its position that the payroll deduction authorization and termination procedures set forth in Section 2.03 are lawful, and that the parties had agreed to Section 2.03 after *Janus* in order to bring the parties' CBA into compliance with that decision.

50. On June 10, 2021, the Hospital filed a response to the Union's motion to dismiss. In its response, the Hospital argued that NLRB precedent and recent federal cases after *Janus* established that Section 2.03 of the CBA was unconstitutional. That same day, ALJ Kehoe denied the Union's motion to dismiss.

51. On June 11, 2021, the Hospital filed an amended complaint, after ALJ Kehoe granted the Hospital's motion to amend on June 10, 2021. The amended complaint similarly contended that the Union violated ORS 243.672(2)(d) and ORS 243.672(2)(b) for the reason stated above. However, it also contended that the Union violated ORS 243.672(2)(a) and ORS 243.672(2)(d) by requiring employees to sign a year-long, irrevocable agreement in direct conflict with the six-month opt-out period referenced in the parties' CBA.

52. On February 7, 2022, the Hospital filed an unopposed motion to file a second amended complaint. That motion was granted. In its second amended complaint, among other changes, the Hospital withdrew its original claim regarding Section 2.03 and its compliance with *Janus*. The Hospital now alleged that the Union violated ORS 243.672(2)(a) and ORS 243.672(2)(d) via its dues deduction agreement. (In all three iterations of the complaint, the Hospital contended that a civil penalty is warranted.)

53. On February 8, 2022, the Union filed a motion to amend its answer and affirmative defenses to plead an entitlement to civil penalties and reimbursement of its filing fee. The Union argued that the Hospital's new claim—that the Union was acting in conflict with Section 2.03 of the parties' CBA—was inherently inconsistent with the Hospital's position that Section 2.03 of the CBA was unlawful. The Union further argued that the new claim was barred by the statute of limitations, the doctrines of standing and ripeness, and the failure to exhaust the grievance process set forth in the parties' CBA.

54. On February 8, 2022, in response to the Union's motion, John Stellwagen (another attorney for the Hospital) asserted, "For the record, the Hospital is not taking a position as to whether or not the contract language in [Section] 2.03 of the parties' contract is lawful." On February 9, 2022, during the hearing, Alli (also representing the Hospital) asserted that the

Hospital was not arguing that Section 2.03 was unlawful, and that the Hospital was unaware of any caselaw stating that it was unlawful. Alli also asserted, that Section 2.03 was legal, valid, and enforceable.

CONCLUSIONS OF LAW

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

2. The Hospital's claims are time-barred under ORS 243.672(6).

Because it is dispositive, we begin with the Union's affirmative defense that the Hospital's claims are time-barred. ORS 243.672(6) requires an injured party to file a complaint no later than 180 days following the occurrence of an unfair labor practice. The Board applies a discovery rule, which means that the limitations period begins to run when a party knows *or reasonably should know* that an unfair labor practice has occurred. *Rogue River Educ. Ass'n. v. Rogue River Sch. Dist. No 35*, 244 Or App 181, 189-91, 260 P3d 619 (2011). Whether and when an injured party reasonably should have known of an unfair labor practice requires case-specific analysis regarding what facts were available to the injured party and what a reasonable inquiry by that party would have uncovered during the period before the complaint was filed. *Id.* at 191. Parties are generally expected to exercise "reasonable or due diligence" in monitoring for violations. *See District Council of Trade Unions, et al. v. City of Portland*, Case No. UP-034-14 at 12, 26 PECBR 525, 536 (2015) (citing *Rogue River School Dist.*, 244 Or App at 189).

The Hospital alleges that the Union violated ORS 243.672(2)(a) and (2)(d) because it used a union membership application containing a dues deduction authorization that is irrevocable for 12 months (rather than six months, as provided for in the CBA). Thus, the dispositive question is when the Hospital knew or should have known that the Union was using a membership application with that disputed language. The Hospital claims that it was unaware of that disputed language until around May 27, 2021, when its outside counsel purportedly discovered it "for the first time" after the initial complaint in this matter had been filed. The Hospital argues that its outside counsel's knowledge is determinative. For the following reasons, we find the Hospital's argument unsupported by fact or law.

To begin, the record indicates that the Hospital itself (as opposed to its outside counsel) had ready access to and knowledge of the Union's membership application well before the limitations period. Specifically, the Union has used a membership application with the disputed language going back to at least 2018, and the Hospital's human resource office has had continuous possession of that application since 2018, and even as long ago as 2015. Since 2015, the Union provided the Human Resources department with membership forms on a quarterly basis, and human resources personnel distributed the forms to bargaining unit members when employees requested the form.

Moreover, when Chief Human Resources Officer England began his position at the Hospital (around July 2019), he personally reviewed the Union's membership application form around the same time that he first reviewed the CBA that contained the relevant language of Section 2.03. Unsurprisingly, England testified that he was very familiar with the CBA—as one would expect, given that he was responsible for administering it on a regular basis. England has

28 years of experience in human resources and has been the Chief Human Resources Officer at four hospitals in addition to Bay Area Hospital. There is no credible basis to question that England knew or should have known of the discrepancy between the Union's membership application and the CBA. Consequently, we conclude that the Hospital, including its Chief Human Resources Officer, knew or should have known in July 2019 or soon thereafter that the Union's membership application stated that the employee's dues deduction authorization would be irrevocable for one year, which conflicted with Section 2.03 of the CBA.

