EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-014-22

(UNIT CLARIFICATION)

OREGON & SOUTHERN IDAHO DISTRICT COUNCIL OF LABORERS' AND LIUNA LOCAL 737,	)	
Petitioner,	)	ORDER ADDING UNREPRESENTED EMPLOYEES TO EXISTING UNIT
v.	)	
MEDFORD WATER COMMISSION,	)	
Respondent.	)	

On December 19, 2022, Oregon & Southern Idaho District Council of Laborers' and LIUNA Local 737 (LIUNA) filed a unit clarification petition under ORS 243.682(2)(a) and OAR 115-025-0050(4) to add the Water Treatment Plant Operators I, II, III, IV, A and B, Specialist, and Lead classifications to its current bargaining unit at the Medford Water Commission. A majority of eligible employees specified in the petition signed valid authorization cards designating LIUNA as the exclusive bargaining representative.

On December 20, 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 January 6, 2023). There were no objections to the petition.

ORDER

Accordingly, it is certified that all employees in the job classifications of Water Treatment Plant Operators I, II, III, IV, A and B, Specialist, and Lead are added to the existing bargaining unit represented by LIUNA.

DATED: January 9, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. DR-001-23

(PETITION TO DECLARE STRIKE UNLAWFUL)

CITY OF PORTLAND, Petitioner, v. LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 483 (LIUNA), Respondent.	)	ORDER DISMISSING PETITION TO DECLARE STRIKE UNLAWFUL

On February 1, 2023, Petitioner City of Portland (City) filed a petition under ORS 243.726(4)(a) and OAR 115-040-0020 to declare a strike by Laborers' International Union of America, Local 483 (LIUNA) unlawful. For the following reasons, we decline to declare the strike unlawful and dismiss the petition.

When a public employer alleges, in good faith, "that a labor organization representing a group of its employees has declared or authorized a strike by such employees and that such strike is or would be in violation of ORS 243.726 or 243.732, the employer may petition the Board for a declaration that the strike is or would be unlawful." OAR 115-040-0020. "The petition shall contain a detailed statement of the facts on which petitioner bases its request for a declaration of an unlawful strike." *Id.* "Upon receipt of such a petition, the Board shall either dismiss the petition or set it for a hearing before the Board." *Id.* We set the matter for hearing only if there is an evidentiary dispute that warrants a hearing. Here, even accepting all of the relevant detailed facts on which the City bases its request, we decline to declare the strike unlawful.

The City's petition is premised on the argument that LIUNA's strike notice violated ORS 243.726(2)(c) and OAR 115-040-0018. ORS 243.726(2)(c) provides that a public employee may lawfully strike so long as, among other things, "[t]he exclusive representative has given 10 days' notice by certified mail of its intent to strike and stating the reasons for its intent to strike to [this] board and the public employer." OAR 115-040-0018 provides:

> "The exclusive representative shall send notice of intent to strike to the Board and the employer by certified mail. The notice shall state the reasons for the intent to strike including the unresolved bargaining issues. The Board and the employer must receive the certified notice ten days before the first date of the strike. However, the Board will not declare a strike unlawful when the exclusive

> representative has entrusted the notice to the postal service for certified mailing at such time that timely delivery could reasonably be expected, provided that both the Board and the employer have actually received written notice of intent to strike at least ten days before the strike begins."

The City asks this Board to declare LIUNA's strike unlawful because the City asserts that LIUNA's strike notice (1) was received nine days, rather than 10 days, before LIUNA's February 2, 2023 strike; and (2) did not state the reasons for the intent to strike. We disagree with both assertions.

According to the City's petition, LIUNA sent its strike notice in three ways: (1) by United States Postal Service (USPS) certified mail sent on Friday, January 20, 2023, and received by the City on Tuesday, January 24, 2023; (2) by USPS priority mail sent on Friday, January 20, 2023, and delivered to the City on Saturday, January 21, 2023, but not viewed by any City employee until Monday, January 23, 2023, because the City buildings are closed on the weekend; and (3) an email sent on Monday, January 23, 2023, and received by the City that same day. In arguing that the notice was untimely for the February 2, 2023, strike, the City asserts that the earliest possible date that it received notice was Monday, January 23, 2023. Based on that date, the City asserts that LIUNA could begin in its strike only on February 3, 2023 (or thereafter). We disagree.

ORS 243.726(2)(c) requires LIUNA to give "10 days' notice by certified mail of its intent to strike." OAR 115-040-0018 requires that this "Board and the employer *receive the certified notice* ten days before the first date of the strike." (Emphasis added.) As alleged in the petition, the City did not *receive* the certified notice until Tuesday, January 24, 2023, which would presumably make the noticed February 2, 2023, strike unlawful under our rule, regardless of how the days were counted. However, the rule provides an exception to the more generalized receipt requirement. Specifically, the rule states that "the Board will not declare a strike unlawful when the exclusive representative has entrusted the notice to the postal service for certified mailing at such time that timely delivery could reasonably be expected, provided that both the Board and the employer have actually received written notice of intent to strike at least ten days before the strike begins." OAR 115-040-0018. Here, the petition sets forth that the City actually received written notice of the intent to strike on Monday, January 23, 2023. In arguing that the February 2 strike is unlawful, the City argues that (1) Monday, January 23, 2023 is nine days before the February 2, 2023, strike; and (2) even if Monday, January 23, 2023, was ten days before the strike, LIUNA cannot avail itself of the "actual notice" provision of OAR 115-040-0018 because it was not reasonable for LIUNA to expect its certified letter to be delivered three days after it was mailed.

We begin with the City's calculation of time under ORS 243.726(2)(c) and OAR 115-040-0018. There is no dispute that January 24, 2023, is one day after the City received actual notice of the intent to strike, which was on January 23, 2023. Under our rules, "day" means "calendar day," and we generally exclude the first day and include the last day when computing time. *See* OAR 115-010-0010(12) and 0012. If we count January 24, 2023, as day one of our 10-day notice calculation, there is also no dispute that February 2, 2023 (the day of the strike) is day 10. The City asserts that LIUNA may only strike beginning day 11 (February 3) because the statute and rule require LIUNA to wait 10 full days after the notice is received, then commence striking on the eleventh day. That, however, is not what the statute and rules say. Rather, the statute provides that LIUNA was required to give "10 days' notice * * * of its intent to strike." LIUNA gave notice of

its intent to strike in 10 days. If the statute required, for example, a labor organization to give a one-day notice of its intent to strike, LIUNA could give notice on February 1, 2023, that it intended to strike in one day (on February 2, 2023), and so on. Our rule similarly provides that that the employer receive the notice "at least 10 ten days before the strike begins." The strike began on February 2, 2023. 10 days before February 2, 2023 is January 23, 2023, which is when the City received actual written notice. Therefore, we conclude that under OAR 115-040-0018, the City received notice of LIUNA's intent to strike at least ten days before the strike began (and precisely 10 days before the strike began).

We disagree with the City's methodology for calculating days under our rule. Under the City's methodology, a labor organization is required to file a strike notice, then starting the following day, wait ten full days before being permitted to strike on the eleventh day. But that is not what the statute or our rule provides. Had the legislature intended such a requirement, we would expect greater clarity or specificity that, after providing written notice of an intent to strike, a labor organization must wait ten days, then commence a strike only starting on the eleventh day (or specified day thereafter). Likewise, our rule emphasizes that the strike will not be declared unlawful so long as the notice is received 10 days before the strike commences (as it was in this case). Our rule does not impose a 10-waiting requirement, with the lawful strike only beginning on the eleventh day. Accordingly, we decline to declare LIUNA's strike unlawful on this basis.

We turn to the City's argument that LIUNA cannot avail itself of the 10-day actual notice provision of OAR 115-040-0018 because LIUNA could not reasonably expect that its certified letter sent on Friday, January 20, 2023, would arrive at the City by Monday, January 23, 2023. The petition provides no detailed facts or evidence on which we should reach such a conclusion. As the petition acknowledges, LIUNA sent its strike notice by USPS certified letter and USPS priority mail, and both of those letters were received by a USPS facility around 12:30 p.m. on Friday, January 20, 2023. LIUNA's letter sent by USPS priority mail arrived at the City on January 21, 2023, the day after it was sent, while the certified letter did not arrive until four days after it was sent (Tuesday, January 24, 2023). The petition is not clear why LIUNA could not reasonably expect its certified letter to arrive by Monday, January 23, 2023, particularly given that the letter was mailed from Portland to another Portland address, and the priority letter arrived on January 21, 2023. We also note that this Board received LIUNA's certified letter in Salem, on Monday, January 23, 2023. Therefore, under these circumstances, we decline to conclude that the petition establishes that LIUNA had no reasonable expectation that it's January 20, 2023, certified letter would not be received by the City by January 23, 2023.

We now turn to the City's argument on the substance of the notice—namely, that LIUNA's notice did not "stat[e] the reasons for its intent to strike." ORS 243.726(2)(c). LIUNA's notice, in relevant part, stated:

> "The decision to strike was not entered into lightly and is the result of over three hundred days of negotiation in which the City of Portland has failed to address our Union's concerns about compensation, safety, and fair treatment in the workplace. These concerns have been broadly disregarded even considering rapid cost of living increases and the significant deterioration of working conditions. For these reasons we declare our intent to strike to secure a fair contract."

The notice itself provides multiple reasons for LIUNA's intent to strike, including compensation, particularly in light of "rapid cost of living increases," as well as safety. The City's petition acknowledges that LIUNA's notice stated multiple reasons for its intent to strike, but asserts that these reasons are not sufficient because they are not detailed enough to "give the City, public, and Board sufficient information to know how to resolve the dispute." Neither the plain text of the statute nor our rules require a strike notice to give the public employer, the public generally, and the Board information about how to resolve a bargaining dispute. Rather, the statute requires that the labor organization "state the reasons for its intent to strike." ORS 243.726(2)(c). Likewise, OAR 115-040-0018 requires that the notice "state the reasons for the intent to strike including the unresolved bargaining issues." We understand, at a minimum, that the reasons and unresolved bargaining issues concern compensation and safety. Although the meaning of "fair treatment in the workplace" in light of "significant deterioration of working conditions" is not entirely clear to this Board, that phrasing on that issue does not invalidate the entire strike notice.

In arguing for a different conclusion, the City relies on *Redmond School District 2J v. Redmond Education Association*, Case No. C-154-77 at 7, 3 PECBR 1564, 1570 (1977). In that case, the Board determined that the strike notice was deficient because the notice stated only that the employer had "refused to agree to a satisfactory contract relating to 'employment relations,'" which is a term defined in ORS 243.650(7) that is merely synonymous with mandatory subjects of bargaining. *See Redmond*, C-154-77 at 7, 3 PECBR at 1570. Here, in contrast, LIUNA identified compensation and safety as unresolved bargaining issues that it intended to strike over. Those issues are more specific than the generalized term "employment relations" or just "mandatory subjects of bargaining." Had the notice only stated that LIUNA was striking over "fair treatment in the workplace," we would be more inclined to agree with the City that the notice did not provide a meaningful reason for the intent to strike. Compensation, however, is a well-understood (and quite common) unresolved bargaining issue on which a strike is based. Safety is likewise a common and increasingly important bargaining issue among public sector employers, public employees, and labor organizations representing those employees. Although the notice did not specify different proposals on those unresolved bargaining issues or identify LIUNA's "bottom line" on those issues, neither ORS 243.726(2)(c) nor OAR 115-040-0018 require as much.

Moreover, the petition does not set forth that, at the time that the notice was received (on January 23, 2023), or any time before filing this petition (on February 1, 2023), the City was somehow confused about the parties' unresolved bargaining issues set forth in the strike notice. Likewise, the petition does not set forth any attempt by the City to gain clarification on LIUNA's stated reasons for striking, or what LIUNA meant by compensation and safety, in the ten days after receiving the notice.[1] For all of the above reasons, we do not conclude that LIUNA's notice violated ORS 243.726(2)(c) or OAR 115-040-0018.

[1]We further note that the petition also does not identify that the City ever objected to the timing of the notice and the strike until the filing of this petition, which was nine days after the City received the notice. Although neither the statute nor our rules regarding a petition to declare a strike unlawful *require* a public employer to object to the timing or substance of a notice *before* filing such a petition, we would expect that a public employer that was legitimately confused about the stated reasons for an intent to strike or legitimately concerned about the lack of sufficient notice would, at a minimum, attempt to *promptly* address that confusion or concern with either the labor organization or this Board. However, the Board was

(Continued * * *)

ORDER

The petition fails to set forth adequate facts or reasons to declare LIUNA's strike unlawful. Therefore, we decline to do so, and we dismiss the petition.

DATED: February 2, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

(Continued * * *)
first notified of the City's objections to the strike notice with the filing of this petition, which occurred at approximately 4:00 p.m. on February 1, 2023, nine days after the City received the notice and approximately eight hours before the commencement of the strike. If the City attempted to raise any concerns about the strike notice with LIUNA at an earlier time, the City did not include that information in its petition.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-001-23

(UNIT CLARIFICATION)

AFSCME LOCAL 3742-2, Petitioner, v. WEST EXTENSION IRRIGATION DISTRICT, Respondent.	)	ORDER REVOKING RECOGNITION OF EXCLUSIVE BARGAINING REPRESENTATIVE

On January 6, 2023, AFSCME Local 3742-2 (AFSCME) filed a petition under OAR 115-025-0050(12) seeking to revoke recognition of its role as the exclusive bargaining representative for all regular full-time employees of West Extension Irrigation District. This Board will order revocation of a recognition only if (1) no collective bargaining agreement is in effect, and (2) the labor organization disclaims further interest in representing the bargaining unit or the labor organization is defunct. OAR 115-025-0050(12)(b). Here, the petition was accompanied by evidence satisfying both criteria.

The Board also directed that a notice of the petition be posted in work areas giving maximum access to the affected employees. *See* OAR 115-025-0060(1). That notice informed any interested person that objections to the petition needed to be filed with this Board by February 3, 2023. No objections were filed. We find that the petition satisfies the criteria for revocation of recognition.

ORDER

The petition is granted. Recognition of AFSCME Local 3742-2 as the exclusive representative of all regular full-time employees of West Extension Irrigation District is revoked.

DATED: February 6, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-024-22

(UNFAIR LABOR PRACTICE)

P.S.,*	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	DISMISSAL ORDER
	)	
MULTNOMAH EDUCATION SERVICE DISTRICT,	)	
	)	
	)	
Respondent.	)	
	)	

P.S., Complainant, Portland, Oregon, represented himself.

Nancy J. Hungerford, The Hungerford Law Firm, Oregon City, Oregon, represented Respondent.

On July 15, 2022, Complainant (P.S.) filed an unfair labor practice complaint against the Multnomah Education Service District (District), alleging that the District violated ORS 243.672(1)(g). On August 8, 2022, the District filed an informal response and moved to dismiss the complaint without hearing, or have the Administrative Law Judge (ALJ) issue an order to make the complaint more definite and certain.[1] P.S. filed a response to the District's motion on August 9, 2022. P.S. subsequently filed a First Amended Complaint on August 22, 2022, adding a claim against the District under ORS 243.672(1)(d). The District filed an informal response to the First Amended Complaint on September 5, 2022.

As amended, P.S.'s complaint alleges that the District violated the parties' collective bargaining agreement and discriminated against him because he filed a duty of fair representation

[1]The matter was initially assigned to ALJ Jennifer Kaufman and then reassigned to ALJ B. Carlton Grew in a periodic reassignment of cases.

For website publication purposes, we have modified this order by replacing the Complainant's name with initials. If needed, a copy of the original order may be obtained by contacting the agency.

claim against the Oregon Education Association, MESD Education Association (Association) along with a claim that the District had breached the collective bargaining agreement. *See P.S. v. Oregon Education Association, MESD Education Association and Multnomah Education Service District*, FR-001-22 (2022) (*P.S. I*). P.S. alleges that the District's violations of the collective bargaining agreement and discrimination for filing *P.S. I*, occurred during the processing of P.S.'s grievance over a written reprimand.

ALJ Grew investigated the First Amended Complaint to determine if an issue of fact or law exists that warrants a hearing, as required by OAR 115-035-0005. The ALJ determined that the First Amended Complaint did not appear to meet the threshold pleading requirements to proceed to a hearing. On September 20, 2022, ALJ Grew issued an order directing P.S. to show cause why the complaint should not be dismissed without a hearing by making the complaint more definite and certain, and providing legal argument regarding the sufficiency of his claims.

On October 2, 2022, P.S. filed a Second Amended Complaint. The following day, on October 3, P.S. filed a response to the ALJ's order to show cause.[2] The District filed its response on October 24, 2022, and again requested that the complaint be dismissed. ALJ Grew subsequently referred the complaint to the Board with the recommendation that the Board dismiss the complaint.

For the following reasons, we find dismissal appropriate.

In considering whether the Second Amended Complaint presents an issue of fact or law that requires a hearing, we assume that the well-pleaded facts alleged are true. *Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon*, *Judicial Department*, Case No. UP-6-04 at 2, 20 PECBR 677, 678 (2004). 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]P.S. included what he referred to as "new claims of retaliation" in his response to the ALJ's order to show cause, alleging that in mid-August, 2022, he was made a "substitute" teacher, which "potentially removes [him] from the bargaining unit and the protections of the Oregon Fair Dismissal Appeals Board." These allegations were not included in P.S.'s complaints, despite the fact that the alleged conduct occurred before P.S. filed his Second Amended Complaint on October 2, 2022, one day before he filed his response containing these new allegations. Under these circumstances, we do not consider additional claims that were not pleaded in P.S.'s Second Amended Complaint (or prior complaints). Regardless, the District's October 24 response refutes P.S.'s claims, confirms that he is a contract teacher, and that his position remains within the bargaining unit. P.S. did not subsequently dispute the District's characterization of his status.

Here, having considered the facts alleged in the complaint and the amended complaints, as well as the facts discovered by the ALJ, we summarize the alleged or undisputed facts[3] as follows:

1. P.S. is a teacher employed by the District. P.S. is represented by the Association, the exclusive representative for teaching personnel employed by the District.

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. Subsection C of Article 13 provides:

"C. Procedural Rules

"1. The grievant must be present at all steps of the procedure if reasonably possible. The grievant may choose and be represented by a representative at any step of these procedures. The Administrator whose action is subject of the grievance shall be present at all stages of the proceedings if reasonably possible.

"2. The number of days indicated at each level should be considered maximum and every effort should be made to expedite the process; provided that except for initiation of the grievance, the number of days indicated at each level shall be extended by any period of approved leave. Time limits may be extended by mutual agreement.

"3. Failure at any step of this procedure to communicate the decision in writing on a grievance within the specified time limits shall permit the grievant to proceed to the next step. Failure at any step of this procedure to appeal a decision to the next step within the specified time limits shall preclude further access to the grievance procedure on that grievance.

"4. The District and its administrators will cooperate with the grievant in the investigation of any grievance, and will furnish the grievant via e-mail with such necessary and readily available information as is requested by the grievant or an authorized representative for the processing of any grievance."

4. The grievance procedure is outlined in subsection D of Article 13, and provides:

"1. Level I - Immediate Supervisor/Appropriate Administrative Authority 56

[3]The summary of facts includes and refers to facts and legal analysis in *P.S. I.*

"a. Informal Phase

"In an attempt to resolve the problem, the grievant shall meet with the immediate supervisor or appropriate administrative authority and discuss the situation. * * * * *

"b. Formal Phase Cabinet

"Step 1 - In the event the problem was not resolved in the informal phase, within ten (10) days the grievant shall submit a written statement of the grievance (Grievance Form) to the Cabinet member or appropriate administrative authority who shall prepare a written statement of response within ten (10) days. * * * * *

"Step 2 -If the grievance is not resolved, the grievant may, within ten (10) days of receipt of the written response from Step 1, request the grievance be heard by the Grievance Review Committee (GRC). The (GRC) will meet within 30 days to review the grievance.

"Composition of GRC: 3 members of the association and 3 members of the district.

"The GRC will meet monthly."

5. After completing the GRC step, the next steps in the grievance process are first, a hearing before the Superintendent or their designee; second, a hearing by the District Board or a hearing panel the Board appoints; and finally, arbitration.

6. In November 2021, P.S.'s supervisor issued him a written disciplinary warning containing two charges. Soon after receiving the discipline, P.S. 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.

7. On November 10, 2021, Association Representative Moore sent an email to District Human Resources (HR) official Hollis Lekas confirming that the parties had agreed to "suspend the grievance timelines relating to the written warning given to * * * P.S." until the parties had finished providing and reviewing relevant documents.

8. On December 14, 2021, Moore provided P.S. with the disciplinary file that he received from the District.

9. On December 21, 2021, Moore sent an email to District HR Director Deon Logan confirming that the parties had agreed to suspend grievance timelines and provided a suggested deadline for filing a grievance. That same day, P.S. filed a grievance with HR Director Logan and informed Logan that he wanted to represent himself.

10. On January 25, 2022, Logan wrote an email to P.S. stating that his grievance was untimely. A few days later, Logan retracted this response and P.S.'s grievance proceeded to go through the steps of the contractual grievance process.

11. In late January 2022, P.S. asked Moore to represent him again. After some negotiation between the Association and the District, P.S.'s discipline was revised to drop the second charge. The first charge remained.

12. On January 27, 2022, P.S. asked Moore how he (P.S.) could move the grievance to the next step, the Grievance Review Committee (GRC). The GRC was created in the most recent CBA.

13. On January 28, 2022, Moore emailed HR Director Logan and proposed that P.S. be allowed to appeal to the GRC. P.S. sent additional emails to Moore inquiring about the GRC on February 18, 23, 25, and 27. On March 1, 2022, 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.

14. On March 9, 2022, Moore emailed P.S. that the GRC had not yet been established and that the Association was working on it. That same day, P.S. emailed Association Assistant Executive Director Angela Dileo requesting a new representative. P.S. also asked, "What are members' rights regarding the union? * * * All I get is marketing material." Dileo did not respond.

15. In a March 18, 2022 email, Association Representative Nancy Lee informed P.S. that she was his new representative and that she had "received [P.S.'s] file." Lee stated that she thought the GRC had been selected, that training for the GRC members was scheduled, and that she expected a hearing to be scheduled in mid-April. P.S. subsequently requested that Lee send him the file she referred to in her email.

16. On March 28, 2022, Lee emailed P.S. stating that Moore had informed her that the GRC had not yet been selected. Lee also confirmed that P.S. already had the file that she had referenced in her email. P.S. asked why the GRC had not been set up and stated that there was a 30-day deadline for the GRC meeting (referring to the timeline in the parties' CBA).

17. Between April 1 and April 12, 2022, P.S. sent several emails to Association Representative Lee about his appeal, including a request that his grievance be moved to the step after the GRC (the Superintendent level), because of the District's non-response. P.S. 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. P.S. also asked to see a written agreement to postpone timelines; Lee did not respond to that request.

18. On April 12, 2022, Lee emailed P.S. 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 P.S. that counsel had advised that P.S. should follow the grievance process step by step, and that the reason the GRC had not responded was because it had not yet been formed. P.S. continued to argue that his grievance should advance to

the Superintendent level. On April 14, Lee emailed P.S. that the Association would notify the District that P.S. wanted to move the grievance to the Superintendent level.

19. On April 23, 2022, P.S. again chose to represent himself in his grievance.

20. On May 5, 2022, P.S. filed an unfair labor practice complaint against the Association and the District (*P.S. I)*. P.S. alleged that the Association had violated its duty of fair representation to him under ORS 243.672(2)(a) in connection with his grievance, and that the District had violated ORS 243.672(1)(g) regarding his grievance. This Board provided a copy of the complaint to the Association and the District, giving them the opportunity to file an informal response or motion against the complaint. The Association filed an informal response and a motion to dismiss; the District did not file an informal response or any motions.

21. On or shortly before June 9, 2022, the newly-formed GRC sent P.S. an emailed invitation to a June 15, 2022, hearing regarding his grievance. School was to end for the year shortly, and P.S.'s last day of work was scheduled to be Monday, June 13. The Association offered to represent P.S. at the hearing, but P.S. did not accept the offer. At some point before the hearing, the District offered to pay P.S. wages for his time attending the meeting.

22. On Thursday, June 9, 2022, P.S. responded to the GRC invitation through an email to District HR Representative Diana Shukri. P.S. stated:

> "Hi. I can't make this. Some points, points, and more points....
>
> "1. I don't work that day, and have an appointment
> "2. I'm reluctant to attend a grievance meeting when I don't know what the committee has seen--HR won't tell me what it has shared with whom.
> "3. The deadline for the GRC step expired in March or April.
> "4. I have pending legal action against the Association, so having 3 GRC members be Association Board members seems improper.
> "5. Angie Turner is especially awkward because in addition to item #4, she's involved in the case and the administrator who's the subject of the grievance is her supervisor
> "6. Alan Moore shouldn't attend, because: 1) I'm not represented by the union, 2) If I were represented, the rep would be Nancy Lee (but, I'm not represented), 3) Point 4 above
> "So, I clicked 'No' to the invitation. Thanks"

23. On Friday, June 10, 2022, at 2:35 pm, HR Director Logan emailed P.S., stating:

> "To my knowledge, you have not requested that HR share information that they have shared with the GRC committee. I am happy to share the training materials if you would like. If you would like the training materials, please submit a request in writing.
> "Mr. P.S., as you are aware, the timeline has been extended several times throughout the process.

"The GRC committee will meet Wednesday, June 15th, from 2:30 pm to 5:30 pm. I hope that you can attend. I and Mr. Moore, will not be present."

24. That same day, at 5:31 PM, P.S. responded to Logan's email, stating: "My last day of work is Monday. I could probably attend Tuesday or Wednesday if we ended before 2:30."

25. On Saturday, June 11, 2022, Logan responded to P.S., stating: "There were many schedules to coordinate. Wednesday at 2:30 is the best time that accommodates the committee. I hope that you can make that time work."

26. On Monday, June 13, 2022, at 8:04 AM, P.S. responded to Logan, stating:

"Hi Dr. Logan. My Wednesday appointment is medical. I'll probably keep it, but am not completely decided. I feel I shouldn't be forced to choose.
"Please send me what the GRC was sent, so I know what their decision was based on, who was privy to anything confidential, and maybe I'll want to respond to something."

27. On Tuesday, June 14, 2022, at 10:11 AM, P.S. wrote Logan, stating, "Please send the records about my grievance that the GRC will have."

28. Also on June 14, at 10:39 AM, Bridget Hartman, an HR representative who had been copied on the earlier emails, wrote P.S., stating:

"Hi Mr. P.S.,
"I am answering for Deon [Logan] since he is off today. We did not provide anything about the grievance to the committee. The meeting on Wednesday is for you to present your case and for MESD to do the same.
"I believe Dr. Logan already sent you the packet that was given to the committee."

29. The GRC met on Wednesday, June 15, 2022, as scheduled. Because P.S. was representing himself, and did not appear, the GRC only considered information provided at the hearing by P.S.'s supervisor. The supervisor told the committee that P.S.'s discipline was warranted. The GRC unanimously voted to uphold P.S.'s discipline, and also suggested, but did not impose, a plan of assistance. (It is not clear whether the GRC had the authority to impose a plan of assistance under the circumstances.)

30. Also on June 15, 2022, an ERB ALJ issued an order to show cause in *P.S. I*. The District did not submit a response to that order.

31. On Wednesday, June 22, 2022, at 2:46 PM, Hartman emailed P.S. with the GRC decision, which denied P.S.'s grievance.

32. On Thursday, June 23, 2022, at 7:25 AM, P.S. emailed Hartman and Logan as follows:

"Hi. I'm repeating previous requests:

"1. Please send me the grievance materials that the Grievance Review Committee saw. Normally, I'd assume they were given the grievance file, but I don't know what to assume nowadays.
"2. Please send me my grievance file and any other documents, communications, and records related to the processing of my grievance (not general administrative guidelines on handling grievance).
"3. Please don't send confidential material to the union. I'm not represented by the union and revoked any authorization for them to be involved in this case. The GRC letter was copied to Alan Moore.

"I have a pending request to appeal this to the Board that preceded the hearing by about two weeks, and a previous appeal to the Superintendent from April. Sending this to the GRC violated the collective-bargaining agreement in a number of ways. In any event, I'd like to know your opinion about next steps."

33. The same day, at 12:46 PM, P.S. wrote Hartman and Logan, asking, "Who was on the GRC? In reviewing this, I only see two administrators: Leslie Valentine and Noa Martinsen." That same day, Logan responded to P.S.'s first June 23 email as follows:

"HR shared the email with you with all GRC committee training resources. The resources shared with you were given to the committee prior to your scheduled meeting that you did not attend.
"If you would like to review your personnel file, please schedule a time with Chris Walling.
"Next steps
"Please review the CBA for next steps if you disagree with the GRC committee's decision.
"Click here to review the MESDEA CBA."

34. A few minutes later, Hartman responded to P.S.'s second June 23 email, stating that the members of the GRC were Bridget Hartman, Noa Martinsen, Leslie Valentine, Christy Fawcett, Jess Rohrbacher, and Angie Turner. Hartman stated that this group would remain in place through the end of the 2022-23 school year.

35. On July 11, 2022, P.S. emailed the ALJ regarding his claims against the Association in *P.S. I,* specifically responding to the ALJ's question as to whether conduct attributed to the GRC had any bearing on his claims against the Association. In his email P.S. responded, in part, that "[t]he Association was involved in the GRC meeting, but not as my representative. It chose who was on the Committee, and half the Committee was members of the Association Executive Board."

36. On July 15, 2022, P.S. filed this action, *P.S. Two*.

37. On August 17, 2022, this Board issued an order dismissing P.S.'s claims against the Association and District, and therefore dismissed the complaint in *P.S. I*.

38. Following the GRC decision, P.S. advanced his grievance to the next step of the process, the meeting with the District Superintendent. P.S. attended that meeting, which was held on August 29, 2022. On September 5, the Superintendent issued a letter denying P.S.'s grievance.

39. On October 3, 2022, P.S. advanced his grievance to the final step in the process short of arbitration, a meeting with a hearing panel appointed by the District Board. That hearing took place, and, on October 17, the District Board issued a letter denying P.S.'s grievance.

DISCUSSION

In *P.S. I*, P.S. alleged that the Association had failed in its duty of fair representation to P.S. in connection with his grievance, under ORS 243.672(2)(a). P.S. also included a claim against the District, alleging that the District had violated ORS 243.672(1)(g), which makes it an unfair labor practice for a public employer to "[v]iolate the provisions of any written contract with respect to employment relations." In that case, this Board dismissed the subsection (2)(a) claim against the Association for failure to state a claim for relief. Because the claim against the Association was dismissed, we automatically dismissed P.S.'s subsection (1)(g) claim against the District. *See P.S. I*, FR-001-22.

Here, P.S. alleges a (1)(g) claim against the District for conduct arising from the processing of the same grievance at issue is *P.S. I*. However, in this case, P.S. has brought a claim solely against the District, and has not named the Association as a party to the complaint, and has not alleged the Association has breached its duty of fair representation. P.S. argues that it is his right as an employee of the District to bring a (1)(g) complaint against his employer to enforce the terms of the collective bargaining agreement. However, as this Board determined in *P.S. I*, longstanding Board precedent requires that a public employee establish that a union violated its duty of fair representation *before* proceeding with a subsection (1)(g) claim against a public 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). Accordingly, this Board has previously dismissed complaints where an individual employee has similarly sought to bring a (1)(g) complaint directly against their employer. *See Vanorman v. City of Portland*, UP-84-94, 15 PECBR 668 (1995) (the Board dismissed a (1)(g) complaint against complainant's employer after the complainant withdrew her (2)(a) complaint against the union). Here, P.S. has not pleaded, let alone established, that the Association violated its duty of fair representation. Therefore, he is not entitled to pursue a (1)(g) claim against the District.

In arguing for a different result, P.S. contends that dismissing his claim on this basis is contrary to *P.S. I*, because in that case, citing prior precedent, this Board questioned whether the Association had a duty to P.S. in the context of his grievance, because he was entitled to pursue a grievance on his own under the terms of the collective bargaining agreement. *See P.S. I,* FR-001-22 at 7, citing *Melendy*, FR-3-08 at 16, 22 PECBR at 990. P.S. thus contends that because his current claim concerns time periods when he was representing himself in the grievance process, the Association was not his exclusive representative. P.S. argues that he is therefore entitled to bring this (1)(g) action against the District without having to fulfill the prerequisite of proving a

(2)(a) complaint against the Association. We disagree. The Public Employee Collective Bargaining Act (PECBA) defines the term "exclusive representative" as "the labor organization that, as a result of certification by the board or recognition by the employer, has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit." ORS 243.650 (emphasis added). Accordingly, the exclusive representative acting as the collective bargaining agent and party to the collective bargaining agreement (as opposed to individual employees), has the requisite standing to pursue (1)(g) complaints regarding disputes over the collective bargaining agreement. *See Vanorman*, UP-84-94, 15 PECBR 668. Put another way, the mere fact P.S. was able to pursue a grievance without the Association's assistance, pursuant to a term the Association negotiated in the collective bargaining agreement, does not therefore mean that P.S. becomes the exclusive representative under PECBA.

P.S. also argues in his Second Amended Complaint, that he has the independent right under ORS 243.666 to bring the (1)(g) complaint against the District. Specifically, P.S. cites to ORS 243.666(2), which provides public employees the ability to "present grievances to their employer and have such grievances adjusted." P.S. argues that this subsection grants a distinct mechanism of enforcement to "the individual employee [as] an injured party in violations of the grievance process" because, according to P.S., "violations of the grievance process cannot be solved through the grievance process." P.S. presents no legal basis for this argument, and to the contrary, alleged violations of the grievance process are often addressed through the grievance process. Indeed, this Board has long required a complainant exhaust the contractual grievance process before addressing a (1)(g) claim to enforce the collective bargaining agreement. *See West Linn Education Association v. West Linn School District No. 3JT*, Case No. C-151-77, 5-8, 3 PECBR 1864, 1868-1871 (1978) (holding that the Board's ability "to hear a complaint alleging contract violation as an unfair labor practice without first requiring the complainant to utilize the dispute resolution procedures agreed to in the collective bargaining agreement would undermine the collective bargaining process.") Regardless, and as discussed, this Board's precedent is clear, that a complainant's ability to bring a (1)(g) complaint requires that complainant first establish their union violated the duty of fair representation.

For these reasons, P.S.'s (1)(g) claim against the District cannot proceed, and we therefore dismiss the claim.

Next, we turn to P.S.'s claim against the District under ORS 243.672(1)(d), which provides that it is an unfair labor practice for a public employer to "[d]ischarge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under [PECBA]." In order to prove a violation of (1)(d), a complainant must show that the employer acted adversely toward an employee because of the employee's role in proceedings before this Board. *Teamsters Local 206 v. City of Coquille*, Case No. UP-66-03 at 12, 20 PECBR 767, 778 (2004), citing *Klamath County Peace Officers Association v. Klamath County and Klamath County Sheriff's Office*, Case No. UP-18-97 at 13, 17 PECBR 515, 527 (1998).

In his Second Amended Complaint, P.S. contends that the District violated subsection (1)(d) by discriminating against him for filing *P.S. I*. P.S.'s numerous allegations allege both discrimination on the part of the District and the GRC. Ultimately, we find that P.S. has failed to establish that there is an issue of fact or law that merits a hearing.

We begin with P.S.'s claim that the District obstructed his rights under the grievance process. P.S. specifically cites to time extensions that were agreed to by the District and the Association and both parties' insistence on proceeding through the grievance process as set out in the collective bargaining agreement. P.S. offers no specific facts regarding how this insistence on following the grievance steps, or the resulting delays in processing his grievance, were at all related to his filing of *P.S. I*. Similarly, P.S. offers no well-pleaded facts supporting the position that any of the agreed to time extensions were related, at all, to *P.S. I*. To the contrary, the documents submitted by the parties indicate the initial extension was the result of an information request for P.S.'s discipline file, and that extension was granted before the complaint in *P.S. I*. The subsequent delays in processing P.S.'s grievance appear to be as a result of the District and the Association working towards establishing the GRC. Regardless, P.S. offers no well-pleaded facts supporting his position that this conduct was intended as discrimination against him based on his role in *P.S. I*.

Next, P.S. alleges that the District "dishonestly declared [P.S.'s] right to the grievance process forfeit[ed]." Here, P.S. again refers to alleged conduct that occurred before P.S. filed the complaint in *P.S. I*. Specifically, P.S. refers to Logan's email of January 25, 2022, where he refused to process the grievance, thereby contradicting previous agreements between the Association and District extending grievance timelines. Possibly for that reason, the District withdrew the letter a few days later and restored the agreed-on timelines. Regardless, P.S. has not offered any well-pleaded facts that Logan's email of January 25, subsequently withdrawn shortly thereafter, represented discrimination against P.S. because he filed *P.S. I* months *after* the relevant exchange.

P.S. also alleges that the District violated P.S.'s "right to cooperation" and withheld requested information. However, despite being provided multiple opportunities to amend his complaint, P.S. does not specifically identify any document or category of document that was not provided to him, or explain how the failure to do so was because he filed *P.S. I*. The only category of documents that P.S. references in his filings are copies of the documents already provided to him. Furthermore, P.S. did not contest multiple statements by District and Association representatives that they had already provided him copies of the relevant material. In addition, at least one of those requests and responses took place in March 2022, months before P.S. filed *P.S. I*.

Turning to P.S.'s claim that the District interfered with P.S.'s right to represent himself, P.S. apparently refers to the fact that the District and Association conferred about P.S.'s grievance throughout the grievance process, including during times when P.S. was representing himself in his grievance. P.S. argues that he alone could discuss his grievance with the District. However, P.S.'s position is not supported by any reference to the collective bargaining agreement, and furthermore, nothing in the interactions described by P.S. describes actual interference that would constitute discrimination against him for filing *P.S. I.*

P.S. further claims that the District violated his right to an impartial review of his grievance by the GRC, by "creating a Committee with multiple conflicts of interest." Specifically, P.S. objects to the District's appointment of District HR officials to the GRC, and an individual

supervised by P.S.'s supervisor.[4] P.S.'s claims apparently arise from his assumption that he was entitled to a GRC committee of neutral members. However, this assumption is not based on the contractual requirements for the GRC, which simply require that the GRC contain three District representatives and three Association representatives. Nothing in the collective bargaining agreement provides a grievant the right to their preferred version of the GRC, or suggests that the GRC members must be free from knowledge of or involvement in a particular grievance. Indeed, in the field of union-management relations, labor-management committees routinely include representatives of human resources and union officials because those individuals generally have familiarity with the grievance process and can otherwise competently represent their respective parties on the committee. Regardless, nothing in that agreement, or in the facts asserted by P.S., indicate that the creation and structure of the GRC was intended to discriminate against P.S.. In other words, although P.S. disagrees with the composition and actions of the GRC, P.S. does not present specific allegations or well-pleaded facts that the composition and actions of the GRC were the result of discrimination against him by the District because he filed *P.S. I*.

P.S. also alleges that in the course of the GRC hearing, the District "retaliated [against him] for filing a complaint with [this Board], by adding accusations, breaking an agreement, and proposing additional punishment [a plan of assistance] after the filing." [5] As an initial matter, P.S. does not explain what he means by "(false) accusations" or "broken agreement", and therefore, this part of his claim lacks the requisite specificity to state a claim. *See Melendy*, FR-3-08 at 18, 22 PECBR at 992 (this Board does not consider merely conclusory statements or allegations that lack sufficient specificity). With regard to the proposed plan of assistance, P.S. states in his Second Amended Complaint that the GRC (as opposed to the District) recommended putting P.S. on a plan of assistance. We find no well-pleaded facts that the actions of the GRC should be attributed to the District. As discussed in this order, the GRC is a committee created under the collective bargaining agreement as part of the grievance review process, and comprised of six members, three appointed by the Association and the three appointed by the District. And even assuming that there were sufficient facts to attribute the GRC's conduct to the District, there are no well-pleaded facts that the proposed plan of assistance was in retaliation for P.S.'s role in *P.S. I*. Indeed, P.S. points to no standards under the contract or the PECBA that would bar the GRC from merely discussing

[4]P.S. also alleges that the District "discriminated against non-union members by restricting membership of the GRC to employees who belong to the union" further claiming that the District appointed "three members of the Association's Executive Board on my GRC." There is simply no basis in the collective bargaining agreement or otherwise, for the position that the District appointed the three Association representatives on the GRC. To the contrary, P.S. acknowledged in his July 11, 2022, email to the ALJ in *P.S. I*, that the Association (as opposed to the District) selected the three GRC labor representatives. Therefore, we do not address the claim as it involves Association conduct, and the Association is not a party to this action.

[5]P.S. also argues that the District "retaliated [against him] for using the grievance process by using it as an opportunity to add new (false) accusations and potential punishment (a suggested Plan of Assistance)." This Board has held that in order to establish a violation of (l)(d), "a complainant must show that the employer's adverse action was caused * * * by an employee's role in proceedings *before this Board* * * *." *Vanorman*, UP-84-94 at 5, 15 PECBR at 673, quoting *Polk County Deputy Sheriffs' Association v. Polk County,* Case No. UP-43-90 at 11, 12 PECBR 503, 513 (1990). We therefore do not address the claim that the District violated the grievance process, as it not relevant to P.S.'s role in proceedings before this Board.

alternatives to P.S.'s discipline. Furthermore, P.S.'s submissions indicate that the charges against him were in fact *reduced* by the District in late January 2022, and never expanded. In sum, these claims do not, as pleaded, state a claim that the District discriminated against him for filing *P.S. I*, in violation of subsection (1)(d).

Relatedly, P.S. claims that the District "added an account [P.S.] wrote to the grievance file without [his] permission. It has little relevance to the grievance, but it does contain informal whistleblowing on unrelated matters." Again, P.S.'s claim lacks specificity as it amounts to a conclusory statement without well-pleaded facts to support it. P.S. does not provide a standard that would bar the District from taking this action or explain how or why this amounts to retaliation for his role in *P.S. I*. As such, this claim does not, as pleaded, warrant consideration by the Board, let alone state a claim for discrimination in violation of subsection (1)(d).

Finally, P.S. alleges that the District failed to make serious effort to ensure that he could attend the GRC hearing or accommodate a medical need, and did not review his written grievance or the grievance file in the hearing. Again, P.S.'s subsection (1)(d) claim in this instance attributes the GRC's conduct to the District without providing well-pleaded facts in support of his claim. Specifically, there are no well-pleaded facts in P.S.'s various complaints that the District controlled the timing of the GRC hearing, or controlled whether the GRC would engage with P.S. about rescheduling the hearing, or controlled any GRC action at all. Thus, P.S. has failed to plead any facts that would establish that the GRC was acting at the direction of the District.

Furthermore, even if the District were to be held responsible for not accommodating P.S.'s request to reschedule the GRC hearing, he has nevertheless failed to allege specific facts that the GRC's actions violated (1)(d). The undisputed facts establish that P.S. was told about the long-delayed GRC meeting on or before Thursday, June 9, 2022, via an emailed invitation. P.S. responded to that notice that same day, stating that the timing of the meeting was "extremely inconvenient," and that therefore he was saying "no" to the invitation. The following day, on June 10, P.S. wrote, "I could probably come if we ended Tues or Weds before 2:30 p.m." Subsequently, on June 13, P.S. stated that the reason for the inconvenience was a medical appointment, and stated that, "I'll probably keep it, but am not completely decided. I feel I shouldn't be forced to choose." P.S. did not assert that he provided the District with any additional facts in support of his inability to attend, such as the time and length of the appointment or its importance. None of these communications indicate that P.S. had, as he states in his Second Amended Complaint, a "medical need" to retain his previously scheduled appointment. Furthermore, P.S. acknowledged in his communications to the District that it was possible for him to change his appointment and characterized the conflict as an inconvenience (as opposed to a medical need). Simply put, it is apparent from the undisputed facts, that P.S. was not willing to change his schedule to attend the GRC.

Consequently, we conclude that P.S. does not provide sufficient well-pleaded facts to adequately allege that the District violated ORS 243.672(1)(d) by discriminating against him because of his role in *P.S. I.*

For all of the reasons stated above, there is no issue of fact or law that merits a hearing, and we dismiss the Second Amended Complaint. *See* ORS 243.676(1)(b).

ORDER

The complaint is dismissed.

DATED: February 21, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-002-23

(REPRESENTATION)

PACIFIC NORTHWEST CARPENTERS UNION, Petitioner,	)	
v.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE
CITY OF ELGIN, Respondent.	)	

On February 22, 2023, Pacific Northwest Carpenters Union (PNCU) filed a petition under ORS 243.682(2) and OAR 115-025-0030 to certify (without an election) PNCU as the exclusive representative of certain City of Elgin employees. Specifically, the petition sought to certify PNCU as the exclusive representative of the Public Works Director, Foreman, Parks & Rec Director, Attendant, Facility Maintenance, Utility Worker II, Clerk-Payroll, Librarian, Waste Water Treatment Operator, Utility Biller, Public Safety Director, Ordinance Officer, and Transfer Site Attendant. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating PNCU as the exclusive representative of the proposed bargaining unit.

On February 23, 2023, the Board's Election Coordinator caused a notice of the petition to be posted. Pursuant to the terms of the notice posting and OAR 115-025-0060, objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by March 15, 2023). There were no objections to the petition or a request for an election.

ORDER

Accordingly, it is certified that Pacific Northwest Carpenters Union is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> Public Works Director, Foreman, Parks & Rec Director, Attendant, Facility Maintenance, Utility Worker II, Clerk-Payroll, Librarian, Waste Water Treatment

Operator, Utility Biller, Public Safety Director, Ordinance Officer, and Transfer Site Attendant.

DATED: March 16, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-012-22

(UNFAIR LABOR PRACTICE)

ST,	)	
	)	
Complainant,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
Pendleton Police Department,	)	AND ORDER
	)	
Respondent.	)	
	)	

On February 27, 2023, this Board heard oral argument on Complainant's objections to a January 17, 2023, recommended order issued by Administrative Law Judge (ALJ) Jennifer Kaufman, after a hearing was held on August 31, 2022, via videoconference. The record closed on October 14, 2022, following receipt of the parties' post-hearing briefs.

Daniel Thenell and Emerson Lenon, Attorneys at Law, Thenell Law Group, P.C., Portland, Oregon, represented Complainant.

Pierre Robert, Attorney at Law, Lane Council of Governments, Eugene, Oregon, represented Respondent.

On April 19, 2022, Complainant ST filed an unfair labor practice complaint against Respondent Pendleton Police Department (the Department). The Department filed a timely answer. The issue in this case is whether the Department failed or refused to comply with ORS 243.666, in violation of ORS 243.672(1)(f), by refusing to allow officer ST to advance her own grievance.

As set forth below, we conclude that the Department did not fail or refuse to comply with ORS 243.666, in violation of ORS 243.672(1)(f), as alleged, because the grievance procedure in the collective bargaining agreement does not permit employees to independently advance their

grievances after the Grievance Committee has decided against advancing a grievance. We therefore dismiss the complaint.

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

The Parties

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

2. Charles Byram has been the Department's police chief since December 2020. Chief Byram started his career with the Department as a patrol officer in 2000. Byram was promoted to sergeant in 2009, and to lieutenant in 2016.

3. The Pendleton City Police Association (the Association) is a labor organization within the meaning of ORS 243.650(13).

4. The Association is the exclusive bargaining representative of a bargaining unit of corporals, police officers, police assistants, and code enforcement officers employed by the Department. Detective Drew Hubel is the Association's president.

5. At the time of the events underlying the dispute in this matter, the Association and the Department were parties to a collective bargaining agreement (CBA) effective from July 1, 2019, through June 30, 2022.

6. Article 28 of the 2019-2022 CBA contains the agreed upon grievance procedure between the Association and the Department. Article 28 states, in relevant part:

> "SECTION 2. Any employee covered by this Agreement or the Association shall present a grievance in the following manner:
>
> "Step 1.
> "(a) The employee is directed to present the grievance within ten (10) calendar days of its occurrence or his/her knowledge of the grievance in writing to the Lieutenant. If the complaint can be settled between them, it will go no further. The Lieutenant shall respond in writing within ten (10) days.
>
> "(b) If it cannot be settled between the employee and the Lieutenant within ten (10) days, the complaint shall be presented to a Grievance Committee consisting of three (3) impartial employees. This committee is not designed to settle a grievance, but to determine whether or not it is actually a valid grievance or should be disregarded. If the complaint is found to be a valid grievance, the Association President, or in case of his/her absence the Association

Vice-President, the employee or the Association will present the written grievance to the Police Chief within ten (10) calendar days, stating the relevant facts the sections of this Agreement violated, and the appropriate remedy.

"Step 2.
If the Police Chief is unable to satisfactorily resolve the grievance within seven (7) calendar days, the grievance shall be referred to the City Manager by the employee or the Association.

"Step 3.
If the City Manager is unable to resolve the grievance within five (5) calendar days the grievance may be referred to binding arbitration upon written request by the Association.

"* * * * *

"SECTION 5. If any employee is aggrieved by disciplinary action or discharge, the employee may proceed as outlined above."

7. On November 2, 2021, the Department terminated the employment of police officer ST for alleged performance issues.[1] That same day, attorney Kirsten Curtis, Oregon State Lodge, Fraternal Order of Police, drafted grievance language on behalf of ST, pursuant to Article 28 of the CBA, alleging that the Department had imposed discipline on ST without just cause.

8. On November 3, 2021, attorney Curtis notified Association President Hubel that ST wanted Hubel to represent ST on the termination grievance.

9. On November 4, 2021, Association President Hubel filed the Association's grievance paperwork on behalf of ST. President Hubel used the language provided by Ms. Curtis on November 2, in the grievance submitted by the Association to the Department. That same day, Hubel emailed ST a copy of the grievance and a copy of the Department's response stating that it would not settle the grievance. Hubel asked ST whether she wanted the Association to continue representing her on the grievance, and stated that if so, the Association would represent ST at grievance meetings and address the merits of her case through the Grievance Committee. Hubel stated that if the Grievance Committee determined that ST's grievance had merit then the Association would advance it through the grievance process. Hubel also stated that ST was free to advance the grievance on her own through representation of her own choosing. Hubel explained, "[t]he [Association] interprets Article 28, Section 5 of the CBA as entitling an employee (you) aggrieved by disciplinary action or discharge, the option of proceeding through the process on their own."

10. On November 17, 2021, attorney Curtis sent a letter to Association President Hubel stating that ST was disappointed with the way the Association had handled her grievance, in part because Curtis had not been copied on correspondence regarding the grievance. Curtis further

[1]Although the Department issued a termination letter to ST dated November 1, 2021, the parties represent that ST's termination was effective on November 2, 2021.

stated, "[ST] has asked me to convey her feelings that the [Association] itself harbors bias against her and she has little faith in this process providing her with fair and meaningful relief from the unjustified discipline * * * If she feels that your representation is ineffective, she is willing to exercise her rights under ORS 243.666(2) to handle her grievance without the assistance of the [Association]."

11. On December 1, 2021, the Association held a Grievance Committee meeting for the purpose of considering ST's termination grievance. The Grievance Committee voted not to advance the grievance.

12. On December 6, 2021, attorney Curtis sent a letter to Association President Hubel notifying him that ST wanted to move forward with her grievance individually, pursuant to ORS 243.666(2). Curtis stated:

> "I am particularly concerned that the [Association] failed to obtain a complete set of the relevant documents prior to submission to the Committee. It has become clear that [ST's] rights are not being robustly asserted by the [Association], and it has become necessary for our office to get more directly involved. There have been consistent failures to copy my office on correspondence, failures to obtain the necessary recommendations, and failures in impartiality and objectivity by many of the individuals involved. [ST] is considering the full range of options available to her in addition to her grievance including, but not limited to, filing [an unfair labor practice complaint] for failure to represent, filing a [Bureau of Labor and Industries] complaint for discrimination and harassment, and filing a civil suit for damages."

Curtis requested the Association to waive its right to be present during the grievance adjustment.

13. On December 10, 2021, Curtis sent a letter to Chief Byram seeking to advance ST's termination grievance.

14. On December 13, 2021, Association President Hubel sent a memorandum to Chief Byram stating that the Grievance Committee had come to a finding regarding ST's termination grievance. Hubel did not state what that finding had been. Hubel further stated that ST's attorney had notified him that ST wanted to pursue the grievance process on her own, and that "per the [Association's] Collective Bargaining Agreement (CBA) Article 28, Section 5, the [Association] believes [ST] is entitled to do so."

15. Before ST's grievance, Chief Byram had never known the Association to take the position that an employee could advance a grievance after it had been disregarded by the Grievance Committee.[2] Byram was historically familiar with the contractual grievance process because he had served on two Grievance Committees when he was a bargaining unit employee with the Department. Byram had also served as the Association's treasurer in 2003 and 2004.

[2]As indicated above, the Grievance Committee "disregards" a grievance pursuant to Step 1(b) of the contractual grievance procedure.

16. After reviewing Association President Hubel's December 13, 2021, memorandum, Chief Byram asked to speak with Hubel and the two met in Byram's office. Byram stated that the Department disagreed with the Association's interpretation of Article 28, Section 5. Hubel responded that the Association's interpretation of the grievance procedure was based on the advice of counsel.

17. On December 14, 2021, attorney Pierre Robert, counsel for the Department, responded to attorney Curtis's December 10, 2021, letter to Chief Byram. Robert stated that Article 28.2 of the CBA "reserves to the [Association] the sole discretion to advance – or to end – a grievance beyond Step 1(a) and explicitly conflicts with [ST] doing so independently. As applied to the facts here, [ORS 243.666(2)] estops [ST's] grievance from proceeding further." Robert stated that the Department would no longer recognize the grievance.

18. ST did not file a second grievance alleging that Department had violated the CBA by refusing to allow her to advance her termination grievance.

19. Before ST, no Department employee had ever attempted to advance a grievance that had been disregarded by the Grievance Committee. Consequently, the Department and the Association had no previous disagreements about whether an employee would be authorized to advance such a grievance on their own under the contractual grievance procedure.

20. In May 2005, Chief Byram, who was a bargaining unit employee at the time, served on a Grievance Committee that considered a grievance over the Department's discipline of police officer BG. The Grievance Committee determined that BG's grievance was not a valid grievance. The Grievance Committee issued a memorandum to the Association's president stating, "the [C]ommittee came to the unbiased conclusion based on all of the facts that the grievance process should not continue." Thereafter, the Association issued a memorandum to the Department stating that the Grievance Committee had determined that BG's grievance was not a valid complaint, that BG had been informed of the Grievance Committee's determination, and that no further action would be taken by the Association on the matter. After BG was informed of the Grievance Committee's determination, BG took Byram aside to express his unhappiness that the grievance was over. BG did not attempt to pursue the grievance on his own, and the memoranda documenting the Grievance Committee's determination mention no option for BG to do so.

21. The CBAs between the Association and the Department in effect from 1978-1981, 1981-1983, 1993-1994, 1996-1999, 2002-2005, 2005-2008, 2011-2014, and 2019-2022 do not contain specific articles covering employee discipline,[3] but do contain management rights provisions at Article 4, Section 2(D), stating that management has the right "to suspend, demote, discharge or take other appropriate disciplinary action against the employee for just cause." The CBAs also contain grievance procedure language that is nearly identical to Article 28, Section 5

[3]There is no contention that other historical CBAs that were not presented into evidence are inconsistent with the CBAs contained in the record regarding the absence of a specific contractual article covering employee discipline.

of the 2019-2022 CBA. Chief Byram and former Chief Edwin Taber,[4] who was the Department's police chief from 1984 through 2000, share a common understanding that the purpose of the language of Article 28, Section 5 was to provide a basis for employees to grieve disciplinary actions in the absence of a specific contractual article covering employee discipline.

22. During the spring of 2022, the Association and the Department engaged in negotiations for a successor CBA. During bargaining, Chief Byram stated that he wanted to insert articles of discipline into the CBA and to remove Article 28, Section 5 so that there would not be another disagreement about whether an employee could advance his or her own grievance after it had been disregarded by the Grievance Committee. President Hubel, who led the bargaining committee for the Association, stated that he wanted to keep the Section 5 language. Hubel stated that it was his understanding that Association officers were personally liable for breaches of the duty of representation and that members could sue members of the Grievance Committee if they felt that they did not get the representation they deserved.

23. The revised grievance procedure that was bargained between the Association and the Department is contained at Article 23 of the 2022-2025 CBA. Article 23, Section 2, Step 1(b) of the 2022-2025 CBA contains the following language that was not included in Article 28, Section 2, Step 1(b) of the 2019-2022 CBA: "If the grievance is not found to be valid, the grievance is considered terminated and will not be advanced to any subsequent steps." The grievance procedure was also modified to remove the language at Article 28, Section 5 of the 2019-2022 CBA. Furthermore, the 2022-2025 CBA includes a new article covering employee discipline which states, in part, "Any disciplinary action imposed upon a career-service, full-time employee shall only be for just cause, and may be appealed under the grievance procedures of this contract."

CONCLUSIONS OF LAW

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

2. The Department did not refuse or fail to comply with ORS 243.666, in violation of ORS 243.672(1)(f), when it refused to allow ST to advance her grievance.

ORS 243.672(1)(f) makes it an unfair labor practice for a public employer to "refuse or fail to comply with any provision of ORS 243.650 to 243.809." ORS 243.666 states:

> "(1) A labor organization certified by the Employment Relations Board or recognized by the public employer is the exclusive representative of the employees of a public employer for the purposes of collective bargaining with respect to employment relations.
>
> "(2) Notwithstanding the provisions of subsection (1) of this section, an individual employee or group of employees at any time may present grievances to their employer and have such grievances adjusted, without the intervention of the labor organization, if:

[4]Before his promotion, Taber was a member of the bargaining unit and served as the Association president from 1981 through 1984.

"(a) The adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; and

"(b) The labor organization has been given opportunity to be present at the adjustment."

Here, ST alleges that the Department refused to comply with ORS 243.666, and consequently violated ORS 243.672(1)(f), by refusing to allow her to advance her own grievance.[5] Specifically, ST argues that ORS 243.666(2) establishes a statutory right for employees to present grievances to their employer and have such grievances adjusted, so long as there is no express conflict with the terms of the applicable collective bargaining agreement. As applied here, ST avers that Article 28, Section 2 of the CBA is ambiguous, and that the parties' past practice does not establish any intent to interfere with an employees' statutory right under ORS 243.666. Therefore, ST concludes, the Department's refusal to process ST's grievance violated the Public Employee Collective Bargaining Act (PECBA). The Department counters that both the express terms of the CBA and the parties' past practice precludes ST from further advancing her grievance in these circumstances.

In addressing the parties' dispute, we must interpret the grievance procedures at Article 28 of the contract. Our goal in a contract interpretation case is to discern the parties' intent. To determine that intent, 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 document as a whole, and if the provision is clear, the analysis ends. Unambiguous contracts must be enforced according to their terms. *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491 (2002). Contract language is ambiguous if it can be given more than one plausible interpretation. *Id*. If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent. *Id*. We examine the parties' prior actions or practice as an aid to contract interpretation only if the contract language is ambiguous. *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09 at 10, 23 PECBR 416, 425 (2009). Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *Yogman*, 325 Or at 364.

We begin our analysis with whether or not the text of the disputed contractual provision is ambiguous. Article 28, Section 2, Step 1(b) of the grievance procedure provides that the Grievance Committee will determine whether the grievance "is actually a valid grievance or should be disregarded." Although Article 28 does not specifically define the terms "valid grievance" or "disregarded," ST makes no convincing argument why we should not afford those terms their plain, ordinary meaning. Moreover, as used in the context of a Grievance Committee determination, the next sentence in Step (1)(b) adds additional clarity to the meaning of those terms. That sentence states: "If the complaint is found to be a valid grievance, the Association President, or in case of his/her absence the Association Vice-President, the employee or the

[5]There is no contention that the Association was not given the opportunity to be present for the grievance adjustment, as required by ORS 243.666(2)(b).

Association will present the written grievance to the Police Chief within ten (10) calendar days * * *." A reading of Step 1(b) as a whole establishes that a "valid" grievance is one that advances to the next step of the grievance procedure, while a grievance that has been "disregarded" does not. The meaning of those terms as used in the context of Step 1(b) is not ambiguous. The contract also unambiguously vests the Grievance Committee, and not an individual employee such as ST, with the authority to determine whether a grievance is valid or whether a grievance should be disregarded (and therefore not allowed to proceed).

ST nevertheless contends that her rights under ORS 243.666(2) are implicated because Article 28, Section 2, Step 1(b) does not allow for the Grievance Committee to settle the grievance. The record does not establish, however, that an opportunity to settle the grievance was intended at this step. Rather, the language is clear that the purpose of Step 1(b) is for the Grievance Committee to determine whether the grievance is valid, and therefore whether or not the grievance may proceed to the next step of the grievance process.

At oral argument, ST also compared the language in Step 1(b), which allows an employee to move a grievance to the following step, to Step 3 of the grievance procedure, which only refers to the Association's ability to appeal the grievance to binding arbitration. ST asserted that this contrast supports her position that an employee may continue to advance the grievance without the Association. It may very well be a plausible interpretation of the Step 1(b) language that an employee can move the grievance to the following step on their own. However, the text is clear that in order for an employee (or the Association) to proceed with the grievance, it must be a *valid* grievance, as determined by the Grievance Committee. Here, there is no dispute that the Grievance Committee determined ST's grievance *was not valid*. Therefore, regardless of whether Article 28 permitted ST to pursue the next step of the process on her own, she was nevertheless unable to proceed with her grievance.

Additionally, it is clear from the text of the CBA, that the processing of grievances related to discipline and discharge are limited to the steps as provided in Article 28. Article 28, Section 2 begins: "Any employee covered by this Agreement or the Association shall present a grievance in the following manner." Section 5 then provides that, "[i]f any employee is aggrieved by disciplinary action or discharge, the employee may proceed as outlined above." That sentence plainly indicates that the same process applies to an employee grieving discipline or discharge, as to any other grievance. Therefore, Article 28 specifically restricts the ability to pursue a grievance to the process set forth therein. Put another way, Article 28, Sections 2 and 5 read in conjunction, only allow an individual employee (or the Association) to further advance the grievance if the Grievance Committee deems the grievance valid. If, as occurred here, the Grievance Committee determines the grievance to be invalid, it is disregarded, and the employee (or Association) may not further advance the grievance.

We also disagree with ST's broader assertion implicit in her argument, that this Board should essentially shift the burden of proof to the employer where ORS 243.666(2) is allegedly implicated. ST does not articulate any legal basis for this position, and we are not aware of any. Indeed, in the Board cases referred to by ST, the Board began by examining the text of the relevant collective bargaining agreement, as we have done in this case. *See Padrta v. Oregon Department of Transportation, Highway Division*, Case No. UP-132-92 at 4, 14 PECBR 213, 216 (1992); *see*

also Strickland v. State of Oregon, Department of Human Resources, Employment Division, Case No. UP-70-91 at 7, 13 PECBR 602, 608, *adh'd to on reconsideration*, 13 PECBR 642 (1992). There was no burden shifting or other alternative legal analysis applied because a failure to comply with ORS 243.666 was alleged, as ST suggests we do here. Indeed, those cases only reinforce this Board's conclusion that ST did not have the ability to move the grievance to the next step of the grievance procedure in these circumstances because, as discussed above, the contract unambiguously precludes it.

Because we conclude that the relevant language of Article 28 is not ambiguous, it is unnecessary for us to proceed to the next step of the analysis, where we examine extrinsic evidence of the parties' intent. However, even assuming that there was some ambiguity in the relevant portions of Article 28, the extrinsic evidence in this case does not support ST's position.

When we examine extrinsic evidence, we consider "other relevant circumstances, including the course of conduct of the parties in their performance of the contract," to determine the parties' intent. *Oregon Public Employees Union, SEIU, Local 503 v. State of Oregon, Oregon State Hospital*, Case No. UC-37-96 at 7, 17 PECBR 434, 440 (1997). Here, the evidence presented regarding the historical application of Article 28 supports the Department's interpretation that the Grievance Committee's determination that a grievance should be "disregarded" ends the grievance process regardless of whether the Association or an individual wished to advance the grievance. Specifically, the evidence established a decades-long course of conduct that, before the dispute in this matter, the contractual grievance procedure has never been interpreted to allow an employee to advance their own grievance after it was disregarded by the Grievance Committee, even if the grievant disagreed with the conclusion of the Grievance Committee. ST presented no evidence regarding the course of conduct of the Association and the Department to support her interpretation that an employee may advance a disregarded grievance on their own. Therefore, the extrinsic evidence reinforces that the intent of Article 28 of the CBA is that the Grievance Committee's determination to "disregard" a grievance constitutes an end to the grievance procedure.[6] Thus, even if we concluded, that the disputed provision was reasonably susceptible to multiple interpretations, we would nonetheless reach the same result based on the extrinsic evidence of the parties' intent.

In arguing for a different result, ST asserts that because no other employee asserted a right under ORS 243.666, the prior conduct of the parties' falls short of establishing that the Grievance Committee's determination precludes a grievant from advancing a grievance. ST argues that the past conduct of the parties is, at best, silent as to intent, and does not establish whether the parties' considered the employee rights set forth in ORS 243.666. Therefore, ST argues, there is insufficient evidence that her statutory rights under ORS 243.666 are not implicated, and therefore

[6]ST objected, in part, on the basis that the ALJ did not to consider the statements and positions of the parties during their Spring 2022 successor negotiations when evaluating the extrinsic evidence of intent in the record., We agree with the ALJ that it unnecessary to consider the statements and positions of the parties during their Spring 2022 successor negotiations, which took place after the dispute underlying this matter and do not shed light on the history of the performance of the contract. Likewise, we are not persuaded that the personal opinion of the Association's current president is probative with respect to the meaning of contract language that was negotiated decades before his tenure (and which he had no involvement in negotiating).

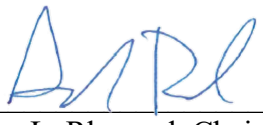
she should be able to advance her grievance. We disagree. As discussed in this order, it is ST's burden to establish the Department violated PECBA as alleged, and the fact that ORS 243.666 is purportedly implicated does not alter our analysis. Regardless, we find the parties' intent clear both in the contract language and the unrebutted evidence in the record regarding the parties' course of conduct, that where the Grievance Committee determined that a grievance was not valid, it is thereby disregarded, thus ending the processing of that grievance.

Consequently, ST did not establish that the Department failed to comply with ORS 243.666, in violation of ORS 243.672(1)(f). We therefore dismiss the complaint.[7]

ORDER

The complaint is dismissed.

DATED: March 16, 2023.



Adam L. Rhynard, Chair

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

[7]The Department argued as an affirmative defense, that the complaint should be dismissed because ST failed to exhaust her available remedies under the CBA as required by *West Linn Education Association v. West Linn School District No.* 3JT, Case No. C-151-77, 3 PECBR 1864 (1978), in which we adopted a requirement that parties utilize the dispute resolution procedures agreed to in their collective bargaining agreement before alleging a contract violation as an unfair labor practice. The Department asserted that ST could have filed a separate grievance alleging that it breached Article 28 by not allowing her to advance her grievance after it was disregarded by the Grievance Committee. The ALJ determined that given the Department's refusal to allow ST to advance her own termination grievance, that ST, as an individual, did not have the ability to obtain a remedy by pursuing a separate grievance alleging that the Department breached Article 28 by refusing to recognize her termination grievance. The ALJ noted that the Association may have had the ability to pursue such a grievance through to arbitration, but that ST did not, and therefore declined to dismiss the complaint on that basis. Neither party objected to the ALJ's determination, and we therefore do not address this argument.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-004-23

(UNIT CLARIFICATION)

TEAMSTERS LOCAL UNION NO. 670, Petitioner, v. UMATILLA COUNTY HOUSING AUTHORITY, Respondent.	)	ORDER ADDING UNREPRESENTED EMPLOYEES TO EXISTING UNIT

On March 10, 2023, Teamsters Local Union No. 670 (Teamsters) filed a unit clarification petition under ORS 243.682(2)(a) and OAR 115-025-0050(4) to add the office and maintenance employees at all locations of Umatilla County Housing Authority (UCHA), excluding the Executive Director and confidential employees, to its current bargaining unit at the UCHA. A majority of eligible employees specified in the petition signed valid authorization cards designating Teamsters as the exclusive bargaining representative.

On March 14, 2023, the Board's Election Coordinator caused a notice of the petition to be posted. Pursuant to the terms of the notice posting and OAR 115-025-0060, objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by March 31, 2023). There were no objections to the petition.

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ORDER

Accordingly, it is certified that all office and maintenance employees at all locations of Umatilla County Housing Authority are added to the existing bargaining unit represented by Teamsters Local Union No. 670.

DATED: April 3, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-003-23

(REPRESENTATION)

BOARDMAN PROFESSIONAL FIREFIGHTERS, Petitioner, v. BOARDMAN FIRE RESCUE DISTRICT, Respondent.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE

On March 22, 2023, Boardman Professional Firefighters (BPF) filed a petition under ORS 243.682(2) and OAR 115-025-0030 to certify (without an election) BPF as the exclusive representative of certain Boardman Fire Rescue District employees. Specifically, the petition sought to certify BPF as the exclusive representative of all full-time, paid Firefighters responding to fire, medical, and rescue emergencies in Boardman, Oregon and the immediate surrounding areas. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating BPF as the exclusive representative of the proposed bargaining unit.

On March 23, 2023, 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 April 12, 2023). There were no objections to the petition or a request for an election.

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ORDER

Accordingly, it is certified that Boardman Professional Firefighters is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> All full-time, paid Firefighters responding to fire, medical, and rescue emergencies in Boardman, Oregon and the immediate surrounding areas.

DATED: April 13, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-034-20

(UNFAIR LABOR PRACTICE)

MW, Complainant, v. AMALGAMATED TRANSIT UNION, DIVISION 757, Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On December 16, 2021, this Board issued an order holding that Respondent Amalgamated Transit Union, Division 757 (ATU) did not violate ORS 243.672(2)(a) or ORS 243.672(2)(c), as alleged in the complaint filed by Complainant. Complainant appealed that order, and on December 21, 2022, the court affirmed our order. *Williams v. Amalgamated Transit Union 757*, 323 Or App 322, 522 P3d 568 (2022). On February 6, 2023, the court issued the appellate judgment, meaning that the matter is now ripe for representation costs to be issued by this Board. OAR 115-035-0055(2)(a).[1]

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

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

2. This case required one day of hearing.

[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). Complainant provided a timely submission on March 24, 2023. ATU did not file any submission.

3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case that required one day of hearing is $3,000. OAR 115-035-0055(1)(b)(C). 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 an attorney employed by Freedom Foundation. Freedom Foundation provided Complainant with free legal representation for that attorney's services, although Complainant was required to pay "for expenses over and above legal services, including taking time off work, travel costs, document production costs, etc." Therefore, Complainant contends that she was "forced to rely on [her] personal financial resources in bringing this [complaint], which has cost [her] not only money, but [her] time and emotional and physical energy."

5. Complainant asks that this Board not order her to pay any representation costs because (1) she expended her personal financial resources to litigate this matter; (2) her claims were meritorious and brought in good faith; and (3) this Board's prior approach and order in a similar matter, *Pratka v. Laborers International Union of North America, Local 483*, Case No. FR-001-21 (2022) (Rep. Costs Order) (*appeal pending*), was erroneous and should be corrected. We address each of Complainant's arguments in turn.

6. Where, as here, this Board finds that a person named in the complaint has not engaged in an unfair labor practice, ORS 243.676(3)(b) directs this Board to "[d]esignate the amount and award representation costs, if any, to the prevailing party." The statute requires this Board to award representation costs if any were incurred by the prevailing party. *Gresham Grade Teachers Association v. Gresham Grade School District No. 4*, 52 Or App 881, 896, 630 P2d 1304 (1981). Thus, we are required to issue representation costs regardless of whether Complainant expended personal financial resources to litigate the matter. The question of whether Complainant expended personal financial resources to litigate the matter only affects the amount of representation costs that this Board is required to order (as discussed in more detail below). Therefore, we reject the argument that we should not award any representation costs based on whether Complainant relied on personal financial resources to litigate her complaint.

7. For similar reasons, we also reject Complainant's argument that we should decline to award representation costs because she brought the matter in good faith. As explained above, a representation costs award is required in these circumstances, regardless of whether the complaint was brought in good faith. *Amalgamated Transit Union, Division 757 (AFL-CIO) v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-64-03, 23 PECBR 250 (2009) (Rep. Costs Order). The question of good faith only concerns the amount of an award because if a "complaint was frivolously filed, or filed with the intent to harass the other person, or both," this Board may issue a civil penalty up to $1,000. ORS 243.676(4)(a)(B). When the Board issues a civil penalty, the $5,000 cap on representation costs no longer applies, and a party is liable for the full amount of reasonable representation costs incurred. OAR 115-035-0055(1)(b)(E). Thus, filing a complaint in good faith does not obviate the requirement for this Board to award representation costs.

8. We turn to Complainant's argument that this Board's decision and rationale in *Pratka* should be reversed. Before addressing that argument, it is useful to understand both the statutory scheme for any representation costs award, as well as this Board's rules in administering that scheme. First, as previously explained, ORS 243.676(2) and (3) require the awarding of representation costs, if any costs are incurred, to the prevailing party. The statute does not set a maximum amount of costs to be awarded or set forth a method for how those costs are to be awarded, but rather leaves those matters for the Board. The Board, through rulemaking, established a maximum amount of representation costs to be awarded (in the absence of a civil penalty), with that maximum amount being modified from time to time, most recently in 2014 (setting the maximum amount of costs at $5,000). In 2017, the Board also changed how it calculated representation costs. Before that 2017 change, the Board calculated representation costs by requiring a petition to be filed and allowing objections to that petition. To determine the representation costs that should be awarded (before 2017), the Board's rules required consideration of numerous factors:

> "(a) consistency with the policies and purposes of the [Public Employee Collective Bargaining Act (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.
> "(b) The appropriate charges for the services rendered, based on:
> "(A) The time and labor customarily required in the same or similar cases;
> "(B) Hourly charges customarily made by representatives for rendering similar services;
> "(C) The novelty and difficulty of the issues and the amount of preparation, research or briefing required; and
> "(D) The skill requisite to perform the services properly.
> "(c) Awards in similar cases."

Former OAR 115-035-0055(4).

Although not set forth in its *former* rules, the Board's representation costs orders at that time generally ordered one-third of the reasonable representation costs incurred up to the monetary cap, but then adjusted that number depending on the other factors set forth in the Board's rules. *See*, *e.g.*, *Oregon School Employees Association v. North Clackamas School District*, Case No. UP-017-13, 26 PECBR 129 (2014) (Rep. Costs Order) (noting one-third of reasonable representation costs as a general principle, but adjusting the award upward under the circumstances of the case); *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-069-11, 26 PECBR 412 (2015) (adjusting the award downward from one-third of reasonable representation costs). That approach to designating representation costs awards resulted in a time-intensive process for the parties and also produced uncertain consistency in representation costs awards. Accordingly, the Board engaged in rulemaking and modified the rules to eliminate the time-intensive requirements of the parties and provide consistency in awards

in a manner that also correlated to representations costs incurred. Specifically, the current rule (effective as of February 1, 2017) provides for a simplified schedule for awarding representation costs to the prevailing party: $250 for a case dismissed without a hearing (if the dismissal order contains a conclusion that the person named in the complaint has not engaged in an unfair labor practice); $1,000 for a case presented solely on stipulated facts; $3,000 for a case that requires one day of hearing; and $5,000 for a case that requires two or more days of hearing. OAR 115-035-0055(1)(b). Because our prior rule had also considered, as a mitigating factor, whether a party "was an individual who, due to the circumstances of the case, had to rely upon his/her personal financial resources," *former* OAR 115-035-0055(4)(a)(D), the Board's new 2017 rule also provides a scheduled representation costs award of $500 (or less) if the non-prevailing party "had to rely on personal financial resources to litigate the matter," *current* OAR 115-035-0055(1)(b)(F).

9. As explained in *Pratka*, before the Board promulgated its rule in 2017 setting forth a schedule of representation costs, the Board had consistently excluded litigation expenses and "costs" from being recoverable in any representation costs award; in other words, costs beyond those of legal representation were never 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, 26 PECBR 398 (2015) (Rep. Costs Order) (non-representation costs of photocopying, clerical assistance, mileage, and telephone usage are not awardable in a representation costs award); *State of Oregon, Department of Corrections*, UP-069-11 at 2 n 2, 26 PECBR at 413 n 2 (Rep. Costs Order) (same); *North Clackamas School District*, UP-017-13 at 2, 26 PECBR at 130 (Rep. Costs 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, any amount of expenses and costs incurred distinct from legal representation do not fall within the meaning of having "to rely on personal financial resources to litigate the matter" within the meaning of OAR 115-035-0055(1)(b)(F). Rather, the rule is designed to provide relief for an individual who has to incur their own representation costs to litigate an unfair labor practice complaint, in the event that the individual is a non-prevailing party.

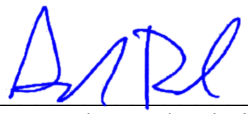
10. We do not understand Complainant to argue that this interpretation of representation costs is inconsistent with the text of our rules or longstanding Board precedent. Rather, Complainant argues that the approach "violates the First Amendment by punishing public interest litigants." Specifically, Complainant argues that our approach targets and punishes public interest litigants who cannot afford to be represented by attorneys. We take issue with the notion that this Board has designed a rule to target or punish any class of litigants. To the contrary, this Board has taken measures to balance the legislative requirement to award representation costs to the prevailing party with the agency's recognition of needed access to our services. To that end, the Board has promulgated rules that cap the liability of the non-prevailing party, even though the statute contains no such cap. The Board has also promulgated a rule that includes a lower cap ($500) for non-prevailing individuals who have had to pay out-of-pocket for their own representation costs. Complainant asks that we also make that cap applicable to individuals who have not expended any financial resources for their own representation costs. We believe that any such decision is best suited through rulemaking, which would allow agency constituents and the public to weigh in and comment on such a change. That rulemaking process would allow the agency to consider what approach best balances the policy determination by the legislature that non-prevailing parties must

pay the reasonable representation costs of the prevailing party with concerns of access to individuals who file unfair labor practice complaints. We are not inclined to effectively modify our rule in an adjudicatory setting. To the extent that Complainant argues that non-prevailing individuals should not have to pay any representation costs, that is an argument that must be addressed to the legislature. Accordingly, as in *Pratka*, we conclude that 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 ATU within 30 days of the date of this order.

DATED: April 14, 2023.



Adam L. Rhynard, Chair

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-001-23

(UNFAIR LABOR PRACTICE)

NP, Complainant, v. EUGENE POLICE EMPLOYEES ASSOCIATION, and EUGENE POLICE DEPARTMENT, Respondents.	)	DISMISSAL ORDER

NP, Complainant, Shedd, Oregon, represented himself.

Rhonda J. Fenrich, Attorney at Law, Fenrich & Gallagher, P.C., Eugene, Oregon, represented Respondent, Eugene Police Employees Association.

Hwa Go, Assistant City Attorney, City of Eugene, Portland, Oregon, represented Respondent, Eugene Police Department.

On January 27, 2023, Complainant filed an unfair labor practice complaint alleging that the Eugene Police Employees Association (Association) breached its duty of fair representation to him in violation of ORS 243.672(2)(a). The complaint also alleged that the Eugene Police Department (Department or City) violated ORS 243.672(1)(g). The complaint was assigned to Administrative Law Judge (ALJ) Jennifer D. Kaufman to investigate the matter and determine whether a hearing was warranted. *See* ORS 243.676(1)(b); OAR 115-035-0005.

As part of that investigation, ALJ Kaufman issued an order on February 24, 2023, directing Complainant to make the complaint more definite and certain. On March 19, 2023, Complainant filed an amended complaint. After receiving additional submissions from Respondents, ALJ Kaufman issued an April 7, 2023, order to show cause why the complaint should not be dismissed without a hearing. Complainant timely responded to the order to show cause. Thereafter, ALJ Kaufman transferred the matter to this Board with the recommendation to dismiss the complaint. For the following reasons, we agree that dismissal is warranted.

In considering whether a complaint presents an issue of fact or law that warrants a hearing, the Board assumes well-pleaded facts to be true; the Board also relies on undisputed facts discovered during the investigation. *R.M. v. Portland Association of Teachers and Multnomah County School District No. 1J (Operating as Portland Public Schools*), Case No. FR-001-18 at 2 (2019). The Board does not consider merely conclusory statements or allegations that lack sufficient specificity. *Melendy v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Department of Human Services, Oregon State Hospital*, Case No. FR-3-08 at 18, 22 PECBR 975, 992 (2009); *Teamsters Local 57 v. City of Brookings/dba Brookings Police Department*, Case No. UP-85-92 at 1-2, 13 PECBR 677, 677-78 (1992). To allege a claim for breach of the duty of fair representation, a complainant must plead three elements: (1) the union had a duty to represent the employee in the manner alleged; (2) the union breached that duty; and (3) the employee was injured by the breach. *See Melendy*, FR-3-08 at 16, 22 PECBR at 990. To proceed to hearing, a complainant must also allege facts that, if proven, would establish that the respondent engaged in conduct that violates the Public Employee Collective Bargaining Act (PECBA), as claimed. If the complainant does not allege facts sufficient to establish the claim, the Board dismisses the claim for "failure to state a cause of action*." Krogstad v. Oregon School Employees Association and Gresham-Barlow School District*, Case No. FR-001-16 at 2, 26 PECBR 738, 739 (2016). Generally, to prevail on a claim for the breach of a duty of fair representation, a complainant must establish that "a labor organization's actions are arbitrary, discriminatory, or taken in bad faith." *Block v. Amalgamated Transit Union, Division 757*, Case No. FR-001-15 at 4, 26 PECBR 486, 489 (2015). A union's action is arbitrary if it lacks a rational basis. *Chan v. Leach and Stubblefield, Clackamas Community College; McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05 at 12, 21 PECBR 563, 574 (2006). A union's conduct is discriminatory if there is "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Id*. at 13; 21 PECBR at 575. A union's conduct is in bad faith if it intentionally acts against a member's interest and does so for an improper reason. *Id*.

Here, the undisputed and well-pleaded facts establish the following. Complainant has been a police officer with the Department for over 21 years. From 2011-19, he was assigned to the Traffic Safety Unit and, in January 2020, he transferred to the Training Section. In March 2022, Complainant and another officer had a contentious meeting with an Association Executive Board member, as well as an acting supervisor (Acting Sergeant Dillon) regarding the Department's decision not to utilize them for staffing at a World Athletic Championships event. Also in March 2022, Complainant confronted Acting Sergeant Dillon about Dillon's alleged wrongful conduct during a 2021 Association election.

In May 2022, the Association and the City entered a Memorandum of Understanding (MOU) regarding the staffing of special events. The MOU provided, among other things, that certain officers (including Complainant) were not eligible for grant overtime or for Traffic Safety Unit specific

overtime. Complainant contends that the MOU was wrong, and furthermore, that the Department endangered officers by understaffing the World Athletic Championships event.

On July 17, 2022, the Department assigned overtime to a non-represented employee in connection with the World Athletic Championships. That same day, Complainant emailed the Association alleging that the overtime assignment violated the MOU and that the overtime should have been assigned to him or to another represented officer. On July 20, 2022, the Association concluded that there was no violation.[1]

In September 2022, Complainant placed a posting on the Association's Facebook page requesting that the Association form a special committee or hold a special meeting to 1) consider Complainant's proposed bylaw changes, and 2) investigate alleged wrongdoing by Association Executive Board members in connection with the 2021 election. The Association declined Complainant's requests.

With those facts in mind, we turn to whether a hearing is warranted on Complainant's amended complaint. In doing so, we must first consider the threshold issue of whether the complaint is time-barred. Under ORS 243.672(6), "[a]n injured party may file a written complaint with the Employment Relations Board not later than 180 days following the occurrence of an unfair labor practice." This statute of limitations incorporates a "discovery rule," which means that the 180-day limitation period begins to run when the allegedly injured party "knows or reasonably should know" that an unfair labor practice has occurred. *Rogue River Education Assoc. v. Rogue River School*, 244 Or App 181, 190, 260 P3d 619, 624 (2011). Here, Complainant filed the complaint on January 27, 2023, meaning that allegations concerning conduct occurring before July 31, 2022, would be time-barred, unless the amended complaint pleaded sufficient facts that Complainant did not or reasonably should not have known that the alleged unfair labor practice(s) occurred. Complainant, however, has not pleaded specific facts establishing any such lack of knowledge. Therefore, we find the allegations concerning conduct before July 31, 2022, to be time-barred by ORS 243.672(6).

That leaves us with Complainant's allegation that the Association declined his September 2022 request (in a Facebook posting) to form a special committee or hold a special meeting to investigate alleged wrongdoing by Executive Board members in connection with the 2021 Association election, and to deliberate on Complainant's proposed bylaw changes. Those allegations concern internal union governance matters, which this Board has consistently held fall outside of the duty of fair representation. *See*, *e.g.*, *St. John Jr. et al. v. Oregon School Employees Association, Local 119 and Mosher, President*, Case No. UP-70-90 at 2, 12 PECBR 409, 410 (1990) ("PECBA does not prescribe specific rules for the conduct of a union's internal affairs."). Furthermore, the pleadings do not establish the requisite element of injury because of the Association's failure to comply with Complainant's requests. Complainant presented no additional arguments or well-pleaded facts to refute these deficiencies in his response to the order to show cause.

[1]The filings do not include the communication in which the Association informed Complainant of its final determination on this matter, but Complainant represents in the amended complaint, at page 6, that the determination was made "by July 20, 2022." Complainant does not contend that the Association refused to process a grievance over this issue.

Accordingly, for the reasons stated above, there is no issue of fact or law that warrants a hearing, and we dismiss the amended complaint.

ORDER

The amended complaint is dismissed.

DATED: April 27, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-004-23

(REPRESENTATION)

AFSCME COUNCIL 75, Petitioner,	)	
v.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE
OHSU, Respondent.	)	

On April 7, 2023, AFSCME Council 75 (AFSCME) filed a petition under ORS 243.682(2) and OAR 115-025-0030 to certify (without an election) AFSCME as the exclusive representative of all full-time and part-time post-doctoral research employees, including but not limited to post-doctoral scholars, post-doctoral researchers, post-doctoral scholar-trainees, and post-doctoral fellows at OHSU.[1] A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating AFSCME as the exclusive representative of the proposed bargaining unit.

On April 10, 2023, 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 3, 2023). There were no objections to the petition or a request for an election.

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[1]The petition specifies that the bargaining unit includes employees compensated by stipend as well as by salary.

ORDER

Accordingly, it is certified that AFSCME Council 75 is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> All full-time and part-time post-doctoral research employees, including but not limited to, post-doctoral scholars, post-doctoral researchers, post-doctoral scholar-trainees, and post-doctoral fellows.

DATED: May 5, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-007-22

(NON-DISCIPLINARY PERSONNEL REASSIGNMENT / TRANSFER)

J.R.,	)	
	)	
Appellant,	)	
	)	
v.	)	DISMISSAL ORDER
	)	
STATE OF OREGON,	)	
OREGON HEALTH AUTHORITY,	)	
	)	
Respondent.	)	
	)	

J.R., Appellant, Eugene, Oregon, represented himself.

Tyler E. Anderson, Senior Assistant Attorney General Labor & Employment Section, Salem, Oregon, represented the Respondent.

On October 17, 2022, Appellant filed an appeal of a "non-disciplinary personnel reassignment and transfer." Specifically, Appellant appealed his assignment to a new work location that was approximately 60 miles from his initial work location. Appellant asserted that the location change was "arbitrary, punitive, retaliatory, objectively unreasonable in nature, and in violation of ORS 240.570(2)," and was "intended to become a constructive discharge."[1]

The matter was assigned to Administrative Law Judge (ALJ) Martin Kehoe, who was subsequently informed by the parties that they would be mediating the matter with this agency's Conciliation Service. On April 6, 2023, ALJ Kehoe contacted the parties and requested a status

[1] ORS 240.570(2) provides that "[a]n appointing authority may assign, reassign and transfer management service employees for the good of the service * * *." ORS 240.570(4) allows a management-service employee who is assigned, reassigned, transferred or removed," as provided under ORS 240.570(2), to appeal that action to this Board.

update. Respondent's counsel replied (copying Appellant) that Respondent believed that the matter was resolved and that Appellant had found a job with another employer. Appellant did not respond.

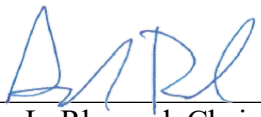
On April 17, 2023, ALJ Kehoe again contacted the parties, requested clarification from Appellant on whether the matter was resolved or whether it should be set for hearing, and offered hearing dates. Appellant did not respond. On May 4, 2023, ALJ Kehoe again asked Appellant for clarification on the status of the appeal and whether he wanted to withdraw the appeal or set the matter for hearing. ALJ Kehoe informed Appellant that if he did not respond by May 18, 2023, the matter would be transferred to this Board with the recommendation that the appeal be dismissed. Appellant did not respond.

A failure to pursue an appeal filed under the State Personnel Relations Law warrants dismissal. *See A.B. v. State of Oregon, Public Utilities Commission*, Case No. MA-006-17 at 1 (August 2017) (failure to pursue appeal warrants dismissal); *Templeton v. State of Oregon, Department of Human Services*, Case No. MA-020-15 at 1 (April 2016) (same). Here, ALJ Kehoe provided Appellant with multiple opportunities to set the matter for hearing (or withdraw the appeal). For six weeks, Appellant failed to respond to any communications from the ALJ. Accordingly, we conclude that Appellant has failed to pursue his appeal, which warrants dismissal.

ORDER

The appeal is dismissed.

DATED: May 24, 2023.



Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-002-23

(UNFAIR LABOR PRACTICE)

C.B.,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
	)	
LINN COUNTY SHERIFF'S OFFICE,	)	AMENDED DISMISSAL ORDER
	)	
Respondent,	)	
	)	
and	)	
	)	
	)	
LINN COUNTY DEPUTY SHERIFF'S ASSOCIATION,	)	
	)	
	)	
Intervenor.	)	
	)	

Daniel Thenell and Paige Chrz, Attorneys at Law, Thenell Law Group, P.C., Portland, Oregon, represented Complainant.

Diana Moffat, Attorney at Law, Local Government Law Group P.C., Eugene, Oregon, represented Respondent.

Ryan Lufkin, Attorney at Law, Public Safety Labor Group, Portland, Oregon, represented Intervenor.

On January 20, 2023, C.B. (Complainant) filed an unfair labor practice complaint against Linn County Sheriff's Office (County), alleging that the County violated ORS 243.672(1)(a) and ORS 243.672(1)(f). The matter was assigned to Administrative Law Judge (ALJ) B. Carlton Grew. On January 30, 2023, Linn County Deputy Sheriff's Association (Association) filed a motion to intervene, which the ALJ granted. On February 20, 2023, the County filed an informal response.

ALJ Grew investigated the complaint to determine if an issue of fact or law exists that warrants a hearing, as required by ORS 243.676(1)(b) and OAR 115-035-0005. The ALJ determined that the complaint did not appear to meet the threshold pleading requirements to proceed to a hearing. ALJ Grew subsequently referred the complaint to the Board with the recommendation that the Board dismiss the complaint. For the following reasons, we find dismissal appropriate.

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). In making our determination, 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).

Here, having considered the facts alleged in the complaint, as well as the undisputed facts discovered by the ALJ, we summarize the alleged or undisputed facts as follows:

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

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

3. The Association is the exclusive certified bargaining representative of sworn and non-sworn employees in employment relations with the County Sheriff's Office.

4. At the time of the events underlying the dispute in this matter, the Association and the County were parties to a collective bargaining agreement.

5. Article 17 of the 2022-2025 collective bargaining agreement contains the agreed upon grievance procedure between the Association and the County. Article 17 states, in relevant part:

> "17.3 Formal Grievance Adjustment.
>
> "Step 1: To commence formal grievance adjustment, the employee and/or the Association shall notify the appropriate supervisor that the employee believes a problem exists and shall identify the affected parties. * * * * *
>
> "(d) If the grievance is not resolved, the supervisor shall issue a response in writing * * *.
>
> "Step 2: If the Association desires to pursue the grievance further after the supervisor's response, it shall file a written notice with the Undersheriff within ten (10) calendar days of receipt of the supervisor's response. * * *.

"Step 3: If a solution is not reached at Step 2, the Association may pursue the grievance further by submitting the grievance in writing to the County Administrative Office within ten (10) calendar days of the Step 2 response. * * * The County Administrative Officer or his/her designee shall issue a response in writing * * *.

"Step 4: If the Association desires to pursue the grievance further after the Administrative Officer's response, it shall file a written notice of intent to arbitrate the grievance with the County Administrative Officer within ten (10) calendar days of the date of his/her response Except for disciplinary grievances involving a law enforcement officers, the parties shall request a list of seven (7) arbitrators from the Employment Relations Board. If the parties cannot mutually agree to an arbitrator, they will alternately strike names and the last one will be the arbitrator. For disciplinary grievances involving law enforcement officer misconduct, as referenced in ORS 243.706 and ORS 243.808, arbitrator selection shall be in accordance with ORS 243.808.

"* * * * *

"17.5 The provisions of this Article shall not be interpreted to require that the Association process any grievance through the grievance and/or arbitration procedure which it in good faith believes lacks sufficient merit.* * * * *."

6. Complainant was a Deputy Patrol Officer with the County Sheriff's Office, a position represented by the Association. Complainant also had legal insurance with the Fraternal Order of Police Legal Defense Plan, Inc., (Plan). The Plan is a self-funded benefits plan that provides an attorney to covered officers in connection with Civil, Criminal, or Administrative proceedings depending on the level of coverage elected. The Plan is not a labor organization or union. Individual officers, such as Complainant, are able to request attorneys from a list of Plan attorneys. The attorneys represent the individual officer and do not represent either the Plan or any labor organization or union. Plan attorneys are paid through the benefit administrator.

7. On December 14, 2021, Complainant was given notice of an investigatory interview pursuant to an internal investigation. The County designated the investigation as "Bolton 1."

8. On March 29, 2022, Complainant retained Plan attorney Dan Thenell, of Thenell Law Group, to represent him.

9. On April 29, 2022, the Sheriff provided Complainant with a notice of proposed discipline in Bolton 1. That same day, the Sheriff also notified Complainant that he was the subject of another internal affairs investigation ("Bolton 2"), and he was placed on administrative leave with pay.

10. On May 9, 2022, Thenell Law Group submitted the Step 1 grievance to Lieutenant Voight for Bolton 1. A few days later, on May 11, Thenell was notified that the Association had also filed a Step 1 grievance for Bolton 1.

11. On June 6, 2022, Complainant was provided a 24-hour notice of an investigatory interview in Bolton 2. This interview was rescheduled to permit attendance by Thenell.

12. On June 13, 2022, the Association submitted a Step 3 grievance in Bolton 1, which was denied by the County on June 17.[1]

13. On September 9, 2022, a *Loudermill* hearing[2] was held in Bolton 2.

14. On September 14, 2022, the Sheriff sent a written notice to the Linn County District Attorney that the Sheriff's Office had "formed the opinion that [Complainant] can no longer be trusted to present or document complete and accurate facts relating to his investigations."

15. On October 20, 2022, a Senior District Attorney notified Complainant that the Sheriff's Office's September 14, 2022, opinion must be disclosed to future criminal defendants pursuant to *Brady v. Maryland*, 373 US 83, 83 S Ct 1194, 10 LEd 2d 215 (1963).

16. On November 4, 2022, the Sheriff terminated Complainant.

17. On November 8, 2022, Thenell submitted Complainant's Step 1 grievance of the termination, which the Sheriff considered and denied the following day, on November 9.

18. On November 14, 2022, the Association notified Thenell that the Association had considered and denied the request to advance Complainant's grievance of the termination to the next step of the grievance process.