At oral argument, the Hospital conceded that England reviewed the Union's membership application, but averred that England is not an attorney and may have "missed" the significance of the relevant language in the context of the CBA. But that is not the legal standard. "Knowledge of an unfair labor practice may be imputed where the filing party would have discovered the conduct in question had it exercised reasonable or due diligence." *Rogue River School Dist.*, 244 Or App at 191. By exercising reasonable or due diligence, England could have identified the disputed language and its inconsistency with the CBA around July 2019, when he began his job, or shortly thereafter. It is not necessary that England have legal training or legal skills to identify which subsection of ORS 243.672(2) was purportedly violated because of the language inconsistency. In other words, at a minimum, the Hospital should have known of its claims for more than *one year* before it filed its complaint in February 2021. Consequently, the complaint (filed February 1, 2021) is time-barred under ORS 243.672(6).

In arguing for a different result, the Hospital contends that its outside attorney, Richard Alli, did not realize that the Union's membership application was inconsistent with the CBA until May 2021, and that his "discovery" is dispositive. We are not persuaded. As a factual matter, by May 2021, Alli had already filed the first complaint in this matter. Dues deduction was the subject at the core of that complaint. The Hospital alleged that it sought a joint Hospital-Union communication to the bargaining unit confirming, among other things, that the Union would "promptly refund any dues requests that were denied." For at least five or six years before Alli filed the complaint, the Union's membership application had been in the Hospital's possession. England himself had personally reviewed it. Thus, we find it difficult to conceive that, as the Hospital's counsel, Alli did not review the Union's membership application in his own client's possession *before* he filed the complaint. But whether or not Alli reviewed the membership application, the Hospital's claim is time-barred. Alli's actual or constructive knowledge of the Union's membership application is not dispositive. As explained above, the Hospital's Chief Human Resources Officer reviewed the membership application when he began his position around July 2019. England was the Hospital manager responsible for administering the CBA and is a highly experienced human resources executive. These facts are sufficient to indicate that England knew or should have known that there was an inconsistency between the application and the agreement, which is sufficient constructive knowledge on behalf of the Hospital. We do not require that every agent, representative, our outside attorney of a party have knowledge of the occurrence of an unfair labor practice before the statute of limitations commences.

Finally, the Hospital advances the novel contention that its claims involve a "continuing violation" and therefore are timely. The Hospital argues that the violation is "continuing" because the Union's membership application remained the same (that is, was never edited to provide for a six-month authorization period to conform to the CBA). The Hospital cites no cases for the proposition that an "unchanging" document constitutes a continuing violation when the

complainant knew (or should have known) about the content of the document long before the limitations period, and we have been unable to find one. The Hospital relies only on *Oregon University System (OUS) v. Oregon Public Employees Union, Local 503*, Case No. UP-61-98 at 3, 19 PECBR 205, 207-208 (2001), and *Mt. Hood Community College Faculty Association and Kotulski v. Mt. Hood Community College*, Case No. UP-7-99, 18 PECBR 636 (2000), but both cases are inapposite. In *Oregon Public Employees Union, Local 503*, the Board rejected a continuing violation theory and concluded that the employer's claim that the union failed to abide by arbitrator's award was untimely. In *Mt. Hood Community College,* the Board held that a refusal-to-arbitrate claim was timely because the respondent employer never clearly stated that it would not arbitrate, despite being asked on several occasions. The Board did not even consider a continuing violation theory.

For all these reasons, we conclude that the Hospital's clams are untimely, and we dismiss both claims on that basis alone.

3. Even assuming that the Hospital's complaint was timely, its claim that the Union violated ORS 243.672(2)(d) is speculative and premature.

ORS 243.672(2)(d) provides, in relevant part, that it is an unfair labor practice for a public employee or for a labor organization or its designated representative to "[v]iolate the provisions of any written contract with respect to employment relations * * *."[8] As defined in ORS 243.650(7)(a), the term "employment relations" "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." However, the mere allegation that a party has breached a contract is insufficient to demonstrate a violation of ORS 243.672(2)(d). We will not consider a complaint that a party has violated a contract where the harm is speculative or the claim is premature. *Eugene Police Employees' Association v. City of Eugene*, Case Nos. UP-38/41-08 at 22, 23 PECBR 972, 993 (2010) (citing ORS 243.676(1)(b); *Washington County Police Officers' Association v. Washington County*, Case No. UP-42-92 at 4, 13 PECBR 627, 630 (1992)).

The Hospital contends that the Union's dues deduction authorization violates the parties' CBA. The Union's dues deduction authorization form in use from 2018 through the time of hearing provides:

> "You acknowledge and confirm this Authorization and Agreement shall be irrevocable for a period of one year from the date upon which you consented to it or until the termination date of the labor agreement between the employer and UFCW, Local 555, whichever occurs sooner. You agree that the Authorization and Agreement will continue from year to year thereafter, unless not less than ten (10) days and not more than (20) days prior to the end of any subsequent

[8]The language of ORS 243.672(2)(d) mirrors that of ORS 243.672(1)(g), which prohibits public employers from violating employment relations contracts with labor organizations. We use the same principles of contract interpretation in both types of cases. *Portland Public Schools v. United Association, Plumbers and Pipefitters Local 290*, Case No. UP-002-19 at 19 (2019); *Tri-County Metropolitan District of Oregon v. Amalgamated Transit Union, Local 757*, Case No. UP-020-16 at 16 (2018).

> one-year period you give your employer and the Union, individually, signed written notice of your revocation of this Authorization and Agreement."

The Hospital argues that this 12-month dues deduction authorization violates Section 2.03 of the CBA.[9] That section provides:

> "PAYROLL DEDUCTION. The Employer shall deduct from each member's wages the amount of Union dues, as specified by the Union, of all members covered by this Agreement who have voluntarily provided the Employer with a written agreement authorizing such deductions. A member wishing to terminate their payroll deduction may do so by contacting the [U]nion, but may not do so until a period of at least six (6) months has passed since the payroll deduction authorization form on file is filled out and signed by the employee. The Union will provide the Hospital a copy of each signed dues document form."