19. On November 15, 2022, Thenell submitted a Step 2 grievance of the termination. The following day, on November 16, the Sheriff responded that no action would be taken in response to the Step 2 Grievance because Thenell lacked standing to file that grievance.

20. On November 22, 2022, Thenell submitted a Step 3 grievance of Complainant's termination. The following day, on November 23, a County Administrative Officer responded to the Step 3 grievance, stating in relevant part "I have reviewed the correspondence and can find no information in your communication that identifies how you, or your firm, are authorized under the terms of the contract between Linn County and the Linn County Deputy Sheriff's Association, to file a grievance on behalf of [Complainant] at any level above step one."

21. On November 28, 2022, Thenell submitted a Step 4 grievance of Complainant's termination and notice of intent to arbitrate to the County. The following day, on November 29, Thenell contacted the Employment Relations Board in an attempt to start the selection of an arbitrator. The County refused to proceed to arbitration.

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[1]The complaint does not state whether or not a written notice at Step 2 was submitted by the Association.

[2]*See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S Ct 1487, 84 LEd 2d 494 (1985).

22. On November 30, 2022, the Association emailed Thenell and expressly denied any authorization for Complainant to proceed to arbitration.

DISCUSSION

Complainant alleges that he has contractual, statutory, and First Amendment rights to pursue his grievance to arbitration, and that the County violated ORS 243.672(1)(a) and (1)(f) by refusing to recognize the advancement of his grievance. Complainant specifically contends that he has the right to pursue his own grievance under ORS 243.666(2) and has a right to a representative of his choosing under ORS 236.360(2)(b). Complainant also argues that by refusing to process his grievance, "[h]e was deprived of a benefit because he chose to associate with the [Plan]" and that requiring him to pursue his grievance through his exclusive representative violates the First Amendment. Complainant further contends that because the County accepted his Plan attorney as his representative throughout the investigation, the County has waived any argument that Complainant is not entitled to proceed on his own. We address Complainant's arguments accordingly, and ultimately find no issue of fact or law that merits a hearing.

ORS 243.672(1)(f) makes it an unfair labor practice for a public employer to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.809." ORS 243.666 states:

> "(1) A labor organization certified by the Employment Relations Board or recognized by the public employer is the exclusive representative of the employees of a public employer for the purposes of collective bargaining with respect to employment relations.
>
> "(2) Notwithstanding the provisions of subsection (1) of this section, an individual employee or group of employees at any time may present grievances to their employer and have such grievances adjusted, without the intervention of the labor organization, if:
>
> "(a) The adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; and
>
> "(b) The labor organization has been given opportunity to be present at the adjustment."

Based on the language in ORS 243.666, we must determine whether Complainant's contention that he should be able to procced with his grievance without the Association is "inconsistent with the terms" of the collective bargaining agreement. *See ST v. Pendleton Police Department*, Case No. UP-012-22 (2023). We have found that an individual employee's right to present grievances is inconsistent with a collective bargaining agreement if the agreement does not allow an employee to advance a grievance without the exclusive representative. *Id*. at 8-9. This Board makes such a determination by examining the text of the relevant contract language, and if the language in the context of the document as a whole is clear, the analysis ends. Unambiguous contracts must be enforced according to their terms. *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491 (2002). Contract language is ambiguous if it can be given more than one plausible interpretation. *Id*. If the provision is

ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent. *Id*. We examine the parties' prior actions or practice as an aid to contract interpretation only if the contract language is ambiguous. *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09 at 10, 23 PECBR 416, 425 (2009). Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 364, 937 P2d 1019 (1997).

Here, the relevant term of the collective bargaining agreement is Article 17, which details the grievance process. The language in Article 17 is clear and unambiguous: after Step 1 of the grievance process only the Association is entitled to pursue a grievance through any additional steps, including arbitration. Furthermore, aside from Complainant's assertion that the County denied him a "contractual benefit," Complainant does not refer to any specific language in support of his position. This Board does not consider merely conclusory statements or allegations that lack sufficient specificity. *See Melendy*, FR-3-08 at 18, 22 PECBR at 992. Regardless, we do not find any contractual right in the collective bargaining agreement for an individual employee to pursue a grievance to arbitration without the Association. We therefore disagree with Complainant's claim that he is entitled under ORS 243.666(2) to pursue his own grievance past Step 1 without the Association, as doing so is inconsistent with the clear terms of Article 17 of the collective bargaining agreement.

Because the language in Article 17 is unambiguous, it is not necessary to examine extrinsic evidence of the parties' intent. In any event, there are no well-pleaded facts regarding extrinsic evidence of the parties' prior actions or practice that support Complainant's position. Complainant argues that the County "consistently permitted [Complainant] to use his [Plan] attorney through all parts of the investigation in lieu of his association representative * * * up to and through his termination without the association." Complainant therefore avers that the County has "waived any argument [that Complainant] is not entitled to proceed on his own." This argument conflates investigatory interviews with the structured grievance process outlined in Article 17. Thenell's presence during investigatory interviews is not relevant to the parties' rights and obligations under Article 17. As an initial matter, Article 17 has nothing to do with employee investigatory interviews; rather, it sets forth the grievance process. Furthermore, although the County allowed Complainant to proceed without the Association at Step 1 of the process, the County did not allow Complainant to do so at Steps 2-4. The County's conduct is in clear compliance with the plain language of Article 17, where an employee or the Association may file at Step 1, but after Step 1, only the Association may proceed through the next steps of the process. Additionally, the Association (the other party to the collective bargaining agreement) considered and denied Complainant's request for grievance advancement and expressly denied any authorization for Complainant to proceed to arbitration on his own. Thus, the parties' conduct was consistent with the contractual bar against individual employees' pursuit of grievances to arbitration.

Complainant also alleges that the County's conduct violated ORS 243.672(1)(f) because the County allegedly failed to comply with ORS 236.360(2)(b). As an initial matter, ORS 243.672(1)(f) makes it an unfair labor practice for a public employer to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.809." Thus, an alleged breach of ORS 236.360 does not sufficiently allege a violation of the Public Employee Collective Bargaining Act (PECBA (ORS 243.650 to 243.809) that would be prohibited under ORS 243.672(1)(f). To the extent that Complainant implies a conflict between ORS 236.360(2)(b)

and ORS 243.666(2)(a), such a claim is unavailing. ORS 236.360(2)(b) provides that public safety employees have the right to have a "representative of the officer's choosing" present at investigatory interviews that the officer reasonably believes may lead to economic sanctions or dismissal. The plain language of the statute is clear that the right to have a "representative of the officer's choosing" applies only to *investigatory interviews*. There is nothing to suggest that the rights afforded under ORS 236.360(2)(b) apply to the grievance process or arbitrations pursuant to a collective bargaining agreement. Furthermore, under ORS 236.370, ORS 236.360 does not apply to public safety officers who are "represented in a collective bargaining unit if the collective bargaining agreement or the established policies of the law enforcement unit that employs the public safety officers provide for procedures and safeguards of the sort provided for in ORS 360.350 to ORS 360.370."[3] Article 16 of the collective bargaining agreement provides procedural requirements for the discipline and discharge of represented employees, including progressive discipline, just cause, investigations, notice, and the opportunity to respond to investigative findings. Complainant does not allege that the procedures and safeguards in Article 16 of the collective bargaining agreement are inadequate. Complainant does not otherwise address why ORS 236.360 should apply in this unfair labor practice complaint.

Next, we turn to Complainant's claim that the County violated ORS 243.672(1)(a), which provides that it is an unfair labor practice for a public employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.662 guarantees the rights of public employees "to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." Complainant contends that the County deprived him of a benefit because he chose to associate with the Plan to secure legal services. Presumably, the "benefit" Complainant is referring to is the ability to proceed with his grievance to arbitration without the Association's involvement. However, beyond this mere assertion, Complainant does not specifically allege how the County's conduct amounts to interference, restraint, or coercion in or because of the exercise of Complainant's right to participate in the activities of a labor organization of his own choosing. Again, this Board does not consider merely conclusory allegations that lack sufficient specificity. *See Melendy*, FR-3-08 at 18, 22 PECBR at 992. Regardless, by Complainant's own acknowledgment, the Plan is not a labor organization. Thus, even if Complainant had pleaded facts that would establish a disputed issue as to whether the County interfered with Complainant's participation in activities of the Plan, such allegations would fall outside of the proscriptions of ORS 243.672(1)(a). Furthermore, as discussed above, the County's conduct complied with the plain language of Article 17. Had the County processed Complainant's grievance past Step 1 without the Association, the County would have been in violation of the collective bargaining agreement. In sum, we find no well-pleaded facts that adequately allege a violation of ORS 243.672(1)(a).

[3]In support of Complainant's position that he was entitled to pursue his grievance to arbitration represented by his Plan attorney, he also cites to a Nevada District Court Trial Opinion that found, under Nevada law, that an employee must be afforded the right to select a representative of their choosing for representation during an interrogation or hearing on discipline. That case is not controlling precedent, and, in any event, it interpreted a different statute with materially different language. It is neither relevant to, nor dispositive of this case.

Complainant further contends that the County's refusal to recognize the Plan as his representative in the grievance process violates his First Amendment right of association. Complainant asserts that in *Janus v. AFSCME, Council 31*, 585 U.S. __,138 S Ct 2448, 2478, 201 LEd 2d 924, 954 (2018), the United States Supreme Court recognized that the First Amendment "broadly protects individual employees' rights to join or refrain from joining a labor association." Therefore, Complainant argues that "forcing an individual employee to prosecute a grievance only through the exclusive labor association" amounts to compelled speech prohibited under *Janus*. Complainant also avers that such conduct further violates *Janus* because it discriminates against employees that are not members of the Association. Complainant's arguments challenge basic principles of exclusive representation, and thus imply a conflict between the First Amendment and PECBA.

We find no well-pleaded facts or any legitimate legal basis for Complainant's argument that would warrant a hearing. As discussed above, there are no well-pleaded facts that the County did not recognize Complainant's grievance past Step 1 because of his association with the Plan. Rather, the County simply followed the express language of the grievance process under Article 17. Regarding Complainant's reading of *Janus,* we find that case inapposite. In *Janus*, 138 S Ct at 2478, the Court held that public-sector agency-shop arrangements violate the First Amendment. The Court also explicitly acknowledged that exclusive representation is and remains constitutionally permissible. *Id*. ("It is also not disputed that the State may require that a union serve as exclusive bargaining agent for its employees * * *. We simply draw the line at allowing the government to go further still and require all employees to support the union irrespective of whether they share its views.") The Court expressly reaffirmed that, "[s]tates can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to subsidize public-sector unions." *Id.* at 2485 n 27. Therefore, Complainant's argument that he has the right under the First Amendment to choose his representative for the purposes of the contractually bargained grievance process misconstrues *Janus.* Indeed, the Ninth Circuit has interpreted *Janus* to address compelled speech (as opposed to association), concluding that a state's authorization of the exclusive bargaining representative did not infringe on union nonmembers' First Amendment rights. *See Mentele v. Inslee*, 916 F3d 783, 789 (9th Cir 2019). Finally, there are no well-pleaded facts to support Complainant's contention that Article 17 discriminates against non-members. To the contrary, Complainant *was a member* of the Association during the period at issue, and the complaint does not otherwise present any well-pleaded facts regarding the County's conduct towards nonmembers.

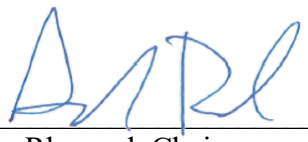
Finally, Complainant argues that because the County accepted his association with the Plan during the relevant investigation, the "County is now estopped from withdrawing consent to deal with Complainant and his [Plan] representative, because doing so materially disadvantages him." As discussed above, just because the County allowed Thenell to be present during investigatory interviews does not mean that Thenell then secured rights to advance the grievance beyond that allowed by the collective bargaining agreement. Put another way, there are no well-pleaded facts to support the contention that Complainant had any legitimate basis for his apparent belief that the County would unilaterally violate the express language of Article 17.

Consequently, we conclude that Complainant does not provide sufficient well-pleaded facts to adequately allege that the County violated PECBA. Because there is no issue of fact or law that warrants a hearing, we dismiss the complaint. *See* ORS 243.676(1)(b).

ORDER

The complaint is dismissed.

DATED: May 31, 2023.



Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-008-23

(REPRESENTATION)

OREGON AFSCME, Petitioner, v. STATE OF OREGON, DEPARTMENT OF CORRECTIONS, Respondent.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE

On May 5, 2023, Oregon AFSCME (AFSCME) filed a petition under ORS 243.682(2) and OAR 115-025-0030 to certify (without an election) AFSCME as the exclusive representative of all full-time and part-time Physicians, excluding supervisors, at the State of Oregon, Department of Corrections. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating AFSCME as the exclusive representative of the proposed bargaining unit.

On May 8, 2023, the Board's Election Coordinator caused a notice of the petition to be posted. The State failed to post timely. On May 17, 2023, an amended notice of petition was provided. Pursuant to the terms of the amended 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 June 1, 2023). There were no objections to the petition or a request for an election.

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ORDER

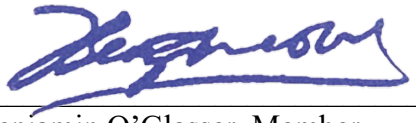
Accordingly, it is certified that Oregon AFSCME is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> All full-time and part-time Physicians, excluding supervisors, at the State of Oregon, Department of Corrections.

DATED: June 5, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-007-23

(UNIT CLARIFICATION)

WASHINGTON COUNTY DISPATCHERS ASSOCIATION, Petitioner, v. WASHINGTON COUNTY CONSOLIDATED COMMUNICATIONS AGENCY, Respondent.	)	ORDER AMENDING CERTIFICATION/RECOGNITION OF EXCLUSIVE BARGAINING REPRESENTATIVE

On April 28, 2023, Washington County Dispatchers Association (WCDA) filed a petition under OAR 115-025-0050(11) to amend the certification/recognition as the exclusive representative of certain positions at Washington County Consolidated Communications Agency (Agency).[1] Specifically, the petition requested that the certification/recognition be amended to reflect a disaffiliation with IAFF Local 1660 and a name change back to Washington County Dispatchers Association.[2]

On May 3, 2023, the Board's Election Coordinator provided the Agency with the April 28, 2023, petition and caused a notice of petition for amendment of certification to be posted. The Agency failed to timely post the notice, and on May 18, 2023, an amended notice of petition was

[1]The parties' current collective bargaining agreement recognizes WCDA, as affiliated with IAFF Local 1660, as the exclusive representative of the following positions at the Agency: Calltaker, Police Dispatcher, Fire Dispatcher, Multi-Discipline Dispatcher, Lead Police/Fire Dispatcher, and Lead Multi-Discipline Dispatcher.

[2]In 2016, this Board amended the certification/recognition to reflect the WCDA's *affiliation* with IAFF Local 1660 (Case No. UC-005-15).

provided. Pursuant to the terms of the amended notice posting, objections to the petition were due by June 2, 2023. No objections were filed.[3]

The information submitted with the petition establishes the following facts in support of granting the petition.

On February 14, 2022, WCDA emailed its members a notice of a special meeting to be held on February 21, 2022, to discuss whether WCDA should disaffiliate or remain affiliated with IAFF Local 1660.

On February 21, 2022, WCDA held a meeting via Zoom with the membership and emailed points of consideration for staying affiliated with IAFF Local 1660 versus disaffiliating.

On February 23, 2022, WCDA distributed to its membership an overview of the February 21, 2022, special meeting.

On June 24, 2022, WCDA emailed the membership budget information for two scenarios: (1) remaining affiliated with IAFF Local 1660; and (2) disaffiliating with IAFF Local 1660. The email also advised that a notice of a vote on affiliation would be forthcoming.

On June 25, 2022, WCDA provided notice of an affiliation vote on whether to stay affiliated with IAFF Local 1660 or disaffiliate and become independent again. This email informed the membership that ballots would be distributed July 1, 2022, and that ballots needed to be returned by July 8, 2022.

On July 1, 2022, ballots were distributed to the membership.

On July 5, 2022, WCDA sent a reminder email to the membership that ballots were due by July 8, 2022.

On July 8, 2022, a ballot tally was conducted with 25 votes to disaffiliate from IAFF Local 1660, 6 votes to remain affiliated, one invalid vote, and one nonmember vote. The results of the vote were emailed to the membership on the date of the tally.

With those facts in mind, we turn to the petition. OAR 115-025-0050(11) provides that a labor organization may file a unit clarification petition to amend the certification or recognition of the labor organization as the exclusive representative. This type of petition "may be appropriate to reflect a change in name or affiliation of the exclusive representative." OAR 1150-25-0050(11)(a). In these circumstances, we require the petitioning labor organization to prove that its "affiliation procedure was conducted in accordance with at least minimal due process to show that no question of representation exists." OAR 115-025-0050(11)(b). As applied to this case, we conclude that

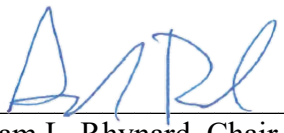
[3]On May 4, 2023, IAFF Local 1660 submitted a statement to the Election Coordinator that it did not oppose the petition and that IAFF Local 1660 and WCDA had "parted ways amicably and voluntarily."

WCDA has established that the disaffiliation procedure was conducted in accordance with at least minimal due process, and that the outcome of the vote was for WCDA to disaffiliate with IAFF Local 1660.

ORDER

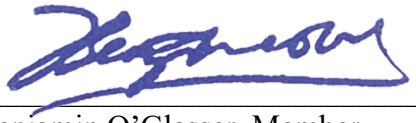
The petition is granted. The certification/recognition of Washington County Dispatchers Association as the exclusive representative of the bargaining unit described above is amended to reflect the disaffiliation with IAFF Local 1660.

DATED: June 7, 2023.



Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-011/027-22

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75, LOCAL 189, Complainant, v. CITY OF PORTLAND AUDITOR'S OFFICE, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Lane Toensmeier, Attorney at Law, Oregon AFSCME Council 75, Portland, Oregon represented Complainant.

Alan Yoder, Deputy City Attorney, City of Portland, Oregon, represented Respondent.

On April 25, 2023, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. On May 8, 2023, Complainant Oregon AFSCME Council 75, Local 189 (AFSCME), filed objections to that order. On May 15, 2023, this Board granted the motion of Respondent City of Portland Auditor's Office to extend the time to file cross-objections until June 16, 2023. On June 1, 2023, AFSCME withdrew its objections, pursuant to an agreement with the City of Portland Auditor's Office. On June 6, 2023, the parties confirmed their shared intent for the Board to issue a final order without objections. *See* OAR 115-010-0090(4) ("If no objections are timely filed, then the Board shall adopt the Recommended Order as the Final Order."). Accordingly, the Board adopts the attached recommended order as its final order in this matter. OAR 115-010-0090(5) allows the Board to limit the precedential value of the final order in these circumstances, and 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

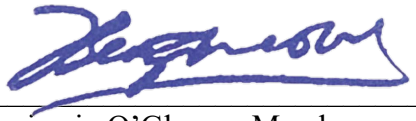
1. The City of Portland Auditor's Office shall cease and desist from violating ORS 243.672(1)(e).

2. The parties shall bargain for a 30-day period regarding a remedy, including a make-whole remedy. If the parties are unable to agree on a remedy within that 30-day bargaining period, each party shall submit its proposed remedy to this Board within 35 days of the date of this order, and the Board shall order a remedy.

DATED: June 8, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-011-22; UP-027-22

(UNFAIR LABOR PRACTICE – BAD FAITH BARGAINING)

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

Hearings were held before Administrative Law Judge (ALJ) B. Carlton Grew on August 9 and 10, and November 1 and December 1, 2022, in Portland, Oregon. The record closed on January 6, 2023, following submission of the parties' post-hearing briefs.

Lane Toensmeier, Attorney at Law, Oregon AFSCME Council 75, Portland, Oregon represented Complainant.

Alan Yoder, Deputy City Attorney, City of Portland, Oregon, represented Respondent.

On April 18, 2022, Complainant Oregon AFSCME Council 75, Local 189, filed a Complaint with this Board alleging that the City of Portland Auditor's Office had unlawfully required AFSCME Auditor's Office bargaining unit employees to return to limited in-person work without notice or bargaining, Case No. UP-011-22. AFSCME also sought expedited review of that case, which this Board denied on April 25, 2022. On August 9 and 10, 2022, a hearing was held in person regarding UP-011-22. On August 29, 2022, AFSCME filed a second Complaint with this Board alleging that the City Auditor's Office had unlawfully failed to bargain over the return of the Auditor's Office bargaining unit employees to additional in-person work, Case No. UP-027-22. AFSCME also sought to expedite this case, which this Board denied on September 6, 2022, along with issuing an order consolidating the two cases. On November 1, and December 1, 2022, a hearing was held via Zoom teleconference regarding UP-027-22. The record in these consolidated cases closed with the submission of the parties' post-hearing briefs on January 6, 2023.

The issues are:

1. With respect to ORS 243.672(1)(e), did the City Auditor's Office breach its statutory duty to bargain in good faith by unilaterally implementing an end to complete telework, and return to office work, by Auditor Office employees without notice to AFSCME, and by sending emails to employees in March and April, 2022, presenting the City Auditor's decision as a fait accompli?

2. With respect to ORS 243.672(1)(e), did the City Auditor's Office breach its statutory duty to bargain in good faith by unilaterally implementing a change to telework requirements on October 10, 2022, and a return to office work, by Auditor's Office employees without bargaining with AFSCME for the PECBA-required period?

3. If AFSCME prevails, what is the appropriate remedy?

As discussed below, we conclude that the AFSCME proved that the City Auditor's Office unilaterally ended completely telework, without notice or bargaining, and subsequently changed telework requirements without bargaining with AFSCME for the period required by the Public Employees Collective Bargaining Act (PECBA).

RULINGS[1]

The Board acted properly within its discretion in declining to expedite these cases. OAR 115-035-0060.

The Board acted properly within its discretion in consolidating these cases. Not only do the cases involve many of the same individuals, the core events at issue in each case happened along with the events in the other case, in particular communications between Bao Nguyen and Jerrell Gaddis during March and April, 2022, and related actions by the parties.

At the August 2022 hearing, AFSCME objected to the admission of Exhibit R-30 because it was not provided to AFSCME until the day before the hearing, without good cause for delay 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. *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). Respondent failed to establish good cause for the delay, and the ALJ acted properly within his discretion in denying admission of Exhibit R-30 at the August 2022 hearing.

At the November 2022 hearing, AFSCME objected to the admission of several exhibits. AFSCME objected to the admission of Exhibit R-30 because it had been denied admission as untimely submitted in the August hearing and was outside the scope of the November hearing. The ALJ acted properly within his discretion in receiving the exhibit. The ALJ noted that the exhibit was relevant to the issues in the November hearing, notwithstanding that it was also relevant to

[1]The following exhibits are received: Joint Exhibits J-1 through J-16; Complainant's Exhibits C-1 through C-9; and Respondent's Exhibits R-1 through R-43.

the August hearing subject matter (see below), and that prior rejection of the exhibit on timeliness grounds at the first hearing did not foreclose its admission at the second hearing.

AFSCME objected to the admission of Exhibits R-31, R-32, R-35, R-36, and R-38, arguing that they were not relevant to the issues in the November hearing. AFSCME argues that the only evidence admissible during the hearing in Case No. UP-27-22 was

> "evidence related to the second change to the status quo announced in City Auditor Mary Hull Caballero's August 29, 2022 email. Ex. J-16. In other words, while Respondent is free to introduce evidence supporting its decision to increase the reporting requirement from one day per week to three or four days per week, Respondent may not introduce new evidence to justify its decision to modify the pre-April 18 status quo of 100% telework." Complainant's brief at 28.

However, as AFSCME is well aware, the rationale for the cessation of the bargaining at issue in UP-27-22 came from an April, 2022 communication between AFSCME field representative Bao Nguyen and the City addressing the first phase of Auditor Unit reentry bargaining. The course of conduct of the principals addressed in each case is relevant to their credibility, perceived credibility, and motives, and relevant to an evaluation of the parties' conduct with regard to the reasonableness of reliance and factors supporting a civil penalty. These cases are, in fact, substantially intertwined. The ALJ noted that the disputed exhibits represented essential context and could have been received even if the first hearing had never taken place. The ALJ also noted that receipt of the disputed exhibits caused no prejudice to AFSCME. The ALJ acted properly within his discretion in admitting the exhibits.

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

FINDINGS OF FACT

The Parties

1. The City is a public employer as defined by ORS 243.650(20). There are two City entities relevant to this case, the City proper/generally (the City), which is the named respondent here, and the City Auditor's Office, which is a quasi-independent agency of the City.

2. Oregon AFSCME Council 75 Local 189 is a labor organization, as defined by ORS 243.650(13), and represents various groups of City employees. Oregon AFSCME Council 75 Local 189 is the named complainant in this case and employs the AFSCME staff relevant to this case. It is also the exclusive representative of at least two City bargaining units. One of those units is a large roughly citywide unit that negotiates collective bargaining agreements through the District Council of Trade Unions (DCTU), a group which also includes local unions of the IBEW, Machinists, and Plumbers, among others. The other relevant AFSCME bargaining unit is a unit in the City Auditor's Office. Accordingly, there are three AFSCME entities relevant to this case (1) the citywide AFSCME-DCTU unit (AFSCME-DCTU); (2) the City Auditor's unit (Auditor's Unit); and (3) the AFSCME administration (AFSCME), the named complainant.

3. The City Auditor's Office performs auditing and program performance evaluations for the City. The City Auditor, an elective office, is the executive of the Auditor's Office. During the events at issue here, Mary Hull Caballero was the City Auditor. Hull Caballero left office at the end of her term on December 31, 2022; her successor is Simone Rede.

4. At the time of hearing, the Auditor's Office had 32 to 35 non-management employees in thirteen classifications, including Performance Auditors, Analysts, Records Coordinators, and Administrative Specialists. In January 2020, three to five Auditor's Office employees (Office Specialists) were included in the AFSCME-DCTU unit. Prior to the recognition of the Auditor's Unit in July 2021, those employees were reclassified out of the AFSCME-DCTU bargaining unit. The present Auditor's Unit does not include the positions formerly in the AFSCME-DCTU unit. The Auditor positions formerly in the AFSCME-DCTU unit play no role in this case.

5. Throughout the events at issue here, Bao Nguyen was the AFSCME field representative for the Auditor's Unit. At the time of the first hearing, Nguyen had seven years of experience as a field representative for AFSCME, and three years of experience prior to that working with another union.

6. Throughout the events at issue here, Jerrell Gaddis was a labor relations manager for the City, assigned to manage all collective bargaining agreements between City unions and the City. Gaddis was the primary labor relations manager working with the City Auditor during the events at issue here. At the time of the first hearing, Gaddis had seven years of experience in labor relations for the City, as well as prior experience with other employers.

City declaration of COVID-19 pandemic emergency and start of telework for many City employees

7. On March 12, 2020, the City declared a state of emergency to better address the challenges of the COVID-19 pandemic.

8. Also on March 12, AFSCME-DCTU requested that its members work remotely in response to the declared state of emergency, including its members then working in the Auditor's Office. This request was made in part because field representative Bao had learned that some employees in the Auditor's Office had been told that telework was not permitted under the City/DCTU collective bargaining agreement.

9. One immediate step taken by the City was to direct categories of City employees to work remotely. The Auditor issued similar instructions to employees in the Auditor's Office.

10. Shortly thereafter, City officials met with the unions that represented City workers to discuss the effect of the emergency on City services and employees. AFSCME-DCTU was part of those discussions. The Auditor was not part of those discussions. Nguyen was present during some of the meetings as an observer.

11. On March 25, 2020, the City and four of its unions, including AFSCME-DCTU, signed a memorandum of understanding to offer telework agreements to every City employee whose duties could generally be performed remotely during the state of emergency, approximately 40 percent of the City's workforce. That agreement provided, in part,

> "* * * The parties anticipate that telework polices will be temporarily modified by the Mayor and/or the Director of the Bureau of Human Resources during the State of Emergency to allow for greater eligibility of employees to utilize a telework agreement. Bureaus will use their discretion and judgment based on operational needs to apply the telework policies in a manner authorized by the Mayor and/or the Bureau of Human Resources Director to maximize the number of employees eligible to work from home. These telework agreements will be in effect for the duration of the declared State of Emergency. Telework agreements entered into under this MOU will terminate at the expiration of the State of Emergency; the Unions agree that should employees wish to keep a telework agreement in place, such agreement will be subject to review and further approval by management upon the conclusion of the State of Emergency and understand that any modifications of the rules and policies during the State of Emergency will no longer be in effect.
>
> "* * *A telework agreement approved during and for the State of Emergency is not a guarantee that employees will be approved for a telework agreement at the conclusion of the State of Emergency. This provision is not subject to the grievance procedure."

Exh. R-4 at 2.

12. The Auditor's Office and Auditor's Unit were not part of the March 25, 2020 City/DCTU agreement.

13. During the spring of 2020, the City began a process to change its formal telework policy, Human Resource Administrative Rule (HRAR) 4.04, to address the new reality of extensive telework. The City gave the unions notice of the proposed rule change and an opportunity to bargain. The updated rule took effect on September 30, 2020. The changed policy stated, in part:

> "A supervisor, manager, Bureau Director, or Commissioner-in-Charge may deny, end, or modify a Telework Agreement at any time, for any business-related reason, unless doing so conflicts with Citywide teleworking guidance given during a state of emergency."

Exh. R-6 at 3.

14. On October 5, 2020, the Auditor's Office issued a revised version of its telework policy, Auditor Administrative Rule (ARA) 4.04. The rule tracked the City rule, stating,

> "A supervisor, manager, or the City Auditor may deny, end, or modify a Telework Agreement at any time, for any business-related reason, unless doing so conflicts with Citywide teleworking guidance given during a state of emergency."

Exh. R-1 at 2.

15. During October, 2020, both the City and the Auditor's Office began collecting individual telework work agreements from their respective employees. Both sets of agreement were identical except for some minor punctuation changes. The Auditor's agreement provided in part:

> "I understand teleworking is a mutually agreed upon work option between myself and my supervisor. I understand that I or my supervisor may modify or end my teleworking arrangement at any time."

Exh. R-25 at 4, R-26 at 4; Exh. R-23 at 4.

16. AFSCME-DCTU was aware that its unit members in the City and Auditor's Office members were signing these telework agreements and did not object.

17. During the first half of 2021, AFSCME began organizing the employees in the Auditor's Office. The AFSCME-DCTU employees formerly in the Auditor's Office had been reclassified out of that bargaining unit and were not part of the unit AFSCME sought to organize.

18. Between July 12 and August 5, 2021, the City, Auditor, and AFSCME exchanged agreements voluntarily recognizing the Auditor's Unit as the exclusive representative of certain Auditor's Office employees. The final agreement was signed by the last signatory on August 5. The AFSCME Auditor's unit did not become part of AFSCME-DCTU.

19. After recognition of the Auditor's Unit, the Auditor obtained additional individual telework agreements from members of the new unit. The agreements were identical in content to those signed before recognition of the unit. The Auditor's Unit did not object to the signing of these agreements.

<u>Partial reentry to City office work.</u>

20. During the late summer of 2021, the City prepared to modify its telework agreements to begin hybrid work, where people would return to City work sites one or more days a week and telework the rest of the week. This effort ceased because of the surge of the Delta variant of COVID-19. The City then planned to have hybrid work begin on January 31, 2022. This effort was suspended due to the surge of the Omicron variant of COVID-19.

21. Beginning in December, 2021, the City and DCTU bargained over reentry issues. AFSCME field representative Nguyen was present at some of those negotiations, but did not participate.

22. On February 17, 2022, the City announced plans to have remote workers return to their City work sites at least one day between April 4 and 17. Beginning April 18, City employees were to work at a City work site for the equivalent of at least one day per week, with City managers having discretion to require additional time at City facilities.

23. On February 28, 2022, Nguyen, who was assigned to the Auditor's Unit, sent City Labor and Employment Relations Managers Jerrell Gaddis and Ron Zito an email entitled "Demand to Bargain (Reentry for the Auditors Office)." The email stated:

> "With the City as a whole starting to look at reentry, I know that we have had initial brief conversations on reentry for Auditors office [*sic*]. I am hoping we can start a discussion on what the Auditors [*sic*] office is looking at and how much of it is already being done on the City side therefore we do not need to duplicate the process."

Exh. J-3.

24. Later that same day, Gaddis emailed Nguyen and Zito, stating,

> "Bao, I will have a discussion with [Auditor's Chief Deputy Amanda Lamb] & Josh about their plans regarding reentry. I can schedule a meeting with all of us to discuss all of [our] collective interests."

Exh. J-3.

Nguyen expected that this exchange of emails would lead to the parties "assembling the troops" for bargaining similar to the bargaining with the DCTU. (Nguyen Testimony.) However, the Auditor and City did not take any such steps known to Nguyen.

25. On March 17, 2022, the Auditor emailed her employees to inform them that she would circulate an Auditor's Office re-entry plan soon. The Auditor's email stated in part,

> "Subject: Re-entry is happening
>
> "* * *
>
> "It looks like it's really going to happen this time. We will be easing out of full-time remote-work next month and moving into hybrid schedules. I've been coming into the office the last few weeks to get used to the idea and am happy to report it's nice to be back.
>
> "The Management Team and I are working on the plan for hybrid scheduling to ensure that we have the appropriate mix for coverage and excellent public service. We'll share the details once we finalize them. The City has not yet set a date to open the buildings to the public, but we expect that to be the phase after employees

are settled in. Watch for updates from Tom Rinehart on the City's overall re-entry plans, which we will consider and adapt as needed.

"Unlike for Archives and Records Management staff, the schedule for re-entry to City Hall offices will be a little bumpy. The good news is that we are getting new carpet. The bad news is that the project requires some muscle on our part to box up stuff, so the work crews don't kill themselves moving the furniture. Facilities scheduled the carpet replacement on the first floor for mid-to-late April and the third floor in mid-to-late May. It's likely we will stagger the start of hybrid schedules for first floor employees and possibly pause it for third-floor employees. More details to come on that.

"We've taken advantage of being away to make several improvements to our workspaces. Archives and Records Management replaced a jillion lights, it is more energy efficient. The third-floor suites in City Hall underwent quite a renovation to upgrade security, create a second small conference room, and make the reception area more welcoming and comfortable for visitors. We still need art on the walls and a thorough dust cleanup, but it's a nice improvement.

"With the expiration of the mask mandate, we added air purifiers to all the conference rooms and areas where cubicles are located in City Hall and the Archives and Records Center. Anyone who wants to wear a mask is welcome to do so. I haven't fully given mine up yet. It's always been true and even more important that you don't come to the office if you are sick, especially if you have respiratory symptoms. Some of our colleagues have kids at home who are as-yet ineligible for the vaccine, and I'm not interested in even a mild case of Covid or a cold!"

Exh. J-4 at 1-2.

26. Nguyen was unhappy with the March 17 email because he had not heard any formal response to his demand to bargain.

27. On April 1, 2022, the same day the City ended its state of emergency, City Labor Relations Director Zito sent Nguyen an email. The email proposed that the Auditor's Unit sign the agreement being negotiated with the DCTU and other unions, stating,

"Just wanted to share the latest pass on the reentry LOA we have been negotiating with all of the City's non-public safety bargaining units.

"Earlier this week, we met with Rachel and Elliott to discuss the attached City counter. Despite a low turnout on Tuesday's call, Rachel confirmed she would be reviewing it with the other parties on the LOA.

"I noticed that AFSCME- Auditor's Office, bargaining unit is not a signature line on the draft LOA proposed by Rachel. It is the desire of the City and the Auditor's Office to have your new bargaining unit a party to this agreement as well.

"We plan to continue this discussion with you, Rachel, and the parties to the agreement on the 12th during our biweekly check-in.

"If you have any concerns with this approach please let us know."

Exh. R-14.

28. The attached draft agreement stated, in part,

"[The City had an] expectation that teleworking staff begin reporting to their worksite for the equivalent of at least one day per week beginning the week of April 18. Bureau Directors have the discretion to require additional time at City facilities."

Exh. R-14 at 2.

29. Nguyen did not respond to Zito's offer.

30. On Monday, April 4, 2022, Auditor Chief Deputy Lamb sent an email to all Auditor staff. It stated, in part:

"Our reentry timeline starts today! To help clarify the process and provide additional information, we have answered some frequently-asked questions on our employee website. We have also created a form for employees who want to request an exception to reentry.

"Please let your division manager know if you have any additional questions. We will update the FAQ as necessary."

Exh. J-5.

31. The terms of the plan were set out in the FAQ's, which stated, in part,

"When will we return to city facilities?

"The Auditor's Office will be following the City's reentry timetable with some adjustment for the recarpeting project in City Hall. Employees working on the 3rd floor of City Hall or in the Archives and Records Center are expected to work at least one day in the office between Monday, April 4 and Friday, April 15. Starting Monday, April 18, they will begin working one of two hybrid schedules adopted by division managers.

“Reentry to the 1st floor of City Hall will be delayed by the carpet project. When it is completed, those staff will begin working one of two hybrid schedules selected by division managers. There may be workspaces available in City Hall offices unaffected by the carpet project and the Archives and Record's Center for employees who wish to work in-person before their assigned spaces are unavailable.

“Will there be any exceptions to the requirement to return to the office?

“The Auditor’s Office will follow the City’s exception request process. Employees must fill out a request form and submit it to Operations Management (Josh McNeal, copying Andrew Bryans) for the Auditor to decide. The criteria to be eligible for an exception are limited. The request form is here [link to document].

“Will we be able to continue teleworking?

“Yes. We want to move to schedules that capture the best qualities of being in-person with those of teleworking. There is no doubt that in-person work makes communication easier, helps new staff learn and contribute to the office culture, facilitates teamwork, and ensures customer service coverage during business hours. Telework can be great for uninterrupted time for writing, editing, and thinking. Plus saving the time that otherwise would have been spent commuting has been pretty great.

“The Auditor’s Office is piloting two hybrid schedules for six months after which we will assess whether to change them. Managers may adopt a four days in-person/one day telework (4/1) or three days in-person/two days telework (3/2) schedules for their divisions.

“All Auditor’s Office employees must work in the office a minimum of three days per week. Managers in coordination with the Auditor and other divisions will determine which schedule works best for their business needs and which days within the schedule must be in-person. They will also factor in employees who currently work alternative schedules

“Can we switch our schedules if we have to come to the office on a telework day?

“No. There may be times when you are be asked to come into the office on a telework day (co-worker is sick, front desk coverage, etc.). Accomplishing our work takes priority over the telework schedule. We do not want variable telework schedules to become an administrative burden for managers, colleagues, or the public.
“Are we required to work remotely?

“No. Employees are welcome to be in-person for their full workweek.”

Exh. J-5 at 3 (emphasis added.)

32. Also on April 4, 2022, Nguyen emailed City Labor Relations Manager Gaddis, stating,

> "Subject: Demand to Bargain (Reentry Auditors office)
>
> "I was notified that the Auditors [*sic*] office is planning to start having employees return to the City as early as next week similar to the rest of the City. I have attached a FAQ that I was notified of. Since we have not finished negotiations on the overall return to work for the other City Unions I am requesting that we hold off on any return for the Auditors [*sic*] office until that bargaining is complete or the 90 days has run its course from the February 28 notification we sent to the City."[2]

Exh. J-6.

33. Gaddis and Nguyen had communicated about labor-management issues several times before, and were well-known to each other. Gaddis interpreted this April 4 email to mean that Nguyen intended to negotiate the Auditor's Unit near term and long-term return through the DCTU bargaining, or to bargain the issue with the Auditor separately for 90 days. Gaddis was aware that the DCTU negotiated plan was for a floor of a one day a week return for City employees but additional days per week if a Bureau chief believed it was necessary. At some point during this period, Gaddis learned that the Auditor wanted a return for three or four days per week.

34. Between April 4 and April 15, 2022, Nguyen and Gaddis had several conversations by telephone about the re-entry plan for the Auditor's Office. Nguyen told Gaddis that he was getting calls from Auditor Unit members concerned about returning to work as soon as the week of April 11 or April 18. Nguyen repeatedly referred to the difference he perceived between the City reentry plan, which emphasized a return for one day per week, and the Auditor's plan, which provided for three or four days per week.[3]

35. During one such conversation, Nguyen told Gaddis that the Auditor's Unit would file an unfair labor practice complaint (ULP) with ERB regarding the Auditor's plan. Gaddis understood from the conversation that if the Auditor only required employees to return to the office one day per week, AFSCME would not file a ULP, but Nguyen did not explicitly say so. Gaddis told Nguyen that he would see if the Auditor would modify her plan to require one day in the office.

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[2]Ninety days from February 28, 2022 was May 29.

[3]In fact, the City plan allowed Bureau chiefs to order reentry for more than one day per week if they believed it was necessary; in drafting her plan, the Auditor viewed her position as comparable to a Bureau chief, and she believed the three day return was important to Auditor's Office services to the public.

36. Gaddis told the Auditor that failure to agree to the one-day plan would result in an unfair labor practice action. Based on that set of circumstances, the Auditor agreed to the one-day plan.[4]

37. On April 15, 2022, Gaddis and Nguyen had a telephone conversation. Gaddis told Nguyen that the Auditor was willing to modify her reentry plan and have staff return to the office one day a week. Gaddis and the Auditor believed that they had reached an agreement with the Auditor's Unit that Auditor employees would be in the office one day per week, and that therefore, the Auditor's Unit would not file an unfair labor practice. This plan is what Gaddis understood Nguyen had wanted from the beginning in order to resolve the matter. Gaddis summarized what he understood to be the reentry plan agreement in an email to Nguyen:

> "Hello Bao, this is a follow up to our phone conversation about re-entry plans for Auditors Office [*sic*]. The following is the plan moving forward based on our phone conversation today.
>
> "For employees who've been working 100% telework, they will come in one day a week while we bargain a longer term solution.
>
> "For employees who've been coming in more than one day a week during the pandemic, they will continue with their status quo while we bargain a longer term solution.
>
> "Please confirm this is your understanding of our phone conversation. I look forward to us scheduling bargaining session specifically to address Re-entry for Auditors Office [*sic*] represented employees."

Exh. J-7.

38. Nguyen replied with an email simply stating, "Yes I can confirm that was my understanding of the conversation as well." Exh. J-7. Gaddis understood that sentence to mean that he and Nguyen had reached agreement on this, first phase of the Auditor employee's reentry. Gaddis told the Auditor that the parties had an agreement on the phase one reentry plan for the Auditor's Office, with Auditor employees working one day per week as were most of the returning City teleworkers. [5]

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[4]It does not appear from the record that Nguyen's proposal to bargain for only 90 days instead of the statutory 150 (*See* ORS 243.698(2); 243.712) was a significant factor in the Auditor's change in position.

[5]Gaddis and Auditor Hull Caballero credibly described their belief that they were giving the Auditor's Unit what it wanted, and thus averting an unfair labor practice. Indeed, their actions make little sense otherwise. Given the relevant conversations between Gaddis and Nguyen, their prior acquaintance, and the process Gaddis described and followed, it is reasonable to conclude that Nguyen was aware that Gaddis and the Auditor believed that they were doing what Nguyen required.

39. Nguyen's understanding of the April 15 discussion with and email from Gaddis was that the parties had failed to reach agreement. Nguyen was unhappy that his demand to bargain had not resulted in formal negotiations, and that his demand appeared to have been ignored by the Auditor.

40. On April 18, 2022, AFSCME filed the unfair labor practice action Case No. UP-11-22. AFSCME's Complaint alleged, in part,

> "16. The City implemented a change to the status quo of matters of employment relations without providing notice to the Union as required by ORS 243.698(2).
>
> "17. The City implemented a change to the status quo of a matter of employment relations prior to the completion of the bargaining process proscribed in ORS 243.698. The City has refused to restore the status quo ante until the completion of the bargaining process.
>
> "18. The City breached its duty to bargain in good faith with the Union by sending emails to the employees of the City Auditor's Office on March 17, 2022, April 4, 2022 and April 12, 2022 presented the City's reentry plan to the employees as a fait accompli.
>
> "19. The City's unilateral implementation of its reentry plan and bad faith bargaining are unfair labor practices as defined by ORS 243.3672(1)(e)."

UP-011-22 Complaint at 4.

Safety issues

41. During April, 2022, and moving forward, COVID-19 remained a threat, although not as significant as before. Employee risk levels varied with the workplace and the particular conditions of individual employees' telework, including contact with the public, the presence of children, and having an immunocompromised household member.

42. Joel Michel is the City's Occupational Health and Wellbeing Program Manager and a nurse practitioner, and the City's infectious disease expert. In his view, COVID-19 presented minimal risks of exposure and transmission of the disease within City office-based employment during the relevant time period. This was in part due to a high rate of vaccination among City employees (including 100 percent of Auditor's Office employees), low rates of infection in Multnomah County, and steps the City had taken to minimize the risk of transmission, including the use of masks, and routinely disinfecting surfaces.

43. In Michel's view, the risk of exposure in the usual telework setting, an employee's home, is usually less than the risk of exposure the employee would face in the City's offices, but both environments had generally minimal risk.

44. Consistent with the general City approach, the Auditor required employees to wear masks and regularly disinfect surfaces. All employees in the Auditor's Office were vaccinated. The Auditor also consistently provided exemptions from office work for vulnerable people.

Auditor's unit bargaining over long-term reentry plan

45. Although surprised by the filing of the unfair labor practice, the City and Auditor's Unit did not alter the next steps in bargaining over the longer-term reentry plan and other factors relevant to future reentry plans. On April 21, 2022, Gaddis provided Nguyen with potential dates for negotiations.

46. On May 4, 2022 the parties met for the first time, with the Auditor's Unit providing its opening offer. The Auditor's Office submitted its first proposal on May 25. The Auditor's Unit submitted another proposal on June 28. The proposals addressed workplace safety, criteria for allowing employees to opt-out of reentry, and notice requirements.

47. The day after the August 9 and 10, 2022 hearing, the parties met again to bargain the issue of reentry. The Auditor's Office offered its second proposal.

48. On August 12, 2022, Gaddis emailed Nguyen, stating,

> "I wanted to follow-up on our August 11 reentry negotiations and clarify our position. ARA 4.04 and the individual telework agreements give us the ability to unilaterally modify or end the telework agreements now that the state of emergency has ended. As you know, in an attempt to avoid the unfair labor practice you filed against us, we agreed to negotiate over the next phase of reentry for 90 days. We did not agree to negotiate for 150 days.
>
> "Our hope is that we will reach an agreement over the next phase of reentry at our next negotiation session on August 17. If we do not reach an agreement, we will let you know our next steps, which may include implementing our reentry plan.
>
> "Please let me know if you have any questions or if you want to discuss further."

Exh. J-12 at 2.

49. That same day, Nguyen replied to Mr. Gaddis' email, stating:

> "Thank you for the email, however the Union disagrees with the position that you are only required to bargain for 90 days. As I mentioned yesterday when met [*sic*] that was an oversight on my part when I emailed you on February 28 regarding Reentry Bargaining the and the law requires that we bargain for 150 days."

Exh. J-12 at 1. (August 12 was the 99th day of bargaining.)

50. On August 18, 2022, the parties met again. During that meeting, AFSCME presented a proposal addressing reentry.

51. On August 23, 2022, Gaddis emailed Nguyen, stating,

> "To follow-up on our email exchange on 8/12, we recognize we have a disagreement around reentry bargaining. As we stated in that email, our position is that ARA 4.04 and our telework agreements allow management to modify telework arrangements after the end of the declared statement of emergency. However, we did agree to negotiate reentry with the union for 90 days to avoid an unfair labor practice. We have upheld our end of that agreement and are now beyond the 90 days.
>
> "Our final offer on reentry is attached. If the union has a counter to this proposal, please provide that counter no later than the close of business on Thursday, August 25. If we do not have agreement at that time, management will assert their rights under the Auditor's Office policies and modify telework agreements to require all employees to work from a City location for three to four days every week. In order to give employees six weeks advanced notice of the change, we intend to announce the reentry plan on Monday August 29. Employees will be required to return to the office three or four days per week starting October 10, 2022 as a six-month pilot.
>
> "Please let me know if you have any questions or if you want to discuss further."