The Hospital's claim is speculative and premature. No Hospital employee has been precluded by the Union from revoking a dues deduction authorization after six months. Rather, the unrebutted evidence indicates that only one Hospital employee sought to revoke a dues deduction authorization before the 12-month revocation period set forth in the membership application. Several days after that employee had signed the dues deduction authorization, the employee told Megan Starks that he wished to revoke the authorization and would instead contribute the funds to a private retirement account. Starks explained that the Union could permit a revocation only after six months, as provided by the CBA, and could not make an exception to that six-month period. Six months later, the employee submitted a written notice to Mary Swan at the Union notifying her that the employee "no longer wish[ed] to pay dues to the union." In response, the Union administered the dues deduction authorization in compliance with the CBA—*e.g.*, it processed the employee's revocation of his authorization for dues deduction after six months, not the 12 months stated in the application itself.

There is no evidence that any other employee sought to revoke a dues deduction authorization after six months and before the expiration of the 12-month revocation period. There is also no evidence that any employee *wanted* to revoke but did not seek to do so because of the language in the membership application. We note that the Hospital did not even attempt to present such evidence.

On this record, even if we agreed with the Hospital that its complaint was timely (which, as set forth above, we do not), the Hospital's claim that the Union breached the CBA and thereby violated ORS 243.672(2)(d) is speculative and premature. We therefore dismiss this claim for this additional, independent reason.

[9] In its post-hearing brief, the Hospital also argues that the Union violated ORS 243.672(2)(d) by violating Article 18 of the parties' CBA. However, the Hospital agreed with removing that issue from the statement of the issues. Therefore, that issue was not adequately preserved, and accordingly it is not addressed in this order.

4. Even assuming that the Hospital's complaint was timely, the Hospital is not an injured party and cannot assert a claim that the Union violated ORS 243.672(2)(a) by using a membership application with a 12-month dues deduction authorization.

Even though it is not a public employee, the Hospital alleges that the Union violated ORS 243.672(2)(a). That statute, like its "mirror" provision, ORS 243.672(1)(a), protects public employees in the exercise of their protected rights under the Public Employee Collective Bargaining Act (PECBA). Under ORS 243.672(2)(a), it 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 under ORS 243.650 to 243.806." (Emphasis added.) The language of ORS 243.672(2)(a) provides two distinct prongs. One prohibits restraint, interference, or coercion "because of" employees' exercise of protected rights. The "because of" prong prohibits the labor organization from basing its actions on an employee's protected activity. 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. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000); *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 29, 22 PECBR 323, 351 (2008).[10] When we analyze whether the respondent's actions interfered with, restrained, or coerced employees "in" the exercise of their protected rights, the respondent'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). Rather, the question in an "in" claim is whether the respondent's action, "'objectively viewed * * * under the particular circumstances[,] would chill [Association] members generally in their exercise of protected rights.'" *Clackamas County Employees' Assn. v. Clackamas County*, 308 Or App 146, 152, 480 P3d 993 (2020) (quoting *AFSCME Council 75 v. Josephine County*, 234 Or App 553, 560, 228 P3d 673 (2010)).

The Hospital alleges that the Union violated 243.672(2)(a) by requiring its members to sign a 12-month irrevocable dues deduction authorization when the CBA envisions that an employee may revoke an authorization after only six months. The Hospital argues that the Union uses a 12-month period (1) "because of" fear that bargaining unit members would seek to revoke their dues deduction authorizations after *Janus v. AFSCME*, 138 S Ct 2448, 201 L. Ed. 2d 924 (2018), and (2) to restrict, limit, and coerce bargaining unit members "in" the exercise of their right as employees to join and participate, or not join and not participate, in the labor organization of their choosing.

We first consider a threshold issue—whether the Hospital may bring a claim under ORS 243.672(2)(a) based on the Union's dues deduction authorization. Under ORS 243.672(6), "[a]n *injured party* may file a written complaint with the Employment Relations Board not later

[10]The language of ORS 243.672(2)(a) largely parallels that of ORS 243.672(1)(a), which makes it unlawful for a public employer or its designated representative to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." We analyze (2)(a) claims using a similar standard to that applied in (1)(a) claims. *See Jefferson County v. Oregon Public Employees Union*, Case No. UP-16-99 at 6, 18 PECBR 285, 290 (1999). ORS 243.662 provides, "Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

than 180 days following the occurrence of an unfair labor practice." (Emphasis added.) The type of injury that must be pleaded and proved for a litigant to show that it is an injured party "is essentially the same as is required of litigants in other contests. The petitioner must show that he has suffered or will suffer a substantial injury as a consequence of the alleged unfair labor practice." *Jefferson County v. Oregon Public Employees Union*, Case No. UP-16-99 at 6, 18 PECBR 285, 290 (1999) (quoting *Oregon City Federation of Teachers v. Oregon City Education Association*, 36 Or App 27, 32, 584 P2d 303 (1978)).