Exh. J-14 at 1.

52. On August 24, 2022, Nguyen emailed Gaddis a proposal at 10:52 AM. Gaddis forwarded the proposal to the rest of City Auditor's bargaining team seven minutes later. Ex. J-15. The parties had bargained for a total of 113 days.

53. That same day, Nguyen emailed Gaddis again at 3:35 PM, stating:

> "The parties did not have an agreement to bargain for 90 days. The union did not offer to bargain for 90 days. My email to you said, 'Since we have not finished negotiations on the overall return to work for the other City Unions I am requesting that we hold off on any return for the Auditors office until that bargaining is complete or the 90 days has run its course from the February 28 notification we went to the City.' This was not a proposal. This was a request to maintain the status quo. The city did not accept a proposal because there was no proposal. The city did not act like there was an agreement because the city did not 'hold off on any return.' The city did not maintain the status quo. There was no acceptance of a proposal and therefore there was no agreement.
>
> "The union renews its demand to bargain over the issue of reentry and any matters of employment relations impacted by reentry. AFSCME Local 189 continues to demand that the city return to the status quo ante (100% remote work) until the parties reach an agreement or until the completion of the PECBA dispute resolution

process proscribed by ORS 243.712. Please be advised that the union is prepared to take any appropriate legal action to enforce its rights under the PECBA."

Exh. C-9.

54. On August 29, 2022, City Auditor Hull Caballero sent an email to all employees of the Auditor's Office informing them of the implementation of the employer's final phase of its reentry plan, to take effect October 10, 2022.

55. Also on August 29, 2022, the union filed the second of these consolidated cases, No. UP-27-22.

56. On October 10, 2022, the Auditor implemented her second phase of reentry, requiring staff to return to work three or four days a week.

CONCLUSIONS OF LAW

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

2. The City Auditor's Office breached its statutory duty to bargain in good faith under ORS 243.672(1)(e), by unilaterally implementing an end to complete telework, and return to office work, by Auditor's Office employees without notice to AFSCME, and by sending emails to employees in March and April, 2022, presenting the City Auditor's decision as a fait accompli.

It is an unfair labor practice for a public employer to "[r]efuse to bargain collectively in good faith with the exclusive representative." ORS 243.672(1)(e). A public employer may violate that duty to bargain in good faith if it does not complete its bargaining obligation before making a change in the status quo concerning a subject that is mandatory for bargaining. *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 183, 295 P3d 38 (2013) (*AOCE II*) (absent "a sufficient affirmative defense, a union has a statutory right to insist that an employer bargain over mandatory subjects before making changes to the status quo").

When reviewing an allegation of an unlawful unilateral change, this Board considers (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. *AOCE II* 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*)). PECBA permits a public employer to make changes involving permissive subject of bargaining. However, 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).

We also consider an employer's defense of waiver if raised as an affirmative defense, meaning that the employer has the burden of proof on the subject. 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.

This case concerns the City Auditor's two phases of efforts to return teleworking employees to the office at the end of the COVID-19 pandemic. In this unfair labor practice claim raised in Case No. UP-011-22, AFSCME argues that the City Auditor violated ORS 243.672(1)(e) in March and April, 2022, when it unilaterally changed the status quo of matters of employment relations including work location and employee safety by implementing its first phase reentry policy without notice and bargaining, communicating directly with represented employees,[6] and presenting its reentry plan as fait accompli. The City argues that the status quo was 'no telework,' or, at least, individual agreements between the City Auditor and its employees that permitted the Auditor to end telework at any time. The City also contends that reducing or ending telework here was simply a change in employee location, with no impact on employee safety, because the pandemic had subsided.

Status quo

This Board recently considered a similar case regarding a revocation of telework status related to the Covid-19 pandemic, *SEIU Local 503 v. Marion County*, Case No. UP-037-21 (2021). In that case, Marion County contended that revocation of its "Temporary Telework Policy" was not a change to the status quo, because the status quo was no telework, established before the pandemic.

In analyzing this claim, this Board noted that a working condition can become the status quo by terms of an expired contract, past practice, work rule, or policy, citing *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). In the *Marion County* case, this Board determined that the status quo was determined by the employer's policy, namely, the Temporary Telework Policy, which remained in effect for 15 months until the revocation of that policy at issue in the case.[7] This Board stated,

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[6]AFSCME states that the emails from the City Auditor on March 17, 2022, and from Chief Deputy Lamb on April 4, 2022, were unlawful direct dealing in violation of ORS 243.672(1)(e). However, it provides no argument or authority for its position. The record here does not indicate that either of those emails were attempts to negotiate directly with Auditor's Unit employees. *See Lane Unified Bargaining Council v. McKenzie School District # 68*, Case No. UP-14-85, 8 PECBR 8160, 8195 (1985). "An employer violates its duty to bargain in good faith when it attempts to negotiate directly with employees."

[7]Marion County also sought to define the status quo as a past practice, which this Board rejected. The City seeks to apply some of *Marion County's* discussion regarding status quo by past practice to the status quo by policy analysis in this case, specifically the prevalence of Covid-19 infection during the relevant time periods. However, the City does not contend that, in this case, the status quo is defined as a past practice.

> "It was a policy that affected almost every aspect of remote employees' working lives--including the location of their work, the means of receiving assignments, the methods of communicating with other employees and the public, the means of performing work, and similar aspects of work. That employer policy determined the status quo during the pandemic." *Marion County*, Case No. UP-037-21 at 13.

The County also argued that its Temporary Telework Policy could not establish a status quo because the policy was designed to be temporary and expressly stated that the County could revoke it at any time. This Board noted, however, that an employer policy that can be changed at any time may still constitute a status quo, citing *Teamsters Local Union No. 223 v. City of Shady Cove*, Case No. UP-3-94 at 11 and n 3, 15 PECBR 589, 599 and n 3 (1995) (personnel manual constituted status quo for new bargaining unit, even though it was not a contract and could be changed at any time). This Board stated,

> "We adhere to [*Shady Cove*] in this case. Although the employer policy in this case was, by its terms, temporary, we conclude that it nonetheless established the status quo. It was in place for 15 months during an emergency. Telecommuting touched almost every aspect of remote employees' daily working lives. Whatever else may be said about whether an expressly temporary policy can establish a status quo in other, more routine situations, here, the policy dramatically affected remote employees' working lives for 15 months. Although there is no bright line on when a temporary emergency-related change becomes the status quo, 15 months is more than sufficient to establish that the Temporary Telework Policy here became the status quo, such that the County was required to bargain a change to that policy." *Marion County*, Case No. UP-037-21 at 13.

The City Auditor's telework policy was in effect for approximately two years. The City argues that its telework policy could not constitute the status quo because the City Auditor's ability to change the policy was included in the language of the telework agreements signed by each individual teleworking employee. The City does not explain how the manifestation of its policy in each individually signed teleworking agreement cannot represent the status quo when this Board has held that implementing the same policy as a directive to employees can establish the status quo. The City does not contend that these individual agreements constitute a collective bargaining agreement. This Board concludes that the City Auditor's modification of telework to require employees to return to the office one or more days per weekday per week was a change in the status quo.

Mandatory subject

The next step of the analysis is to determine whether that change concerns a mandatory subject of bargaining. Under the PECBA, "employment relations" for the employees at issue here expressly excludes safety issues except those "safety issues that have a direct and substantial effect on the on-the-job safety of public employees" which are mandatory subjects of bargaining. ORS 243.650(7)(h). In *Marion County,* the union contended, as here, that the subject of the change concerned a safety issue that had a direct and substantial effect on the on-the-job safety of public

employees and was therefore a mandatory subject pursuant to ORS 243.650(7)(h). The County argued that the revocation of the Temporary Telework Policy concerned only workplace location, not safety, and that even if safety was involved, the County union had raised only "generalized concerns" about COVID-19, not direct and substantial effects on employees' on-the-job safety. This Board agreed with the union, reasoning that the subject of the disputed change was a safety issue, not, as the County argued, workplace location. This Board reached this conclusion after examining the policy to determine its "core feature" or an intended change that "defines and ultimately shapes the scope of" the proposal. *Marion County*, Case No. UP-037-21 at 14, citing *Jackson County v. Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. UP-002-20 at 6 (2020); and *Oregon Tech American Association of University Professors v. Oregon Institute of Technology*, No. UP-023-20 at 28 (2020). This Board also noted that the subject of a proposal or change is a "safety issue" "if it would reasonably be understood, on its face, to directly address a matter related to the on-the-job safety of employees," quoting *Multnomah County Corrections v. Multnomah County*, 257 Or App 713, 734, 308 P3d 230 (2013).

In *Marion County*, this Board readily concluded that the County's telework policy was reasonably understood, on its face, to directly address a matter related to on-the-job safety of employees--namely, COVID-19 exposure and transmission in the workplace, both in its enactment, and its attempt to end the policy when it (erroneously, ultimately) concluded that COVID-19 was no longer a serious threat. The same is true of the City Auditor's policy[8] at issue here. While the City argues that the core of the City Auditor's policy was work location, there is no actual dispute that the policy was prompted and driven by the course of the pandemic. As this Board stated in *Marion County*,

> "[J]ust as the County enacted the Temporary Telework Policy because it believed that it was necessary for employee safety, it revoked that policy when it believed that the COVID-19 concerns had diminished such that employees could safely work in Marion County facilities (with other safety measures). That revocation was a change concerning the safety issue of COVID-19 exposure. There is no evidence that the County stopped its employees from telecommuting for other reasons, such as complaints about service delivery or service quality caused by employees working remotely. On balance, on this record, we conclude that the core feature of the Temporary Telework Policy (and its revocation) was COVID-19 exposure." *Marion County* at 15.

In this case, the City and City Auditor policies at issue specifically cite the March 12, 2020 City state of emergency declaration in response to the COVID-19 pandemic, and the declaration of the end of that state of emergency on April 1, 2022. Therefore, the subject of the City Auditor telework policy at issue here, and its revocation, is the safety issue of COVID-19 exposure.

The City argues that, even if the Auditor's policy involved safety issues, with the reduction of the COVID-19 infection rate, it was no longer a safety issue by March and April, 2022. This argument rather misses the point, because the issue we address is whether the policy concerned

[8]While the Auditor's Office is, in some respects, independent from the City, throughout the pandemic the Auditor followed the City's declaration of emergency and generally copied or closely followed City regulations regarding employees during the pandemic.

significant safety issues, not simply a benchmark risk of infection. In any event, the evidence demonstrates that, even at the time of hearing, significant and comprehensive safety measures were being taken in the Auditor's workspace, including addressing vaccination status, mandatory masking, surface disinfectant, and exempting vulnerable people from the return requirements. And, again, as this Board did in *Marion County*, we conclude that workplace measures in place at reentry to reduce risk neither eliminate the risk nor are they immune from bargaining and codification in a binding labor agreement enforceable through the contract dispute resolution process. As this Board stated in *Marion County*,

> "When bargaining over the safety issue of COVID-19 exposure, the parties are free to make (or reject) proposals about how to address that issue, including but not limited to proposals about specific safety measures. PECBA does not dictate the content of such proposals, or the ultimate outcome of bargaining. PECBA requires only that the County bargain in good faith with the Union about the safety issue, rather than decide unilaterally how to address it." *Marion County* at 16.

Exhaustion

We turn to whether the City Auditor exhausted its duty to bargain, and the factually related issue of whether the Auditor's Unit waived bargaining. There is no dispute that the City provided notice and an opportunity to bargain to the DCTU, that bargaining did take place, and that the City and DCTU reached an agreement regarding the first phase of reentry. Nguyen was present at some of those sessions, but not explicitly in the capacity of the representative of the Auditor's Unit. While the Auditor's Unit was aware of those negotiations, and DCTU agreement, the Auditor's Unit was never formally part of those negotiations and did not sign the agreement. In fact, on April 1, 2022, City Labor Relations Director Zito sent a copy of the DCTU agreement to Nguyen as negotiator for the Auditor's Unit, and the Unit never agreed to sign that agreement.

The Auditor's Office is a separate entity from the City regarding matters such as telework policy. While the Auditor's Office continued to follow the City teleworking policy's imposition and changes, it clearly communicated to the Auditor's Unit that the policies it issued were its own, and effectuated those policies by amending its own rule, ARA 4.04. The City does not contend that the City-DCTU negotiation process and agreement constituted notice of a change of Auditor's Office policy.[9]

In the case of the Auditor's Office, the first communication on the subject was the Auditor's email of March 17, 2022. That email did not present the new telework policy. AFSCME contends that this memorandum constituted a unilateral change in the telework policy, and a direct communication of that change to the bargaining unit as a fait accompli. Against the background of the City-DCTU negotiations and policy changes, however, and given the email's lack of details, and explicit statement that the policy was not finalized, we conclude that the March 17 Auditor's

[9]It is apparent that, throughout this process, the Auditor relied upon the City-DCTU negotiations and outcome, and City amendments to the City telework policy, without acknowledging that the Auditor's Unit was not subject to that policy. Indeed, the Auditor appeared to make her policy choices based on the options the City presented to its Bureau Chiefs.

memorandum did not represent a unilateral change. Indeed, it represented the obvious time and opportunity to engage the Auditor's Unit in bargaining, but the Auditor did not take that step.

On April 4, 2022, Auditor's Office Chief Deputy Lamb issued a memorandum containing a detailed plan for a phased reentry into the office and reduction of teleworking. On its face, the document presented the changes as a fait accompli, presented without prior notice or an opportunity to bargain. The new telework policy was issued as a fait accompli without an opportunity for the union to bargain over it and was thus a violation of ORS 243.672(1)(e), unless the Auditor's Office has a valid affirmative defense.

Waiver or agreement

As noted above, 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 City contends that the Auditor and the Auditor's Unit reached an agreement that waived the union's right to bargain the first phase of reentry and, consequently, its claim of an unfair labor practice over that reentry plan. We turn to whether the Auditor's Unit waived its right to bargain, by agreement or other means.

In response to the announcement/enactment of the policy, Nguyen sent Gaddis and Zito a demand to bargain on February 28, 2022. Nguyen testified at hearing that he envisioned that the parties would "assemble the troops" to engage in a bargaining process like the one between the City and the DCTU. Finding of Fact 24. However, in his April 4, 2022 communication to Gaddis, Nguyen suggested that the process could possibly be truncated to avoid a duplication of effort.

When the Auditor's Office issued its plans without bargaining, Nguyen contacted Gaddis and informed him that the Auditor's Unit planned to file an unfair labor practice complaint. Nguyen expressed strong disagreement with the Auditor's plan to return to work three days per week, when most City employees were required to return initially for only one day per week. Gaddis interpreted Nguyen's comments to mean that if the Auditor changed the reentry plan to one day per week, the Auditor's Unit would be satisfied and not file a complaint. Gaddis took the threat of a ULP seriously, and consulted with the Auditor. In response, the Auditor agreed, based on the threat of a ULP, to reduce the days required to one day.

The evidence in the record does not support the conclusion that an agreement was reached between the representatives of the Auditor's Unit and the Auditor's Office. There is no evidence of a direct if/then statement such as, 'if the Auditor requires only one day of reentry, then the union will not file an unfair labor practice complaint.' There is no evidence of a direct statement such as, 'we have a deal.' There is no evidence of any type of handshake agreement. The City argues that Gaddis' April 15, 2022 email, and Nguyen's response, establish an agreement. They do not. As Nguyen testified, Gaddis' email simply sets out the Auditor's plan of action, and Nguyen's response simply acknowledges that fact. There is no language in either the email or response that would support the conclusion that a complete and final agreement was reached.

Gaddis was plainly under the impression that providing Auditor's Office employees the same terms as most of the rest of the City would solve the problem of initial reentry, and the parties

would work out the other details later. Gaddis clearly believed that he was giving the Auditor's Unit what it wanted. It does not appear likely that he came to this conclusion without some suggestion by Nguyen. However, the final emails do not acknowledge any agreement.

In any event, the Auditor's Office failed to meet its burden to prove its defense that the Auditor's Unit waived bargaining over reentry in conversation between Gaddis and Nguyen. Gaddis' email of April 15, 2022, without adequate proof that it reflected a prior, verbal agreement, does not on its own establish such an agreement. It is simply a recitation of the Auditor's plan moving forward. While Nguyen knew, or should have known, that Gaddis' belief that he had resolved the issue was in error, the fact that Nguyen chose to inform Gaddis of this fact by filing a ULP instead of by direct communication does not represent a waiver of the union's rights or agreement to Gaddis' plan.

We have concluded that the City Auditor's Office, without notice or an opportunity to bargain, unilaterally adopted its change in the status quo of telework. We also conclude that the City has failed to meet its burden to establish that the Auditor's Unit waived its rights to pursue bargaining on these issues by agreement or waiver. Accordingly, we conclude that the Auditor's Office violated ORS 243.672(1)(e).

We turn to the issue raised in the second ULP in these consolidated cases, UP-027-22.

3. With respect to ORS 243.672(1)(e), the City Auditor's Office breached its statutory duty to bargain in good faith by unilaterally implementing a change to telework requirements, and a return to office work, by Auditor's Office employees without bargaining with AFSCME for the PECBA-required period.

ORS 243.712 provides that parties must bargain under the circumstances here for 150 days, unless the parties reach an agreement sooner. It is undisputed that, while the Auditor's Office actually bargained for more than 90 days, it refused to bargain for more than 113 days. The Auditor's Office claims that the 90-day bargaining period over reentry was the result of an agreement, based on some of the same conversation and emails between Nguyen and Gaddis in March and April, 2022, addressed above.

We have already concluded that the exchange of views culminating in the exchange of emails on April 15 between Gaddis and Nguyen did not create agreement, or a waiver, regarding the implementation of the Auditor's Office first phase of reentry. The City Auditor Office arguments in favor of an agreement over the 90-day bargaining deadline rest on an even slimmer factual basis. The Auditor's Office argues that Nguyen's April 4, 2022 email stating that, if the Auditor held off on making the changes, the parties would bargain for 90 days after the DCTU agreement was reached, bound the union to a 90-day bargaining period.

AFSCME correctly notes that, first, the City Auditor did not agree to "hold off" until the DCTU bargaining was completed, and that the City Auditor never stated any agreement to any part of Nguyen's suggestion. Finding of Fact 53. In addition, the proposed 90-day period explicitly began February 28, 2022, thus ending on May 29, 2022. Finally, there is no evidence of any 90-

day limit in any ground rule for these negotiations. We conclude that there was no agreement between the parties to bargain for only 90 days.

Nor would the circumstances justify any reliance by the City on a 90-day negotiation period. The 90-day period was simply an assertion in an email that was never acknowledged by the City until the end of that bargaining 121 days later. In addition, Auditor's Office officials had a recent, painful experience that communications between the parties which they believed established an agreement without using formal language of agreement were not recognized by the Auditor's Unit. It is true that Nguyen did not admit his error until the end of the 90 days after the actual start of bargaining, but there is no evidence that the City ever relied on Nguyen's statement as a statement of law, and no evidence that Auditor's Office officials were unaware of the actual, applicable statutory 150-day time limit.

The City contends that the agreement on the 90 days was actually part of the agreement regarding the number of days in the reentry. We have already concluded that there was no agreement regarding reentry. There are no indicia of agreement regarding the 90 days either. What the record contains is Nguyen's assertion of 90 days, the City's silent reliance on that assertion, and then Nguyen's repudiation of his assertion. The number of days is not mentioned in any other communications or agreements, such as ground rules. We conclude there was, in fact, no agreement regarding the 90-day period.

It appears that the City Auditor relied on Nguyen's 90-day representation. However, the City Auditor never made that reliance apparent; in that light, the failure to address the issue in a confirming communication or ground rules is significant. In addition, Auditor's Office reliance on Nguyen's statement was unwarranted. Auditor's Office officials were presumably well aware that Nguyen's statement did not reflect the legal requirements.

Accordingly, we conclude that the City Auditor's Office wrongfully terminated bargaining over reentry after 113 days instead of 150, and therefore wrongfully implemented its final offer regarding reentry on August 29, effective October 10, 2022.

Remedy

Having found that the City Auditor's Office violated ORS 243.672(1)(e), this Board will order it to cease and desist from the unfair labor practice conduct. ORS 243.676(2)(b). We must also order affirmative action necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c).

AFSCME requests in part that this Board (1) order the City Auditor's Office to restore the status quo of employees of the Office working remotely until the Office has fulfilled its bargaining obligations; and (2) rule that the Office's good faith bargaining efforts terminated with the March 17, 2022 email from City Auditor Mary Hull Caballero and any subsequent days do not count towards the 90 day good faith bargaining requirement in ORS 243.698(1).

AFSCME asks for a return to the status quo, and for a full 150 day bargaining period over the reentry issue. It apparently envisions that Auditor's Office employees will leave the workplace and exclusively telework for 150 days or until the parties reach agreement. AFSCME contends,

without further explanation, that having the Auditor employees return to work for one day per week somehow eviscerated the Auditor's Unit bargaining power over the issue of return to work generally, and gave the employer no incentive to compromise over telework generally.

We generally order an employer to affirmatively remedy a unilateral change violation by restoring the status quo. We conclude that such a remedy is inappropriate under the circumstances of this case. As in the *Marion County* case, the record shows that the vast majority of Auditor's Office employees have already returned to working in-person in the first, and then second phase of reentry, and a wholesale and immediate return to the status quo of teleworking may be unnecessarily disruptive for both the employer and employees. In addition, such a return would not reflect the change in COVID-19 risk as it has developed over time, and the national and local emergence from the pandemic crisis.

While we will not restore the 100% teleworking status quo, the affected employees should be compensated for the costs of their non-telework until bargaining is completed. The Auditor's Unit seeks damages in the form of commuting and other costs for bargaining unit employees who were forced back to work because of the unilateral action of the Auditor's Office. This Board finds it appropriate and consistent with the policies and purposes of PECBA and related statutes to order the parties to bargain for a 30-day period regarding a remedy, including a make-whole remedy (without a windfall to the affected employees). If the parties are unable to agree on a remedy within that 30-day bargaining period, each party must submit its proposed remedy to the Board within 35 days of the date of the order, and the Board will order a remedy.

Posted Notice

The Auditor's Unit also requests that we order the Auditor's Office to post a notice. We generally order notice posting if we determine that a party's violation of PECBA (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was committed by a significant number of the respondent's personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge. *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).

Not all of these criteria need be satisfied to warrant posting a notice. *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05 at 17-18, 21 PECBR 891, 907-908 (2007); *and Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02 at 2, 19 PECBR 684, 685 (2002). However, we typically require the presence of multiple factors before requiring a posted notice. *See Wy'East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06 at 47, 22 PECBR 668, 714 (2008). In this case, we conclude that the Auditor's Unit has not established that the requisite factors are met. Therefore, we decline to order the City Auditor's Office to post a notice.

Civil penalty

We may award a civil penalty when the action constituting an unfair labor practice was egregious or the party committing an unfair labor practice did so knowingly and repetitively. ORS 243.676(4)(a)(A); OAR 115-035-0075. Actions are egregious only if they were "taken in knowing disregard of the law." *Association of Professors of Southern Oregon State College v. Oregon State System of Higher Education and Southern Oregon State College*, Case Nos. UP-13/118-93 at 16, 15 PECBR 347, 362 (1994); *Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-014-17 at 22 (2018).

The Auditor's Unit requests that we award a civil penalty because the because, it argues, the relevant Auditor's Office actions were taken in knowing disregard of the law. The Auditor's Unit argues that the *Marion County* case put the employer on notice, as did the first of the two consolidated unfair labor practice complaints in this case. This Board concludes that the record does not establish that the Auditor's Office actions regarding telework were taken in knowing disregard of the law, and the employer did not commit an unfair labor practice knowingly and repetitively. While Nguyen's representations and conduct do not vitiate the employer's violations of notice and bargaining requirements of the PECBA, they do affect the evaluation of whether the employer's conduct was sufficiently wrongful to warrant a civil penalty. In particular, Nguyen's failure to correct Gaddis' false belief that an agreement over the first phase of reentry had been reached, or reassert the union's desire for full bargaining regarding reentry, could have avoided this entire course of litigation. While the employer's reliance on erroneous perceptions of Nguyen's representations was imprudent, it was not a conscious, willful, deliberate violation of the PECBA. Finally, as in the Marion County case,

> "[W]e consider the fact that the COVID-19 pandemic has presented novel and emergency circumstances, and that public employers have been required to act rapidly in response to quickly changing public health data, recommendations, and directives. Under all these circumstances, we conclude that a civil penalty is not warranted." *Marion County* at 21.

PROPOSED ORDER

1. City Auditor's Office shall cease and desist from violating ORS 243.672(1)(e).

2. The parties shall bargain for a 30-day period regarding a remedy, including a make-whole remedy. If the parties are unable to agree on a remedy within that 30-day bargaining period, each party shall submit its proposed remedy to this Board within 35 days of the date of this order, and the Board shall order a remedy.

SIGNED AND ISSUED 25 April 2023.

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-012-22

(UNFAIR LABOR PRACTICE)

ST, Complainant, v. PENDLETON POLICE DEPARTMENT, Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On March 16, 2023, this Board issued an order dismissing the complaint filed by ST (Complainant) against Respondent Pendleton Police Department (the Department). In doing so, we held that the Department did not refuse or fail to comply with ORS 243.666, in violation of ORS 243.672(1)(f), when it refused to allow Complainant to individually advance a personal grievance. 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).

1. The Department 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 August 31, 2022.

3. We award representation costs according to the schedule set forth in OAR 115-035-0055(1)(b). The representation costs award for a case that required one day of hearing is $3,000. OAR 115-035-0055(1)(b)(C). If a non-prevailing party 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). On June 7, 2023, the Department stipulated that Complainant had to rely on personal financial resources to litigate this matter. As the record does not establish any mitigating factors, we award $500.

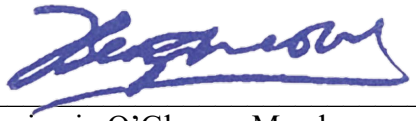
ORDER

Complainant shall remit $500 to the Department within 30 days of the date of this order.

DATED: June 8, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-001-23

(REPRESENTATION)

CITY OF PORTLAND PROFESSIONAL WORKERS UNION, Petitioner, v. CITY OF PORTLAND, Respondent.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE (ELECTION RESULTS)

On February 1, 2023, Petitioner City of Portland Professional Workers Union filed a petition under ORS 243.682(2) and OAR 115-025-0031(1) to request an election for a bargaining unit comprised of the following classifications at Respondent City of Portland (City):

> "Coordinators I, II, II, Analysts I, II, III, Administrative Specialists I, II, III, Financial Analysts I, II, III, Environmental Regulatory Coordinators, Technology Business Representative, Government Relations Specialists I, II, Multimedia Specialist, [and] Hearings Officer[,] excluding confidential and supervisory employees in these classifications."

On February 27, 2023, the City filed objections to the petition on multiple grounds. The matter was transferred to Administrative Law Judge (ALJ) B. Carlton Grew to conduct a hearing on those objections. On April 5, 2023, Respondent advised the ALJ that the parties had entered into a settlement agreement and that a hearing would not be necessary. The matter was returned to the Board's Election Coordinator for purposes of conducting an election, consistent with the parties' agreement.

Thereafter, the parties entered into a Consent Election Agreement and Memorandum of Understanding regarding the eligible voters in the election. Pursuant to the terms of those agreements, the Board's Election Coordinator sent ballots to eligible voters on May 15, 2023. Three hundred and seventy-eight valid ballots were returned by the deadline of June 5, 2023,

which constitutes the date of the election.[1] OAR 115-025-0072(1)(b)(A).

A tally of ballots was held on June 6, 2023. Before the tally, the City challenged 17 voters on the basis that they were ineligible to vote (1) under the Memorandum of Understanding, or (2) because they are supervisory employees under ORS 243.650(23), managerial employees under ORS 243.650(16), or confidential employees under ORS 243.650(6). The Board received ballots from four voters who were challenged by the City. Pursuant to OAR 115-025-0073(2)(b), those four ballots were impounded. The remaining 374 ballots were counted, with 306 ballots cast for City of Portland Professional Workers Union, and 68 ballots cast for no representation. Because "the number of challenges will not affect the outcome of the election," Respondent's challenges "will not be resolved." OAR 115-025-0073(2)(c).

On the same date as the ballot tally (June 6, 2023), the Election Coordinator provided the parties with the tally of ballots. OAR 115-025-0073(1). Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by June 16, 2023). OAR 115-025-0075(1)(a). No objections were filed. Accordingly, it is certified that

CITY OF PORTLAND PROFESSIONAL WORKERS UNION

is the exclusive representative of a bargaining unit comprised of the following classifications at the City of Portland:

> "Coordinators I, II, II, Analysts I, II, III, Administrative Specialists I, II, III, Financial Analysts I, II, III, Environmental Regulatory Coordinators, Technology Business Representative, Multimedia Specialists, and Hearings Officer, excluding supervisory, managerial, and confidential employees."

DATED: June 20, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

[1]Seven ballots were declared invalid by the Election Coordinator because they lacked the required signature on the ballot envelope.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-015-23

(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, Attorney at Law, Bennett Hartman LLP, Portland, Oregon, represented Complainant.

Rebekah Jacobson, Attorney at Law, Garrett Hemann Robertson P.C., represented Respondent.

On March 14, 2023, Complainant Salem Keizer Education Association (Association) filed an unfair labor practice complaint against Respondent Salem-Keizer School District (District). The case was assigned to Administrative Law Judge (ALJ) Martin Kehoe who, after conducting an investigation, determined that a disputed issue of fact or law existed that warranted a hearing. On April 12, 2023, the Association informed this Board that the Association and District had conferred and agreed to request that the Board expedite the complaint under OAR 115-035-0060. On April 18, 2023, the Board granted the joint request to expedite the complaint.

On April 19, 2023, the Board issued a notice of hearing and prehearing order, setting a hearing for May 23, 2023, to be conducted by videoconference (at the request of the parties). The parties filed prehearing briefs on May 18, 2023.[1]

[1]The District filed a timely answer before the Board granted the request to expedite the complaint.

The Board conducted a hearing on May 23, 2023. The parties made oral closing arguments at the end of that hearing, at which point the record closed.

The issues are:

(1) Did the District's actions regarding full-time-equivalency (FTE) calculations as alleged in the complaint violate ORS 243.672(1)(e)?

(2) Has the District established any affirmative defenses?

As set forth below, we conclude that the District violated ORS 243.672(1)(e).[2]

RULINGS

1. The parties submitted 14 stipulated facts, and Joint Exhibits 1-6, which the Board received and accepted.

2. Pursuant to the terms of a prehearing order, the Association submitted Exhibits A1-A5, which were subsequently renumbered C1-C5. On the day of the hearing, the Association amended its exhibit list and added two exhibits (C6 and C7).

3. At hearing, Exhibits C5 and C7 were admitted without objection. Exhibits C1-C3 were admitted over relevancy objections. Exhibit C4 was not offered and, therefore, not admitted.

4. The District objected to Exhibit C6 on grounds of both relevance and untimely submission. A decision on the admissibility of Exhibit C6 was reserved until the issuance of this order. Under the terms of the prehearing order in this case (including an extension request that was granted by the Board), both parties were required to deliver an exhibit list and all exhibits to each other (and upload them into this Board's Case Management System) by May 18, 2023. The Association did not include Exhibit C6 on its exhibit list or otherwise deliver and upload Exhibit C6 until May 23, the day of the hearing. A party seeking to add exhibits after the date set by a prehearing order "must show good cause." *Wy'East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06 at 9, 22 PECBR 668, 676 (2008). Here, the Association did not establish good cause for the late submission of the exhibit. Accordingly, Exhibit C6 is not admitted.

[2]We also conclude that the District did not establish any affirmative defenses. The District pleaded two affirmative defenses: (1) that the District was entitled to use the expedited bargaining procedure of ORS 243.698 regarding its notice to change FTE calculations; and (2) that the District is currently engaged in good-faith bargaining with the Association in successor negotiations on other subjects. The first affirmative defense is effectively a rephrasing of the legal question before the Board on the Association's complaint, which we find in favor of the Association as explained below. The second affirmative defense (whether the District is otherwise engaging in good-faith successor negotiations on other subjects) is not pertinent to whether the District's actions regarding the FTE calculations were lawful. Therefore, we reject both pleaded affirmative defenses.

FINDINGS OF FACT[3]

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

2. John Beight is the District's Executive Director of Human Resources. In that role, he oversees Peggy Stock, Director of Employee Relations. Beight has been involved in education for approximately 26 years and has been involved in human resources for approximately 16 years.

3. The Association is a "labor organization" within the meaning of ORS 243.650(13) and is the exclusive representative of all licensed teachers, counselors, nurses, school psychologists, physical and occupational therapists, audiologists, speech language pathologists, and social workers employed at the District. The bargaining unit excludes substitute teachers.

4. Eric Schutz is the Oregon Education Association (OEA) UniServ Consultant assigned to the Association. Schutz has been a UniServ Consultant for the Association for approximately 11 1/2 years. Before that, he was a high school math and theater teacher at the District for approximately eight and one-half years. As a UniServ Consultant, Schutz is involved in labor relations matters with the District on behalf of the Association.

5. The parties are currently covered by a collective bargaining agreement that expires on June 30, 2023.

6. On June 8, 2022, this Board issued an order involving these same parties in Case No. UP-006-21. In that order, this Board held that the District violated ORS 243.672(1)(e) by unilaterally changing the methodology for calculating FTE for part-time secondary educators and those who taught an additional class during their preparation time. As part of that order, this Board found that how FTE is calculated impacts both pay and workload and, therefore, is a mandatory subject of bargaining. In that order, this Board also held that the District violated ORS 243.672(1)(e) by failing to timely provide information to the Association. As a remedy, this Board ordered the District to return to the status quo regarding FTE calculations and to make Association-represented employees whole for lost wages and benefits. The order also ordered the District to post a notice of its violations and to email that notice to Association-represented employees.

7. Pursuant to this Board's June 8, 2022, order, the District paid over $600,000 in backpay and benefits to impacted educators. Schutz and Beight were both involved in reaching that financial resolution. That process was time consuming and challenging.

[3]The parties' stipulations of fact and joint exhibits contain most information that is relevant to the resolution of this dispute. The testimony at hearing largely concerned (1) the parties' respective positions on the importance of the subject of FTE calculations; (2) the Association's perspective that its methodology for FTE calculation is longstanding and relatively standard in Oregon K-12 public sector education; (3) the District's perspective on the challenges of using the Association's FTE calculation methodology; and (4) the logistical reasons why the District opted to announce that it would change that calculation during the hiatus period. Although the evidence presented at the hearing provided some added context, it largely does not inform the Board on the legal question presented by this case. Accordingly, we do not recount much of that additional hearing evidence in this order.

8. The District also returned to the status quo, as identified in that order, for the 2022-23 school year, setting FTE based on the number of classes taught in proportion to a full-time teaching load.

9. On or around December 8, 2022, the Association notified the District of its intent to engage in successor bargaining. An initial meeting to discuss ground rules was held on February 23, 2023. On April 6, 2023, the parties exchanged initial proposals; bargaining is open to the public.

10. On or around February 17, 2023, the District informed the Association that the District intended to transition calculating FTE for all full-time and part-time secondary licensed staff based exclusively on time assigned to work. The District stated that it intended to make that change effective July 1, 2023, which is the day after the parties' current contract expires.

11. On or around February 22, 2023, the Association, via a letter from its counsel, objected to the District's proposed change. Specifically, the Association objected that the District appeared to be attempting to circumvent successor bargaining by announcing a change to FTE calculation that would take effect after the parties' contract expired. The Association's letter also included a demand to bargain.

12. The District responded that successor negotiations had yet to begin under ORS 243.712 because the parties had yet to exchange initial proposals. Therefore, the District asserted that expedited bargaining under ORS 243.698 applied to the announced change.

13. In response to the Association's demand to bargain over the District's intended change to FTE calculations, the District offered two dates in March during the work day. The Association responded that the bargaining would need to be in "open session" and after school was out for the day in order to allow Association members to attend, similar to the parties' practice for successor negotiations. The Association offered three additional dates in March during the evening to allow members to attend, with the bargaining to take place in open session.

14. On April 12, 2023, the District responded by offering six dates during the day in April and May 2023 for "expedited bargaining" on the FTE calculation issue. The Association reminded the District of the need to hold these bargaining sessions "after-hours."

15. In mid-April, the parties agreed to dates for both expedited bargaining (on the intended FTE calculation change) and for successor bargaining. The first bargaining date for expedited bargaining was held on May 17, 2023.

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) through its actions regarding FTE calculations.[4]

This dispute concerns the interplay between ORS 243.712, which provides the procedures and obligations for initial and successor bargaining, and ORS 243.698, which provides the procedures and obligations for when a public employer may invoke the expedited process for mid-term bargaining. That interplay was first addressed by the Board shortly after the passage of SB 750 (1995) in *In the Matter of the Petition for Declaratory Ruling Filed by the Sandy Union High School District*, Case No. DR-4-96, 16 PECBR 699 (1996).

In *Sandy Union*, the Board answered questions regarding three scenarios that were posed by the petitioner in a declaratory ruling request: (1) which bargaining period applies when the parties are already in successor negotiations and the employer desires to make a change in a condition of employment not covered by the existing agreement; (2) which procedure applies when the expedited process has begun, but not concluded, before the start of successor bargaining; and (3) which bargaining period applies when the employer notifies the labor organization of an intended change in a mandatory subject of bargaining and the previous contract has expired with no successor contract successfully negotiated. The Board ruled that the expedited bargaining process of ORS 243.698 only applied to the second scenario, and that the traditional bargaining process of ORS 243.712 applied to the other two scenarios.

In reaching that result, the Board, examined the text and context of the applicable provisions. The Board concluded initially that:

> "By its terms, ORS 243.698 is limited in scope. Its shorter bargaining period applies only in certain specific circumstances: (1) during the term of a contract; (2) when the employer notifies the union of 'anticipated changes'; (3) giving rise to an obligation to bargain—*i.e.*, changes concerning a condition of employment that is a mandatory subject of bargaining not covered by the existing agreement."

Sandy Union, DR-4-96 at 5, 16 PECBR at 703. The Board further concluded "that the legislature intended ORS 243.698 to provide a relatively expeditious process to address those mid-contract change proposals [that] arise outside the normal bargaining period." *Id.* at 7, 16 PECBR at 705. Consequently, the Board emphasized that "[t]he expedited process was not intended to override the regular bargaining process. Put another way, the expedited process applies when the employer's bargaining obligation arises because of its desire to make a mid-term change in working conditions, and no other avenue exists for resolving the dispute." *Id.* at 7, 16 PECBR at 705.

The Board also directly addressed the question of which process applies when an employer announces an intent to change a mandatory subject of bargaining during the hiatus period (the period after a contract has expired and before a new contract is successfully negotiated). The Board found that question "easily answered" because "[i]f there is no collective bargaining agreement in effect, ORS 243.698, by its terms, does not apply." *Id.* at 8, 16 PECBR at 706.

[4]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 and provide the parties with the opportunity for oral argument. *See* OAR 115-010-0100(3)(b).

The question presented in this case is a slight gloss on the one "easily answered" in *Sandy Union*. Specifically, the question is whether a public employer can avail itself of the expedited process of ORS 243.698 when it announces, during the term of a contract, that it intends to make a change *after* the contract expires. Although that precise question was not answered in *Sandy Union*, we conclude that the reasoning and principles it set forth are instructive. Specifically, *Sandy Union* announced that ORS 243.698 only applies to "a *mid-term* change in working conditions, and no other avenue exists for resolving the dispute." *Id.* at 7, 16 PECBR at 705 (emphasis added). In this case, the District announced a change to take effect *after* the parties' contract expires. Such a change, is not, by definition, a "mid-term change." In other words, "[i]f there is no collective bargaining agreement in effect" when the change would be operative, the expedited bargaining process of ORS 243.698 "does not apply." *Id.* at 8, 16 PECBR at 706. Consequently, the District's announcement that it would change the FTE calculation once there was no collective bargaining agreement in effect does not constitute "a mid-term change in working conditions." *See id.* at 7. Therefore, the expedited bargaining process of ORS 243.698 does not apply. *Id*

Moreover, in *Sandy Union*, the Board emphasized that the expedited procedures of ORS 243.698 apply only when "no other avenue exists for resolving the dispute." Making a change during the hiatus period, when the parties already have an avenue to resolve the dispute under the procedures of ORS 243.712, does not satisfy the *Sandy Union* standard. We further note that a public employer's announcement that it tends to make a change to a mandatory subject after the contract expires unnecessarily and impermissibly confuses the role and function of successor bargaining. In this case, for example, the same subject (FTE calculation) that the District has announced it will change after contract expiration also will be a part of the parties' ongoing successor bargaining.[5] In this way, the District's proposed change is analogous to the first question presented in *Sandy Union*, which the Board concluded was not subject to the expedited bargaining process of ORS 243.698 because "the employer has a suitable process available to it to address any proposed changes."

As in *Sandy Union*, the District's proposed action here (seeking to change a term or condition of employment during the hiatus period) would undermine the regular bargaining process by allowing the District to "segregate out a particular (and usually difficult) issue for expedited treatment. It would also promote inefficiency to require the parties to conduct separate expedited and regular negotiations concurrently." *Id.* at 7, 16 PECBR at 705. We further note that allowing the District's actions here could result in a scenario in which Association-represented employees could go on strike on the issue of FTE calculation, while still being engaged in successor negotiations on other unresolved mandatory subjects of bargaining (and unable to go on strike on those issues because the procedures of ORS 243.712 have yet to be exhausted). Such a scenario is inconsistent with the Public Employee Collective Bargaining Act (PECBA), namely, the statutory purpose of "encouraging practices fundamental to the peaceful adjustment of disputes arising out of differences as to wages, hours, terms and other working conditions * * *." ORS 243 656(3). PECBA establishes a multi-step bargaining process "designed to help the parties narrow and resolve the issues that separate them." *Blue Mountain Faculty Association/Oregon Education Association/OEA/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05, 21 PECBR 673, 754 (2007). This ensures that most critical issues are subjected to "the crucible

[5]Although the stipulations of fact do not address this issue, both parties' prehearing briefs acknowledge it to be true.

of PECBA's dispute resolution process[.]" *Id.* at 674 (quoting *Roseburg Education Association v. Roseburg School District No. 4,* Case No. UP-26-85, 8 PECBR 7938, 7956 (1985)). Although an alternative expedited process exists for mid-term changes, the *Sandy Union* standard does not permit use of that process for implementation of a hiatus-period change.

Accordingly, we conclude that a public employer may not avail itself of the expedited bargaining procedures of ORS 243.698 when it announces a change to the status quo on a mandatory subject of bargaining to take effect after the parties' existing contract expires. Because the District did so here, its actions violated ORS 243.672(1)(e).

Having concluded that the District violated ORS 243.672(1)(e), we order that the District cease and desist from that conduct. ORS 243.676(2)(c). In this context, that includes (1) maintaining the status quo and (2) addressing the subject through the provisions of ORS 243.712 and successor bargaining.

The Association also requests that we order a notice posting. We generally order a 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). Here, the District's announced change potentially impacted the Association's functioning by requiring the Association to engage in a separate process of expedited bargaining over a subject that should have been addressed in successor bargaining. Therefore, we find a notice posting appropriate. 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 a common method of communication between the District and Association-represented employees. Accordingly, we will order the District to post the notice and distribute it to bargaining unit employees by email.

Finally, the Association requests that we order 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). Here, the record does not establish that the District's actions satisfy those criteria. Accordingly, we decline to order a civil penalty.

ORDER

1. The District shall cease and desist from violating ORS 243.672(1)(e), as set forth in this order.

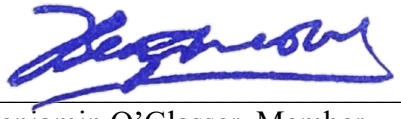
2. The District shall post the attached notice for 30 days at all District facilities where Association-represented employees work, so as to maximize employee access to the notice.

3. 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 22, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, 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-015-23, *Salem Keizer Education Association v. Salem-Keizer School District*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that the Board found that Salem-Keizer School District (District) committed an unfair labor practice in violation of ORS 243.672(1)(e), which prohibits a public employer from refusing to bargain in good faith with the exclusive collective bargaining representative of its employees. The Board concluded that the District violated the duty to bargain in good faith through its actions regarding an announced change in FTE calculations intended to take effect July 1, 2023. To remedy this violation, the Board ordered the District to:

1. Cease and desist from violating ORS 243.672(1)(e), which includes (1) maintaining the status quo and (2) addressing the subject through the provisions of ORS 243.712 and successor bargaining.

2. Post this notice for 30 days in prominent places where employees represented by Salem Keizer Education Association are employed.

3. Distribute this notice by email within 10 days of the date of this order to all employees represented by Salem Keizer Education Association.

Dated_____, 2023

EMPLOYER
By: _____

Title: _____

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for 30 consecutive days from the date of posting in each employer facility in which bargaining unit personnel are likely to see it. This notice must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 1225 Ferry Street S.E., Salem, Oregon, 97301-3807, phone 503-378-3807, EmpRel.Board@ERB.Oregon.gov.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-005-23

(UNIT CLARIFICATION)

JOSEPHINE COUNTY SHERIFF'S ASSOCIATION, Petitioner, v. JOSEPHINE COUNTY SHERIFF'S OFFICE, and OREGON AFSCME COUNCIL 75, LOCAL 3694, Respondents.	)	ORDER TRANSFERRING POSITION TO A MORE APPROPRIATE BARGAINING UNIT

On April 10, 2023, Josephine County Sheriff's Association (Association) filed a unit clarification petition under OAR 115-025-0050(1)(d) and (8) to determine whether the position of Animal Control Officer, currently within the bargaining unit represented by Oregon AFSCME Council 75, Local 3694 (AFSCME), more appropriately belongs in the bargaining unit represented by the Association. A majority of eligible employees in the position signed valid authorization cards indicating a desire to select the Association as their bargaining representative. *See* OAR 115-025-0050(8)(b).

On April 11, 2023, the Board's Election Coordinator directed the Josephine County Sheriff's Office to post a notice of the petition by April 17, 2023. *See* OAR 115-025-0060. Because the Josephine County Sheriff's Office did not post the petition as directed, an amended notice of the petition was provided for posting on April 24, 2023. Pursuant to the terms of the amended notice posting, objections to the transfer were due within 14 days of the date of the notice posting (*i.e.*, by May 8, 2023). No objections were filed.

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 May 24, 2023. Three valid ballots were returned by the deadline of June 14, 2023, which constitutes the date of the election. *See* OAR 115-025-0072(1)(b)(A). A tally of ballots was held on June 15, 2023, and a majority of the votes counted were cast for the Association. The tally of ballots was provided to the parties on June 15, 2023.

Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by June 26, 2023). *See* OAR 115-025-0075. No objections were filed.

ORDER

The result of the election is certified, and the petition to transfer the position of Animal Control Officer to the bargaining unit represented by Josephine County Sheriff's Association is granted.

DATED: June 29, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-018-22

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION, Complainant, v. CLACKAMAS COUNTY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 4, 2023, this Board heard oral argument on the objections of Respondent Clackamas County (County) and the cross-objections of Complainant Clackamas County Employees' Association (Association or CCEA) to a September 30, 2022, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe, after a hearing on July 12, 2022.[1] The record closed on July 27, 2022, upon receipt of the parties' post-hearing briefs.

Katelyn S. Oldham, Attorney at Law, Oldham Law Office LLC, Beaverton, Oregon, represented the Complainant.

Andrew Narus, Assistant Clackamas County Counsel, Clackamas County, Oregon, represented the Respondent.

On May 31, 2022, the Association, filed an unfair labor practice complaint with the Board against the County. The Association requested that the Board expedite all or part of the complaint pursuant to OAR 115-035-0060. On June 6, 2022, the County opposed the request to expedite. On June 10, 2022, the Board granted the request to expedite, but decided that, unlike most expedited matters, this case would be assigned to an ALJ to conduct the hearing

[1]Due to a vacancy on the Board at the time of oral argument, the Board delayed its consideration of the parties' arguments until after May 1, 2023, to allow for a full three-member Board to participate in the decision of this case.

and issue a recommended order as expeditiously as possible. *See* OAR 115-035-0060(5)(b).[2] On June 21, 2022, the County filed a timely answer.

The issues are:

(1) Did the County violate ORS 243.672(1)(a) or ORS 243.672(1)(e) by failing to adequately respond to the Association's March 2022 information request or by failing to bargain as requested by the Association in May 2022?

(2) Is a civil penalty warranted?

As set forth below, we conclude that the County violated ORS 243.672(1)(e).[3] However, we decline to award a civil penalty.

RULINGS

1. The ALJ correctly admitted all the exhibits that were offered during the hearing. Additionally, the ALJ correctly did not admit an Excel spreadsheet that the Association relied on during the hearing, as it was not provided to the County in advance of the hearing or formally offered into evidence.

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

FINDINGS OF FACT

The Parties

1. The County is a "public employer" within the meaning of ORS 243.650(20). It employs around 2,400 to 2,500 employees in total. Of those, around 370 are "non-represented/management employees," around 2,035 are represented by a union (a number that includes a mix of full-time, part-time, and temporary employees), and around 100 are temporary employees who are non-represented.

2. Gary Schmidt is the current County Administrator.

3. Eric W. Sarha is the Deputy Director of Human Resources (HR) for the County. Sarha has worked for the County for five years. During that time, he has been the County's chief negotiator.

4. Heather Pedersen is the County's Classification/Compensation Manager. Pedersen has had that role for 17 years.

[2]In expediting the matter, the Board also ruled that post-hearing briefs would not be allowed, unless agreed to by both parties (*see* OAR 115-035-0060(5)(c)). Here, both parties agreed to submit post-hearing briefs.

[3]Because our remedy would be the same, we exercise our discretion to not reach whether the County's conduct also violated ORS 243.672(1)(a).

5. The Association, a union, is a "labor organization" within the meaning of ORS 243.650(13). It is the exclusive representative of three distinct bargaining units of County employees. One of those units includes a relatively wide-ranging group of County employees, and has been referred to as the "main" or "EA" unit. Another of the Association's units includes a group of employees who work for the Housing Authority of Clackamas County (which is part of the County), and has been referred to as the "HAC" or "HACC" unit. The Association's third unit includes the County's part-time and temporary employees, and has been referred to as the "EAT" unit. In total, the Association represents about 1,000 County employees.[4]

6. The Association's current President is Don Miller. Miller works for the Housing Authority of Clackamas County.

7. Greta Nickerson has been the Association's Vice President since 2021. Nickerson is a Payroll Specialist for the County and works in the County's Department of Finance.

8. Represented County employees are covered by one of eight separate collective bargaining agreements (CBAs) between a union and the County, each of which is affiliated with a different bargaining unit. The County and the Association are parties to three of those CBAs (with a separate CBA for each of the Association's three units). Further, each of the Association's three current CBAs runs from 2021 to 2024 and was signed by the parties on April 28, 2022.

9. Outside of the Association's three bargaining units, the American Federation of State, County and Municipal Employees represents three separate units of County employees, the Federation of Probation and Parole Officers represents another, and the Clackamas County Peace Officers' Association represents yet another unit that includes employees in the Clackamas County Sheriff's Office.

Oregon's Equal Pay Act and the County's Equal Pay Analysis

10. Under Oregon's Equal Pay Act, differences in pay among employees who perform "work of comparable character" must be based on one or more "bona fide factors" enumerated in the same statute. Those factors include "education," "experience," and "seniority," among others. Although some of the Equal Pay Act's bona fide factors are specifically defined by law or an Oregon Bureau of Labor and Industries (BOLI) regulation, others are not so defined. Additionally, the term "work of comparable character" (which has occasionally been abbreviated as "WCC" in the record), as used in the Equal Pay Act, has five specific factors of its own (including "knowledge," "skill," "effort," "responsibility," and "working conditions") and is irrespective of job description or job title. The five factors are also defined in BOLI regulations.[5]

[4]Both parties consistently refer to all the employees represented by the Association as Association "members."

[5]*See* ORS 652.210(13) (defining "work of comparable character"); ORS 652.220 (listing the eight "bona fide factors"); OAR Ch 839, Division 8 (BOLI's Pay Equity regulations).

11. Under the Equal Pay Act, an Oregon employer can voluntarily choose to conduct an "equal pay analysis" of its compensation practices to determine whether those practices comply with the statute. When an employer does so, and also takes corresponding steps to eliminate discriminatory wage differences, it can reduce its liability if an Equal Pay Act lawsuit is filed against the employer during the following three years.[6] Evidence of an equal-pay analysis is admissible for purposes of an employer's motion to disallow compensatory and punitive damages, but "is inadmissible in any other proceeding."[7] Accordingly, this element of the Equal Pay Act has been described as the statute's "safe harbor" provision.

12. In late 2018, the County voluntarily contracted with a consulting company called "THR" (a pseudonym) to conduct an equal pay analysis and identify County policies that might be in violation of the Equal Pay Act. None of THR's work was performed by an attorney.

13. In 2018 and 2019, as part of THR's equal pay analysis, County employees were directed to fill out "pay equity questionnaires" that were sent out by THR. Those questionnaires asked employees about their "experience" (specifically, time spent in an employee's current County classification) and other subjects. Subsequently (before the County hired Heidi Mason, an attorney, whose role is detailed below), THR collected completed questionnaires. No attorney was involved in the collection process. The County later learned that THR's question about "experience" was vaguely written, and was phrased differently depending on which union represented an employee.[8]

14. In early 2019, the County notified its employees and their unions that the County would be performing an equal pay analysis.

15. Since early 2019, the County has received several questions and expressed concerns from its employees about pay equity and related matters. Additionally, one County employee has filed a BOLI complaint against the County concerning pay equity.[9]

16. In November 2020, before THR gave the County its final report, the County sought out another consultant to evaluate THR's methodology and findings, to help the County conduct another equal pay analysis, and to get additional recommendations and feedback regarding the County's business policies and practices. At the time, the County was not confident in the accuracy of the work product that it was receiving from THR.

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[6] *See* ORS 652.210(4) (defining "equal-pay analysis"), ORS 652.235.

[7] *See* ORS 652.235 (describing circumstances under which an equal-pay analysis is inadmissible).

[8] Copies of these pay equity questionnaires were not shared with Association and are not included in the record. Association Vice President Nickerson testified that, in at least one "survey" that was given to employees, the County asked if employees felt that they were adequately compensated for the type of work that they were doing, and if other classifications performed similar work.

[9] The record does not reveal precisely when these questions and concerns were shared, what they were, or who shared them. It also does not provide any other details about the BOLI complaint.

17. Heidi Mason is a private attorney with Innova Legal Advisors. On February 16, 2021, the County and Mason signed a contract for Mason to provide the County with outside legal services related to the Equal Pay Act. Section 2.1 of that contract specified, "The relationship of Firm to County arising out of this Contract shall be that of attorney and client. Firm shall assist the County in the provision of legal services, including consultation with the officers of County as necessary." Section 2.2 stated, "County staff shall assist Firm in locating, developing and providing any documentation necessary to support the legal services provided by the Firm." As of June 2022, the County had paid Mason approximately $85,000 for her legal services.

18. Mason started working for the County shortly after signing the February 16, 2021, contract with the County. On March 1, 2021, the County had its first meeting with her. In total, the County had over 20 meetings with Mason between March 1, 2021, and June 2022, and also exchanged a significant number of emails with her during that period.

19. In April 2021, THR gave the County a written final report that included findings and recommendations, and broadly identified a number of employees that it concluded were either underpaid or overpaid. Ultimately, the County was unsatisfied with THR's report and did not rely on it. Moreover, the County did not give the Association a copy of THR's report or any of the underlying data affiliated with it.

20. While Mason worked for the County, her primary contact for the County was Classification/Compensation Manager Pedersen. However, Mason also worked with and provided advice and counsel to other members of Pedersen's Classification/Compensation team, HR, County Counsel, the County Administrator, and the Board of County Commissioners. The County's Classification/Compensation team collected information and provided it to Mason to help her with her analysis.

21. As indicated above, part of Mason's work involved reviewing the work of THR, including its findings and recommendations. After doing so, Mason identified "some gaps and concerns," concluded that THR's work did not comply with the Equal Pay Act, and recommended that the County should not adopt THR's work. After that, the County asked Mason to help it "redo" THR's equal pay analysis.

22. While working for the County, Mason answered the Classification/Compensation team's questions, gave advice concerning the County's existing pay practices, helped the County's Classification/Compensation team come up with a "framework" for complying with the Equal Pay Act, and developed some "components" of the County's equal pay analysis. In particular, Mason advised the County regarding how to apply the Equal Pay Act's "work of comparable character" term of art. Mason also helped the County develop the specific "criteria" (*i.e.*, employee information) or definitions that the County would use to apply and measure the Act's "bona fide factors" (including "education," "experience," and "seniority," for example) to determine appropriate employee pay. As part of that, Mason provided guidance and direction regarding what type of information the County should collect on employees, and how to legally use that information in an equal pay analysis. In general, the County relied on Mason's advice.

23. As part of its 2021 equal pay analysis, the County reviewed every job classification and the work that employees were performing within those classifications. The County also established minimum qualifications for every classification, and collected "prior relevant non-[C]ounty experience for every employee." After that, the County identified employees it viewed as performing "work of comparable character" and, with Mason's assistance, evaluated and compared their pay rates. Many of those employees were in different bargaining units and had different pay plans. To address pay differences, the County planned to propose "grouping" different classifications together, regardless of the employees' respective units, and "reconciling" the salary grades of a given grouping. In theory, if those changes were made, the County would have consistent initial base pay and movement through the corresponding pay scale for all of its employees. Among other things, the County concluded that approximately 660 employees were below their "expected pay rate." To remedy that, the County planned to propose increasing those employees' hourly pay rates. The County did not work with the Association or its officers while conducting its equal pay analysis or while collecting related data.

24. Before the County conducted its equal pay analysis, the County did not maintain any information about its employees' "experience" other than the time that each employee spent working for the County and in his or her classification. Now, based on Mason's advice and guidance, the County is also tracking pre-County employment experience. To evaluate that type of "experience," the County's Classification/Compensation team (not Mason) collected and considered the application materials, resumes, and CVs that the County had on file for each employee. In addition, the term "seniority" has historically been defined differently in different CBAs and County ordinances. Based on Mason's advice, the County developed a new definition for "seniority" that would be consistent for all County employees (regardless of which CBA covers an employee) for purposes of the County's equal pay analysis. The County did not share that new definition of "seniority" with any of its unions or notify them of the change.

25. THR did not use the completed pay equity questionnaires in its pay equity analysis. Further, the County opted to keep the questionaries "in house" and did not give Mason copies of them. Nevertheless, the County did review and use the questionaries as part of the County's own pay equity analysis to help it determine "work of comparable character."

26. In December 2021, the County, with Mason's assistance, completed the first phase of its equal pay analysis. It was "significantly different" than THR's equal pay analysis.

27. In or around January or February 2022, the County announced that the results of its latest equal pay analysis would be released.

28. On March 7, 2022, the County shared some of the results of its equal pay analysis in a single meeting attended by leaders of each of the unions (including the Association). During that meeting, the County showed a PowerPoint presentation and reported, among other things, that the County would be taking action to increase the wage rate for certain employees as a result of the County's equal pay analysis. The PowerPoint and the County's presenters did not identify any individual employees by name. As noted in the PowerPoint, the County recommended that about 490 Association-represented employees (about 361 in EA, 15 in HAC, and 114 in EAT) receive salary adjustments (*i.e.*, pay increases) because they were being *underpaid*. The County also noted

that about 259 Association-represented employees (about 228 in EA, 11 in HAC, and 20 in EAT) were *above* the expected payrate. The penultimate PowerPoint slide specifically indicated that the "Next Steps" of the County's plan would include the following: (1) "Commence impact bargaining related to pay plan changes so that adjustments can be implemented." (2) "Implement pay increases for all employees as soon as possible." (3) "Review employees shown as *above* expected pay rate and recommend further action." (4) "Review and recommend updates to current merit recognition system." The County's presentation did not recommend that any employee's salary be reduced as a result of the equal-pay analysis; such reduction is expressly prohibited by the Oregon Equal Pay Act.[10]

29. After listening to the County's March 7, 2022 presentation, the Association immediately had serious concerns about the County's proposed changes, and was particularly concerned about the employees the County asserted were above their expected payrate. The Association was also concerned about the County's assertions, made during the March 7, 2022 meeting, that the portion of the County's equal pay analysis that concerned overpaid employees was still incomplete, and that the number of employees the County viewed as being overpaid could go down after further investigation. At some point, during a meeting, Association President Miller verbally raised concerns with Classification/Compensation Manager Pedersen about the accuracy of the payrates that the County was using to determine that certain employees were being overpaid, and about whether the County was properly considering "total compensation" (*i.e.*, pay plus benefits).

30. On March 8, 2022, Classification/Compensation Manager Pedersen sent an email to the Association and others. The email included, as an attachment, a copy of the PowerPoint presentation that the County had shared on March 7, 2022. The bottom of Pedersen's email included a separate email message from County Administrator Schmidt, sent to all County employees earlier the same day, that announced that the County's equal pay analysis had been completed, and generally explained that analysis. Schmidt's message also stated that, on March 8, 2022, "the Board of County Commissioners have approved moving forward with salary adjustments for some individual employees to align with the County's compensation philosophy with an effective date of January 1, 2022." It further stated, "**No employee's pay will be reduced as a result of the County's analysis.**"(Emphasis in original.) Subsequently, the email noted, "The timing for implementation of these pay increases will depend on when agreements are reached with the respective unions. Once bargained, employees identified for salary adjustments will receive individual written notice from Human Resources."

The Association's First Information Request

31. On March 11, 2022, Katelyn S. Oldham, the Association's attorney, sent a letter with a Public Employee Collective Bargaining Act (PECBA) information request to Deputy Director of HR Sarha and Classification/Compensation Manager Pedersen via email. The letter requested the following information so that the parties could "engage in expedited bargaining," and explained why the Association needed that information:

[10] *See* ORS 652.220(4) ("An employer may not reduce the compensation level of an employee to comply with the provisions of this section.").

"1. For each CCEA covered employee:

"i. Name of the employee, classification/job title, department, and amount per hour the County believes the employee is being underpaid or overpaid. Additionally, comparator classification/job title (if known).

"• This information can be provided in a spreadsheet, chart, or other list format already existing and prepared pursuant to the Equal Pay Act Study.

"2. Copy of the County's analysis and Data regarding those positions that are being underpaid and that may be 'overpaid.'

"• If we need to sign a proprietary nondisclosure agreement limiting the dissemination to EA officers and their attorney, we will agree to do so.

"• This analysis and data should include not only employees who are represented by a labor union or association, but also those employees at Clackamas County who are nonrepresented/exempt. We noted that the charts shared with the unions on March 7th in the PowerPoint did not include nonrepresented positions or the amount of over or under payment in that employee group. For us to understand the data, we need to review a complete set that includes the nonrepresented individuals."[11]

32. On April 7, 2022, Assistant Clackamas County Counsel Andrew Narus sent an email to Oldham that included two attachments. The email stated,

> "Attached are documents responsive to your March 11 information request. Please be aware that the information contained in these documents is contingent on our bargaining changes to the pay plans for each bargaining unit. As we will explain as part of the County's initial proposal, the County needed to reconcile different salary grades across different bargaining-unit pay plans to conduct its analysis. So, this information is not 'final' until we reach agreement on the reconciliations the County made. I will be sending an initial proposal next week, which will provide more detailed information.

[11]In its entirety, the first paragraph of the Association's information request stated, "This request for information is being issued pursuant to the PECBA so that [the Association] can administer the contract and engage in expedited bargaining concerning the County's Equal Pay Act Study. As you know, the PECBA requires that employers provide information that may be needed to administer the contract, including for bargaining purposes, and to perform its functions as the exclusive representative of CCEA members." According to Association Vice President Nickerson, the Association's reference to "administer the contract" involved the paygrades section of the parties' CBA.

> "In the attached documents, we have not disclosed each employee's name. Instead, a unique identifier has been provided. I appreciate the explanation offered in your March 11 letter regarding the CCEA's general interest in the information requested. But could you please specifically explain the relevance of the individual employees' names?
>
> "With respect to your request for a copy of 'the County's analysis and Data,' that analysis was conducted at the direction, with the participation, and consistent with the legal advice of outside legal counsel and the Office of the County Counsel. We are asserting the attorney-client and attorney work product privilege over the analysis and data. If there is any specific information you would like, please let me know and I will let you know if we are able to provide it.
>
> "I had hoped to share a specific proposal with you today, which I believe will provide additional information about how the County hopes to proceed. However, I will not be able to do so until next week. I understand you may have questions about the County's implementation of its analysis and its impacts on CCEA members, and I would ask for your patience as we prepare to deliver a proposal."

33. One of the two attachments to Narus's April 7, 2022, email, ("CCEA Equal Pay Report Summary of Findings 4.2002.pdf"), ostensibly included "Report Findings" for the "EA, EAT, [and] HACC Union Groups" and resembled a spreadsheet. That attachment noted, in part, how much each employee was allegedly being paid above or below the employee's "expected" hourly payrate. As indicated in Narus's email, in lieu of including employees' actual names, the attachment used anonymous, four-digit "Unique IDs," which largely prevented the Association from identifying individual employees.[12] The same attachment also listed each employee's department (*e.g.*, Health, Housing and Human Services) and "Job Description/Classification" (*e.g.*, Abuse Investigator). The other attachment to Narus's April 7 email, ("EA IR Visual.pdf"), appeared to indicate which classifications the County was proposing be "grouped" together into the same pay range. The attachment contained no additional explanation of the information provided, why certain classifications had been grouped together therein, or how the County had arrived at its conclusions. As noted above, neither attachment included the underlying "Data" requested by the Association.

The County's Initial Salary Grade Realignment Proposal

34. On April 20, 2022, Deputy Director of HR Sarha emailed Oldham, Association President Miller, and others a copy of the County's first formal proposal to the Association that concerned the County's pay equity analysis. The email (which included six attachments) summarized the actions that the County was proposing to provide pay increases to the employees the County had identified for increases, and provided a brief explanation of why the County believed that those actions were necessary. As indicated above, in part, the County proposed that

[12]The same "Unique IDs"/"unique identifiers" were also used when the attachment was shared with the County Administrator and other management officials. Early on in her time working for the County, Mason advised the County to keep employee names off documents where possible. Mason's rationale for doing so is not included in the record.

certain classifications that the County had deemed to be performing "work of comparable character," regardless of the classification's bargaining unit, be "consolidated" into a single "WCC grouping" and "salary grade." Significantly, that proposal required a variety of "salary grade realignments"—including giving pay increases to employees who were identified as being below their expected pay rate—and the elimination of certain vacant classifications from the salary schedule/pay plan. Additionally, under the same proposal, the County would also limit the upper and lower ranges of salaries for certain classifications. A similar initial proposal was sent to the County's other unions.

35. Among other things, Deputy Director of HR Sarha's April 20, 2022, email, specifically noted,

> "In order to evaluate employees[']pay across pay plans and complete its analysis, the County was required to reconcile the salary grades within a job classification or WCC grouping. When reconciling salary grades, in almost all cases, the County adopted the existing salary grade with (1) the highest minimum salary that (2) had incumbents in a position in the classification. In the County's view, this benefits the most employees as salary grade placement is based on the minimum of the grade, it is the fairest implementation for employees at both ends of the pay range based on the current compensation system, and it most positively impacts employees recommended for salary adjustments while minimizing negative impacts for employees appearing to be above their expected pay rates. Where the County did not select the salary grade with the highest minimum salary as described above, it was because the salary grade with the highest minimum was part of a job series (*e.g.*, Management Analyst 2) and selecting that salary grade would have a significant impact on other classifications in the series that would not otherwise be impacted."

Subsequently, the same email stated, "The County has not yet completed its review of those employees that have been initially identified as being above their expected pay. Once this work is completed the County will be putting forth a proposal to address this issue, as well as other proposals to address changes that may be needed to comply with the Oregon Equal Pay Act."[13]

36. On April 27, 2022, Classification/Compensation Manager Pedersen issued a letter to an Accountant 2 (Accountant Doe) who worked in the County's Department of Finance and was represented by the Association. The letter stated, in part,

[13]There are no other County proposals in the record, but at least one additional proposal was expected after the hearing. Association Vice President Nickerson testified that the County has never proposed changing working conditions for employees the County has identified as being above their expected payrates. Relatedly, Deputy Director of HR Sarha testified that he was unaware of any County proposal to freeze employees' pay.

> "Based on the equal pay analysis, you were determined to be below your expected pay rate by $5.494091 per hour. The County is currently finalizing the analysis and taking steps to implement salary modifications throughout the County. We recognize, however, that you will be retiring from the County very soon and would like to apply this adjustment before you exit the County.
>
> "As such, you will be receiving an additional lump sum payment of $5391.89 with your final paycheck. This payment reflects a retroactive adjustment to your pay from 1/1/22 through 4/28/22 by the hourly rate noted above." (Emphasis in original.)[14]

Accountant Doe's Accountant 2 classification was one of the classifications involved in the County's April 20, 2022, salary realignment proposal, which the Association had not accepted as of the hearing for this case. Moreover, the County never notified the Association of the payment to Accountant Doe.

37. On April 27, 2022, Oldham also spoke with Narus over the telephone and asked the County to "at least try to provide (1) the names of the affected [Association-represented] employees, (2) general comparator information regarding those employees who are not in any of the County's bargaining units ('unrepresented' employees), and (3) information concerning the experience and/or seniority of the affected employees."

38. On April 28, 2022, the parties signed and ratified the latest versions of their three CBAs. The CBAs did not resolve the proposed salary grade realignment matter. Several weeks before April 28, 2022, the parties reached a related tentative agreement.

39. On May 4, 2022, at 1:18 p.m., Narus sent Oldham an email. It stated, in part,

> "One item I would like to discuss is the County's concerns about providing names. Until the parties bargain the changes to the salary grades, which is the only proposal the County has made at this time, it is not certain that all the identified employees will be above or below the appropriate pay rate at the conclusion of bargaining. So, I'm curious about whether [the Association] intends to share this information with each employee, as that could lead to inaccurate expectations."

Narus's May 4, 2022, email, also clarified that the spreadsheet that the Association had received was created in response to the Association's information request and was not part of another, larger spreadsheet.

The Association's Demand to Bargain

40. On May 4, 2022, at 6:08 p.m., Oldham sent a letter to Deputy Director of HR Sarha, Classification/Compensation Manager Pedersen, and others via email. Therein, Oldham wrote,

[14]The record does not reveal when this individual received the alluded-to final paycheck, or their name.

> "Pursuant to your email of April 20, 2022, we are formally demanding to bargain the proposed changes to wage rates of [Association] bargaining unit employees because of the Equal Pay Analysis. Please let me know what your availability is to meet for bargaining.
>
> "We have requested information from the County to be able to effectively bargain but have only received limited information. I will be following up separately regarding that issue."[15]

41. On May 10, 2022, Oldham sent a separate letter to Sarha, Narus, and others via email. In sum, the May 10, 2022, letter summarized Oldham's March 11, 2022, information request, detailed how the Association viewed the County's April 12, 2022, response as inadequate, and requested additional information. Among other things, Oldham wrote, "I have received no information to indicate that the County has a legitimate privilege in the entire study or that the data would be protected from disclosure by that privilege." Regarding the Association's purported need to know the identities of the affected Association-represented employees, Oldham wrote, in part, "We need this information because these are our members and, as their exclusive bargaining representative, we need to know whether and how pay adjustments could impact them." The letter also pointed out some perceived flaws with the County's analysis and related proposal. Near the end of the letter, Oldham wrote,

> "As I stated in my letter of March 11, 2022, while the [Association] is willing to bargain over the impacts of the equal pay analysis and, specifically, regarding ways in which employees will be treated fairly and equitably moving forward and made whole to the extent they can be, we cannot do so blindly, and we cannot interfere with the legal requirements of Oregon's Equal Pay Act. We remain concerned that bargaining blindly over these pay adjustments could short a member on an increase that that [*sic*] they are legally entitled to under the Act, or that we could bargain a salary range that has the unintended consequence of causing a member to be red circled, or otherwise detrimentally impacted. We are particularly concerned that if we do not have sufficient information to be able to identify the impacts of a bargaining proposal and who they will impact, we are doing our members a disservice."[16]

42. On May 19, 2022, in another email, Oldham notified the County that the Association would initiate an unfair labor practice complaint with the Board the following week. Oldham also wrote, among other things, that the County's "lack of transparency regarding [the] equal pay analysis has been incredibly frustrating for the [Association]," and that the Association

[15]The Association did not demand to bargain anything related to the County's equal pay analysis in 2020 or 2021.

[16]As defined in the Association's brief (at 5), "'Red-circling' the wage of an employee means no additional merit, step or other adjustments are made until the employee is deemed to be at the level of pay the employer deems appropriate."

could not even answer employees' "basic questions" such as, "[H]as my job been identified by the County as subject to an adjustment or possible redlining?" Subsequently, Oldham wrote,

> "Finally, given the County's initial proposal combining multiple, unrelated job classifications into one pay range and eliminating the upper maximums of such ranges, we are concerned that the County may be using the equal pay analysis as a pretext for moving to a different pay scale that is not appropriate nor justified by the act as naturally flowing from the analysis. The act does not intend for employees [to] be penalized or reduced in compensation or that all employees be paid the same compensation. Indeed, such results would be contrary to the act."

43. In the last week of May 2022, the Accountant 2 who had received the April 27, 2022, letter about receiving an additional lump sum payment gave Association Vice President Nickerson a copy of that letter. At the time, the former Accountant 2 was working for the County as a temporary employee, no longer worked in the County's Department of Finance as she had before, had retired earlier in 2022, and had already been paid the promised lump sum. The former Accountant 2 shared the letter with Nickerson because she was concerned that she might have to pay some of the lump sum back to the County.[17]

44. On May 23, 2022, Oldham sent an email to Narus and Deputy Director of HR Sarha in which she wrote, in part, "I have never received an answer regarding support for the claim of attorney-client privilege in the data and I have never received information identifying which of our members will be impacted."

45. On May 31, 2022, the Association filed this case's unfair labor practice complaint with the Board against the County.

46. On June 8, 2022, the parties met for their first bargaining session regarding the County's proposed salary grade realignment. During that session, the Association requested (1) "historical information about the classifications the County was proposing to remove from the [Association's] salary plan" and (2) "examples regarding how the [work of comparable character] factoring worked in certain cases." The parties also discussed having the affected employees' names shared pursuant to a confidentiality agreement.

47. On June 9, 2022, Narus sent an email to Oldham. The email included, as an attachment, a proposed confidentiality agreement that, if signed by both parties, would cover the names of the employees who would be impacted by the County's proposal. The email also included, as an attachment, a "Framework Description" that was based in part on Mason's guidance and legal advice concerning the factors of "work of comparable character." The document did not illustrate how the framework was actually applied to any classifications. According to the email, the Framework Description document was provided in response to the

[17]Nickerson testified that she has heard that other County employees have also received additional payments. However, those employees were not named during the hearing, and they have not contacted her. Further, Nickerson did not know if any of those employees still worked for the County as of the hearing. The County did not deny that it has unilaterally made the additional payments.

Association's request for information "the County relies upon to propose collapsing various wage and salary scales together."

48. On June 13 and 22, 2022, the parties held bargaining sessions regarding the County's salary realignment proposal. During those sessions, among other things, the Association expressed that, in its view, the County's proposal would result in "compression issues" and possible Equal Pay Act violations.

49. On June 22, 2022, Narus sent Oldham another email that included, as an attachment, a revised version of the proposed confidentiality agreement that the County shared on June 9, 2022. On June 23, 2022, at 2:18 p.m., Oldham responded to Narus's June 22, 2022, email. Oldham's response included her own revisions to the proposed confidentiality agreement.

50. On June 23, 2022, at 3:13 p.m., Oldham emailed Narus and Deputy Director of HR Sarha a letter with a counterproposal from the Association in response to the County's proposed salary realignment. One aspect of the counterproposal was a proposal to raise the maximums for any classification that the County wanted to adjust down. Another aspect generally involved a proposal to not strike certain classifications from the Association's pay plan as proposed by the County. Oldham's June 23, 2022, letter also stated, "As we have repeatedly indicated, we are concerned about 'bargaining blind' and making proposals that will have unintended consequences because we have been prevented by the County from receiving the [E]qual [P]ay [A]ct analysis data and even our own members' names who the County believes will be impacted." At some point after June 23, 2022, the Association gave the County an Excel spreadsheet version of its counterproposal after the County requested it do so.

51. On June 27, 2022, at 8:46 a.m., Narus emailed Oldham a digitally signed copy of the confidentiality agreement that included a few edits to Oldham's revised version of the proposed agreement. Later that same day, at 9:11 a.m., Oldham signed the same version of the agreement. Accordingly, at 9:35 a.m., Narus emailed Oldham a copy of the County's "Report Findings" document that included the requested employee names. Since receiving those names, the Association has not adjusted or modified its June 23, 2022, counterproposal.

52. On June 28, 2022, Narus sent Oldham another email. It stated that the County had compiled the bona fide factor information used for Association-represented employees. However, it also stated that, before the County disclosed that information, it would like to enter into another confidentiality agreement with the Association. The email included a proposed confidentiality agreement as an attachment.

53. On June 29, 2022, Oldham emailed Narus a modified version of the proposed confidentiality agreement. After exchanging a series of emails on that subject, on June 30, 2022, both parties' representatives signed a modified confidentiality agreement covering the County's bona fide factors information. Shortly thereafter, the County gave the Association a "bona fide factors document."

54. The bona fide factors document that the County gave the Association generally contained some "basic employment information" organized into three columns. One of those

columns addressed "years of service" and another addressed "years of experience." As with the Report Findings document, the Association has not modified its June 23, 2022, counterproposal since it received the bona fide factors document.[18]

55. Mason did not create or prepare the County's bona fide factors document. However, Mason did review the document before it was finalized. In addition, the information contained in the document was gathered and prepared at Mason's direction.

CONCLUSIONS OF LAW

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

2. The County violated ORS 243.672(1)(e) by failing to adequately respond to the Association's March 2022 information request, and by failing to bargain as requested by the Association in May 2022.

The Association asserts two separate violations of ORS 243.672(1)(e). The Association centrally asserts that the County violated ORS 243.672(1)(e) via the County's response to the Association's information request. The Association also asserts that the County violated ORS 243.672(1)(e) when it implemented unilateral changes before the statutory bargaining period ended and before the Association accepted the County's proposal. We address both assertions below.

The Duty to Provide Information

Legal Standards

ORS 243.672(1)(e) makes it 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" of its employees. As part of that statutory "duty to bargain," a public employer is required to supply relevant information upon request to the exclusive representative when the information is sought for purposes of collective bargaining or representation of bargaining unit employees. *Multnomah County Corrections Officers Association v. Multnomah County Sheriff's Office and Multnomah County,* Case No. UP-21-86 at 27-28, 9 PECBR 9529, 9555-56 (1987). In such cases, relevance is ordinarily determined by the liberal "discovery-type" standard adopted in *NLRB v. Acme Indus. Co.*, 385 US 432, 87 S Ct 565(1967). Under that standard, the duty to supply information arises so long as the information sought is of probable or potential relevance to a contractual or collective bargaining matter. *Association of Oregon Corrections Employees v. State of Oregon, Department*

[18]Neither of the two requested documents that was provided to the Association pursuant to a confidentiality agreement is included in the record. Moreover, neither of those documents was submitted to the ALJ for *in camera* review. At the outset of the hearing, the Association asserted that it signed the two confidentiality agreements "under duress," and that neither document is truly confidential or protected by a privilege. Subsequently, the Association generally described the bona fide factors document as a table with employee names, a column titled "directly relevant experience at time of placement in classification," another column titled "EPA seniority at time of placement in classification," and a third column titled "time in classification as of January 1, 2022 experience seniority."

of Corrections, Case No. UP-7-98 at 10, 18 PECBR 64, 73 (1999); *Washington County School District No. 48 v. Beaverton Education Association & Nelson*, Case No. C-169-79 at 6-8, 5 PECBR 4398, 4403-05 (1981). Of note in this particular case, a party must generally "provide requested information where the information is * * *'reasonably necessary to allow meaningful bargaining on a contract proposal.'" *Oregon Education Association and Moberg v. Salem-Keizer School District #24J*, Case No UP-55-96 at 4, 17 PECBR 188, 191 (1997) (quoting *Washington County School District No. 48*, C-169-79 at 8, 5 PECBR at 4405).

Our analysis of a party's obligation to provide requested information begins with the premise of full disclosure. However, an exclusive representative's interest in information will not always predominate over other legitimate interests. The employer may legally object to the release of requested information, and the duty to supply the requested information may be limited or sometimes excused for certain reasons. Those reasons might include legitimate and substantial confidentiality interests, privacy claims, and personnel information protected by statute, for example. Beyond that, this Board has recognized that, in appropriate cases, an employer may furnish relevant information to an exclusive representative in a form different from that sought by the representative. Additionally, there may be acceptable alternatives to complete disclosure. We urge the parties to take a common-sense approach. *Oregon AFSCME Local 3581 v. State of Oregon, Real Estate Agency*, Case No. UP-42-03 at 5, 21 PECBR 129, 133 (2005); *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81 at 5-7, 6 PECBR 5027, 5031-33 (1982).

In this context, the initial burden is on the exclusive representative to show that the requested information is relevant. If the exclusive representative fails to make a threshold showing, the employer's duty to provide the information does not arise. *Jackson County Sheriff Employees Association v. Jackson County and Jackson County Sheriff's Office*, Case No. UP-66-92 at 3, 14 PECBR 270, 270B (1992) (citing *Oregon School Employees Association v. Salem-Keizer School District 24 J*, Case No. UP-135-86 at 5, 10 PECBR 635, 639 (1988), *aff'd*, 103 Or App 221, 797 P2d 375 (1990)). After the threshold requirement of relevance has been met, we consider the totality of the circumstances. To do so, this Board has historically considered four factors: (1) the reason given for the request; (2) the ease or difficulty with which the information can be produced; (3) the kind of information requested, including any assertion of confidentiality; and (4) the history of the parties' labor-management relations. Those are frequently referred to as the *Colton* factors, based on the case in which the Board first described them, *Colton School District 53*, C-124-81 at 5-7, 6 PECBR at 5031-33. *See Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-014-17 at 2 (2021) (order on remand) (*appeal pending)*; *Multnomah County Corrections Officers Association v. Multnomah County Sheriff's Office and Multnomah County*, Case No. UP-83-87 at 4, 10 PECBR 667, 670 (1988).

When the type of information requested is one that an employer claims is confidential, the employer must show (1) that it had a legitimate and substantial confidentiality interest and (2) that it pursued a good faith accommodation to reconcile the conflict. We then balance an exclusive representative's need for information against any legitimate and substantial confidentiality interest established by the employer. *Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-009-15 at 7-8, 26 PECBR 724, 730-31

(2016) (citing *East County Bargaining Council v. David Douglas School District*, Case No. UP-43-07 at 20, 23 PECBR 333, 352 (2009)), *aff'd*, 291 Or App 109, 419 P3d 779, *rev den*, 363 Or 599 (2018); *State of Oregon, Department of Corrections*, UP-7-98 at 8, 18 PECBR at 71. As noted in *State of Oregon, Real Estate Agency*, UP-42-03 at 5, 21 PECBR at 135, in cases dealing with a confidentiality defense, this Board has narrowly applied the confidentiality exception to the employer's duty to furnish information. Moreover, in this context, the party asserting confidentiality has the burden of proving it. *State of Oregon, Department of Corrections*, UP-7-98 at 7-8, 18 PECBR at 70-71 (citing *John Doe Agency v. John Doe Corp.*, 493 US 146, 156, 110 S Ct 471 (1989)).

Attorney-client privilege (*i.e.*, lawyer-client privilege) is covered by Oregon Evidence Code (OEC) 503, which is codified at ORS 40.225. As stated in OEC 503(2), "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client * * *." *See State v. Riddle*, 330 Or 471, 477, 8 P3d 980 (2000) (defining "communication" as an "interchange of thoughts or opinions"); *Lincoln County Employees Association (LCEA) v. Lincoln County*, Case No. UP-039-16 at 10-11, 27 PECBR 100, 109-10 (2017); *Bell v. Tri-County Metropolitan Transportation District of Oregon and Pension Plan for Bargaining Unit Employees of TriMet*, Case No. UP-043-13 at 3-6, 26 PECBR 616, 618-21 (2016). Nonetheless, without more, a blanket assertion of attorney-client privilege does not excuse an employer from producing requested information. *See Ashland Police Association v. City of Ashland*, Case No. UP-50-05 at 9-11, 21 PECBR 512, 520-22 (2006) (citing *Beaverton Police Association v. City of Beaverton*, Case No. UP-60-03 at 11, 20 PECBR 924, 934 (2005)).

Relatedly, the work-product privilege (*i.e.*, work-product doctrine) protects written material prepared by a party or its representative in anticipation of litigation or for trial from disclosure. However, in order for the work-product privilege to attach, the prospect of litigation must be more than a mere possibility or contingency, and the material cannot have been prepared in the regular course of business. Moreover, another party may obtain the material by showing that it has a substantial need of the material in the preparation of that party's case and is unable to obtain the substantial equivalent of the materials by other means without undue hardship. ORCP 36B(3); *See generally Sprint Communications*, 343 NLRB 987, 988-92 (2004) (discussing work product privilege in the context of a collective bargaining relationship).

Discussion

We conclude that the Association met its initial burden and firmly established that the information that it requested of the County on March 11, 2022, (and afterward) was directly relevant to the Association's representational duties and to the County's proposed changes to Association-represented employees' wages. Days earlier, the County's March 7 presentation, expressly contemplated that the County would make bargaining proposals based on the equal-pay analysis. Correspondingly, it was reasonable for the Association to infer that reviewing the information would be necessary to understand the County's proposals, underlying methodology, and how the proposals impacted specific bargaining unit employees.

Furthermore, the information would allow the Association to verify the County's analysis

and factual information. Armed with the information, the Association would be able to meaningfully respond to the County's bargaining proposals that were based on the information. Without the requested information, the Association also could not communicate with its members regarding their views and questions about the County's bargaining proposals and its impacts, or otherwise meaningfully prepare for and participate in bargaining over wages.

In addition, consideration of three of the four *Colton* factors readily supports disclosure and production. Regarding "the reason given for the request," as outlined above, on March 11, 2022, the Association formally made a PECBA information request directly in response to the County's equal pay analysis presentation a few days before. In that presentation, the County conveyed its plans to take actions to increase the wage rate for certain employees, and to review and "recommend further action" regarding employees shown as above their expected pay rate. Moreover, the Association's information request specifically stated, and the record indicates, that the request was being made so that the parties could engage in expedited bargaining over the County's plans. Accordingly, the Association sufficiently established the relevance and the pressing significance of its request. Regarding "the ease or difficulty with which the information can be produced," there is no indication that the information requested by the Association was difficult or expensive for the County to share, and there is no indication that the County raised any concerns about this factor. Moreover, it appears that, except for perhaps two spreadsheets, the information requested was already in the County's possession when the request was made. Finally, regarding "the history of the parties' labor-management relations," there is no evidence in the case record that the Association has ever made any unreasonable information requests in the past.

We next turn to the remaining *Colton* factor, "the kind of information requested." Here, the Association sought: (1) "the County's analysis and [d]ata regarding those positions that are being underpaid and that may be 'overpaid'"; and (2) the identities/names of potentially affected Association-represented employees and how much each of them was allegedly underpaid or overpaid. As discussed above, and as is typical of PECBA information requests, the Association requested information to adequately participate in bargaining with the County over proposed changes in employee pay. The County has presented two arguments as to why it withheld information: (1) the County's central assertion that the information requested should be kept confidential because it is protected by attorney-client privilege or attorney work-product privilege, and (2) the County's interest in managing employee expectations. The Association counters that the County cannot demonstrate that it had a "legitimate and substantial confidentiality interest" in the information requested. Upon review, we conclude that the County has failed to show a legitimate or substantial confidentiality interest in either the underlying data or the identities of the potentially affected employees.

We first address the County's position that the information requested by the Association generally was confidential under attorney-client privilege and the attorney work-product doctrine. Here, the record establishes that Mason was hired and paid to provide legal services to the County regarding its equal pay analysis. There is also no reasonable dispute that Mason and the County confidentially communicated with one another, and that Mason helped the County formulate work product. We do not conclude that the County's *analysis* or Mason's *legal advice* must be disclosed. However, the balance of the Association's request sought materials that were neither confidential attorney/client communications nor protected "work-product."

Rather, the balance of the Association's request sought the underlying "data" of the County's pay equity analysis, which included a variety of basic employee information derived from completed pay equity questionnaires (which were neither solicited nor generated by Mason). The underlying data also included application materials, resumes, and CVs that the County already had on file and that were created by represented employees for their own employment or application purposes, and not by the County or Mason, or otherwise created in anticipation of litigation.[19] The County has failed to establish that these requested materials constitute confidential attorney/client communications or protected work product.

The County argues that defining the underlying data as employee information, "misunderstands" how the County completed its equal pay analysis. The County's argument, as we understand it, is that some of the data in question was the product of it or its contractor's analysis (*e.g.*, that a different "definition of seniority" was developed during the equal-pay analysis). However, both in its prehearing exchanges with the Association and at hearing, the County failed to adequately differentiate what it considers non-privileged data and what it considers protected analysis. On the record in this case, the data that the County and its contractors considered in conducting the equal-pay analysis are not shielded from disclosure by any privilege. Again, we do not find that the County's *analysis* must be disclosed. We recognize that the Associations' initial information request sought that analysis, and that the Association never clearly disclaimed that portion of its request. However, a blanket assertion of privilege will not shield a party from liability under PECBA for failure to produce requested information that is *not* subject to a colorable claim of privilege. The County, not the Association, possessed all the materials at issue and was therefore in the best position to narrow and focus the parties' discussion regarding the scope of the information request and the applicability of any privilege(s).

We next turn to the names of Association-represented employees. The County argues that

[19]The County, while not objecting to the description of the "data" in the recommended order, argues that it "reasonably understood that the Association was pursuing the data that was either generated by the analysis or had been specially prepared for inclusion in the analysis, such as the value applied to the bona fide factors for each employee." The County further avers that "[i]f the Association was merely requesting "basic employee information, * * * [then] it would not be necessary to propose a proprietary nondisclosure agreement to facilitate disclosure." However, the County required such an agreement for release of information as basic as the names of employees who were going to be impacted by the County's proposed wage adjustments. Regardless, to the extent that the initial request for information was as broad as the County avers, the County did not work with the Association or its officers while conducting its equal pay analysis or while collecting related data, so it is hard to conceive how the Association could have submitted a narrower initial request. Moreover, in its response, the County made a blanket assertion of attorney-client and attorney work-product privilege over the "data" and did not give any indication to the Association what it (the County) believed constituted the "data." Furthermore, the Association, despite not being provided with any details from the County as to what materials it consulted in its analysis, attempted to narrow its request, and on April 27, 2022, requested information concerning the experience or seniority of the affected employees. Additionally, the County did not provide the Association with the underlying data (*e.g.*, pay equity questionnaires, employee application materials, resumes, and CVs), County witnesses testified that these were the materials consulted in the County's analysis, and the County did not submit any alternative materials as exhibits or for *in camera* review. For these reasons, based on the information contained in the record, we find that this description of the data is appropriate.

the names associated with the salary adjustments generated by its equal pay analysis remained protected attorney work-product until the County disclosed that information "because generating employee names and wage adjustments was the overriding purpose of the County's equal pay analysis." This argument places the equal-pay analysis in a vacuum and fails to acknowledge the County's subsequent waiver of any privilege that may have been applicable to the employees' identities. Specifically, on March 7, 2022, the County presented results of its equal-pay analysis, including information about the number of employees who it concluded were over- and under-paid. It expressly contemplated that its "next steps" would include bargaining with the Association over wage increases. In this context, the Association sought information that would enable it to understand the bargaining proposals that the County told it to expect. In response, the County shared information about the contemplated salary adjustments, but withheld employee names, which were replaced with four-digit "Unique IDs." *See* April 7, 2022, email, ("CCEA Equal Pay Report Summary of Findings 4.2002.pdf") Then, on April 27, 2022, the County communicated to Accountant Doe that it would implement a pay raise by paying out a lump sum with Accountant Doe's final paycheck. There is no evidence that the County asked or instructed Accountant Doe to keep the payment secret. Indeed, Oregon law permits employees to discuss their wages. *See* ORS 659A.355(a) (prohibiting adverse employment actions against any employee who has "[i]nquired about, discussed or disclosed in any manner the wages of the employee or of another employee").

We cannot reconcile the County's purported concern that revealing employee names would unduly reveal its confidential legal analysis, with the substance of its announcement that it would seek to bargain mid-term wage adjustments to Association represented employees and, especially, with its unilateral implementation of a mid-term wage adjustment for at least one employee. We cannot place much weight on the County's concern, particularly one that it disregarded through its conduct. Accordingly, we do not find any merit to the argument that the identities of the employees impacted by the equal pay act analysis constitute attorney/client privileged information or attorney work-product.

Next, we address the County's asserted interest in managing employee expectations. Specifically, the County conveyed to the Association that it did not want to disclose which Association-represented employees would be affected by the County's proposal, because the County was concerned about the possibility of those employees inaccurately expecting a pay raise, even though bargaining had not yet concluded. To the extent that the County's concern is valid, it is one that is likely shared by the Association. Moreover, such a concern exists any time that compensation is a subject of bargaining efforts. Regardless, the County has not articulated any legal basis as to how an employer's asserted interest in managing employee expectations outweighs the Association's right to relevant information, or otherwise excuses the County's related obligations under PECBA.

Furthermore, and as discussed above, without the requested information, the Association could not engage in meaningful bargaining or make an informed counterproposal. Indeed, "[w]ithout essential information, the bargaining process cannot function properly." *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 40, 22 PECBR 323, 362 (2008). The exclusive representative needs access to relevant information to fully and fairly represent employees. See *David Douglas School District*, UP-43-07 at 21, 23 PECBR 333, 353. Access to such information is "necessary to aid the union in protecting the

interests of the employes and to achieve the purposes and policies of collective bargaining legislation." *Oregon State Police Officers' Association v. State of Oregon,* Case No UP-24-88 at 7, 11 PECBR 718, 724-725 (1989) (citing *NLRB v. Whitin Machine Works*, 217 F2d 593, 35 LRRM 2215 (CA 4, 1954); *Aluminum Ore Company v. NLRB*, 131 F2d 485, 11 LRRM 643 (CA 7, 1942)). In this case, the Association requested information that was necessary for it to adequately assess and respond to County bargaining proposals regarding employee pay. Represented employees cannot directly negotiate over their pay with their employer—only the exclusive representative may do so. The Association is entitled—and is arguably *obligated*—to communicate with potentially affected employees it represents regarding proposals to change their pay, and to verify the information that the County relied on. Indeed, the record plainly shows that the Association requested information to fulfill these obligations, as to avoid "bargaining blindly" over the critical issue of employee pay.

Finally, we address the County's asserted attempt at a good-faith accommodation. As noted above, when a party withholds information on the basis of confidentiality or conflicting legal obligations, the withholding party must prove both a legitimate and substantial confidentiality interest, *and* that it pursued a good-faith accommodation to reconcile the conflict. Here, as set forth above, the County has not established a legitimate and substantial confidentiality interest in the at-issue information (*i.e.*, the names and underlying data). To the extent that the County had a valid claim of privilege over some portions of the information initially sought by the Association and withheld by the County, the County did not pursue a good-faith accommodation to reconcile the perceived conflict or to appropriately narrow its assertion of privilege.