We understand the Hospital to argue that it suffered an injury as a result of the inconsistency between the dues deduction authorization and the CBA. To the extent that the Hospital contends that employees' decisions about whether to become *union members* and to pay dues to the union representing an existing bargaining unit can somehow injure a public employer, we question that premise. Under PECBA, public employers are not permitted to influence or be involved in employees' decisions about whether or not to join a union. *See* ORS 243.670(2)(a) (public employers may not use "public funds to support actions to assist, promote or deter union organizing"); ORS 243.670(1)(a)(B) ("'Assist, promote or deter union organizing' means any attempt by a public employer to influence the decision of any or all of it employees" regarding "[w]hether to become a member of any labor organization"). The prohibition in ORS 243.670 is deliberately broad; the legislature "wrote the statute broadly to encompass 'any' attempt to influence the decisions of employees with regard to union organizing[.]" *United Academics of Oregon State University v. Oregon State University*, 315 Or App 348, 355, 502 P3d 254 (2021). Put plainly, the import of the statute is that a public employer has no proper role in employees' decisions about whether to join the union that represents their bargaining unit. Given the statutory prohibition on public employers influencing employees' decisions about union membership, it is difficult to envision any situation in which the Hospital could be injured by an employee's decision about whether to join and to pay dues to the Union—for the very basic reason that the Hospital has no role in that decision in the first place.[11]

Further, if the Hospital is contending that it is injured because the dues deduction authorization permits improper deductions, we also question that premise. Under ORS 243.806(8), a public employer that relies on the labor organization's list of employees who have authorized dues deductions to make such deductions is "not liable to a public employee for actual damages resulting from an unauthorized deduction." ORS 243.806(8)(a). Further, under the statute, a public employer such as the Hospital is entitled to a defense and indemnity from the labor organization that receives payments from the employer for deducted dues. ORS 243.806(8)(b). In other words, under ORS 243.806, the Hospital's sole role with respect to dues deductions is to act as a pass-through for employee payments of union dues through payroll deduction. Given the statutory protections afforded to the Hospital, any argument that the Hospital can sustain injury arising from the inconsistency between the Union's dues deduction authorization and the CBA is strained, at best.

[11]Notably, PECBA requires that when the Board finds that a public employer has used public funds to assist, promote, or deter union organizing, thereby violating ORS 243.670(2)(a), the Board "shall impose a civil penalty equal to triple the amount of funds the public employer expended to assist, promote or deter union organizing." ORS 243.676(4)(b).

But even assuming that the Hospital could sustain a cognizable injury as a result of the inconsistency between the language in the Union's dues deduction authorization and the CBA, there simply is no evidence in the record of such injury. Here, the Hospital asserts a claim based on alleged interference with employee (rather than employer) rights. As explained above, the record evidence is unrebutted that only one employee sought to revoke a dues deduction authorization, and that employee was permitted to revoke six months after signing the authorization. The record is devoid of evidence of any injury or harm sustained by even a single employee. Rather, during new employee orientations since the *Janus* decision, the Union has typically told bargaining unit employees that they have no legal obligation to become union members, pay union dues, or authorize payroll deductions. Employees are free to authorize (or not) deductions to pay union dues. They also may opt to pay union dues by receiving a direct bill from the Union. Because the Hospital asserts an ORS 243.672(2)(a) claim based on interference with *employee* rights, and because no employees were injured, it follows that the Hospital is not an "injured party" and therefore it cannot pursue a claim under ORS 243.672(2)(a).

In arguing for a different result, the Hospital contends that it sustained injuries apart from and distinct from any injuries to employees, and was injured because (1) it is "the sole signatory" to the CBA, and thus it is entitled to the benefit of the bargain it negotiated, "which it loses when its employees' rights are violated"; (2) the Union's actions, in "misrepresenting, interfering with, and restricting employees' rights to revoke their dues deduction agreement," resulted in an "impact on direct monetary benefits" to Hospital employees; and (3) the Union's conduct had "widespread impacts" on Hospital operations, including "employee dissatisfaction and negative impacts on staff performance, morale, recruitment, and retention."

We can see no basis for finding that the Hospital is an "injured party" simply because it is a party to the CBA. At oral argument, the Hospital asserted that it would be "bizarre" if the Union could, without legal consequence, use a dues deduction authorization that was not consistent with the terms of the CBA. But unfair labor practice liability under ORS 243.672(2)(a) does not turn merely on whether a party's use of a standard form (such as that used by the Union here) is inconsistent with a term in the CBA. Rather, as a threshold matter, there must be some injury caused by that inconsistency—and here there simply is no evidence of injury.

There also is no evidence that the Union "misrepresented" employees' rights in its communications with employees. After *Janus*, during new employee orientations, the Union typically informed employees that they had no legal obligation to become Union members, pay Union dues, or authorize payroll deductions. Given that clear disclosure, it is difficult to see how the length of the revocation period in the dues deduction authorization agreement could "mislead" employees about their rights. Put differently, having been informed that they had no obligation to become union members at all, employees who signed the dues deduction authorization were voluntarily agreeing to pay union dues via payroll deduction (as opposed to paying a bill sent to them by the Union). Moreover, as explained above, in response to the only employee who sought to revoke his dues deduction authorization, the Union allowed that employee to revoke upon the expiration of six months, just as set forth in the CBA. Thus, there is no evidence that the Union sought to "enforce" a longer revocation period than permitted by the CBA. Likewise, there is no evidence that the Union's dues deduction authorization had any impact on employees' monetary benefits, as the Hospital alleges.

Finally, there is no evidence that the Union's use of a membership application with a 12-month dues deduction authorization had any effect on employee recruitment and retention, as the Hospital asserts. The Hospital relied solely on testimony from Chief Human Resources Officer England, who testified that because the Hospital is a unionized employer, it "could" experience an impact on hiring and retention. England's speculation as to what *could* be a contributing factor determining recruitment and retention is speculative. It is not evidence of a direct and substantial injury. England acknowledged in his testimony that "employees leave for all sorts of different reasons" and that to characterize unionization as a primary reason that staff decide not to work at the Hospital would be "ludicrous." Moreover, Hospital employees are not required to become union members, which the Union explains during new employee orientation. Therefore, even if the Hospital had presented actual evidence (which it did not) that potential employees did not apply, did not accept offered positions, or left their positions because the Hospital is unionized, there nonetheless is still no evidence that the length of the dues deduction revocation period in the standard Union membership application affected recruitment or retention.