Here, the accommodation proposed was sharing certain information pursuant to a confidentiality agreement. We encourage parties to confer and enter into agreements that facilitate the mutual exchange of information. That process may include agreeing to provisions that reasonably protect the parties' respective interests, both vis-à-vis one another and relative to non-parties. However, the reasonableness of the protections must be assessed in context. Here, some of the information at issue that was subject to the confidentiality agreement included employee names, *i.e.* the identities of the employees who were subject to a bargaining proposal that would change their rate of pay. We are dubious that it ever would constitute a good-faith accommodation for a public employer to condition the release of this type of basic employee information on a confidentiality agreement that so significantly restricts the exclusive representative's ability to communicate with its own members about a pending bargaining proposal. Regardless, in this case the confidentiality agreement's terms that governed the Association's access to, and usage of, that information were unnecessarily restrictive.

In particular, the confidentiality agreement required that the Association receive the County's permission "on a case-by-case basis" before sharing the information deemed confidential under the agreement with employees whose wages would be impacted. This requirement both (1) undermined the Association's role as the exclusive representative by limiting its ability to communicate with its members regarding the potential impacts to them individually; and (2) significantly reduced the Association's ability to efficiently assess the nature of any proposals by the County. Furthermore, this accommodation occurred in the context of midterm, expedited bargaining (which generally limited the amount of time that the parties had to bargain the proposed changes to 90 days). *See* ORS 243.698. The County provided employee names, only subject to the

restrictive confidentiality agreement, on June 27, 2022. That date was 108 days after the March 11, 2022 information request, and 68 days after the County's April 20, 2022, proposal.

This specific context, along with the timeline and the County's other contemporaneous actions, further highlight that the arrangement insisted on by the County was unreasonable and does not constitute a good-faith accommodation.[20] In particular, and as it relates to employee names, the County continued to insist on a restrictive confidentiality agreement even as it issued a payment to at least one specific employee and bargaining unit member, Accountant Doe.

Accordingly, for the foregoing reasons, we hold that the County's response to the Association's information request violated ORS 243.672(1)(e).

Unilateral Changes

An employer also commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change concerning a "mandatory subject of bargaining" without first completing its bargaining obligation under the PECBA. *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11 at 10, 25 PECBR 525, 534 (2013); *Multnomah County Sheriff's Office and Multnomah County*, UP-21-86 at 29-30, 9 PECBR at 9557. The ultimate burden of proving an unlawful unilateral change is with the complainant labor organization. OAR 115-010-0070(5)(b).

In general, if a subject is specifically included in the definition of "employment relations" under ORS 243.650(7)(a), then the subject is mandatory for bargaining. *Portland Fire Fighters Assoc. v. City of Portland*, 305 Or 275, 281-85, 751 P2d 770, 773 (1988); *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99 at 14-17, 19 PECBR 76, 89-92 (2001). That statutory definition specifically covers matters concerning "direct or indirect monetary benefits," which naturally includes pay or wage changes such as those included in the County's equal pay analysis proposal and related actions. Moreover, as indicated by the pleadings, both parties agree that "wages" is a mandatory bargaining subject. *See also* ORS 243.656(3).

[20]In arguing for a different result, the County submits that there is no evidence in the record "that the confidentiality agreement hampered the Association's efforts to bargain the County's proposal" and that the proposal only impacted a "fraction" of the employees represented by the Association, and therefore was not overly restrictive. As discussed above, we disagree with the County's view of the evidence, as the facts in this case show that the County failed to even attempt to pursue an accommodation until 68 days after expedited bargaining had begun, and that the Association was required under the terms of the confidentiality agreement, to obtain the County's express permission on a "case-by-case basis" to discuss the proposal with the bargaining unit employees that would be impacted. Although it is accurate that the Association added this language to the confidentiality agreement, that addition modified the County's proposed language that barred *any* disclosures. The County's arguments, again, fail to adequately consider the role of the Association as the exclusive representative, and its right to information necessary to adequately represent bargaining unit employees. Furthermore, it is the *County's burden* to establish that it pursued a good-faith accommodation, not the Association's burden to show that the alleged good-faith accommodation was insufficient, as the County's argument implies.

On May 4, 2022, the Association timely demanded to bargain the changes that the County proposed on April 20, 2022. The Association has never accepted the County's proposal; it made a counterproposal on June 23, 2022. Then, on or around April 27, 2022, a mere seven days after making its initial wage increase proposal, the County increased the wages of at least one bargaining unit member, Accountant Doe. That payment was made before the County completed its PECBA bargaining obligations and resulted in payment of wages beyond the wages that the parties agreed to in their CBA. A change in wages is a change in working conditions. *See Northwest Education Association/OEA/NEA v. Northwest Regional Education Service District*, Case No. UP-23-06 at 8-12, 22 PECBR 247, 254-58 (2008). In sum, the County's clear unilateral actions do not amount to good faith bargaining, and separately establish an unfair labor practice under ORS 243.672(1)(e).

The County argues that it was legally obligated to make this payment to its departing employee or face penalties and additional liability under ORS 652.150. Therefore, the County avers, its conduct should be excused because the consequences that the County would face if it failed to provide a timely and complete final paycheck to a departing employee override the Association's "negligible interest in bargaining a significant lump sum payment to a soon-to-be-retiring employee." The County's argument suggests that its only choice was to comply with the Equal Pay Act and ORS 652.150 in lieu of PECBA. However, the County made no apparent attempt to harmonize its legal obligations. It did not share its perspective or seek to bargain about this issue with the Association before unilaterally issuing payment *without notice to the Association*. Even if the County were correct that a conflict existed between its obligations, "[f]aced with possibly conflicting obligations under the PECBA and another law, public employers and labor organizations are not excused from their duty to bargain." *University of Oregon,* UP-009-15 at 7, 26 PECBR 724, 730. Here, the County made no effort to bargain with the Association on the matter, much less attempt to reconcile the perceived conflict between its obligations.

Remedy

Having concluded that the County violated ORS 243.672(1)(e), we order the County to cease and desist from engaging in that unlawful conduct. *See* ORS 243.676(2)(b). The Association has not requested, and we will not order, an affirmative remedy that would require employees to repay the additional payments received as part of one of the County's unilateral actions or to forfeit those payments in the future. *See Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08 at 17 n 10, 23 PECBR 365, 381 n 10 (2009) (citing *Northwest Education Association/OEA/NEA v. Northwest Regional Education Service District*, Case No. UP-23-06 at 13 n 4, 22 PECBR 247, 259 n 4).

3. We decline to award 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.

To be awarded a civil penalty, a complainant must include a request for a civil penalty in the complaint, and "the request must include a statement as to why a civil penalty * * * is appropriate, with a clear and concise statement of the facts alleged in support of the statement." OAR 115-035-0075. Here, the Association's request for a civil penalty included a statement that a civil penalty was warranted because the County's actions were "clearly unlawful under the PECBA and are harmful to the affected bargaining unit members and to the Association."

Even assuming that such a statement satisfies the requirements of OAR 115-035-0075, the Association did not include "a clear and concise statement of the facts alleged in support of the statement," as required under that rule. Additionally, the Association made no mention of a civil penalty (or why one should be ordered) in its post-hearing brief. Rather, the Association first explained and briefed why a civil penalty should be awarded in its memorandum in aid of oral argument before the Board in support of the Association's cross-objections. Under these circumstances, we decline to award a civil penalty.

ORDER

1. The County has violated ORS 243.672(1)(e).

2. The County shall cease and desist from failing to adequately respond to the Association's March 2022 information request, and from refusing or failing to bargain in good faith with the Association as requested by the Association in May 2022, as outlined in this Board order.

3. The County shall bargain in good faith with the Association, and all relevant timelines for completing this bargaining shall be reset as of the date of this Board order.

DATED: June 29, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-031-23

(UNFAIR LABOR PRACTICE)

AFSCME LOCAL 328/COUNCIL 75, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFL-CIO),	)	
Complainant,	)	
v.	)	CONSENT ORDER
OREGON HEALTH & SCIENCE UNIVERSITY,	)	
Respondent.	)	

Lane Toensmeier, Staff Attorney, AFSCME Council 75, represented the Complainant.

Darryl Walker, Legal Counsel, Oregon Health & Science University, represented the Respondent.

On May 26, 2023, AFSCME Local 328/Council 75, American Federation of State, County and Municipal Employees (AFL-CIO) ("Complainant") filed an unfair labor practice complaint against Oregon Health & Science University ("Respondent") alleging a violation of ORS 243.672(1)(e). 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 employer within the meaning of ORS 243.650(20).
3. Complainant and Respondent are parties to a collective bargaining agreement.
4. In 2020, OHSU introduced the Food Resource Program ("Program"). The Program was initially available only to OHSU students. The purpose of the Program was to address food insecurity by making food items available to students.
5. In approximately January of 2021, AFSCME Representative Kate Baker encouraged OHSU Executive Vice Provost David Robinson and OHSU Vice President of Human Resources Greg Moawad to expand the Program to make AFSCME represented employees

eligible for Program benefits. OHSU agreed to make AFSCME represented employees eligible. Under the Program, OHSU granted AFSCME represented employees access to food supplies. Approximately two times per week, the Program afforded AFSCME represented employees access to supplies including seasonal fresh fruit and shelf stable items such as flour, soup stock, beans and soups. The Program served as an income supplement to ensure that AFSCME represented employees had food security.

6. The benefits provided under the Program are matters of employment relations as defined by ORS 243.650(7).
7. AFSCME-represented employees were eligible to participate in the Program for approximately two years.
8. On March 24, 2023, OHSU Benefits and Wellness Director Dominica Thompson ("Thompson") notified employees that OHSU had discontinued the Program "effective immediately."
9. OHSU did not provide notice to AFSCME before it terminated the Program. OHSU did not bargain the termination of the Program, or any effects of the termination of the Program on matters of employment relations, prior to terminating the Program.
10. On April 6, 2023, Thompson emailed employees to inform employees of food resources that employees could access in lieu of the Program. OHSU did not provide notice to AFSCME of the implementation of these resources. OHSU did not bargain the implementation of these resources prior to Thompson's announcement.

Stipulated Conclusions of Law

1. The Board has jurisdiction over these parties and subject matter.
2. Respondent violated ORS 243.672(1)(e) by unilaterally discontinuing the Program and by implementing an alternative to the Program without providing notice, and without bargaining with, Complainant.

Stipulated Order

1. Respondent violated ORS 243.672(1)(e) as stipulated above.
2. Respondent will engage in good faith negotiations with Complainant over the change to any mandatory subjects of bargaining. The 90-day period of bargaining identified in ORS 243.698(1) will begin upon the first meeting between the parties.
3. Respondent will reimburse the Complainant's filing fee under OAR 115-035-0075 within 30 days of this order.
4. Respondent will pay the Complainant $2,500 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.

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Lane Toensmeier
On behalf of Complainant

Darryl Walker
On behalf of Respondent

This Consent Order is approved and adopted by the Board.

DATED this 3 day of July, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin P. O'Glasser, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-005-23

(REPRESENTATION)

BURNS POLICE ASSOCIATION, Petitioner, v. CITY OF BURNS, and OREGON AFSCME COUNCIL 75, LOCAL 3036, Respondents.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE (ELECTION RESULTS)

On April 7, 2023, Burns Police Association (Association) filed a petition under ORS 243.682(1) and OAR 115-025-0035 to change the exclusive representative of all City of Burns Police Department employees (excluding the Chief of Police and Reserve Officers) from Oregon AFSCME Council 75, Local 3036, to the Association.

On May 22, 2023, the Board's Election Coordinator sent ballots to eligible voters, pursuant to the terms of a consent election agreement. In response to an eligible voter's request for an extension of the ballot deadline date because of a mailing address issue, the deadline date was extended by one week. Five valid ballots were returned by the deadline of June 20, 2023, which constitutes the date of the election. *See* OAR 115-025-0072(1)(b)(A). A tally of ballots was held on June 21, 2023, and the majority of valid votes counted were cast for the Association. The tally of ballots was provided to the parties on June 21, 2023.

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 July 3, 2023). *See* OAR 115-025-0075. No objections were filed.

ORDER

Accordingly, it is certified that Burns Police Association is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> All employees with the Burns Police Department, excluding the Chief of Police and Reserve Officers.

DATED: July 5, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, 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.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On August 4, 2022, this Board issued an order holding that Silver Falls School District 4J (District) violated ORS 243.672(1)(e), as alleged in the complaint filed by Oregon School Employees Association (OSEA). The District appealed that order, but subsequently moved to dismiss the appeal. The court granted the motion and dismissed the appeal. On June 14, 2023, the court issued the appellate judgment, which means that the matter is now ripe for representation costs to be issued by this Board. *See* OAR 115-035-0055(2)(a).

Pursuant to ORS 243.676(2)(d) and OAR 115-035-0055, this Board finds as follows.

1. OSEA 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, OSEA is the party in whose favor our order was issued and is therefore entitled to representation costs.

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 District shall remit $5,000 to OSEA within 30 days of the date of this order.

DATED: July 7, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-045-20 and UP-004-21

(UNFAIR LABOR PRACTICE)

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 555,	)	
Complainant,	)	
v.	)	
BAY AREA HOSPITAL,	)	RULINGS,
Respondent,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
and	)	
BAY AREA HOSPITAL,	)	
Complainant,	)	
v.	)	
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 555,	)	
Respondent.	)	

On April 19, 2023, this Board heard oral argument on the objections of Bay Area Hospital (Hospital) and the cross-objections of United Food and Commercial Workers, Local 555 (Union), to an October 11, 2022, recommended order issued by Administrative Law Judge (ALJ) Jennifer D. Kaufman, after a hearing was held on April 4-7, 2022, via videoconference.[1] The record closed on June 29, 2022, following receipt of the parties' post-hearing briefs.

[1]Before the cross-objections period ended, a vacancy occurred on the three-member Board. Oral arguments were subsequently scheduled to coincide with the projected appointment of a new Board Member Benjamin O'Glasser, who was appointed to the Board, effective May 1, 2023. After reviewing the file in this matter, Member O'Glasser recused himself from this case and he did not participate in the deliberations or decision in this matter.

Elizabeth A. Joffe, Attorney at Law, McKanna Bishop Joffe, LLP, Portland, Oregon, represented United Food and Commercial Workers, Local 555.

Richard J. Alli, Jr., and John M. Stellwagen, Attorneys at Law, Bullard Law, Portland, Oregon, represented Bay Area Hospital.

On December 14, 2020, the Union filed an unfair labor practice complaint against the Hospital. On February 1, 2021, the Hospital filed an unfair labor practice complaint against the Union.[2] On February 18, 2022, the Union filed its first amended complaint. The complaints were consolidated for purposes of the hearing in this matter.

The issues are:

1. By communicating directly with Union bargaining unit members about the critical status of the Oregon Retail Employees Pension Trust (the Trust), did the Hospital:

a. Interfere with, restrain, or coerce members in or because of their protected activities in seeking to maintain their collectively bargained 401(k) benefits, in violation of ORS 243.672(1)(a);

b. Dominate or interfere with the administration of the Union by directly dealing with Union members, in violation of ORS 243.672(1)(b);

c. Refuse to bargain collectively in good faith with the Union by directly dealing with Union members, in violation of ORS 243.672(1)(e); and/or

d. Use public funds to support actions to assist, promote, or deter union organizing, in violation of ORS 243.670(2)(a) and ORS 243.672(1)(i)?

2. Did the Hospital cancel a planned disbursement of certification pay to Union members in response to members' protected activities in seeking to maintain their collectively bargained 401(k) benefits, and if so, did that cancellation violate ORS 243.672(1)(a)?

3. Did the Hospital cancel a planned disbursement of certification pay to Union members for the purpose of discouraging them from participating in Union activities or supporting the Union, and if so, did that cancellation violate ORS 243.672(1)(c)?

4. Did the Hospital use public funds to support actions to assist, promote, or deter union organizing by assisting and/or encouraging members to pursue decertification of the Union, in violation of ORS 243.670(2)(a) and ORS 243.672(1)(i)?

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[2]Thereafter, the ALJ held the cases in abeyance while the parties attempted to resolve their disputes through mediation. The parties did not reach a resolution in mediation, and the cases were taken out of abeyance for further processing.

5. Did the Union refuse to bargain in good faith with the Hospital by refusing to bargain over the increased costs incurred by the Hospital when the Trust entered critical status, in violation of ORS 243.672(2)(b)?

6. Should the Hospital or the Union be required to pay a civil penalty pursuant to ORS 243.676(4)?

7. Should the Hospital or the Union be required to post and distribute a notice of any violations found?

8. Is filing-fee reimbursement warranted?

As set forth below, we conclude that the Hospital (1) violated ORS 243.672(1)(a)[3] by its September 4 and October 18, 2020, communications to bargaining unit employees regarding the contribution surcharge and by rescinding funding for the certification pay plan; (2) violated ORS 243.672(1)(b) and (e) by engaging in direct dealing with its employees regarding the contribution surcharge; and (3) violated ORS 243.672(1)(i) and ORS 243.670(2) by using public funds to issue communications that were designed to undermine employees' support for the Union and to give employees legal advice about how to get out of the Union. We also conclude that the Union did not violate ORS 243.672(2)(b), as alleged. We further conclude that the Hospital will be required to post a notice of its violations and distribute that notice to its employees via email. We also conclude that the Union is entitled to a civil penalty under ORS 243.676(4)(a)(A), a civil penalty under ORS 243.676(4)(b), and filing-fee reimbursement under ORS 243.672(6) for its answer.

RULINGS

1. The Hospital objected to the ALJ's denial of the Hospital's motion to strike portions of the Union's first amended complaint. The Hospital argues that the ALJ should have granted its request to strike all references to conversations that took place between the Union's Executive Director, Michael Marshall, and the Hospital's bargaining representative and legal counsel, Richard Alli, in July and August of 2020. The Hospital argues that the communications were related to bargaining matters and were not relevant to the Union's unfair practice allegations. We find that the ALJ acted properly within her discretion in denying the Hospital's motion. We also agree with the ALJ, that the challenged portions of the Union's first amended complaint pertain to alleged threats about negative consequences if the Union did not give up the 401(k) plan, and are

[3]Where a subsection (l)(a) violation has been proven, we need not consider a parallel (l)(c) claim that is based on the same facts. *State Teachers Education Association/OEA/NEA and Andrews et al. v. Willamette Education Service District and State of Oregon, Department of Education*, Case No. UP-14-99 at 33, 19 PECBR 228, 260 (2001), *aff'd without opinion*, 188 Or App 112, 70 P3d 903 (2003), *rev den*, 336 Or 509, 87 P3d 1136 (2004). Additionally, finding an additional violation of ORS 243.672(1)(c) based on the same facts would not alter our remedy in this case. Therefore, we find it unnecessary to address the (1)(c) claim.

therefore relevant to the Union's allegations that the Hospital violated ORS 243.672(1)(a) and (c) in that manner.

2. On March 29, 2022, six days before the hearing was scheduled to commence, the Union filed a motion requesting leave to file a second amended complaint. The Union sought to allege additional unfair labor practices by the Hospital in connection with the Hospital's payment of employee retention bonuses and the Hospital's alleged failure to timely furnish the Union with requested information regarding the payment of those bonuses. The Union maintained that it had only recently become aware of the Hospital's alleged unlawful conduct because of the Hospital's delay in furnishing requested information. The Hospital objected to the proposed complaint amendment, arguing that it expanded the Union's legal claims and would significantly expand the scope of evidence to be presented at the hearing. The Hospital requested that if the ALJ approved the complaint amendment, then the hearing be postponed to give the Hospital time to investigate the new allegations and prepare its response. The ALJ granted the Union's request for leave to amend its complaint, and also granted the Hospital's request to postpone the hearing if the Union filed a second amended complaint. The Union objected to the ALJ's decision regarding postponement, and chose not to file a second amended complaint.

The Hospital objected to the ALJ's ruling granting the Union's motion requesting leave to file a second amended complaint, on the basis that the proposed amendments regarding employee retention bonuses were unrelated to the allegations in the complaint. The Union cross-objected to the ALJ's ruling granting the Hospital a postponement in the event a second amended complaint was filed. The Union argued that the Hospital's alleged unlawful withholding of relevant information related to the retention bonuses as requested by the Union was the sole reason for the timing of the Union's request to amend.

We find that the ALJ acted within her discretion with respect to granting the Union's motion to file a second amended complaint and granting the Hospital's request to postpone the hearing. Under OAR 115-035-0010(2), a complainant may amend an unfair labor practice complaint on its own motion before the ALJ serves the complaint, and thereafter, only with the approval of the ALJ. OAR 115-035-0010(2) also establishes that if the ALJ allows the amendment, "respondent shall be given a reasonable period of time to amend its answer." The Union argues that postponement of the hearing was not necessary because the ALJ could have scheduled additional days of hearing to provide the Hospital with time to respond to the new unfair labor practice allegations. Given the procedural history of this case and the number of prehearing disputes that developed between the parties (many of which resulted in lengthy filings, and not all of which are addressed herein), it was reasonable for the ALJ to conclude that the late addition of new allegations that expanded the scope of the evidence and legal arguments to be presented would not be manageable in this particular case without a hearing postponement. The ALJ acted properly within her discretion in ruling that if the Union amended its complaint, then she would grant the Hospital's request to postpone the hearing. *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 4, 22 PECBR 668, 671 (2008), *rev'd and remanded*, 244 Or App 194, 260 P3d 626 (2011), order on remand, 24 PECBR 786 (2012) (among other factors to be considered in evaluating whether to allow amendment of a complaint, it is appropriate for the ALJ to consider the nature of the proposed amendment and whether it would expand the evidence to be

presented at hearing, whether the respondent objects to the amendment, and practical considerations such as the effect of the amendment on the orderly presentation of evidence). Furthermore, although the Union was unwilling to postpone the hearing to pursue the new allegations, it was not precluded from filing a separate complaint to pursue those allegations.

3. The Hospital objected to the ALJ's ruling that the Hospital could not question employee witnesses regarding communications with their Union representative. This dispute initially arose during a prehearing conference between the parties regarding the Hospital's intention to call bargaining unit witnesses to testify regarding their conversations with Union representatives about retirement benefits. The Union objected, citing *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07 at 46, 22 PECBR 752, 797 (2008). In that case, the Board held that maintaining the confidentiality of private discussions between employees and union representatives about workplace concerns furthers the purposes of the Public Employee Collective Bargaining Act (PECBA), and that employees cannot waive the confidentiality of those discussions because "[c]onfidentiality protects all employees in the bargaining unit from the chilling effect of revealing private conversations. An employer cannot act in a way that chills employees even if an individual employee does not object." *City of Portland*, UP-7-07 at 50, 22 PECBR at 801. Consistent with the Board's reasoning in *City of Portland*, the ALJ ruled that the Hospital should not be permitted to question its witnesses regarding private discussions between those employees and Union representatives about the employees' retirement benefits. Citing *Hood River County v. Oregon AFSCME Council* 75*, Local 1082*, Case No. UP-09-08 at 6, n 5, 23 PECBR 583, 588 at n 5 (2010), the ALJ also ruled that it would be inappropriate for *either* party to present testimony regarding private communications between the Union and its members about representational matters. The Union voluntarily chose not to question its witnesses about such communications.

The Hospital objected to the ALJ's ruling, arguing that *Hood River County* overruled *City of Portland* by stating that an employee could waive the confidentiality of union-employee communications at the union's request. The ALJ disagreed, concluding that the Board's decision in *AFSCME* did not disturb the holding of *City of Portland*.

On Board review, the Hospital renews its objection to the ALJ's ruling. We find that the ALJ correctly ruled that testimony regarding private communications between Union representatives and bargaining unit members about their retirement benefits should be excluded, consistent with the Board's reasoning in *City of Portland*. In doing so, we disagree with the Hospital's assertion that *Hood River County* overruled *City of Portland*. The question of whether *employers* can obtain a voluntary waiver of the confidentiality of private union-employee communications was not at issue in *Hood River County*. Furthermore, in *Hood River County* the Board approvingly cited *City of Portland* extensively without questioning its determination that employers may not obtain such waivers. Therefore, we agree with the ALJ's ruling.

4. The Hospital objected to the ALJ's ruling that Mr. Alli, counsel for the Hospital, could not testify as a rebuttal witness. During the first day of hearing, the Hospital's counsel, Richard Alli, stated that it would be necessary for him to testify to rebut Union Executive Director Michael Marshall's testimony regarding Alli's alleged threats of consequences if the Union refused to give up its 401(k) plan. Alli's name was not included on the witness list furnished by

the Hospital pursuant to the ALJ's prehearing order. Alli represented that it was not foreseeable that he would need to testify because the Union's filings did not provide detailed information regarding the alleged threats that were made during his conversations with Marshall.[4] The Union objected to Alli appearing as a witness because the Hospital did not include Alli on its witness list, and because the Rules of Professional Conduct (RPC) precluded Alli from testifying in a preceding in which he was an advocate. The ALJ concluded that the need for Alli's testimony was foreseeable, and excluded Alli's testimony on the basis that the Hospital did not include him on its witness list.

We find that the ALJ acted properly within her discretion in concluding that good cause did not exist for allowing Alli to testify. Under OAR-115-0068(4), a party that fails to comply with prehearing requirements, including the requirement to furnish opposing counsel with a list of its witnesses by seven days before the hearing, "shall be denied the right to offer such evidence or make argument regarding such matter at the hearing unless good cause is shown." Here, we agree with the ALJ that it was foreseeable that Alli's recollection of the conversations between he and Marshall would be at issue during the hearing. Paragraph 13 of the Union's first amended complaint alleges that during a telephone conversation that took place between Alli and Marshall in July or August 2020, "Alli made multiple threats to Marshall regarding extreme negative consequences for the [U]nion and its bargaining unit if the [U]nion refused to voluntarily eliminate the 401(k) plan." Furthermore, the Union's March 21, 2022, response to the Hospital's motion to strike states:

> "[T]he Union does not intend to call Mr. Alli as a witness in its case in chief. It does plan to call Mr. Marshall to testify about those communications. Whether the Hospital calls Mr. Alli to rebut that testimony is up to the Hospital. The Hospital has known of these complaint allegations for over 15 months: ample time to determine whether to have another attorney represent it at hearing so that Mr. Alli can testify."

Given those statements in the Union's filings, we reject the Hospital's assertion that it was surprised by the substance of Marshall's testimony and the need for Alli's testimony.

5. On August 1, 2022, after the record in this matter had closed, the Union filed a motion requesting the ALJ to take administrative notice of a consent order adopted by this Board on July 5, 2022, in *Oregon Nurses Association v. Bay Area Hospital*, Case No. UP-015-22. The Union contended that the consent order demonstrated that the Hospital had repeatedly taken unilateral action that violates the duty to bargain in good faith and was therefore relevant to the Union's request for a civil penalty under ORS 243.676(4)(a). On August 15, 2022, the Hospital

[4]Alli also represented that he did not know whether he would be able to continue his involvement in the hearing, that he intended to seek ethics counsel, and that the Hospital might request a continuance of the hearing. The Hospital ultimately took the position that it could retain Alli as its counsel and present him as a witness without violating RPC 3.7 because Alli's recusal would be a substantial hardship to the Hospital. As explained in this ruling, the ALJ correctly concluded that even if the Hospital was correct in its assessment of Alli's obligations under the RPC, the exclusion of Alli's testimony was warranted because of the Hospital's failure to include Alli on its witness list. We therefore do not address the question of whether Alli would have violated the RPC by testifying.

filed a response in opposition to the motion. The ALJ took administrative notice of the consent order. On Board review, the Hospital objects to the ruling on the basis that the consent order is not relevant to the proceeding.

We find that the ALJ acted within her discretion in granting the Union's request to take administrative notice of the consent order, to determine its relevance, if any, to whether the Union is entitled to a civil penalty. This Board has previously taken official notice of its own orders. *See AFSCME Local 2831 v. Lane County*, Case No. UP-009-18 at 4, n 3 (2019); *Tualatin Employees' Association v. City of Tualatin*, Case No. UP-054-12 at 5 n 3, 25 PECBR 861, 865 n 3 (2013).[5]

6. The remaining rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT[6]

The Parties

1. The Union is a labor organization within the meaning of ORS 243.650(13).

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

3. The Hospital is a public acute care facility in Coos Bay, Oregon. The Hospital employs about 1,200 staff who are represented by one of three different labor organizations. The Union represents approximately 550 of the Hospital's employees in what is essentially a wall-to-wall bargaining unit, excluding nurses and security guards.

4. The Union and the Hospital have had a collective bargaining relationship for at least three decades. The most recent collective bargaining agreement between the parties has effective dates of July 1, 2018, through June 30, 2022.

5. Michael Marshall is the Union's Executive Director. Marshall has been the Union's Executive Director since about 2017, and has worked for the Union in various positions since about 2006.

6. Clay England is the Hospital's Chief Human Resources Officer (CHRO). England's predecessor as CHRO was Suzie McDaniel.

[5]We address the relevance of the consent order in the remedy section of this order.

[6]The Hospital objected to the recommended order's Findings of Fact 13, 14, 16-20, 22-24, 33-39, and 41. The Union objected to Findings of Fact 7, 9, 12, 13, 29, 30, 39 and 41, and also requested that we include additional factual findings. The Board has reviewed the objections, as well as the relevant portions of the record, and made limited additions to the Findings of Fact for clarity, along with a few minor corrections. With regard to the remaining objections, we conclude that the Findings of Fact at issue, including the ALJ's inferences contained therein, are supported by the record.

Bargaining Unit Retirement Benefits

7. For at least 30 years, the Union and the Hospital have provided bargaining unit employees with a pension benefit plan known as a the "Oregon Retail Employees Pension Trust" (the Trust). The Trust is a multiemployer,[7] defined benefit employee pension plan.

8. Article 14, Section 14.02 of the 2018-2022 collective bargaining agreement states:

> "The Hospital and the Union accept and agree to be bound by the terms of the existing Pension Trust Agreement referenced by the terms of this Labor Agreement. By this acceptance the Employer agrees to and shall become a party to each of said Trust with the same force and effect as though the Employer has executed the original declarations. Further, the Employer accepts as his representatives for the purpose of this Trust Fund, the Employer Trustees serving on the Board of Trustees of said Trust Fund and their duly appointed successors. Any amendments that from time to time may be made to the aforesaid Trust shall be binding upon the Hospital provided such written amendments are first sent to the Chief Human Resources Officer no less than thirty (30) calendar days before the effective date of such amendment."

9. The Trust is managed by a Board of Trustees (the Trustees). The Trustees include five representatives from labor and five representatives from the Trust's various employer participants. The Hospital does not have a representative participating as a member of the Trustees, and has declined invitations to have a representative serve as one of the Trust's employer Trustees. Union Executive Director Marshall has been a member of the Trustees for approximately 10 years. The Trustees hire outside experts to furnish advice regarding management of the Trust, including an investment advisor, a fund attorney, and an actuary. The day-to-day operations of the Trust are handled by a third-party administrator.

10. Article XIII, Section 2 of the Trust Agreement provides that the Trust shall be administered "in accordance with Section 302(c) of the Labor Management Relations Act of 1947, the Employee Retirement Income Security Act of 1974 [ERISA], the Internal Revenue Code, and the Regulations pertinent thereto, and other applicable statutes and regulations, as such statutes and regulations presently exist or as they may hereafter be amended."

11. The Pension Protection Act of 2006 (PPA) is an amendment to the ERISA that includes measures designed to restore multiemployer pension plans that are in danger of being unable to meet their pension distribution obligations. Pursuant to the PPA, when a multiemployer pension plan enters critical status as defined within the PPA, the plan's sponsor must adopt a rehabilitation plan that imposes revised contribution schedules to restore the plan's financial health. 29 USC § 1085(e). Plan participants have 180 days from the expiration date of a collective bargaining agreement in effect at the time that the plan entered critical status to adopt a contribution schedule under the rehabilitation plan, after which point a "default schedule" will be imposed. 29 USC § 1085(e)(3)(C). Until such time as a rehabilitation schedule is adopted by the parties, an automatic contribution surcharge is imposed on the employer equal to 5 percent of the

[7]The Trust includes 45-50 participating employers.

contributions required during the first year that the plan enters critical status, and 10 percent for each succeeding plan year that the plan remains in critical status. 29 USC § 1085(e)(7).

12. The Trust has entered critical status on two occasions. In 2009, the Trust entered critical status due to underfunding caused by low investment returns. Consequently, in 2010, the Trustees adopted a rehabilitation plan requiring supplemental pension contributions under either a "preferred schedule" or a "default schedule." In August 2010, during successor bargaining, the parties negotiated a "Side Letter of Agreement" adopting the preferred schedule of supplemental pension contributions. Until the parties adopted the preferred schedule, the Hospital was assessed a contribution surcharge pursuant to the requirements of the PPA.

13. In 2020, the Trust entered critical status again because the plan was projected to have a negative credit balance by the year 2023. The parties discussed the general possibility of the Trust entering critical status during contract negotiations in 2018.[8] The possibility that the Trust might enter critical status because of a negative credit balance first came up after an actuarial report was delivered to the Trustees in 2019.

14. During bargaining for the 2018-2022 collective bargaining agreement, the parties negotiated to offer employees 401(k) plan benefits. Section 15.01 of the 2018-2022 collective bargaining agreement states: "Beginning July 1, 2019, the Hospital agrees to contribute to and be bound by the UFCW Investment Saving Plan and Trust. The Hospital will comply with all terms and conditions of the plan, including deducting from employee compensation the employee's elective contribution to the plan, and forward the money in a timely manner to the Trust." Article 15, Section 15.02 states: "The Hospital shall contribute fifteen cents ($.15) for each eligible straight time compensable hour paid for all eligible employees covered by this Labor Agreement beginning with hours worked on or after the first fill pay period beginning on July 1, 2021."

The Certification Pay Program

15. During bargaining for the 2018-2022 collective bargaining agreement, the parties negotiated a certification pay program to provide additional compensation to employees who obtain professional certifications beyond the minimum requirements for their positions. Section 6.08 of the 2018-2022 collective bargaining agreement states:

> "The Union and the Hospital agree to form a subcommittee with an equal number of representatives for the purpose of reviewing and determining which certifications for jobs within the bargaining unit will be eligible to receive certification pay. The [U]nion committee members may change at the discretion of

[8]Although minutes from the parties' bargaining sessions do not capture verbatim discussions between the parties, the Hospital's minutes from the May 31, 2018, bargaining session reflect that Marshall told the Hospital something to the effect that although the Trust was starting at a good place, Marshall also stated that "it doesn't take a huge swing to put us out or put us in a great place either." The minutes also reflect that Marshall stated that "[t]his year has been rocky so far but if we can break even the rest of the year we are still good." The minutes further reflect that Marshall mentioned that the Trust had been close to entering critical status again, stating that, "we had a bad year and were looking at critical status and we postponed going into critical status again."

> the [U]nion based on which job classifications are being reviewed. Once mutual agreement is reached on the certifications that will receive additional compensation and the amount of such additional compensation the [U]nion and Hospital representatives shall agree on the start date of such certification pay."

16. Pursuant to Section 6.08 of the collective bargaining agreement, the Union and the Hospital established a certification pay subcommittee. Megan Starks was the Union's spokesperson during the subcommittee meetings, and former CHRO Suzie McDaniel was the Hospital's spokesperson. Clay England, who succeeded McDaniel as CHRO, also attended meetings as of October 2019. The subcommittee met at least eight times between January and December 2019.

17. As of July 15, 2019, the subcommittee had developed a draft specialty certification policy and a draft specialty certification application form. The certification pay program was projected to be implemented on July 1, 2020.

18. During a meeting on September 25, 2019, the subcommittee discussed whether to issue certification pay in the form of a bonus or a pay differential. The subcommittee also discussed the selection of eligible departments and classifications for the program, and agreed to start with the Respiratory Therapy Department.

19. During a meeting on October 16, 2019, the subcommittee discussed the selection of other departments to follow the Respiratory Therapy Department. The subcommittee also continued its discussions regarding the identification of eligible certifications.

20. During a meeting on December 17, 2019, the subcommittee continued to refine its identification of eligible certifications. The subcommittee agreed that the targeted departments would be Respiratory Therapy, Admitting, Pharmacy, Rehabilitation, and IT. The subcommittee had identified the classifications that would be eligible for certification pay, but did not yet have an all-inclusive list of which employees would qualify. The subcommittee had not yet agreed upon whether the additional compensation would be issued in the form of a bonus or a pay differential, and it had not yet discussed a dollar amount to be paid. The subcommittee was still projecting that the program would be implemented in July 2020. Specialty certification applications were circulated and completed by managers and eligible employees.

21. In early 2020, the COVID-19 pandemic began to have a major impact on the Hospital's day-to-day operations. As a result, the subcommittee did not meet again until September 15, 2020.

22. During the September 15, 2020 subcommittee meeting, CHRO England, who was by this time, acting as spokesperson for the Hospital, stated that the Hospital intended to spend about $160,000 for the certification pay program, that the Hospital wanted to distribute the payments as a bonus so that the program could be implemented quickly, and that the Hospital wanted eligible employees to be compensated before the end of the year. England suggested that it would make a nice Christmas bonus. The Union was in favor of the dollar amount proposed by the Hospital but had concerns about distributing the money in the form of a bonus. The

subcommittee discussed utilizing different tier levels for the bonus payment based on factors including the time and cost of obtaining the certification. The subcommittee ultimately agreed that certification pay would be distributed as a bonus during the first year and would move to a pay differential the following year. By the end of the meeting, the subcommittee had an agreement that $160,000 was budgeted for the first round of certification pay, which would be issued as a bonus to eligible employees before the end of the year.[9] The subcommittee was in the process of finalizing a spreadsheet identifying eligible classifications within the targeted departments. The committee did not yet have a shared understanding of how many employees within each targeted classification would be eligible for certification pay, and England had some questions about eligible certifications for certain classifications. Consequently, the precise dollar amount that each eligible employee would receive had not yet been determined.

The Trust's Entry into Critical Status and the Hospital's Response

23. On April 29, 2020, the Trustees issued a "Notice of Critical Status Pension Plan" to Trust participants, beneficiaries, local unions, and contributing employers. The Notice stated that the Trust was in critical status because it was projected to have an accumulated funding deficiency in four years, that federal law requires "pension plans in critical status to adopt a rehabilitation plan aimed at restoring the financial health of the plan," and that "all contributing employers pay to the plan a surcharge to help correct the plan's financial situation." The notice further stated that the surcharge would be applicable until employers entered into a collective bargaining agreement that implemented one of the schedules in the rehabilitation plan.

24. Beginning in May 2020 and continuing through the summer of 2020, Union Executive Director Marshall and Hospital attorney Alli had numerous discussions regarding the adoption of a rehabilitation plan. Alli told Marshall that the surcharge was a problem for his client and that he wanted to go to the bargaining table to address it. Alli suggested eliminating the bargaining unit's 401(k) plan in exchange for adopting the preferred schedule of the rehabilitation plan. Marshall told Alli that he had raised the issue and that the Union was not interested in giving up its negotiated 401(k) benefit. Alli told Marshall that they did not have to use the 401(k) contribution as a precondition for bargaining over the surcharge. Marshall stated that the Hospital should handle the matter the same way it did the last time that the Trust had entered critical status, by paying the surcharge and dealing with the rehabilitation plan during contract negotiations. Alli stated that the impact needed to remain cost neutral for the Hospital, and the Union needed to figure out a way to pay for it. Marshall stated that if they waited until bargaining they could figure out how to handle the costs and that the Hospital would find a way to recoup its costs during negotiations. Alli commented that if things were not done right, then the members would pay for

[9]During the hearing, England testified that the Hospital had not actually budgeted $160,000 for certification pay but that it was using $160,000 as a ballpark estimate for purposes of discussion. England's testimony was impeached by his testimony from the parties' arbitration hearing, during which England testified that $160,000 was budgeted for the certification pay plan and that the plan was scheduled to begin in the year 2020. Furthermore, England testified during the hearing in this matter that the $160,000 that had been allocated for certification pay was taken away to offset the contribution surcharge, and that if the Union had agreed to get rid of the 401(k) program to cover the cost of the surcharge, then the Hospital would have moved forward with the certification pay program.

the difference when it came time for negotiations. Alli also stated that the Union was managing things the wrong way and that if they continued down that path they would not even have a bargaining unit, much less a pension.

25. On June 15, 2020, the Trustees issued a "Notice of Adoption of Rehabilitation Plan" to all participating employers and unions. The Notice stated that a rehabilitation plan had been adopted and that "[t]he parties to each bargaining agreement that expires after the Trust entered critical status and after receiving schedules for the Pension Trust must bargain over adopting one of the schedules contained in the Rehabilitation Plan. * * * Schedule 1 is the Preferred Schedule and has been pre-selected by the parties to bargaining agreements covering over 94% of the Trust's participants. By law the Trust is also required to provide a Default Schedule which is Schedule 2." The Notice further stated:

> "Until such a time as a bargaining agreement is in place that contains a Rehabilitation Plan Schedule, employers contributing to the Plan are subject to a surcharge. For hours worked from June 1 through December 31, 2020, the surcharge will be five percent (5%) of the total contributions payable to the Pension Trust. Effective with hours worked January 1, 2021 or after the surcharge will be ten percent (10%) of the total contributions payable to the Pension Trust. The surcharge shall cease to apply to hours worked after the effective date of a collective bargaining agreement containing one of the Rehabilitation Plan's two schedules."

26. By letter dated August 3, 2020, David Barlow, an attorney retained by the Trust, advised the Hospital that it had failed to pay the five percent contribution surcharge that was due in June, and requested payment to avoid a collections process.

27. On August 14, 2020, the Hospital's attorney, Alli, sent a letter to Union Executive Director Marshall stating, in part:

> "On August 3, 2020, the Oregon Retail Employees Pension Trust ('OREPT') issued a letter to Bay Area Hospital purporting to assess certain trust contributions based on its unilateral determination to assess a 'contribution surcharge' based on OREPT's funding status. OREPT and Local 555 appear to believe that these funds can be assessed without regard to the specific terms of the current labor contract between the Hospital and Local 555, which is effective July 1, 2018 – June 30, 2022.
>
> "As you know, during multiple conversations over the course of the past several weeks, Bay Area Hospital has offered to immediately adopt Schedule I of the pension trust rehabilitation plan which will require an additional employer hourly contribution of a total of twenty-three cents ($.23) per hour to be implemented in three separate installments beginning January 1, 2021. In order to maintain a cost neutral impact on the total amount of the parties[']economic settlement of the existing four year labor agreement, the Hospital has proposed adopting the rehabilitation plan program in exchange for the union's agreement in deleting Article 15 on the same date Schedule I contributions begin which is January 1,

2021. As I described to you during our various conversations, there are currently no UFCW bargaining unit members participating in the voluntary 401(k) program referenced in Article 15.

"It is my understanding that UFCW Local 555 has rejected the Hospital's offer to accept the Schedule I rehabilitation plan effective January 1, 2021 as described above.

"OREPT's assessment and Local 555's failure to defer the effective dates of any 'contribution surcharge' until a new contract is bargained represent an attempt to increase the Hospital's contribution rates beyond what was agreed to in bargaining. It appears that both UFCW and/or OREPT believe that they have the authority to unilaterally change the Hospital's contribution rates and unilaterally increase the cost of the parties settlement without any effort to bargain over these proposed changes, including but not limited to OREPT's proposed surcharge ostensibly effective for hours worked by bargaining unit employees on or after June 1, 2020.

"* * * * *

"Should it subsequently be determined that the trust has the unilateral right to impose a surcharge or increase the Hospital's pension contribution, such change would be a unilateral change which would then require the Hospital to make its own unilateral change to delete Article 15 of the labor agreement. Let me say again that the Hospital is willing, ready and able to adopt Schedule I of the rehabilitation plan of the pension trust in exchange for the union's agreement to delete Article 15 of the labor agreement. If UFCW Local 555 is unwilling to accept this proposal, the Hospital hereby provides notice pursuant to ORS 243.698 of the Hospital's intent to implement a unilateral change to the contributions provided under the contract in Article 15 or in other areas of the contract to insure [*sic*] that any OREPT assessment is cost neutral as specifically agreed on by the parties during the bargaining process.

"Please provide a set of available dates * * * The Hospital will comply with its obligations to pay the surcharge once the trust has complied with its obligation to provide notice to the Chief Human Resources Officer as required by the last sentence of Section 14.02. The Hospital fully intends to adopt Schedule I of the rehabilitation plan before it is obligated to pay any surcharge."

28. By letter dated August 20, 2020, Union Executive Director Marshall responded to Alli. The letter stated, in part:

"Notwithstanding the fact that no legal right exists for BAH to make the intended unilateral change your letter indicates, the stated premise in your letter that the parties agreed that there would be no further cost associated with the defined benefit plan in which BAH contributes to on behalf of our members is incorrect. BAH is aware of its financial obligations to the defined benefit retirement plan, and the

requirements under federal law by BAH's participation in the Trust. BAH is also aware of the requirements under the PPA should a plan enter critical status, including the requirement that the employer pay a surcharge, having previously paid a surcharge in 2010 and subsequently bargained to implement a rehabilitation plan in 2011, both of which are referenced in Article 14, Section 14.01(D) of the parties CBA.

"In addition, I specifically had conversations with representatives of the hospital during our last bargaining process discussing the funding status and potential credit balance issues that might necessitate a surcharge and modification of the rehabilitation plan. I indicated that I could not guarantee additional rehabilitation money would not be needed during the life of the current CBA, nor could I guarantee the Plan would not enter critical status which would necessitate a surcharge."

29. On September 4, 2020, the Hospital distributed a letter to all bargaining unit members with the following "summary" at the top of the page in bold lettering:[10]

"• UFCW Pension Plan is underfunded.
"• BAH is required to pay ongoing fees to the plan.
"• This unexpected/unplanned cost will have to be offset by either
- o a) decreasing UFCW pension benefits
- o b) reducing future salary increases or
- o c) <u>eliminating the UFCW 401(k) and future contributions. Currently there are no UFCW members participating. BAH 403b and 457b plan will still be available</u>

"• This letter encourages members to contact their UFCW reps to accept option C which has no financial impact to our employees." (Emphasis in original.)

The letter went on to state that the most common reason for a pension plan to enter critical status was due to underfunding, and that plans such as the Trust could become underfunded due to mismanagement, poor investment returns, employer bankruptcy, and other factors beyond the control of the Hospital. The letter noted that this was the second time that the Trust had entered critical status in 10 years, and went on to state:

"To make up for this second event of underfunding, a Rehabilitation Plan must be negotiated and adopted by the Hospital and the Union. Until the parties reach and sign an agreement on this second Rehabilitation Plan, the Hospital must pay an additional hourly surcharge to the pension plan trust for each hour of pension contribution it makes on behalf of eligible UFCW employees. It is estimated that the surcharge will be approximately $180,000 over the remaining 24 months of our existing contract.

"* * * * *

[10]Although the letter indicated that it had been sent to four Union representatives, it was not sent to any of them. The Union obtained the letter after a unit member shared it with Starks.

"The Hospital has proposed to the Union that we accept the first rehabilitation plan which reflects no reduction in benefits. In order to offset the additional cost, the Hospital proposes that your bargaining unit agree to eliminate the Union's 401(k) plan (and the third year Hospital contribution) that was agreed to in our current contract. Option 1 is an additional Hospital expense of $.23 per hour added to the current hourly contribution rate to be phased in starting January 1, 202l. The elimination of the 401(k) is equal to $.15 per hour beginning January 1, 2021.

"There are a number of reasons why we feel this would be best for all parties. First, there has been no voluntary participation in this 40l(k) plan to date. Second, employees may participate in the 403b or 457b Defined Contribution 'DC' plans (similar in design to the Union's 401(k)). Finally, this will mitigate the financial impact to the Hospital. The cost of the Hospital's contribution toward the 401(k) in year three is estimated to be approximately $120,000. While this Hospital proposed solution will still increase the Hospital's costs by about $60,000 over the course of the agreement, the Hospital is willing to cover this in order to leave pension benefits untouched[.]

"The Union's repeated refusal to negotiate with us adds additional costs that will have to be offset against future bargained wage and/or benefit increases. As a matter of perspective, a $160,000 reduction in wages would have reduced the increase you received in July by 30%. This Hospital does not want to do this in your next contract. We would prefer to eliminate a plan that has had no participation in two years. We want to utilize our limited resources in a way that provides the most impact to you and your family.