For all these reasons, the Hospital is not an "injured party" and therefore cannot assert a claim under ORS 243.672(2)(a). We therefore dismiss this claim for this additional, independent reason.

5. The Union is entitled to a civil penalty.

ORS 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. City 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)).

In its first complaint, filed on February 1, 2021, the Hospital alleged that the Union violated ORS 243.672(2)(b) and (2)(d) when it declined to bargain about Section 2.03 in the CBA. Both claims were premised on a common allegation—that Section 2.03 was "unconstitutional (and unlawful) under the United States Supreme Court's *Janus* decision." The Hospital also requested a civil penalty because the Union had declined the Hospital's request to bargain about the "unconstitutional and unlawful contract provision in violation of the *Janus* decision." For the

following reasons, we conclude that the Hospital's first complaint was not warranted by existing law or by a reasonable argument for the extension, modification, or reversal of existing law.

To begin, the Supreme Court's decision in *Janus* affected only fair share fees required of *nonmembers.* The Court was careful to cabin the reach of *Janus*, explaining that "[s]tates can keep their labor-relations systems exactly as they are—only they cannot force *nonmembers* to subsidize public-sector unions." *Janus*, 138 S Ct at 2485 n 27 (emphasis added). The Hospital's claims in its first complaint did not involve nonmembers. The Hospital claimed only that Section 2.03 violated the rights of union *members*. There is no basis in *Janus* to argue that Section 2.03, which concerns only *members'* dues, was unlawful. In fact, the counsel who filed the Hospital's complaint is the negotiator who bargained Section 2.03 to bring the former language into compliance with *Janus*. And, most significantly, that counsel stated on the record at the hearing in this case that Section 2.03 is "valid" and "enforceable."[12] That concession underscores what we view as obvious: the first complaint was not warranted by existing law or by any reasonable argument for the extension, modification, or reversal of existing law.

Further, the core of the Hospital's legal theory—that *Janus* affects union members' agreements to pay union dues—has repeatedly been rejected by the courts, including by the Ninth Circuit Court of Appeals. Four months *before* the Hospital filed its complaint, the Ninth Circuit rejected the argument that *Janus* affected union *members'* agreement to pay union dues. *Belgau v. Inslee*, 975 F3d 940, 951 (9th Cir 2020), *cert den*, 141 S Ct 2795 (2021) (court described itself as joining "the swelling chorus of courts recognizing that *Janus* does not extend a First Amendment right to avoid paying union dues"). Rejecting the plaintiffs' argument that an employer may not deduct union dues unless employees first waive their First Amendment rights, the court was clear—that argument "misconstrues *Janus*." *Id*. at 952. Stated plainly, *Janus* "in no way created a new First Amendment waiver requirement for union members before dues are deducted pursuant to a voluntary agreement." *Id*.; *see also Labarrere v. University Professional and Technical Employees (UPTE), CWA 9119*, 493 F Supp 3d 964, 971 (SD Ca 2020), *aff'd*, 2022 US App LEXIS 2531 (9th Cir 2022) ("the *Janus* waiver requirement does not apply under the circumstances of a voluntary union member").

The Hospital's attempt to distinguish *Belgau* mischaracterizes the court's decision. The Hospital argues that *Belgau* did not "address whether the employer and labor organization can unilaterally enter an agreement predetermining and requiring those union members to continue to pay dues for up to six months after they opt out of the union." *Belgau* is not, as the Hospital implies, an impediment to agreements between labor organizations and employers. Rather, in *Belgau,* the court accepted the fact that the labor organization and the employer had a collective bargaining agreement and that the agreement's terms were valid. The court then considered plaintiff employees' agreement to irrevocable one-year dues deduction agreements, and squarely held that "[n]either state law *nor the collective bargaining agreement* compels involuntary dues deduction and neither violates the First Amendment." *Belgau*, 975 F3d at 944 and 945 (emphasis added) (employees signed agreements that "the 'voluntary authorization' will be 'irrevocable for a period

[12]That position was inconsistent with the position taken by the Hospital's other attorney the day before. On February 8, 2022, in response to the Union's motion, that attorney asserted, "For the record, the Hospital is not taking a position as to *whether* or not the contract language in [Section] 2.03 of the parties' contract is lawful."

of one year'"). The court reasoned that the dues deduction agreements between the union members and the union were "'made by concededly private parties,' and depended on 'judgments made by private parties without standards established by the State.'" *Belgau*, 975 F3d at 947 (quoting *Am Mfrs Mut Ins Co. v. Sullivan*, 526 US 40, 52 (1999)). The same is true in this case. Here, after being informed during new employee orientation that they had no obligation to become union members, employees voluntarily entered into private dues deduction authorization agreements with the Union. *The Hospital* did not establish the standards for that private agreement—indeed, the Hospital's ultimate complaint is that the Union *set its own irrevocable period* that was different from the standard set forth in the CBA. Thus, *Belgau* does not leave open, as the Hospital insinuates, the prospect that Section 2.03, in and of itself, somehow raises First Amendment implications under *Janus*.

To the extent that the Hospital argues that the length of the 12-month irrevocable period in the dues deduction authorization itself makes the Union's agreement unlawful under *Janus*, that argument is also not warranted by existing law. Twelve-month dues deduction agreements have been repeatedly upheld by the courts. *See Belgau,* 975 F3d at 945 (employees agreed that the "'voluntary authorization' will be 'irrevocable for a period of one year'"); *Labarrere*, 493 F Supp 3d at 967 (employees signed an acknowledgement that they understood "that this voluntary service fee authorization shall renew each year on the anniversary of the date I sign below, unless I mail a signed revocation letter to UPTE's central office, postmarked between 75 days and 45 days before such annual renewal date"); *Anderson v. SEIU Local 503*, 400 F Supp 3d 1113, 1116 (D Or 2019), *aff'd*, 854 Fed Appx 915 (2021), *cert den*, 142 S Ct 764 (2022) (plaintiffs signed union membership agreement authorizing the payment of union dues that was irrevocable for a period of at least one year; court dismissed plaintiffs' claims that the agreement violated their First Amendment rights, holding that the membership agreement does not compel involuntary dues deductions and does not violate the First Amendment, citing *Belgau v. Inslee*, 359 F Supp 3d 1000, 1016 (WD Wash 2019)); *Fisk v. Inslee*, 759 Fed Appx 632, 633 (9th Cir 2019) ("deduction of union dues in accordance with the membership cards' dues irrevocability provision," which authorized the deduction of union dues for at least a full year and provided that the employee could opt out of dues payments only during a 15-day window each year, "does not violate the Appellants' First Amendment rights."). Despite this clear authority, the Hospital nonetheless essentially contends that a dues deduction period *shorter* than one year was unlawful under *Janus*. That allegation is not supported by existing law.[13]

Finally, the Hospital's essential premise that it was subject to "substantial risks" that its deduction of dues authorized by the Union's dues deduction authorization agreement would "create *Janus* liability to the employer, which may be joint and several liability independent from that incurred by the union[,]" is not supported by existing law. As described above, *Belgau* disposes of that argument. Moreover, the Hospital has the benefit of the additional protection in state law. Specifically, as part of HB 2016, enacted in response to *Janus*, the Oregon legislature

[13]In its response to the Union's motion to dismiss, the Hospital attempted to enlarge the scope of its claims. It argued that the Union's actions "could only be intended to limit employees in an effort to terminate union membership and their dues deduction authorization, and to interfere with resignation from the Union." The complaint, however, alleged only that the Union's payroll deduction language, not the union membership-related language, was unlawful.

created a comprehensive scheme regulating dues payments for public employees, public employers, and labor organizations representing public employees. ORS 243.806(1) provides that "[a] public employee may enter into an agreement with a labor organization that is the exclusive representative to provide authorization for a public employer to make a deduction from the salary or wages of the public employee, in the manner described in [ORS 243.806(4)], to pay dues, fees and any other assessments or authorized deductions to the labor organization or its affiliated organizations or entities." ORS 243.806(4) describes how a public employee may provide a dues-deduction authorization. ORS 243.806(2) then requires a public employer to "deduct the dues, fees and any other deduction authorized by a public employee under this section and remit payment to the designated organization or entity." ORS 243.806(8)(b) provides that a labor organization that receives payment from a public employer who relies on the list provided by the labor organization "shall defend and indemnify the public employer" for any unauthorized deductions that result from the employer's reliance on the labor organization's list of members. After HB 2016, there is no legal basis for the Hospital to assert that it bore "substantial" risk of "*Janus* liability" arising from dues deductions undertaken at the Union's request.[14]

Plainly stated, the Hospital's first complaint was not warranted by *Janus, Belgau,* or by the decisions from the "swelling chorus of courts" concluding that voluntary dues deductions by union members are lawful. There likewise was no good faith basis for the Hospital to argue that the Union's 12-month dues deduction period was unlawful, *see SEIU Local 503*, 400 F Supp 3d at 1116; *Inslee*, 759 Fed Appx at 633, or that it faced "substantial" risk of liability under *Janus* for deducting union dues as requested by the Union.

For all these reasons, we conclude, without hesitation, that the Hospital's first complaint was frivolously filed because a reasonable lawyer would know that the claims it alleged were not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law. A civil penalty is warranted on this basis alone.

In addition, we also find that that the Hospital's first amended complaint was not well-grounded in fact. Specifically, when the Hospital amended its complaint in June 2021, it alleged two new claims. Those claims (for violations of ORS 243.672(2)(a) and (2)(d)) were predicated on the purportedly timely "discovery" by the Hospital's outside counsel of the Union's membership application in May 2021. That discovery, the Hospital alleged, rendered the claims timely because the Union's membership application was "not in the possession of the Hospital." That allegation was not well-grounded in fact. Contrary to the first amended complaint's allegation that the Hospital never had "possession" of the membership application, the uncontroverted testimony at hearing revealed that the Hospital had possessed membership applications for several years, even for as long as seven years. The Hospital had those applications because human resources staff distributed the application to employees who requested one. Further, the Hospital's Chief Human Resources Officer reviewed the form during his orientation to his job in about July 2019 when he joined the Hospital. This evidence demonstrates that the Hospital's allegation

[14]Further, although it is not legal precedent, the *Attorney General Advisory* issued by Oregon Attorney General Ellen Rosenblum on July 20, 2018, also clearly states that *Janus* did not impact agreements to pay union membership dues and "agreements by union members to pay dues should continue to be honored." *Attorney General Advisory: Affirming Labor Rights and Obligations in Public Workplaces* (July 20, 2018).

in its June 2021 amended complaint that it had no knowledge or possession of the Union's membership applications was untrue. For this additional, independent reason, we find that a civil penalty is warranted.

The Union also asserts that a civil penalty is warranted because the Hospital filed its complaints with the intent to harass. The Union points out that the Hospital alleged in its initial complaint that Section 2.03 of the CBA was unlawful under *Janus,* and maintained that position on June 10, 2021, when it filed its response to the Union's motion to dismiss. But then, the very next day, the Hospital amended its complaint to allege the *opposite* contention: that Section 2.03 was lawful and enforceable, and that the Union violated the provision by distributing its membership application. The Hospital continued to press its first legal theory (that Section 2.03 is unlawful under *Janus*), in addition to its diametrically opposed theory, until shortly before hearing. It then dropped the first argument and, at hearing, pursued only the argument that Section 2.03 was lawful, and the Union violated that provision (and interfered with employees' rights) by using an inconsistent membership application. At the outset of the hearing, the Hospital's counsel stated on the record that Section 2.03 is "valid" and "enforceable." Finally, the Hospital reversed course once more, reverting at oral argument before this Board to its original argument that Section 2.03 is unlawful under *Janus*.