"If you agree that offsetting retirement costs against future wage and/or benefit increases is a bad idea, then we would ask that you reach out to your UFCW leaders and let them know."

30. After the September 4, 2020 letter was circulated, bargaining unit members began contacting the Union to inquire about enrolling in the 401(k) plan. The Union's October 2020 member newsletter included instructions about how to enroll in the 401(k) plan and stated that the Hospital was scheduled to begin making contributions to the plan in July 2021. The newsletter also stated that members were encouraged to enroll. In October 2020, numerous bargaining unit employees submitted 401(k) plan enrollment forms.[11]

31. On October 18, 2020, the Hospital mailed a letter to bargaining unit employees stating, in part:

[11]The record does not establish the precise number of employees who submitted enrollment forms for the 401(k) plan. On October 2, 2020, Union representative Starks emailed a "few" enrollment forms to the plan administrator. On October 23, 2020, Hospital Benefits Coordinator Nanette Stevens sent an email to the plan administrator stating that she had a "stack of enrollment forms."

"On September 7, 2020[12] we sent you a letter informing you of the additional unplanned (outside the contract) and unbudgeted costs that Bay Area Hospital was burdened with due to a UFCW pension rehabilitation plan fee. This fee was required because of how the UFCW Pension Trust has been managed.[13] The plan is underfunded and the Hospital has to find money to try to bring the pension plan back to an adequate funding level. This is the second such fee that we have had to pay over the last 10+ years, however and unfortunately, probably not the last.

"* * * * *

"Since UFCW leadership has been unwilling to discuss options which might be less impactful to BAH employees (i.e. eliminating the 401(k)), we are forced to find an offset for the approximate $160,000 funding shortfall.

"We discussed many options that could be used to compensate for the additional rehabilitation fee. Since your Union leadership refuses to bargain in good faith with us, unfortunately, we have decided the offset will need to come out of our $160,000 budgeted UFCW certification pay plan that was scheduled to start this year. We had hoped that our letter would have encouraged UFCW leadership to change their approach and consider eliminating the 401(k), which at the time had no participants. But this wasn't the case and we are left with having to take this unfortunate action.

"If you would like your Union to bargain over this issue to find the best solution for you, please feel free to let them know by contacting them."

On the morning of October 20, 2022, the Hospital distributed the letter to unit employees via email.

32. Later that day a certification pay subcommittee meeting was cancelled by the Hospital.[14] Union representative Starks sent an email to Executive Administrative Assistant Kayla Land asking why the meeting was cancelled, and Land responded, "As of now, this is being put on hold. Please refer to the email that was sent out from [England] this morning." Starks responded that the email "does not change the fact that we have a contract in place and there is an agreement for this committee to meet and fulfill our obligations. * * * Is the [H]ospital refusing to meet and uphold the working agreement?" CHRO England responded, "By no means do we intend to not honor our agreement. [Land] will reschedule the meeting. * * * My intention is that we continue down the path that [we] have been on, but perhaps a little slower. The realities are that Bay Area Hospital is saddled with a cost that was outside the contract and those costs have to be accounted

[12]The referenced letter is dated September 4, 2020.

[13]The record contains no evidence that the plan entered critical status because of mismanagement by the Trustees.

[14]The October 20, 2020 meeting was scheduled to take the place of an October 13, 2020 meeting that was also cancelled by the Hospital.

for and covered. * * * Since your leadership refuses to find an agreeable win-win approach, we were left with the certification pay funding."

33. There was no discussion between the Union and the Hospital about the Hospital's plan to use the certification pay funding to pay for the pension contribution surcharge before the Hospital announced its plan to the bargaining unit employees.

34. On October 21, 2020, the Union filed a class action grievance alleging that the Hospital had violated the collective bargaining agreement with its cancellation of certification pay bonuses.[15]

35. The certification pay subcommittee met on November 17, 2020. The subcommittee continued its discussion of ranking eligible employees into tiers. CHRO England stated that he wanted to move from a bonus to a pay differential because the point of the bonus had been to roll out the program quickly, and now they had the time to sort out the details of a pay differential. Because the Hospital no longer had plans to fund the certification pay program, the committee was unable to implement anything. England would not give a timeline for implementation of the program, stating that it depended on finding a funding source.

36. The subcommittee had four additional meetings on December 1, 2020, December 22, 2020, January 26, 2021, and February 18, 2021. The committee made little progress because the program could not be implemented without funding from the Hospital.[16]

37. On February 1, 2021, Executive Administrative Assistant Land distributed a "specialty certification application" to bargaining unit employees for the purpose of identifying those employees who held certifications beyond what were needed to fulfill their basic job requirements. The application was previously distributed in 2019, however, the completed applications were lost.

38. As of the date of the hearing, the Hospital had not allocated any funds for the certification pay program.

The Hospital's Communications with Unit Employees about Avoiding Union Membership

39. On October 28, 2020, a group of three employees from the Hospital's cancer center – Erika Martiz, Scott Stallard, and Brian Webb – met with CHRO England and HR representative

[15]The grievance was the subject of an arbitration hearing on April 13 and 14, 2021. The arbitrator issued his award on July 12, 2021, finding that there had been no contract violation. The arbitrator's award states: "[T]his opinion and award addresses the narrow issue of whether the Employer violated the CBA on or before October 21, 2020, when it did not pay certification pay to unit members." The arbitrator expressly declined to address issues of "unfair bargaining," which he regarded as matters for this Board to decide.

[16]During the hearing, England did not dispute that the subcommittee meetings slowed down and eventually stopped because the funding issue was unresolved.

Nanette Stevens for the purpose of discussing their retirement benefits.[17] The employees asked if the Hospital could bring them into its retirement plan. England responded that the employees were locked into the Union's contract and that the Hospital's hands were tied. The employees asked England about the possibility of getting out of the Union, and whether they could join another union or if they could remove only the cancer center employees from the Union. England responded that he did not know, but that he would talk to the Hospital's attorney and get them the information that they had asked for. England told the employees that he would try to find a resolution because he wanted to keep them happy.

40. On November 11, 2020, Maritz sent an email to CHRO England, Stallard, and Webb following up on the October 28, 2020 meeting. Maritz stated that employees at their level of skill and specialization should be receiving a six percent employer match in their 401(k) plan. Maritz further stated, "We have been forced into a union that is designed for the food industry, which employs people into positions that are easy to fill and has a less than adequate pension plan." Maritz noted that she, Stallard, and Webb were important employees whose services supplied the Hospital with a significant amount of revenue. Maritz also stated that they had expected to hear back from England about another meeting, and she asked England to advise them about how the Hospital planned to resolve the situation.

41. On November 16, 2020, CHRO England responded to Maritz, Stallard, and Webb with an email stating, "I did reach out to our attorney to ask what options are available to exclude a group of employees from union membership. I received a very lengthy response which I will try to summarize here." England's email went on to summarize "ERB [Employment Relations Board] Regulations and Legal Rulings" involving unit determination questions. The email then stated:

> "In the case at hand it appears the cancer unit employees and the employer have a number of procedural options to remove the cancer unit employees from the current wall-to-wall bargaining unit. The first option is to bargain the unit out during successor bargaining. Unfortunately, this option is not available until the contract opens in 2022. In the interim, the employer and cancer unit employees are left with the procedural option of filing a petition before the ERB to remove their unit from the wall-to-wall bargaining unit, potentially including the following: 1) filing a petition for decertification, 2) filing a representation petition to change representation; and 3) filing a petition for redesignation."

The email went on to furnish guidance regarding each of the three types of petitions. For example, the email states, "The cancer unit employees could arguably first seek separate representation from the wall-to-wall bargaining unit through [a representation petition], consistent with the tests set forth above. In the event that effort is successful, then the cancer unit employees could ultimately seek to decertify in a second step once they have autonomy from the wall-to-wall unit." England closed the email by stating, "Please review and then let [Executive Administrative Assistant Land] know when you are ready to meet and we will set up a meeting to discuss."

[17]Maritz testified that the cancer center employees were concerned about their retirement benefits because of the recent death of a coworker who could not afford to retire.

CONCLUSIONS OF LAW

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

2. The Hospital violated ORS 243.672(1)(a) by its September 4 and October 18, 2020, communications to bargaining unit employees regarding the contribution surcharge and by rescinding funding for the certification pay plan.

Under PECBA, it is an unfair labor practice for a public employer or its designated representative to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.672(1)(a). ORS 243.662 guarantees public employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." Subsection (1)(a) has two prongs, commonly referred to as the "because of" and "in" the exercise prongs. The Union contends that the Hospital's actions violated both prongs of the statute.

To determine if an employer interfered with, restrained, or coerced employees "because of" the exercise of protected rights, we examine the employer's motives or reasons for the employer's action. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12 at 18, 25 PECBR 871, 888 (2013). If an employer acts "because of" employees' exercise of protected rights, the employer's actions are unlawful. It is not necessary for a complainant to prove that the employer acted with hostility or union animus, or prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. *Id.*

We determine the employer's reason for acting by examining the record as a whole. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 626, 16 P3d 1189, 1195 (2000). After we make that factual determination, we decide whether the reasons were lawful or unlawful. *Id.* at 639. If, after considering the evidence from both parties, the facts persuade us that the employer acted for lawful reasons, the "because of" claim must be dismissed. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03 at 9, 20 PECBR 733, 741 (2004). If the record persuades us that the employer acted for unlawful reasons, including that the employer's stated reasons were a pretext for unlawful conduct, we will find a "because of" violation of subsection (1)(a). If we find the employer acted for both lawful and unlawful reasons, we apply a mixed motive analysis. In that analysis, we determine whether the employer would have taken the same action in the absence of the protected activity. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-39-10 at 15-16, 25 PECBR 325, 339-40 (2012).

When we analyze whether an employer's actions restrained, interfered with, or coerced employees "in" the exercise of their protected rights, "the employer's motive is irrelevant." *Id*. at 15, 25 PECBR at 339. "We focus only on the effects of the employer's actions on the employees. If the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity," the employer violates the "in" prong of subsection (1)(a). *Id*. A violation of the "in" the exercise prong of subsection (l)(a) may

be either derivative or independent. An employer who commits a "because of" violation also generally commits a derivative "in" the exercise 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. *Id*. An independent violation is typically "based on an employer's threat or implied threat of interference with employees' exercise of protected rights." *Tigard Police Officers' Association v. City of Tigard*, Case No. UP-59-10 at 11, 24 PECBR 927, 937 (2012). For a reasonable employee to be chilled in the exercise of protected activity, there must be some relationship between the protected activity and the employer's actions or statements. *Id*. (citing *Teamsters Local 223 v. Tillamook County Emergency Communications District*, Case No. UP-46-95 at 8, 16 PECBR 397, 404 (1996)).

Turning to the facts in this case, the Hospital proposed to eliminate the collectively bargained 401(k) plan in order to offset the cost of the contribution surcharge, and the Union refused to do so. The Hospital then sent a letter to unit employees proposing to eliminate the plan, so that the contribution surcharge would not be "offset against future bargained wage and/or benefit increases." Some employees then sought to enforce their right to participate in the 401(k) plan. The Hospital subsequently announced in another letter to employees, that the "offset" for the contribution surcharge would come from its planned disbursement of certification pay. The Hospital then rescinded the certification pay, thereby consummating the threat that if the 401(k) was not eliminated, the result would be a reduction of other wages and benefits.

We find that the Hospital's conduct violated the "because of" prong of ORS 243.672(1)(a). In *Central Education Association and Vilches v. Central School District. 13J*, Case No. UP-74-95 at 14, 17 PECBR 54, 67 (1996), *recons,* 17 PECBR 93 (1997), *aff'd*, 155 Or App 92, 95 n 1, 962 P2d 763 (1998), this Board adopted the "*Interboro* doctrine," which takes its name from *Interboro Contractors, Inc*., 157 NLRB 1295 (1966), *enforced*, 388 F2d 495 (2d Cir 1967). Under that doctrine, an employee is engaged in protected activity when the employee seeks to enforce their own rights under a collective bargaining agreement. Here, the employees were engaged in protected activity when they sought to enforce their rights under the contract to participate in the 401(k) plan and declined to give up that contractual right. The evidence establishes a direct connection between that protected activity and the Hospital's retaliatory announcement that it was going to pay for the contribution surcharge with the money that it had budgeted for the certification pay plan, and its subsequent withdrawal of funding for the certification pay plan.

The Hospital argues that the parties never reached a final agreement on each of the factors necessary to implement the certification pay plan, and therefore that its actions did not amount to a rescission of the certification pay disbursement. That claim is belied by the Hospital's unequivocal statement to its employees in the October 18, 2020, letter, that it was going to pay for the pension plan surcharge "out of our $160,000 budgeted UFCW certification pay plan that was scheduled to start this year." Furthermore, CHRO England testified that if the Union had agreed to eliminate the 401(k) plan, then the Hospital would have moved forward with the certification pay plan. Thus, we find no merit in the Hospital's argument.

We recognize that, at the time that the Hospital announced that it was going to use the money budgeted for the certification pay plan to pay for the contribution surcharge, the parties were still finalizing details regarding which certifications would be eligible for certification pay.

Nonetheless, the record establishes that, but for the refusal of the employees and the Union to eliminate the 401(k) plan, the subcommittee would have met as scheduled in October 2020 and would have continued to negotiate those details. Accordingly, we conclude that, but for the refusal to eliminate the 401(k) plan, the Hospital would have used the budgeted $160,000 to issue a certification pay bonus to eligible employees before the end of 2020.[18] Instead, the details were never finalized because, without funding, there was nothing to implement, and the negotiations between the parties stalled and eventually stopped. Indeed, the Hospital's motivation for cancelling the planned disbursement of certification pay was plainly communicated in its October 18, 2020, letter: "We had hoped that our [September 4, 2020,] letter would have encouraged UFCW leadership to change their approach and consider eliminating the 401(k), which at the time had no participants. But that wasn't the case and we are left with having to take this unfortunate action." Thus, the Hospital's own statement expressly establishes that the Hospital rescinded certification pay funding as a direct consequence of the employees and Union refusing to give up the 401(k) plan. Consequently, we conclude that the Hospital violated the "because of" prong of ORS 243.672(1)(a).

We also conclude that the County committed a derivative violation of the "in the exercise" prong of subsection (1)(a). A "because of" violation "almost always restrains, coerces, or interferes with the exercise of protected rights." *Oregon AFSCME Council 75, Local 3742 v. Umatilla County,* Case No. UP-2-08, at 20, 23 PECBR 108, 127 (2009) (citing *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 42, 22 PECBR 323, 351 (2008)). Here, the Hospital urged employees to relinquish a contractual benefit (their 401(k) plan) under the threat of future wage and benefit reductions, and then acted on that threat by rescinding certification pay. Accordingly, we find that the Hospital's conduct would have the natural and probable effect of deterring employees from enforcing their right to participate in the 401(k) plan, out of fear that it would negatively impact their wages and benefits.

We do not address the question of whether the Hospital also committed an independent violation of the "in the exercise" portion of subsection (1)(a) as doing so would not impact the remedy. *See City of Portland*, UP-7-07, 22 PECBR 752 (citing *Lebanon Community School District*, UP-4-06 at 42, 22 PECBR at 354).

3. The Hospital violated ORS 243.672(1)(e) by engaging in direct dealing with its employees regarding the contribution surcharge.

An employer who engages in unlawful direct dealing by communicating directly with bargaining unit members about bargaining issues commits a *per se* violation of ORS 243.672(1)(e), which makes it unlawful for an employer to "[r]efuse to bargain collectively in good faith with the

[18]The Hospital argues that we should defer to the arbitrator's finding that no contract violation occurred because the parties had not reached a final agreement. As stated above, the arbitrator specifically declined to address any unfair labor practice questions, which require a different analysis from the question of whether a contract violation occurred. Consequently, the arbitrator's conclusion does not assist us in resolving the dispute before us, which does not present an alleged violation of ORS 243.672(1)(g). Furthermore, a violation of the contract is not a prerequisite, as the Hospital argues, for finding that the Hospital's rescission of the planned disbursement of certification pay violated ORS 243.672(1)(a).

exclusive representative." *See Roseburg Professional Firefighters Association v. City of Roseburg*, Case No. UP-021-13 at 12, 26 PECBR 111, 122 (2014) and cases cited therein. This Board has held that "[d]irect dealing need not take the form of actual bargaining." *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757 and Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-035/036-20 at 60 (2021) (*TriMet*) (quoting *Allied Signal Inc.*, 307 NLRB 752, 754 (1992)).[19] Direct dealing includes "conduct by an employer that amounts to dealing with the [u]nion through the employees, rather than the employees through the [u]nion." *Id*. (citations omitted). The prohibition on direct dealing includes an employer's attempts "to persuade the employees to exert pressure on the [exclusive] representative to submit to the will of the employer, and to create the impression that the employer rather than the union is the true protector of the employees' interests." *General Electric Co.*, 150 NLRB 192, 194-195, (1964), *enforced*, 418 F 2d 736 (2nd Cir., 1969), *cert. denied,* 397 U.S. 965 (1970)).

Applying the above principles to this case, the Hospital's September 4 and October 18, 2020, letters undermined the Union and constituted direct dealing with employees. Before sending the letters, the Hospital demanded that the Union bargain over a cost neutral solution to the contribution surcharge, suggesting the elimination of the 401(k) plan. The Union (correctly) asserted that it was not obligated to bargain mid-term over the surcharge, that the Hospital was responsible for paying the surcharge, and that the parties should address the matter during regular contract negotiations. The Hospital, dissatisfied with the Union's response, threatened the Union that if it did not comply with the Hospital's demand to address the surcharge, then the Union would not even have a bargaining unit, much less a pension. The Hospital then sent the letters to lobby bargaining unit employees directly. Thus, even after the Union made clear that it was not interested in bargaining over elimination of the 401(k) plan, the Hospital directly communicated with unit employees to exert pressure on the Union to change its position on that matter and to "submit to the will of the [Hospital.]" *See General Electric Co.*, 150 NLRB at 194-95.

Additionally, although the letters reiterated a proposal that the Hospital had already conveyed to the Union (to eliminate the 401(k) plan to cover the costs of the pension contribution surcharge), the Hospital also presented employees with a proposal that *had not* been previously communicated to the Union: to use the money budgeted for the certification pay plan to pay for the contribution surcharge. The Hospital's letter presented the proposal as a *fait accompli*; however, the Hospital also suggested that employees contact the Union to "bargain over this issue to find the best solution for you." Thus, the Hospital indicated that its decision to rescind the money budgeted for the certification pay plan was not final, and that there may still be room to negotiate. Hence, the letter operated as a proposal that was communicated through the unit employees, rather than through the Union.

Furthermore, the Hospital falsely implied in its letters to unit employees that the Union was (1) responsible for the Trust going into critical status, and (2) also unlawfully refusing to negotiate over a solution on behalf of employees. Specifically, the October 18, 2020, letter criticized the

[19]This Board may consider cases decided under the NLRA for guidance in determining what constitutes direct dealing, "particularly to cases decided before 1973, the year in which PECBA was adopted." *TriMet,* UP-035/036-20 at 60 n 31 (2021) (quoting *Portland Ass'n of Teachers v. Multnomah Sch. Dist. No. 1*, 171 Or App 616, 631 n 6, 16 P3d 1189 (2000)).

Union for "refus[ing] to bargain in good faith with us," which was unsubstantiated. Indeed, as discussed in this order, the Union was under no obligation to bargain over the surcharge during the term of the parties' collective bargaining agreement, and the Hospital was required under federal law to pay the surcharge. The Hospital also stated that the contribution surcharge "was required because of how the UFCW Pension Trust has been managed." By referring to the Trust as the "UFCW Pension Trust," without explaining that the Trust is managed by an equal number of Trustees from both labor and management, the Hospital gave the false impression that the underfunding of the Trust was caused by the Union's handling of the plan. These misrepresentations indicate that the letters were designed to undermine the unit employees' faith in the Union, particularly in light of the Hospital's recent threat regarding the future existence of the bargaining unit. Moreover, while the letters gave the impression that the Union was acting irresponsibly, the letters described the Hospital as advocating on behalf of employees. For example, the September 4 letter states, in part:

> "The Union's repeated refusal to negotiate with us adds additional costs that will have to be offset against future bargained wage and/or benefit increases' * * * 'This Hospital does not want to do this in your next contract. We would prefer to eliminate a plan that has had no participation in two years. We want to utilize our limited resources in a way that provides the most impact to you and your family.'"

In sum, these letters seek to use unit employees to exert pressure on the Union while unduly portraying the Hospital, as opposed to the Union, as "the true protector of the employees' interests." *See General Electric Co.*, 150 NLRB at 194-95. We find these actions amount to direct dealing with the employees regarding the contribution surcharge, in violation of ORS 243.672(1)(e).

4. The Hospital violated ORS 243.672(1)(b) by engaging in direct dealing with its employees regarding the contribution surcharge.

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." Subsection (1)(b) is concerned with the rights of the union itself, rather than the rights of the employees. *City of Portland*, Case No. UP-7-07 at 43, 22 PECBR at 794. We have previously held that an employer dealing directly with employees on contract issues can violate subsection (1)(b) because:

> "By bypassing the exclusive representative and dealing directly with the employees on contractual matters, a public employer undermines the exclusive representative's status and impairs the representative's ability to discharge its statutory obligations. Bargaining unit members who see the employer dealing directly with other unit members about contractual issues will inevitably lose confidence in the exclusive representative's capability to represent their interests in dealing with the employer."

AFSCME, Local 2909 v. City of Albany, Case No. UP-26-98 at 14, 18 PECBR 26, 39 (1999). Furthermore, where an employer's representatives bypass the union's designated representatives

and make new bargaining proposals directly to employees, such communications are unlawful, even though there may be no direct proof that the union lost support of its membership or suffered any other actual harm because of the employer's conduct. *State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05 at 28, 22 PECBR 372, 399 (2008). Such direct dealing amounts to unlawful interference with the union, in that it "impacts the [u]nion's ability to fulfill its obligations because it undermines unit members' willingness to rely on and trust the [u]nion to protect their interests." *City of Albany*, UP-26-98 at 14, 18 PECBR at 39.

Here, we have already determined that the Hospital engaged in direct dealing with bargaining unit employees when it conveyed a new proposal directly to employees, to use the money budgeted for the certification pay plan to pay for the contribution surcharge. Because the letter operated as a proposal that was communicated through the unit employees rather than through the Union, the Hospital undermined the Union's role as the exclusive representative and impaired its ability to discharge its statutory obligations in violation of subsection (1)(b).

5. The Hospital violated ORS 243.672(1)(i) and ORS 243.670(2) by using public funds to issue communications that were designed to undermine employees' support for the Union and to give employees legal advice about how to get out of the Union.

ORS 243.672(1)(i) makes it an unfair labor practice to violate ORS 243.670(2), which prohibits public employers from using public funds to support actions "to assist, promote or deter union organizing." The statute defines "assist, promote or deter union organizing" to include "any attempt by a public employer to influence the decision of any or all of its employees" regarding "whether to support or oppose a labor organization that represents them." ORS 243.670(1)(a)(A). The Board has interpreted these provisions "as prohibiting any act or instance of a public employer making an effort to affect or alter (including by indirect or intangible means) the decision of any or all of its employees regarding whether to support or oppose a labor organization." *United Academics of Oregon State University v. Oregon State University*, Case No. UP-021-18 at 18 (2020), *aff'd*, 315 Or App 348, 502 P3d 254 (2021). Here, the Union contends that the Hospital violated that prohibition by soliciting legal advice about how employees could get out of the Union and furnishing that advice to its employees, and by drafting and distributing communications to its employees that undermined the Union. We agree.

For the reasons stated above, we have already concluded that the Hospital's September 4 and October 18, 2020, communications to its employees were calculated to undermine employees' support for the Union. Therefore, by using its resources to draft and distribute those letters, the Hospital used public funds in an attempt to influence the decision of its employees regarding whether to support the Union.

We next consider the Hospital's conduct in furnishing legal advice and guidance to its employees about how to get out of the Union. We easily conclude that soliciting an attorney to answer employees' questions about how to get out of a union, and then furnishing the employees with legal advice and guidance about their options for doing so, qualifies as an "effort to affect or alter" the decision of "whether to support or oppose a labor organization." The Hospital argues that it did not run afoul of the statute because it did not encourage the employees one way or the

other, but simply provided a neutral response to their questions. On the contrary, the Hospital did not limit itself to a neutral, factual response to the employees' inquiries. Instead, the Hospital furnished legal analysis and supplied advice and guidance regarding which petition the employees should file. In doing so, the Hospital sent a signal that it supported the employees in their desire to be free of the Union, and that it wanted to facilitate their efforts to do so, even if the Hospital could not itself participate in the process.

The Hospital argues that finding a violation of ORS 243.670(2) would exceed the purpose and intent of the statute by preventing public employers from addressing questions posed by employees.[20] Under ORS 243.670(3), "[i]f an employee requests the opinion of the employee's employer or supervisor about union organizing, nothing in this section prohibits the employer or supervisor from responding to the request of the employee." As explained above, however, the Hospital's actions in this case do not fit within that safe harbor provision because the Hospital did not simply respond to the employees' questions in this case. Rather, it solicited its attorney to furnish legal advice and guidance to employees regarding their options for getting out of the Union. This Board has previously determined that employer responses to employee questions that are "not merely factual," but rather, include legal positions and "[advise] employees on how to take certain actions" do not fall within the exceptions set forth in ORS 243.670(3) and violate ORS 243.670(2). *Oregon State University,* UP-021-18 at 22-23. Put another way, we disagree that our determination regarding the Hospital's conduct would reasonably preclude public employers from responding to employees' questions in a manner that was not intended to facilitate their efforts to get out of a union.

The Hospital also argues that finding a violation of ORS 243.670(2) would violate public employers' rights to obtain legal counsel under the First and Fourteenth Amendments of the United States Constitution. The Hospital reasons that public employers would "be barred from seeking legal advice on routine labor matters." Here again, we disagree that our determination regarding the Hospital's conduct would reasonably be interpreted to preclude public employers from seeking legal advice on routine labor matters. First, the statute specifically exempts expenses incurred in connection with "[a]ddressing a grievance or negotiating or administering a collective bargaining agreement" and "[n]egotiating, entering into or carrying out an agreement with a labor organization." *See* ORS 243.670(4)(a) and (d). Moreover, the Hospital was not seeking advice on a routine labor matter in this case. The Hospital was obtaining legal advice for the purpose of instructing its employees about how to get out of the Union.

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[20]In support of its argument regarding the intent of ORS 243.670, the Hospital contends that legislative testimony supports a finding that ORS 243.670 was "intended to prevent the retention of expensive, anti-union consultants during organizing efforts." This argument has been rejected by the Court of Appeals in *United Academics of Oregon State University v. Oregon State University*. In that case, the employer asserted that the bill that led to ORS 243.670, was intended to prohibit "big budget anti-union campaigns and compel public employer neutrality." 315 Or App 348, 354, 502 P 3d 254, 258 (2021). The Court of Appeals held that the "[employer's] proposed interpretation of the statute is not persuasive because it conflicts with the plain words used by the legislature. ORS 243.670(1)(a) defines the prohibited conduct as '*any* attempt by a public employer to influence the decision of any or all of its employees * * *.'" *Id*. at 355 (emphasis in original). The Court further explained that "[n]o analysis of the legislative history can undercut the fact that the legislature wrote the statute broadly to encompass 'any' attempt to influence the decisions of employees with regard to union organizing, and did not include the limitations that [employer's] argument asks us to recognize." *Id*.

Consequently, we conclude that the Hospital used public funds to "deter union organizing" in violation of ORS 243.672(2)(a), and thereby violated ORS 243.672(1)(i).

6. The Union did not violate ORS 243.672(2)(b) by refusing to engage in midterm bargaining with the Hospital over the Trust's contribution surcharge.

Under ORS 243.672(2)(b), it is an unfair labor practice for a labor organization or its designated representative to refuse to bargain collectively in good faith with a public employer if the labor organization is an exclusive representative. Accordingly, a labor organization violates ORS 243.672(2)(b) when it refuses to bargain over a mandatory subject of bargaining when it is obligated to do so.

Here, the Hospital contends that the contribution surcharge was unanticipated, and therefore, the Union was obligated to bargain midterm to offset the costs against employee benefits provided for under the collective bargaining agreement. Specifically, the Hospital asserts that it "provided proper notice pursuant to ORS 243.698 of the Hospital's intent to implement a unilateral change to the contributions provided under the contract in Article 15 [the 401k plan] (or in other articles of the contract) to ensure that [the contribution surcharge] would be cost neutral for the Hospital." Therefore, the hospital avers, the Union was "thereby require[ed] to bargain in good faith over the change" under ORS 243.698, and its refusal to do so violated ORS 243.672(2)(b).

There are numerous and significant issues with the Hospital's argument. First of all, the proposition that a Union is required to bargain when an employer proposes a change to mandatory subjects of bargaining under ORS 243.698, is directly contrary to the statutory language, which states that: "[w]ithin 14 calendar days after the employer's notification of anticipated changes [that impose a duty to bargain], the exclusive representative *may* file a demand to bargain. If a demand to bargain is not filed within 14 days of the notice, the exclusive representative *waives its right to bargain* over the change or the impact of the change identified in the notice." ORS 243.698(3) (emphasis added). Therefore, there is simply no basis for the Hospital's claim that the Union violated ORS 243.672(2)(b) when it did not either demand to bargain with the Hospital over the announced change or cede to the Hospital's demand that it must bargain over that announced change.

Furthermore, ORS 243.698 only applies to a proposed midterm change by the employer that "concern[s] a condition of employment that is a mandatory subject of bargaining *not covered by the existing agreement*." *In the Matter of the Petition for Declaratory Ruling Filed by the Sandy Union High School District,* Case No. DR-4-96 at 5, 16 PECBR 699, 703 (1996); *see also 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 5, 20 PECBR 721, 725 (2004); *see also* OAR 115-040-000(2)(a). Here, the Hospital explicitly acknowledges that it proposed to unilaterally change the 401(k) plan as addressed in Article 15, or alternatively, benefits set forth "in other articles of the contract." Accordingly, ORS 243.698 does not apply here.

Additionally, the Hospital contends that:

> "The Union can certainly waive that opportunity to bargain the impacts of the change [proposed by the Hospital], but in this case, rather than waive the opportunity, the Union instead refused to bargain and asserted that no such obligation existed. The Union therefore set up a scenario requiring the Hospital to choose to either implement the unilateral change by budgeting to accommodate the impacts of the contribution surcharge, without negotiating those impacts with the Union, which would have no doubt resulted in the Union filing an unfair labor practice complaint, or instead the Hospital could file its own unfair labor practice complaint in an effort to compel the Union to fulfill its obligation to come to the table and bargain over the Hospital's proposed changes."

The Hospital thus appears to concede that 1) ORS 243.698 does *not* compel the Union to negotiate over proposed changes (contrary to its underlying argument); and 2) had the Hospital made a unilateral change to the 401(k) plan (or to other benefits expressly addressed in the contract), that it would be committing an unlawful unilateral change to the terms and conditions of the collective bargaining agreement. Furthermore, the Hospital apparently argues that in order to avoid committing its own unfair labor practice, the Union was compelled to come to the table to renegotiate contractually bargained benefits, or be subject to an unfair labor practice. We find such a proposition to be fundamentally at odds with PECBA. In sum, the Hospital's argument is directly contrary to the plain language of ORS 243.698 and longstanding Board precedent, and we consequently reject it.

As discussed above, we easily conclude that there is no obligation for the Union to bargain over the established terms of the collective bargaining agreement under ORS 243.698. We also decline to otherwise find the Union was required to bargain midterm about the costs of the contribution surcharge. This Board has previously held, that "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." *Hillsboro Professional Firefighters, IAFF Local 2210 v. City of Hillsboro*, Case No. UP-046-20 at 13 (2022) (emphasis added) (finding no obligation to reopen agreement and negotiate over retirement benefits that were affected by legislation, where the subject of retirement benefits was covered by the parties' contract).[21] Section 14.02 of the parties' collective bargaining agreement binds the Hospital to the terms of the Trust Agreement and any amendments that may be made. Furthermore, the Trust Agreement specifically provides that the Trust shall be administered in accord with applicable laws. The Hospital does not dispute that the contribution surcharge was assessed by the Trustees in compliance with applicable federal law. Therefore, consistent with our reasoning in *City of Hillsboro*, we conclude that the Union was not obligated to bargain midterm over the contribution surcharge.

[21]The Hospital's reliance on *Multnomah Cty. v. Multnomah Cty. Corr. Deputy Ass'n*., 317 Or App 89, 505 P3d 1037 (2022), is inapposite because that case addressed whether an employer has a duty to engage in midterm bargaining over a mandatory subject that *is not* covered by the applicable collective bargaining agreement, when the Union initiates a demand to bargain.

The Hospital nevertheless argues that the Union was required to bargain midterm about the costs of the contribution surcharge because the Hospital could not have anticipated that the Trust would enter critical status again. The Hospital's position is undermined by evidence (including the Hospital's own minutes from relevant bargaining sessions) that the parties had discussed the potential for the Trust to enter critical status again. Regardless, the question of whether the Hospital anticipated the surcharge is otherwise unavailing. Indeed, in *City of Hillsboro*, the employer was not required to engage in mid-term negotiations over the impact of Senate Bill (SB) 1049 on retirement benefits, notwithstanding that it was outside of the parties' control, and therefore not anticipated.[22]

For the reasons detailed above, we find no basis for the Hospital's allegation that the Union violated ORS 243.672(2)(b) and therefore dismiss the Hospital's bad faith bargaining allegation.

Remedy

Because the Hospital violated ORS 243.672(1)(a), (b), (e), and (i), a cease-and-desist order is required. ORS 243.676(2)(b). We must also take such affirmative action as necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c). The record establishes that because of the Hospital's retaliatory rescission of its funding for its certification pay plan, no bargaining unit employees have received any compensation pursuant to the certification pay plan. Therefore, we conclude that a make whole remedy is appropriate. We order the parties to bargain in good faith to finalize the details of the certification pay bonus that the Hospital was scheduled to pay to its eligible employees before December 31, 2020. We also order the parties to bargain in good faith to determine which employees would have received compensation under the certification pay plan in 2021 and 2022, had the Hospital not rescinded funding for the certification pay plan. Furthermore, we order the Hospital to make all affected bargaining unit employees whole for any loss of compensation they suffered because of the Hospital's recission of funding for the certification pay plan, from the date of the violation to the date that the Hospital complies with this order. If the parties do not reach agreement on an appropriate make-whole remedy after 60 days of bargaining, each party shall submit to the Board the last offer made to the other party within seven days of the conclusion of bargaining. The Board may choose the Union's or Hospital's final offer, or craft an alternate remedy that best effectuates the purposes and policies of PECBA.

Additionally, we order the Hospital to post and email a notice. We generally order the posting of a notice if were determine that a party's violations of PECBA: (1) were calculated or flagrant; (2) were part of a continuing course of illegal conduct; (3) were 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),

[22] *Oregon School Employees Association v. Silver Falls School District 4J*, Case No. UP-010-21 at 19-20 (2022), is not to the contrary. In that case, the Board concluded that, having agreed to bargain midterm, the employer was obligated to do so in good faith. Here, the Union never agreed to bargain midterm over the Trust's contribution surcharge. Accordingly, the Board's decision in *Silver Falls* does not impact our determination in this case.

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 Oregon Trail School District No. 46*, UP-16-06 at 47, 22 PECBR at 714. Here, three factors are present. First, as set forth above, the Hospital's actions were calculated to undermine employees' support for the Union. Second, the Hospital's actions impacted the entire bargaining unit. And third, because the Hospital engaged in direct dealing with its unit employees, the Hospital's actions had a significant potential impact on the functioning of the Union. In addition, because the record establishes that email was the common method of communication between the Hospital and its employees, we order the Hospital 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).

The Union has requested that the Hospital be ordered to pay a civil penalty under ORS 243.676(4)(a). 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). We have found that conduct is "egregious" where it is "conspicuously bad" and "flagrant." *Id*. at 18, 21 PECBR at 223.

We do not find that the element of repetitive conduct is satisfied here because there is no evidence of a prior Board order finding similar unlawful conduct between the Hospital and the Union.[23] We do find, however, that the Hospital's unfair labor practice conduct was egregious. We have found that "egregious" offenses are those that tend to undermine the very nature of the collective bargaining process. *Lincoln County Education Association v. Lincoln County School District,* Case UP-27-02 at 24, 20 PECBR 571, 594 (2004.) Here, the Hospital's conduct in withholding budgeted and agreed-on compensation from employees because the Union did not agree to eliminate the collectively bargained 401(k) plan qualifies as such an offense. The Hospital's conduct sends a message that employees may suffer consequences if the Union does not accept the Hospital's proposals, thereby interfering with the Union's ability to freely evaluate

[23]As addressed in the Rulings section of this order, the ALJ acted properly within her discretion in taking administrative notice of the consent order adopted by the Board in *Oregon Nurses Association v. Bay Area Hospital*, Case No. UP-015-22 (July 5, 2022), for purposes of determining its relevance. However, we ultimately conclude that the consent order does not establish that a civil penalty is warranted because that order does not involve the "same parties" and because the complainant in that case was a different labor organization. Furthermore, the conduct that formed the basis of the consent order took place *after*, not before, the Hospital's unlawful conduct in this matter.

the Hospital's proposals and solicit employee input regarding proposals. Consequently, we conclude that the Union is entitled to a civil penalty under ORS 243.676(4)(a)(A). [24]

Because the Hospital violated ORS 243.670(2), the Hospital is also required to pay "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). In accordance with the parties' stipulation on the matter, this Board ordered the Hospital to produce information reflecting the amount of public funds it spent on the offending conduct. [25] The Union subsequently agreed to accept the amounts reflected in the Hospital's documentation for the purposes of calculating the civil penalty, which total $13,194.85. Accordingly, we award a civil penalty amount equal to three times this figure: $39,584.55.

The Union also requests reimbursement of its filing fees. PECBA authorizes us to order reimbursement to the prevailing party "in any case in which the complaint or answer is found to have been frivolous or filed in bad faith." ORS 243.672(6). A claim is frivolous only if every argument asserted in its support is one which a reasonable lawyer would know is not well-grounded in fact or law, or warranted by a reasonable argument for an extension of the law. *SEIU Local 503, OPEU, v. State of Oregon, Department of Transportation*, Case No, UP-11-09 at 22, 23 PECBR 939, 960 (2010). The Union asserts that reimbursement for filing its answer is warranted because "the Hospital's pursuit of this action for the Union's alleged failure to bargain, despite the Hospital's own acknowledgment that it sought midterm changes to existing contract language [Article 15, the 401(k) plan], is frivolous, filed with the intent to harass, and/or is in bad faith." The Union contends that the basis of the Hospital's complaint, that the Union had a duty to bargain concessions to existing contract language, is contrary to longstanding Board precedent "establishing no obligation to bargain over proposed midterm changes to subjects already bargained to completion by the parties." We agree with the Union. Indeed, as discussed in this order, the Hospital's argument that the Union is required to bargain under ORS 243.698 has no basis in existing law and is undermined by the plain language of PECBA.

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[24]The recommended order did not award a civil penalty under ORS 243.676(4)(a)(B). Although the Union filed cross-objections to that order, it did not object to the denial of a civil penalty under ORS 243.676(4)(a)(B), based on the dismissal of the Hospital's complaint. Because no cross-objections were filed regarding that civil penalty, we decline to address it. *See* OAR 115-010-0090(3).

[25]To resolve a dispute over the production of subpoenaed attorney billing records, the parties entered into a prehearing stipulation in which they agreed that the dollar amount of public funds expended by the Hospital on the matters that the Union alleged violated ORS 243.670(2) would be produced if the ALJ determined that the Hospital violated ORS 243.670(2), as alleged. After the recommended order issued finding that the Hospital violated ORS 243.670(2), the Union requested the relevant information, and the Hospital refused to provide it. The Union subsequently requested that the Board issue an order directing the Hospital to produce the relevant information. The Hospital objected, arguing that the recommended order was not a final order under OAR 115-010-0090. The Board subsequently issued a ruling directing the Hospital to provide the Union with the information that the parties stipulated to, as the parties' stipulation clearly stated that the information would be provided "only if, and after, the *ALJ* concludes the Hospital violated ORS 243.670(2)." (Emphasis added.)

Furthermore, the Hospital's argument is not warranted by a reasonable argument for an extension of the law. Again, ORS 243.698 does not obligate a Union to bargain where an employer proposes a unilateral change. The Hospital's argument is contrary to the statutory language, and furthermore, the Hospital's own acknowledgment that the Union "can certainly waive its right to bargain." Additionally, our case law is clear that there is no obligation for the Union to bargain midterm over proposals to change mandatory subjects expressly covered by the existing agreement. We therefore find the Hospital's argument frivolous 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. We therefore find that the Union is entitled to reimbursement for its answer to the Hospital's frivolous complaint.

We decline to issue a reimbursement for the Union's filing fee for its complaint. We begin by noting that both a civil penalty and reimbursement of the fee for filing a complaint are available if an answer is "frivolous" or "frivolously filed." *Compare* ORS 243.672(6) (Board has the discretion to award reimbursement of a filing fee for an answer if the complaint "is found to have been frivolous or filed in bad faith") *with* ORS 243.676(4)(a)(A) (the Board may award a civil penalty to a respondent if it dismisses the complaint and "the complaint was frivolously filed, or filed with the intent to harass the other person, or both."). A civil penalty (but not reimbursement of a filing fee) is also available to a complainant if the respondent committed an unfair labor practice that was egregious. Although the record does establish that the Hospital's conduct was egregious (as discussed above), the record does not establish that the Hospital's *answer* was either frivolous or filed in bad faith.

The Hospital requests reimbursement for its reasonable costs and fees accrued in responding to the Union's motion to take administrative notice of the consent order, arguing that it is entitled to recoup its costs and fees because the motion was frivolous. The Hospital cited no rule authorizing us to reimburse the costs and fees accrued in responding to a *motion*. As stated above, ORS 243.672(6) authorizes reimbursement for filing fees when a *complaint* or an *answer* was found to have been frivolous or filed in bad faith. Therefore, we deny the Hospital's request.

ORDER

1. The Hospital shall cease and desist from violating ORS 243.672(1)(a), (b), (e), and (i).

2. The Hospital and the Union shall bargain in good faith over an appropriate make-whole remedy for the Hospital's rescission of funding for the certification pay plan, consistent with the Remedy section of this order. The parties have 60 days from the date of this order to reach an agreement. If the parties do not reach an agreement within 60 days, each party shall submit to the Board the last proposal that it made to the other party within seven days of the conclusion of bargaining. The Board will either select one of the parties' last offers or craft its own remedy.

3. The Hospital shall post the attached notice for 30 days in prominent places where Union-represented employees are employed.

4. The Hospital shall distribute the attached notice by email to all Union-represented employees within 10 days of the date of this order.

5. The Hospital is ordered to pay the Union a civil penalty of $1,000.00 within 30 days of the date of this order.

6. The Hospital is ordered to pay the Union a civil penalty of $39,584.55 within 30 days of the date of this order.

7. The Hospital is ordered to reimburse the Union's $300 filing fee within 30 days of the date of this order.

DATED: July 10, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

*Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

*Member O'Glasser did not participate in the deliberations of this case.

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 Nos. UP-045-20 and UP-004-21, *United Food Commercial Workers, Local 555 v. Bay Area Hospital and Bay Area Hospital v. United Food and Commercial Workers, Local 555*, 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 Bay Area Hospital (the Hospital) committed unfair labor practices in violation of ORS 243.672(1)(a), (b), (e), and (i) of PECBA.

The Board concluded that the Hospital violated: ORS 243.672(1)(a) when it issued letters to employees on September 4 and October 18, 2020, that had the tendency to deter employees in or because of the exercise of their protected right to participate in the collectively bargained 401(k) plan and when it rescinded budgeted certification pay; ORS 243.672(1)(b) and (e) when it bypassed United Food and Commercial Workers, Local 555 (the Union), and directly dealt with its employees regarding a proposal for paying for a pension contribution surcharge; and ORS 243.672(1)(i) and 243.670(2) when it expended public funds to issue letters to employees that were calculated to undermine employees' support for the Union, and when it expended public funds to furnish employees with legal advice and guidance about how to get out of the Union.

To remedy these violations, the Board orders the Hospital to:

1. Cease and desist from violating ORS 243.672(1)(a) by interfering with, restraining, or coercing employees in or because of their rights guaranteed under ORS 243.662 of the PECBA.

2. Cease and desist from violating ORS 243.672(1)(b) and (e) by dealing directly with bargaining unit employees regarding collective bargaining matters.

3. Cease and desist from violating ORS 243.672(1)(i) and ORS 243.670(2) by expending public funds to support actions to assist, promote, or deter union organizing.

4. Bargain with the Union to implement a remedy to make affected employees whole for the Hospital's rescission of funding for the certification pay plan.

5. Pay the Union a civil penalty in the amount of $1,000.00.

6. Reimburse the Union's $300 filing fee within 30 days of the date of this order.

7. Pay the Union a civil penalty in the amount of $39,584.55 which is equal to triple the amount of funds the Hospital expended to assist, promote, or deter union organizing.

8. Post this notice for 30 days in prominent places where Union-represented employees are employed.

9. Distribute this notice by email to all Union-represented employees within 10 days of the date of the order.

EMPLOYER

Dated: _____, 2023

By: _____

Title: _____

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for 30 consecutive days from the date of posting in each employer facility in which bargaining unit personnel are likely to see it. This notice must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 1225 Ferry Street S.E., 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. UP-003-23

(UNFAIR LABOR PRACTICE)

M.K., Complainant, v. OREGON STATE POLICE, Respondent, and OREGON STATE POLICE OFFICERS ASSOCIATION, Intervenor.	)	DISMISSAL ORDER

Daniel Thenell and Paige Chrz, Attorneys at Law, Thenell Law Group, P.C., Portland, Oregon, represented Complainant.

Sylvia Cramond, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

Daryl Garrettson, Attorney at Law, Lafayette, Oregon, represented Intervenor.

On January 23, 2023, M.K. (Complainant) filed an unfair labor practice complaint against Oregon State Police (OSP), alleging that OSP violated ORS 243.672(1)(a) and ORS 243.672(1)(f). The matter was assigned to Administrative Law Judge (ALJ) Jennifer Kaufman. On February 3, 2023, Oregon State Police Officers Association (Association) filed a motion to intervene, which the ALJ granted. On February 7, 2023, OSP filed an informal response.

ALJ Kaufman investigated the complaint to determine if an issue of fact or law exists that warrants a hearing, as required by ORS 243.676(1)(b) and OAR 115-035-0005. The ALJ determined that the complaint appeared to meet the threshold pleading requirements. On February 17, 2023, the ALJ served the complaint as required by OAR 115-035-0030. On March 3, 2023, OSP filed its answer to the complaint. On March 15, 2023, the ALJ set the matter for hearing on July 18, 2023.

On May 31, 2023, this Board issued a dismissal order in *C.B. v. Linn County Sheriff's Office*, Case No. UP-002-23, dismissing the complaint in that case without a hearing. Because the complaint in this case advances the same legal arguments that were addressed by the Board in *Linn County Sheriff's Office,* ALJ Kaufman issued an order directing Complainant to show cause why the complaint in this matter is distinguishable and should not be dismissed without a hearing. Complainant filed a response to the order to show cause on June 13, 2023, asserting two arguments why the complaint should not be dismissed: (1) the CBA language in this case, regarding whether an employee may initiate grievance arbitration, is different than the CBA language on that issue in *Linn County Sheriff's Office*; and (2) the matter was already set for hearing. The ALJ subsequently referred the complaint to the Board with the recommendation that the Board dismiss the complaint. For the following reasons, we find dismissal appropriate.

In considering whether a complaint presents an issue of fact or law that warrants a hearing, we assume well-pleaded factual allegations 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). In making our determination, 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).