We agree that the Hospital's shifting legal theory unnecessarily complicated and likely prolonged this case, and that the Union was required to expend greater resources and incur more attorney's fees than would otherwise have been necessary. The Hospital's assertion of diametrically opposed legal positions is conduct from which we could reasonably infer an intent to harass, considering all the other circumstances in this case. *See Makro Capital of Am., Inc. v. UBS AG*, 436 F Supp 2d 1342, 1351 (SD Fla 2006), *aff'd*, 543 F3d 1254 (11th Cir 2008) (diametrically opposed legal positions predicated on the same set of facts can cast doubt upon the existence of a good-faith basis for a party's allegations). In addition, the timing of the Hospital's change in legal strategy is troubling. Within the space of 24 hours, the Hospital shifted from arguing that Section 2.03 is *unenforceable* under *Janus* (in its June 10, 2021, response to the Union's motion to dismiss) to arguing that Section 2.03 is valid and enforceable (in its June 11, 2021, amended complaint). Although parties in litigation commonly assert alternate legal theories, the Hospital's simultaneous assertion that the dues deduction authorization was *both* unlawful and lawful, only to drop the former argument shortly before hearing, is conduct that creates justifiable concern about its good faith. *See Salstrom v. Citicorp Credit Servs., Inc.*, 74 F3d 183, 185 (9th Cir), *cert den*, 519 US 813 (1996) (affirming sanctions based on number and length of the pleadings, the timing of the pleadings, and the substance of the claims asserted). Further, the fact that the Hospital withdrew its first theory shortly before hearing, but then appeared to revive it at oral argument before this Board, compounds our concern. It is not too uncharitable to say that it appears that the Hospital shifted between theories at whim, which raises substantial doubt about whether it acted in good faith.

In this case, however, because we conclude that the Hospital's original complaint and first amended complaint were frivolous, and a civil penalty is warranted on both those bases, it is unnecessary to also determine whether the complaints were filed with an intent to harass, *see* ORS 243.676(4)(a)(B) (a civil penalty may be ordered where "the complaint was frivolously filed, or filed with the intent to harass the other person, or both"), and we decline to do so.

6. Reimbursement of the Union's filing fee is warranted.

ORS 243.672(6) provides that the Board "may, in its discretion, order fee reimbursement to the prevailing party in any case in which the complaint or answer is found to have been frivolous or filed in bad faith." *See also* OAR 115-035-0075. For the reasons explained above, we find that the Hospital's original complaint and first amended complaint were not "well-grounded in fact or law" and therefore are frivolous. Under the circumstances of this case, we find that an order requiring the Hospital to reimburse the Union's filing fee is warranted.

ORDER

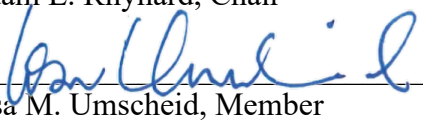
1. The complaint is dismissed.

2. The Hospital is ordered to pay the Union a civil penalty of $1,000 within 30 days of this order.

3. The Hospital is ordered to reimburse the Union's $300 filing fee within 30 days of this order.

DATED: November 14, 2022.

Adam L. Rhynard, Chair



Lisa M. Umscheid, Member

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

STATE OF OREGON

EMPLOYMENT RELATIONS BOARD

(UNFAIR LABOR PRACTICE)

AFSCME LOCAL 3336/COUNCIL 75, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO), Complainant, v. DEPARTMENT OF ADMINISTRATIVE SERVICES on behalf of THE DEPARTMENT OF ENVIRONMENTAL QUALITY Respondent.	Case No. UP-019-22 CONSENT ORDER

Lane Toensmeier, Staff Attorney, AFSCME Council 75, represented the Complainant.

Yael Livny, Senior Assistant Attorney General, Oregon Department of Justice, represented the Respondent.

On June 16, 2022, AFSCME Local 3336/Council 75, American Federation of State, County and Municipal Employees (AFL-CIO) ("Complainant") filed an unfair labor practice complaint against the Department of Administrative Services on behalf of the Department of Environmental Quality ("Respondent") alleging violation of ORS 243.672(1)(g). On July 7, 2022, Complainant filed an amended complaint, adding a request for a civil penalty. In lieu of litigating the case, the 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. Complainant is a labor organization within the meaning of ORS 243.650(13).
2. Respondent is a public agency within the meaning of ORS 243.650(20).

3. On November 8, 2021, Complainant and Respondent entered into a written settlement agreement to resolve a dispute regarding matters of employment relations relating to an employee ("Grievant") represented by Complainant.
4. The written agreement between the parties required Respondent to assign a supervisor identified in the written agreement to receive "training on cultural competency (with a focus on Black women and African-Americans in Oregon if readily available), micro-aggressions, and implicit bias" within a defined period of time.
5. Respondent breached the written settlement agreement by failing to assign the supervisor to receive the identified training.

Stipulated Conclusions of Law

1. The Board has jurisdiction over these parties and subject matter.
2. Respondent's violation of the Settlement Agreement violated ORS 243.672(1)(g).
3. The violation was egregious and a civil penalty of $1,000 is appropriate.

Stipulated Order

1. Respondent violated ORS 243.672(1)(g) as stipulated above.
2. Respondent will cease and desist from committing the unfair labor practice above and will comply with the Settlement Agreement.
3. Within 60 days of the entry of this Order, the Manager identified in the Agreement will receive training on cultural competency (with a focus on Black women and African-Americans in Oregon if readily available), micro-aggressions, and implicit bias. The parties have agreed that such training is available and have determined which specific trainings the manager will take in a separate agreement between the parties.
4. Respondent will provide Complainant with a copy of the Workday transcript of the trainings taken by the manager listed in the settlement agreement within 90 days of the date of this order.
5. Respondent will issue a written apology to the Grievant for failing to implement the Settlement Agreement within 30 days of the date of this order.
6. Respondent's violation of the Settlement Agreement was egregious and Respondent will pay a civil penalty of $1,000 to Complainant within 30 days of the entry of this order.
7. Respondent will reimburse the Complainant's filing fee under OAR 115-035-0075 within 30 days of this order.
8. Respondent will pay the Complainant $1,500 for its reasonable representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055 within 30 days of this order.

///

///

Lane Toensmeier
On behalf of Complainant

Brian Boling
On behalf of Respondent

This Consent Order is approved and adopted by the Board.

DATED this 16 day of December, 2022

Adam L. Rhynard, Chair

Shirin Khosravi, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-025-22

(UNFAIR LABOR PRACTICE)

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 75,	)	
Complainant,	)	FINDINGS AND ORDER ON COMPLAINANT'S PETITION FOR REPRESENTATION COSTS
v.	)	
CLACKAMAS COUNTY,	)	
Respondent.	)	

On October 5, 2022, this Board issued an order holding that Respondent Clackamas County (County) violated ORS 243.672(1)(e) and (1)(g) by 1) failing to affirmatively recommend that the County commissioners ratify tentative agreements reached with American Federation of State, County and Municipal Employees, Council 75 (AFSCME); and 2) removing and restricting the authority of its bargaining team to carry on meaningful bargaining with AFSCME. The order also directed the County pay a $1,000 civil penalty to AFSCME. 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).

2. This case required one day of hearing, which was held on August 24, 2022.

3. 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).

4. On October 25, 2022, AFSCME timely filed a petition seeking full reasonable representation costs of $13,536.25, for a total of 67.25 hours of legal work. 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).

5. On November 16, 2022, the County filed objections to AFSCME's petition for representation costs, one day after the deadline to file written objections under OAR 115-035-0055(2)(c). In its objection to the petition for full representation costs, the County did not object to the hourly rates of the attorneys or staff that worked on the matter, but rather argued that the number of hours was not a reasonable amount of time under the circumstances and requested that the amount of representation costs awarded be reduced to $9,000. The County submitted a supporting statement identifying the hourly rate and total costs incurred by the objecting party. *See* OAR 115-035-0055(2)(e).

6. On November 17, 2022, AFSCME filed a response to the County's objection to its petition for full representation costs, and argued that the County's objections should not be considered because they were untimely.

7. On November 18, 2022, the County filed a motion for relief from the 21-day deadline and requested that the Board consider the County's objections to the petition for full representation costs, despite the fact that it was untimely. In its motion, the County explained that the objections were filed late as a result of a calendaring error.

This Board determines whether the party responsible for untimely objections has demonstrated good cause for the late filing. *See AFSCME Council 75, Local 2503 v. Hood River County (Public Works),* UP-005-20 (2021); *see also SEIU Local 503, OPEU v. Oregon University System, Portland State University,* UC-07-09, 23 PECBR 137 (2009). This Board evaluates good cause based on the circumstances of the individual case. *Oregon School Employees Association v. Reynolds School District No. 7*, Case No. C-237-79, 5 PECBR 4353 (1981). We have found that failure to properly calendar a deadline is not good cause for a late filing. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections,* Case No. UP-45-98, 18 PECBR 377 (1999). We also do not consider whether the opposing party was prejudiced by the late filing. *Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05 at 6, 22 PECBR 422, 427 (2008).

The County acknowledges the Board's "good cause" standard for late filings, but nevertheless argues that standard should not apply to the deadline for objections to a petition for full representation costs. Specifically, the County contends that the standard should not apply because there is no explicit requirement in OAR 115-035-0055 that the deadline to file objections may only be extended for good cause. The County also argues that the deadlines related to the post-hearing procedures for resolving disputes about representation costs are "fundamentally different than the substantive deadlines for a party to, for example, file an Answer to a Complaint or to raise objections to a recommended order." The County cites no legal authority in support of

its position or otherwise offers any compelling argument why this Board should depart from the good cause standard and grant greater leeway to the County in these circumstances. Thus, consistent with our prior precedent, we find that the County must establish that it had good cause for its untimely objections. In this case, the County inadvertently missed the deadline for filing objections due to a calendaring error. As discussed above, the failure to properly calendar the relevant deadline does not constitute good cause. We therefore strike and do not consider the County's objections to AFSCME's petition for full representation costs.

However, even if we considered the County's objections, we would award AFSCME the requested representation costs of $13,536.25. In arguing for a reduced award, the County submits that the 67.25 hours of legal work performed on behalf of AFSCME were excessive, in part because the County spent 54.2 hours of legal work in the matter. As the party with the burden of proof, it is not uncommon or unreasonable for Complainant's counsel to spend more time litigating an unfair labor practice complaint. On this record, even if we considered the County's objections, we would be unwilling to conclude that the approximately 13 more hours of legal work spent by AFSCME's legal representatives were unreasonable. Accordingly, because AFSCME was the prevailing party and was awarded a civil penalty, it is entitled to "[t]he full amount of reasonable representation costs." OAR 115-035-0055(1)(b)(E). Accordingly, we award AFSCME the full reasonable representation costs requested of $13,536.25.

ORDER

The County shall remit $13,536.25 to AFSCME within 30 days of the date of this Order.

DATED: December 23, 2022.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.