Here, having considered the facts alleged in the complaint, as well as the undisputed facts discovered by the ALJ, we summarize the alleged or undisputed facts as follows:

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

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

3. The Association is the exclusive certified bargaining representative of Oregon State Police Officers, including Complainant, in employment relations with OSP.

4. At the time of the events underlying the dispute in this matter, the Association and the State (on behalf of OSP) were parties to a collective bargaining agreement (CBA) that runs from July 1, 2019 – June 30, 2023.

5. Article 11 of that CBA addresses discipline and discharge, including the agreed-on discipline grievance procedure between the Association and OSP. Article 11 states, in relevant part:

"ARTICLE 11 - DISCIPLINE AND DISCHARGE

"11.1 Discipline.

"Disciplinary action, including discharge, shall be only for just cause. The employee may choose an unpaid suspension in lieu of an economic sanction. Such suspension will be leave without pay and will not count as hours worked for purposes of overtime calculation.

"11.2 Exclusive Remedies.

"The parties agree that the procedures described in this Agreement are the full disciplinary and discharge remedies and procedures for which employees are entitled.

"11.3 Appeals.

"Within fifteen (15) business days of the Association's receipt of notice of disciplinary action (except for discharge), the Association may appeal the discipline by filing a notice of appeal of discipline with the OSP Human Resources Services Section. The notice of appeal shall state the date the disciplinary action notice was received by the Association, article(s) and an explanation of why the discipline was not for just cause. Within ten (10) business days of the receipt of the notice, the Superintendent or designee shall meet to discuss the appeal. The Superintendent or his designee shall respond within fifteen (15) business days from the meeting date. The Association may advance the grievance appeal to arbitration within fifteen (15) business days of the date of response or the date the response is due whichever is sooner. The arbitration appeal must be contemporaneously submitted to the Department of Administrative Services (DAS) Chief Human Resource Office, Labor Relations Unit in writing, and include a copy of the discipline, the response of the Department and a statement of the response for the appeal. The parties agree to schedule arbitration as soon as is practicable. Verbal reprimands or lower forms of informal corrective action cannot be grieved. Personnel investigations and the resulting corrective action when the employee has stipulated to the conduct pursuant to Article 9, Section 9.3.3 and 9.4.4 cannot be grieved. Any personnel investigation which results in a verbal reprimand will be documented on the personnel complaint form and a copy of the complaint form sent to the Association. Discharge from employment may be appealed directly to arbitration (within fifteen (15) business days of the effective date of the discharge) as provided herein."

6. Article 12 of the parties' CBA sets forth the grievance procedure for disputes other than discipline and discharge, and states, in relevant part:

"ARTICLE 12 - SETTLEMENT OF DISPUTES

"12.1 Grievance Procedure.

"The parties agree that for the purpose of this Agreement, a grievance shall be defined as a dispute regarding the meaning, interpretation or application of this Agreement and that such dispute shall be settled as provided in this Article. Discipline and discharge shall be handled as described in Article 11. In the event that the matter being grieved involves the act or failure to act of the supervisor of the employee, the Association may elect to skip Step 1 of the grievance procedure and file the grievance at Step 2.

"Step 1. The affected employee and/or the Association shall submit the grievance in writing to a supervisor of the employee, with a copy to Human Resources within twenty (20) business days after the grievant becomes aware of its occurrence as follows * * * * *."

7. Complainant was a Trooper with OSP, a position represented by the Association. Complainant also had legal insurance with the Fraternal Order of Police Legal Defense Plan Inc., (Plan). The Plan is a self-funded benefits plan that provides an attorney to covered officers in connection with Civil, Criminal, or Administrative proceedings, depending on the level of coverage elected. The Plan is not a labor organization or union. Individual officers, such as Complainant, may request attorneys from a list of Plan attorneys. The attorneys represent the individual officer and do not represent either the Plan or any labor organization or union. Plan attorneys are paid through a benefits administrator.

8. In October 2020, OSP received an anonymous complaint alleging that Complainant engaged in inappropriate conduct while on duty. OSP subsequently began an investigation into the complaint.

9. On October 28, 2020, Complainant retained a Plan attorney to represent him from Thenell Law Group P.C. (Plan attorney).

10. On November 2, 2020, Complainant attended an investigatory interview and was represented by an Association representative and his Plan attorney.

11. The anonymous complaint was found to be not substantiated due to lack of corroborating evidence of inappropriate conduct.

12. OSP later reopened the investigation after learning the identity of the individual that reported the anonymous complainant to OSP in October 2020. OSP conducted interviews with the individual, who was also employed at OSP.[1]

[1]The complaint contains facts regarding the alleged conduct that Complainant was investigated for that ultimately lead to Complainant's termination. Those specific factual allegations, however, are not relevant to the limited issue before us, which is whether Complainant has the right to proceed to arbitration on his own, without the Association.

13. On March 12, 2021, OSP conducted a second investigatory interview with Complainant. During this interview, Complainant was represented by an Association attorney and again by his Plan attorney.

14. On May 3, 2021, OSP completed a "Finding of Fact" in which two allegations were found to be substantiated against Complainant.

15. On May 24, 2021, OSP accepted a response to the Finding of Fact from Complainant's Plan attorney.

16. On June 17, 2021, OSP issued a pre-termination letter to Complainant.

17. On August 2, 2022, Complainant attended a pre-dismissal hearing, represented by his Plan attorney.

18. On October 10, 2022, OSP issued a notice of termination to Complainant, with an effective date of October 31, 2022.

19. On November 3, 2022, Complainant's Plan attorney sent a letter titled "Appeal of Discharge to Arbitration" to OSP through the State of Oregon, Department of Administrative Services. The letter was sent on behalf of Complainant and assertedly was sent pursuant to Article 11.3 of the CBA.

20. On November 8, 2022, John Nees, State Labor Relations Manager, emailed the Plan attorney on behalf of OSP. Nees refused to engage in arbitration regarding the appeal of Complainant's termination, which was filed by his Plan attorney and not by the exclusive representative. That same day, the Plan attorney notified the Employment Relations Board (Board) of the appeal to arbitration and requested a list of arbitrators.

21. On November 9, 2022, the Board provided a list of arbitrators to the parties. That same day, OSP's attorney responded to the Board via email and requested that the list be withdrawn. The Plan attorney responded, asserting that OSP was "estopped from relying on the exclusivity argument" because it allowed Complainant's Plan attorney "to represent him throughout this process and allowed [the Plan attorney's office] to represent [Complainant] at the *Loudermill* [hearing]."[2]

22. On November 22, 2022, Complainant's Plan attorney sent a letter to State Labor Relations Manager Nees, where Complainant alleged legal and contractual support for Complainant's right to arbitrate his claim.

23. In or around November 2022, the Association communicated to Complainant and his Plan attorney that the Association's State Executive Committee had considered the issue of arbitrating Complainant's grievance and voted not to pursue arbitration. The Association also

[2]*See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S Ct 1487, 84 LEd 2d 494 (1985).

communicated to Complainant and his Plan attorney that the Association made the ultimate decision on whether any discipline grievances would proceed to arbitration.

24. On January 23, 2023, Complainant filed this unfair labor practice complaint, alleging that OSP violated ORS 243.672(1)(a) and ORS 243.672(1)(f) by refusing to arbitrate Complainant's appeal of his termination.

DISCUSSION

The complaint in this case alleges that, by refusing to recognize the advancement of Complainant's grievance to arbitration, OSP violated Complainant's First Amendment rights, ORS 243.672(1)(a), and ORS 243.672(1)(f). Complainant argues that he has the right to pursue his own grievance under ORS 243.666(2) and has a right to a representative of his choosing under ORS 236.360(2)(b). Complainant also asserts that by refusing to process his grievance, "[h]e was deprived of a benefit because he chose to associate with the [Plan]" and that requiring him to pursue his grievance through his exclusive representative (the Association) violates the First Amendment. Complainant further contends that because OSP accepted his Plan attorney as his representative throughout the investigation, it waived any argument that Complainant is not entitled to proceed on his own.

The legal arguments in this complaint are effectively the same as those asserted in *Linn County Sheriff's Office*, UP-002-23, which this board dismissed, finding that there was no issue of fact or law that warranted a hearing. As noted above, Complainant argues that this case is distinguishable because (1) the relevant CBA language in this case is different; and (2) the matter was already set for hearing in this case. We address these arguments below, and ultimately conclude that there is no issue of fact or law that merits a hearing.[3]

We first address Complainant's argument that this complaint should proceed to a hearing because the CBA language by which an employee may initiate arbitration is different than the CBA language that was at issue in *Linn County Sheriff's Office*. Complainant contends that, because the language of each CBA is particular to each employer, the Board must assess a complainant's rights as stated in the applicable CBA to determine whether the complainant possesses the right to pursue their own grievance under ORS 243.666(2). Although we agree with Complainant that the CBA is different in this case, it nonetheless provides no greater individual right to advance a grievance under ORS 243.666(2) than existed under the CBA in *Linn County Sheriff's Office*. In the absence of contract language that supports such a right, we find no well-pleaded facts supporting an allegation that OSP violated ORS 243.672(1)(f) by failing to recognize Complainant's arbitration appeal.

[3]Complainant's response to the order to show cause also asserts that, "[t]he parties' interactions [in this case] differ also because while the Board concluded that [the complainant in *Linn County Sheriff's Office*] did not have any legitimate basis for his apparent belief that the [employer in that case] would unilaterally violate the express language of the grievance article, [Complainant in this case] does." We do not find any well-pleaded facts supporting this statement. We therefore decline to address it further, as this Board does not consider merely conclusory statements or allegations that lack sufficient specificity. *See Melendy*, FR-3-08 at 18, 22 PECBR at 992.

ORS 243.672(1)(f) makes it an unfair labor practice for a public employer to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.809." ORS 243.666(2) provides, in relevant part that,

> "[A]n individual employee or group of employees at any time may present grievances to their employer and have such grievances adjusted, without the intervention of the labor organization, if * * * [t]he adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect."

Here, we must determine whether Complainant advancing his grievance without the Association would be "inconsistent with the terms" of the relevant CBA. *See Linn County Sheriff's Office,* UP-002-23 at 5 (citing *ST v. Pendleton Police Department*, Case No. UP-012-22 (2023)). As we explained in *Linn County Sheriff's Office*, in making its determination, this Board first examines the text of the relevant contract language. If the language of the agreement clearly does not allow an employee to advance a grievance without the exclusive representative (in the context of the document as a whole), the analysis ends. *Id*. This is because unambiguous contracts must be enforced according to their terms. *Id*. (citing *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491 (2002)). If a provision is ambiguous (*i.e.*, it can be given more than one plausible interpretation), we proceed to the second step and examine extrinsic evidence of the parties' intent. *Id*. We examine the parties' prior actions or practice as an aid to contract interpretation only if the contract language is ambiguous. *Id*. (citing *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09 at 10, 23 PECBR 416, 425 (2009)). Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 364, 937 P2d 1019 (1997).

Here, the relevant provision of the CBA is Article 11, which is titled "Discipline and Discharge" and includes the grievance process applicable to discipline and discharge. Complainant alleges that the CBA provides that "*employees* are vested with disciplinary and discharge remedies which include the right to appeal discharge to arbitration." We find no basis in the CBA for Complainant's argument. To the contrary, the language in Article 11 is clear and unambiguous: only the Association is entitled to appeal a disciplinary action through the grievance process, including appeals to arbitration. *See* Article 11.3 ("The *Association* may advance the grievance appeal to arbitration within fifteen (15) business days of the date of response or the date the response is due whichever is sooner." (Emphasis added)). Furthermore, Article 11.2 states that "[t]he parties agree that the procedures described in this Agreement are the full disciplinary and discharge remedies and procedures for which employees are entitled." Therefore, the CBA is explicit that the only way that an employee may appeal discipline (including discharge) is through the grievance process in Article 11, which provides that the Association (as opposed to the individual employee) has the right to appeal.

As further clear evidence of the parties' intent, the CBA includes a *separate* grievance process that is applicable to disputes that do not arise from discipline or discharge. That separate grievance process expressly permits the "affected employee and/or the Association" to file grievances, while expressly stating that "Discipline and discharge shall be handled as described in Article 11." *See* CBA Article 12. If we were to accept Complainant's arguments—which we do not—it would render meaningless the limiting language that is found in CBA Article 12.

Accordingly, Complainant is not entitled under ORS 243.666(2) to pursue his own grievance, as doing so is inconsistent with the clear terms of Article 11 of the collective bargaining agreement.

We briefly address Complainant's "waiver" argument, which appears to contend that OSP's conduct has created ambiguity about the grievance process. At the outset, we reiterate that, because the language in Article 11 is unambiguous, it is not necessary to examine such extrinsic evidence of the parties' intent. Moreover, there are no well-pleaded facts regarding extrinsic evidence of the parties' prior actions or practice that support Complainant's position. Rather, Complainant only asserts that OSP has "waived any argument [that Complainant] is not entitled to proceed on his own" because OSP "consistently permitted [Complainant] to use his [Plan] attorney through all parts of the investigation in lieu of his association representative * * * up to and through his termination without the association." Complainant's argument is identical to the argument that was asserted—and that this Board rejected—in *Linn County Sheriff's Office*. As we explained in that case, this type of argument conflates investigatory interviews with the contractual grievance process. Put another way, the Plan attorney's presence during investigatory interviews simply is not relevant to the parties' disciplinary appeal process set forth in Article 11. Furthermore, OSP clearly rejected Complainant's appeal to arbitration submitted by his Plan attorney (as opposed to the Association). Additionally, the Association denied Complainant's request for grievance advancement, and communicated to Complainant that the Association was the only party with the right to appeal a disciplinary grievance to arbitration. Thus, contrary to Complainant's arguments, OSP's conduct was consistent with the plain language of Article 11.

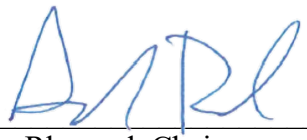
Next, Complainant argues that because the ALJ initially scheduled this matter for hearing, the Board already decided that "an issue of fact or law exists" under ORS 243.676, and therefore a hearing is warranted. Complainant does not point to any legal basis for his position, and we are not aware of any. Furthermore, Complainant's argument fails to acknowledge that the arguments presented in the complaint were expressly rejected by the Board in *Linn County Sheriff's Office,* which was issued *after* the hearing in this matter was initially scheduled. After the dismissal order in that case impacted the viability of the complaint in this case, the ALJ appropriately issued the order to show cause, requiring Complainant to explain why this case should not be dismissed. Complainant's response to the order to show cause did not dispute that their legal arguments are the same as those that this Board rejected in *Linn County Sheriff's Office.* Instead, Complainant only asserted the Board should consider the different language in the applicable CBA. As discussed above, we find no merit to that argument.

Aside from the arguments addressed above, Complainant does not explain why this complaint and the arguments made therein materially differ than the legal arguments that we soundly rejected in *Linn County Sheriff's Office*. We also do not find any well-pleaded facts in the complaint, or the response to order to show cause, that would warrant a different outcome in this case. Accordingly, we do not find any basis to revisit those arguments in this order. Consequently, we conclude that Complainant does not provide sufficient well-pleaded facts to adequately allege that OSP violated ORS 243.672(1)(a) or ORS 243.672(1)(f). Because there is no issue of fact or law that warrants a hearing, we dismiss the complaint. *See* ORS 243.676(1)(b).

ORDER

The complaint is dismissed.

DATED: July 25, 2023.



Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-010-23

(UNIT CLARIFICATION)

OREGON AFSCME COUNCIL 75, Petitioner, v. STATE OF OREGON, OFFICE OF ADMINISTRATIVE HEARINGS, Respondent.	)	ORDER REVOKING RECOGNITION OF EXCLUSIVE BARGAINING REPRESENTATIVE

On July 3, 2023, Oregon AFSCME Council 75 (AFSCME) filed a petition under OAR 115-025-0050(12) seeking to revoke recognition of its role as the exclusive bargaining representative for all full-time and part-time employees of the State of Oregon, Office of Administrative Hearings, which currently includes the classifications of Administrative Law Judge 3, Office Specialist 1, and Legal Secretary. The Board's Election Coordinator directed that a notice of the petition be emailed or posted in work areas so as to give maximum access to the affected employees. *See* OAR 115-025-0060(1). That notice informed any interested person that objections to the petition needed to be filed with this Board by July 24, 2023. No objections were filed.

This Board will order the revocation of recognition or certification of an exclusive representative only if (1) no collective bargaining agreement is in effect, and (2) the labor organization disclaims further interest in representing the bargaining unit or the labor organization is defunct. OAR 115-025-0050(12)(b). Here, the petition was accompanied by evidence satisfying both criteria. Accordingly, we grant the petition.

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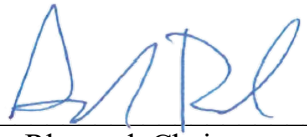
ORDER

The petition is granted. Recognition of Oregon AFSCME Council 75 as the exclusive representative of all full-time and part-time employees of the State of Oregon, Office of Administrative Hearings, which currently includes the classifications of Administrative Law Judge 3, Office Specialist 1, and Legal Secretary, is revoked.

DATED: July 31, 2023.



Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-003-23

(UNIT CLARIFICATION)

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

Jason Weyand and Luke Kuzava, Attorneys at Law, Tedesco Law Group represented Petitioner.

Matthew Farley and Lisa Rogers, Attorneys at Law, Portland Office of City Attorney, represented Respondent.

On February 23, 2023, Petitioner AFSCME Council 75, Local 189 (Union) filed a unit clarification petition with the Employment Relations Board (Board). On March 2, 2023, the Union filed an amended petition under OAR 115-025-0050(6). The amended petition seeks to clarify the status of seven unrepresented employees in the City of Portland's (City) Human Capital Management team and, specifically, whether they are public employees that can be added to the Union's existing unit of Business Systems Analysts (BSAs). On March 22, 2023, the Respondent City filed timely objections. Pursuant to OAR 115-025-0065(1)(c) and OAR 115-025-0065(2), the case proceeded on an expedited basis. The case was assigned to Administrative Law Judge (ALJ) Jennifer Kaufman, who determined that a disputed issue of fact or law existed that warranted a hearing.

On April 7, 2023, the Board issued a notice of hearing and prehearing order, setting a hearing for April 20 and 21, 2023, to be conducted by videoconference (at the request of the parties). ALJ Kaufman conducted a hearing on April 20, 21, and 24, 2023. The parties filed closing briefs on May 1, 2023, at which point the record closed, and the case was transferred to the Board for the issuance of a final order.

The issues are:

(1) Does the settlement agreement in Case No. UC-005-21 have any impact on the petition in this case?

(2) Should the petitioned-for employees (described below) be excluded from the existing bargaining unit because they are confidential employees within the meaning of ORS 243.650(6)?[1]

As set forth below, the settlement agreement in Case No. UC 005-21 does not bar inclusion of the petitioned-for employees in the Union's bargaining unit. We also conclude that the petitioned-for employees are not confidential employees under ORS 243.650(6). Therefore, we grant the petition to add those employees to the Union's existing bargaining unit of BSAs.

RULINGS

1. In defining the issues for hearing, the ALJ overruled all the City's objections that are not specifically addressed in this Order. Initially, on March 27, 2023, the ALJ communicated to the parties that "[t]he only question presented by this UC petition is whether the identified employees are public employees under ORS 243.650." Before and during the hearing, the issues before this Board were further refined to those identified above.

2. The parties submitted Joint Exhibits J1-J7, which the ALJ accepted into evidence.

3. Pursuant to the terms of a prehearing order, the Union submitted, and the parties stipulated to the admissibility of, the Union's exhibits P1-P16, P18, and P22-P27, which the ALJ accepted into evidence. At hearing, the Union submitted an additional exhibit, P28, which the ALJ admitted into evidence without objection.

4. Pursuant to the terms of a prehearing order, the City submitted, and the parties stipulated to the admissibility of, the City's exhibits R1-R88, which the ALJ accepted into evidence.

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

[1] In a prehearing order, the ALJ identified a third question regarding whether the petitioned-for employees are supervisory employees. At hearing, the City withdrew its objection to the petition based on supervisory status. Additionally, in prehearing correspondence with the parties, the ALJ identified a fourth question. However, the hearing record and the parties' closing briefs reflect that the only issues in dispute are those listed above.

FINDINGS OF FACT

1. The City is a public employer as defined in ORS 243.650(20).

2. The City's workforce is organized within approximately 27 Bureaus. Within those Bureaus, many of its employees are members of bargaining units. Among the City's Bureaus are the Bureau of Technology Services and the Bureau of Human Resources. The Bureau of Technology Services implements and maintains the City's technology services. The Bureau of Human Resources is responsible for the City's human-resources-related operations, including labor relations and collective bargaining.

3. The Bureau of Technology Services is comprised of several divisions, including the Enterprise Business Solutions (EBS) division. EBS is comprised of three teams: Human Capital Management (HCM), Finance and Logistics, and Technical. HCM is staffed by a supervisor (Hope Elie) and the seven petitioned-for employees in this case: Monica Borden, Steven Brown, Amy Cornell, Anna Cowen, Victoria Duffey, DeAnn Kamish, and Britt Schweizer. Finance and Logistics is staffed by a supervisor and six represented Business System Analysts (BSAs).

4. The Union is a labor organization, as defined by ORS 243.650(13).

5. The Union represents various groups of City employees, including BSAs. The Union's representation of this classification followed a unit clarification petition that was filed with this Board in 2021, Case No. UC-005-21. That case proceeded to a hearing but, before it was adjudicated, the parties entered into a settlement agreement. Under the settlement agreement, the City voluntarily recognized the Union as the exclusive representative of its BSAs, with some exclusions. The exclusions included the petitioned-for HCM employees in this case, who at the time were also classified as BSAs. The settlement agreement states, among other things, that it "is based on the unique circumstances of the above unit-clarification petitions and shall not set any precedent for any purpose."

6. Acting as a part of the District Council of Trade Unions (DCTU), the Union engaged in coalition bargaining with the City, resulting in the parties' current contract. The BSAs on the Finance and Logistics team have been represented and included in the DCTU bargaining unit.

7. The job titles of the petitioned-for HCM employees have not remained consistent. From approximately 2018 until June 2022, they were classified as BSAs. In June 2022, following the settlement agreement that excluded the HCM BSAs from the bargaining unit, the City sought to reclassify these employees. In January 2023, the seven employees at issue were notified that they would now be called "Business Management Analyst, Senior." Some of the HCM team members objected to this proposed title change. In April 2023, after the ALJ defined the issues for hearing that referred to the HCM team members' Business Management Analyst, Sr., title, the City finalized its reclassification and designated the non-supervisory HCM team members as "Systems Analyst, Senior". The job duties of the petitioned-for employees did not materially change during or because of this reclassification process and remained similar to the job duties of the represented

BSAs. At hearing, the parties were not consistent in their use of job titles. For ease of reference, we will refer to the petitioned-for employees by their most recent classification (Systems Analyst, Senior or SAS) in this Order.

8. Both currently-represented BSAs and the petitioned-for SASs have responsibilities within EBS, including Systems Applications and Products in Data Processing (SAP). SAP are large-scale software packages or solutions, consisting of integrated modules, that can track and control complex government operations, such as resource management in the areas of finance, human resources, asset management, and procurement. SAP software must be customized and maintained, which is a task requiring specialized technical expertise.

9. The City has used SAP for over a decade. After a transition period that began in 2006, the City implemented SAP in 2009. In 2010, the City experienced significant problems with SAP functionality, which frustrated its compliance with some of its obligations under its collective bargaining agreements. Redesigns have improved SAP's functioning. Employees from every City bureau and department use SAP (*e.g.*, to input and retrieve data, enter time and payroll data, and to communicate and review information relating to City projects and operations). Different teams within EBS are responsible for different SAP modules. The Finance and Logistics team, including its BSAs, is responsible for financial function modules. All BSA positions and the petitioned-for SAS positions require similar SAP subject-matter expertise and have some similar job duties. The HCM team, which includes the petitioned-for SAS positions, is responsible for the human resources modules, which manage functions such as payroll and benefits administration. In order to effectively update SAP, full information about change requirements is necessary.

10. The City's Bureau of Human Resources employs several HR Systems Analysts, and they create the requirements for any changes to SAP. Once those requirements are created, HCM employees configure and implement SAP changes.

11. The City's labor relations functions intersect with SAP design, maintenance, and operations. The City currently has bargaining relationships with multiple labor organizations, including the Union, the DCTU coalition, and several others. Whenever the City bargains with one of these labor organizations, there is the potential need for modifications to SAP modules.

12. For purposes of bargaining a particular contract, the City maintains two types of teams: (a) the bargaining team, and (b) the management team. The bargaining teams sit at the bargaining table and negotiate with the union's representatives. The bargaining teams' members generally include the City's Labor Relations Manager and negotiators. Those individuals have included Maureen Weber, Marquis Fudge, Ron Zito, Jamaal Anthony, and AnnMarie Kevorkian-Mattie. The management teams do not sit at the bargaining table. Rather, that team's function is to supply information to the bargaining team, including through a discussion of concepts and strategies that involves input from all team members. The management teams' members include representatives that work in various City departments, including the Bureau of Human Resources, the Bureau of Technology Services, and the City Attorney's office.

13. Since 2013, some of the petitioned-for SAS employees have been included in some management team meetings. When assisting a management team, these employees both respond to questions from other bargaining or management team members and identify potential issues with SAP based on the discussions that occur in team meetings. For example, if bargaining involves a proposal related to a change in premium pay, a bargaining team asks an SAS whether the proposal can feasibly and efficiently be implemented in SAP.

14. Before 2013, the City experienced difficulties in timely and accurately configuring SAP to account for bargained changes. The current HCM involvement on the management teams allows the HCM team to begin planning SAP changes earlier in the collective bargaining process, which helps to ensure timely implementation of any SAP changes.

15. As part of those efforts, the petitioned-for SASs collaborate on meeting the requirements for SAP changes. These SASs each have expertise in different SAP subspecialities; no single SAS has the necessary expertise in all SAP modules.

16. In developing bargaining proposals, the City's bargaining teams consider both what is technologically feasible with SAP modules and what is administratively efficient. However, HCM personnel do not make decisions or vote on whether the City will make a particular proposal. Their role is limited to providing SAP-related expertise and information. That commonly involves work outside of meetings with other SASs on the HCM teams. For example, after a management team meeting, the assigned SAS brings information regarding the City's proposals and strategy to the HCM team. All SASs participate in HCM team meetings to collaborate with the assigned SAS to perform work related to assessing SAP impacts of bargaining proposals. The team is instructed not to share confidential bargaining information outside the team.

17. To facilitate the involvement of the HCM team on the City's management teams and to balance workload, four of the petitioned-for SASs (Cowen, Kamish, Duffey, and Schweizer) and Supervisor Elie are assigned to attend management team meetings for particular contracts. The City requires attendees at management team meetings to sign in, and attendance records reflect that SASs regularly attend management team meetings as assigned. Cowen and Schweizer have the most significant experience providing technical assistance to the management teams. Cowen estimated that she spends about five percent or less of her total work time attending management team meetings. Schweizer similarly estimated that she spent approximately one to six percent of her time attending management team meetings. However, not all time spent in management team meetings is relevant to SASs and their limited scope of work. When the management team discusses proposals that do not relate significantly to SAP issues, the HCM team members may perform other work. Even when assigned to a particular contract, HCM team members do not attend all management team meetings regarding that contract. HCM team members sometimes are excluded from portions of the bargaining process with no SAP impacts. SAS Duffey testified that she has never attended any management team meetings for any contract. Schweizer is the only SAS that has attended bargaining sessions, but she functioned as an observer; she did not speak (other than to introduce herself), her opinion on proposals was not solicited at bargaining, and she never gave her opinion on the merits of proposals.

18. The three remaining SASs (Borden, Brown, and Cornell) are not assigned to attend any management team meetings. Unassigned HCM team members assist assigned HCM team members on an as-needed basis, depending on their particular SAP module expertise. There is no apparent correlation between the contract assignments and individual SASs' specific SAP module expertise.

19. Supervisor Elie estimated that HCM team members who are assigned to a management team can spend as much as six to eight hours in a day supporting the management team during a bargaining window, which can last two to six months. During bargaining, Supervisor Elie expects SASs to spend 20-50 percent of their time on negotiations and supporting the labor management team. However, the City does not maintain statistical data regarding the total percentage of working time that that SASs spend supporting management teams, as compared to their other work. Supervisor Elie testified that SASs are expected to balance their workload in order to maintain availability to sit in on management team meetings. Ellie also expects that if an SAS assigned to attend a management team's meeting is unable to do so, another HCM team member will attend in their place. Elie's role in management team meetings does not materially differ from the role of the SASs under her supervision.

20. The City has drafted a document titled "CoP – EBS HCM Collective Bargaining Roles & Responsibilities" that defines the role of an SAS to include providing recommendations or concerns regarding "potential system impact, configuration complexity, or historical system processes related to items in bargaining to ensure system stability, and continuity of current system configurations." Because of their presence in management team meetings, SASs have broadly been exposed to some bargaining information related to a variety of topics.[2] Although the City considers it "very common" for it to disclose confidential draft proposals to SASs, there is scant evidence of specific occasions on which the City has done so for the purpose of seeking confidential assistance on a contemplated bargaining proposal. This occurred at least once, with regard to the City's efforts to understand SAP impacts with regard to accounting for personal holidays for both "positive-time" and "negative-time" employees, in anticipation of making a proposal in DCTU Bargaining.

21. If the City shifted all the work of sitting in management team meetings to Supervisor Elie, it would result in an increase in the amount of time that Elie must devote to management team meetings.

CONCLUSIONS OF LAW[3]

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

[2]These topics have included: potential changes to sick time; potential changes to DCTU coalition composition; potential responses to union proposals and/or concerns identified during bargaining; potential negotiation strategies; issues that have been identified by the bargaining team; historical information regarding bargaining proposals that may reflect intent in prior proposals; and summaries of tentative agreements and bargaining proposals.

[3]Because the Board is issuing this final order without a recommended order, the Board will grant any timely submitted request for reconsideration and provide the parties with the opportunity for oral argument. *See* OAR 115-010-0100(3)(b).

2. The 2021 settlement agreement between the parties does not have a preclusive effect on this petition.

In its objections to the Petition, the City stated that the Petition is "barred or otherwise subject to dismissal due to a binding agreement for the employees to be excluded from the Union." At hearing and in its closing brief, the City appeared to have abandoned this objection. Nevertheless, we address it briefly.

A right under the Public Employee Collective Bargaining Act (PECBA) can be waived through express contract language that constitutes a "clear and unmistakable waiver." *Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170 at 175, 295 P3d 38 (2013); *Oregon School Employees Association v. Bandon School District #54*, Case No. UP-26/44-00 at 15-16, 19 PECBR 609, 623-24 (2002); *AFSCME Local 88 v. Multnomah County Board of Commissioners and Multnomah County Executive*, Case No. C-21-84 at 18, 7 PECBR 6452, 6469 (1984). However, we are not bound by the parties' agreements regarding confidential status. *Oregon School Employees Association, Chapter No. 4 v. Springfield School District 19 of Lane County*, Case No. C-252-80 at 6, 6 PECBR 4608, 4613 (1981).

The parties' 2021 settlement agreement states that it "is based on the unique circumstances of the above unit-clarification petitions and shall not set any precedent for any purpose." It does not contain any express language sufficient to effectuate a waiver of a right under PECBA, and the parties presented no extrinsic evidence of intent to create such a waiver. Accordingly, the Agreement does not have any preclusive effect on the petition in this case.

3. The SASs are not confidential employees within the meaning of ORS 243.650(b). Therefore, they are appropriately included in the Union's bargaining unit.[4]

Legal Standard

Under PECBA, "[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. However, under ORS 243.650(19), "confidential employees" are not "public employees" and cannot be included in a bargaining unit. "The purpose of the confidential employe exclusion is to protect an employer from having [its labor relations] policies or strategies prematurely disclosed to employe[e] labor representatives by those employe[es] who are necessarily involved in the preparation of matters for use in the bargaining process." *Teamsters Local 57 v. City of Bandon*, Case No. UC-101-85 at 6, 9 PECBR 8625, 8630 (1986). The confidential-employee exclusion is a "narrow technical concept." *AFSCME Local 1724, Council 75, AFL-CIO v. City of Eugene*, Case No. UC-10-85 at 9, 9 PECBR 8591, 8599 (1986).

To determine confidential status, the Board assesses whether an employee meets the criteria set out in ORS 243.650(6), which defines a "confidential employee" as "one who assists

[4]There is no argument that the petitioned-for SASs lack a community of interest with the existing bargaining unit or that it would be otherwise inappropriate to add those employees to the existing unit.

and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." To make this assessment, we ask three questions:

> "(1) Does the allegedly confidential employee provide assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining?
>
> "(2) Does the assistance relate to collective bargaining negotiations and administration of a collective bargaining agreement?
>
> "(3) Is it reasonably necessary for the employee to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies?"

AFSCME, Council 75 v. Illinois Valley Fire District, Case No. RC-38-97 at 6, 17 PECBR 493, 498 (1998) (paragraph breaks added), *citing Oregon Public Employees Union v. Department of Justice*, Case No. UC-120-87 at 6-7, 10 PECBR 942, 947-48 (1988). Each of these questions must be answered in the affirmative for an employee to be deemed a confidential employee. We look at the employee's actual duties, not future expected duties. *AFSCME Local Union No. 2746 v. Clatsop County*, Case No. UC-4-93 at 6, 14 PECBR 434, 439 (1993).

In a unit clarification case such as this, no party bears the burden of proof. OAR 115-025-0065(4). Nevertheless, because this case involves a statutory exclusion to the definition of "public employee," there must be sufficient evidence establishing that the exclusion applies before we will conclude that an otherwise public employee is a confidential employee. *Id.* In the absence of detailed, specific evidence establishing that a putative confidential employee meets the statutory definition, we will conclude that the employee is a public employee covered by PECBA and not a confidential employee under the statute. *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 23, 25 PECBR 996, 1018 (2014).

Because it is dispositive, we address only the question of whether it is "reasonably necessary" for the SASs to be designated as confidential. In answering that question, we must examine the nature and scope of the assistance that the employees provide to persons with collective bargaining-related responsibilities. The assistance provided cannot be casual or sporadic; an employee who assists an individual with collective bargaining responsibility in manner that is only "minimal and limited in scope" will not be designated as a confidential employee. *Oregon AFSCME Council 75, Local 2479-2 v. Morrow County*, Case No. UC-2-00 at 9, 18 PECBR 737, 745 (2000). The benchmark is what is "reasonable under the circumstances." *Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC v. City of Beaverton*, Case No. UC-54-86 at 7, 10 PECBR 25, 31 (1987). In determining what is "reasonable under the circumstances," we seek to avoid the "proliferation of confidential employees." *Id.* To that end, a confidential employee designation must be justified by something other than the mere "convenience of management." *Oregon AFSCME, Council 75 v. Benton County*, Case No. C-210-82 at 18, 7 PECBR 5973, 5990 (1983). Rather, we limit the confidential employee designation to those employees "who provide confidential assistance to individuals who have a significant

involvement in the formulation and determination of employer policies in the area of collective bargaining." *City of Eugene*, UC-10-85 at 9, 9 PECBR at 8599. (Emphasis omitted.)

We have held that it is reasonably necessary to designate as confidential a personal executive assistant who assists a Human Resources Director who "develops collective bargaining proposals and administers the CBA through the grievance process and through day-to-day interpretation of the CBA." *Service Employees International Union Local 503, Oregon Public Employees Union v. Oregon Cascades West Council of Governments*, Case No. UC-16-04 at 9, 20 PECBR 786, 794 (2004). In *Oregon Cascades*, the executive assistant was "heavily involved in decisions regarding whether the CBA standards for internal or external recruitment are applicable to a job opening and provides assistance in collective bargaining." *Id.* In contrast, we have held that an employee's access to bargaining information, input into bargaining, and mere presence when bargaining is discussed is insufficient to render the employee confidential. *Oregon AFSCME, Council 75 v. Eastern Oregon Correctional Institute*, Case No. UC-76-87 at 9-10, 10 PECBR 820, 828-829 (1988). Likewise, an employee who collects raw data or answers questions "in developing matters for grievance processing or contract negotiations" does not require that the employee be deemed confidential. *City of Beaverton*, UC-54-86 at 9, 10 PECBR at 33.

For the following reasons, we find that it is not reasonably necessary for the petitioned-for SASs to be designated as confidential employees. The core function of these employees is important, but narrow: the petitioned-for SASs use their technical knowledge to ensure that SAP modules accurately account for whatever terms are included in collective bargaining agreements. That technical knowledge, the City asserts, makes it reasonably necessary to designate the SASs as confidential employees because they are sometimes provided with City bargaining proposals before they are exchanged with the Union. The City provides those proposals to the SASs in order to identify and troubleshoot any potential technical challenges that it might encounter when it implements the proposals in SAP, if those proposals ultimately are accepted and included in a ratified collective bargaining agreement. Specifically, as currently assigned, the SASs (and Supervisor Elie) sometimes attend management team meetings where proposals are developed and debated, both before and in parallel with the collective bargaining process. Their assistance to these other City employees (some of whom formulate, determine, and effectuate management policies in the areas of collective bargaining) involves providing technical feedback on how City and union bargaining proposals might affect SAP modules. At times, that has involved gathering information regarding historical bargaining proposals. It also has involved incidental exposure to many bargaining-related topics and bargaining proposals that may not yet be publicly available. Finally, some of the information provided by the SASs is generative (*i.e.*, they develop answers using their technical expertise, rather than simply accessing and providing existing information).

At the outset, we note that the City's management team is distinct from its bargaining team and that only four of the seven petitioned-for SASs have ever participated in any management team meetings. We further observe that the SASs who do attend management meetings primarily have been exposed to confidential information incidental to their *presence* at management team meetings. The record does not establish that, in attending these management team meetings, the SASs commonly have provided meaningful assistance to the City's bargaining team at a time when the City bargaining team's proposals necessarily were shrouded in secrecy. Rather, the evidence is that the assistance provided by the petitioned-for SASs has been "minimal and limited in scope,"

which is insufficient to establish confidential employee status. *See Morrow County*, UC-2-00 at 9, 19 PECBR at 745. Additionally, we note that the overall amount of time that the petitioned-for SASs spend in management team meetings regarding collective bargaining proposals is minimal when compared to their overall worktime.

Our decisions consistently have held that mere access to confidential information does not justify classification as a confidential employee under PECBA. *Oregon AFSCME Council 75, AFL-CIO v. SAIF Corporation,* Case No. RC-6-01 at 10, 19 PECBR 399, 408 (2001). To hold otherwise would allow for the broad proliferation of confidential employees, which we seek to avoid. *City of Beaverton*, UC-54-86 at 7, 10 PECBR at 31. On the record in this case, it is not reasonably necessary to designate the petitioned-for SAS classification as confidential in order to provide the City with protection from premature disclosure of management collective bargaining policies, proposals, and strategies.

We further emphasize that the only plausible justification for confidential status is rooted *before* a proposal is made at the bargaining table, since that is where the risk of premature disclosure of management's bargaining proposals or strategies resides. In contrast, evidence of an employee's feedback about proposals that *already* have been made at the bargaining table does not support a confidential designation for that employee. After a proposal is made it must proceed through the collective bargaining process—and ultimately to agreement, ratification, and its effective date—before it triggers a need to modify SAP. Here, based on the record evidence, we are not persuaded that the technological vetting of a proposal must occur before that proposal is disclosed in bargaining. Therefore, we cannot find that it is reasonably necessary for the City to receive confidential assistance from the petitioned-for SAS.

The City argues that if this Board fails to determine that the SASs are confidential employees, then it would inextricably lead down a slippery slope towards regressive bargaining, botched implementation, and unfair labor practice complaints. However, in support of its argument, the City chiefly relies on its experience when SAP was first implemented in 2013. In so doing, the City speculatively forecasts that its SAP-related challenges when SAP first was implemented will recur in the absence of ongoing involvement of SASs in management team meetings. There is no clear evidence that the involvement of the HCM team in management team meetings in 2013 could or would have *prevented* the challenges that it experienced in 2013. Rather, another plausible explanation is that the City adopted a new computer system, initially had technical issues, and those issues have faded in the years since implementation. Indeed, there is no clear evidence that the current involvement of the HCM team in management team meetings has ever recently prevented any similar or specific debacle with SAP. It also is left unexplained why efforts to prevent these challenges should be viewed as a component of confidential management strategy regarding collective bargaining proposals.

We take the City's concern regarding its ability to vet its own proposals at face value and commend its desire to avoid allegations of regressive bargaining or downstream implementation challenges. However, the City is not forced to choose between its current approach and fully sequestering the SASs from the bargaining team. For example, Supervisor Elie may assume the management team responsibilities currently assigned to four of the SASs that she supervises. As their supervisor, she can reasonably be expected to have a sufficient understanding of SAP

capabilities to help the management team make sufficiently well-informed decisions during any confidential decision-making stages. We are not persuaded that this would unreasonably overtax Elie, based on the evidence presented regarding the nature and extent of SASs' involvement in management team meetings.

We conclude that the City's proffered justification for designating the SASs as confidential is rooted primarily in the convenience of the employer. The City appears to conflate the issues of whether it is necessary for the SASs to have expertise designing and administering SAP with whether it is necessary for a member of the HCM team to sit in management team meetings to provide real-time feedback on collective bargaining proposals in a confidential manner. The core functions of the HCM team vis-à-vis collective bargaining simply do not require this feedback to flow from the petitioned-for SASs, or that such an exchange occur in a confidential manner. The ongoing, fully enmeshed involvement of the petitioned for SASs is not reasonably necessary for the City's bargaining team to effectively develop proposals in a confidential manner. It will not significantly impair the City's bargaining team to delay full consultation with its SASs until after initial bargaining proposals are made.

Moving forward, there can be no question that the City and the Union are aware of the need to account for SAP capabilities in considering some types of bargaining proposals. As a result, some of the City's bargaining proposals can be expected to be made contingent on the City's need to confirm a proposal's technological feasibility with the HCM team. Although that may result in some small measure of inconvenience or delay, parties frequently must take time between bargaining sessions to evaluate proposals, and we are not persuaded that any resulting inefficiencies here would be unusual or unique.

ORDER

The petitioned-for HCM employees currently classified as System Analysts, Senior are public employees and are properly included in the Union's existing bargaining unit of City Business Systems Analysts.

DATED: August 2, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-010-23

(REPRESENTATION)

BOARDMAN POLICE OFFICERS ASSOCIATION, Petitioner, v. BOARDMAN POLICE DEPARTMENT, Respondent.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE

On July 5, 2023, Boardman Police Officers Association (BPOA) filed a petition under ORS 243.682(2) and OAR 115-025-0030 to certify (without an election) BPOA as the exclusive representative of all police officers employed by Boardman Police Department (BPD). A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating BPOA as the exclusive representative of the proposed bargaining unit.

On July 6, 2023, the Board's Election Coordinator caused a notice of the petition to be posted. BPD failed to post timely. On July 17, 2023, an amended notice of petition was provided. Pursuant to the terms of the amended 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 4, 2023). There were no objections to the petition or a request for an election.

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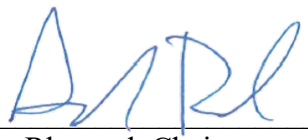
ORDER

Accordingly, it is certified that Boardman Police Officers Association is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

All police officers employed by Boardman Police Department.

DATED: August 7, 2023.



Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-011/027-22

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75, LOCAL 189, Complainant, v. CITY OF PORTLAND AUDITOR'S OFFICE, Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On June 8, 2023, this Board issued an order holding that the City of Portland Auditor's Office violated ORS 243.672(1)(e) as alleged in the complaint filed by Oregon AFSCME Council 75, Local 189 (AFSCME). The appeal period under ORS 183.482 has run without either party filing an appeal. Consequently, this Board now issues this order for representation costs. *See* OAR 115-035-0055(2)(a).

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

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

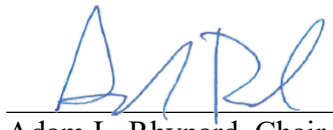
2. This case required four days of hearing.

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 four days of hearing is $5,000. *See* OAR 115-035-0055(1)(b)(D).

ORDER

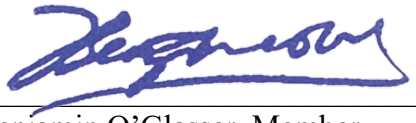
The City of Portland Auditor's Office shall remit $5,000 to AFSCME within 30 days of the date of this order.

DATED: August 11, 2023.



Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-023-23

(UNFAIR LABOR PRACTICE)

L.T., Complainant,	)	
v.	)	DISMISSAL ORDER
OREGON STATE POLICE, Respondent.	)	

Kirsten L. Curtis and Paige Chrz, Attorneys at Law, Thenell Law Group, P.C., Portland, Oregon, represented Complainant.

Sylvia Cramond, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, Salem, Oregon, represented Respondent.

On April 25, 2023, L.T. (Complainant) filed an unfair labor practice complaint against Oregon State Police (OSP), alleging that OSP violated ORS 243.672(1)(a) and (f). The matter was assigned to Administrative Law Judge (ALJ) Martin Kehoe. On May 9, 2023, OSP filed an informal response.

ALJ Kehoe investigated the complaint to determine if an issue of fact or law exists that warrants a hearing, as required by ORS 243.676(1)(b) and OAR 115-035-0005. The ALJ determined that the complaint appeared to meet the threshold pleading requirements. On May 15, 2023, the ALJ served the complaint as required by OAR 115-035-0030. On May 23, the ALJ set the matter for hearing on August 23, 2023. On May 25, 2023, OSP filed its answer to the complaint.

On July 18, 2023, OSP filed a motion for order to show cause and dismissal, arguing that the complaint in this case advances the same legal arguments as the complaint in *C.B. v. Linn County Sheriff's Office*, Case No. UP-002-23 (2023), which this Board dismissed without a hearing. On July 20, 2023, ALJ Kehoe issued an order directing Complainant to show cause why

the complaint in this matter should not be dismissed without a hearing in light of the Board's order in *Linn County Sheriff's Office*.

On July 28, 2023, in further support of its motion to dismiss, OSP provided the ALJ with the Board's dismissal order in *M.K. v. Oregon State Police and Oregon State Police Officers Association*, Case No. UP-003-23 (2023). OSP stated that in dismissing that complaint without a hearing, the Board addressed the same legal arguments and the relevant collective bargaining agreement (CBA) language at issue in the complaint in this case. That same day, Complainant filed a response to the order to show cause, asserting the following arguments why the complaint should not be dismissed: (1) the CBA language in this case, regarding whether an employee may initiate grievance arbitration, is different than the CBA language at issue in *Linn County Sheriff's Office*; and (2) Complainant was not a member of the Oregon State Police Officers Association (Association), and the Board "has yet to opine on how an opted-out Association member's rights interact with his membership within a fraternal organization."

The ALJ subsequently referred the complaint to the Board with the recommendation that the Board dismiss the complaint. For the following reasons, we find dismissal appropriate.

In considering whether a complaint presents an issue of fact or law that warrants a hearing, we assume well-pleaded factual allegations 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). In making our determination, 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).

Here, having considered the facts alleged in the complaint, as well as the undisputed facts discovered by the ALJ, we summarize the alleged or undisputed facts as follows:

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

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

3. The Association is the exclusive certified bargaining representative of Oregon State Police Officers, including Complainant, in employment relations with OSP.

4. At the time of the events underlying the dispute in this matter, the Association and the State (on behalf of OSP) were parties to a CBA effective July 1, 2019 – June 30, 2023.

5. Article 11 of that CBA addresses discipline and discharge, including the agreed-on discipline grievance procedure between the Association and OSP. Article 11 states, in relevant part:

"ARTICLE 11 - DISCIPLINE AND DISCHARGE

"11.1 Discipline.

"Disciplinary action, including discharge, shall be only for just cause. The employee may choose an unpaid suspension in lieu of an economic sanction. Such suspension will be leave without pay and will not count as hours worked for purposes of overtime calculation.

"11.2 Exclusive Remedies.

"The parties agree that the procedures described in this Agreement are the full disciplinary and discharge remedies and procedures for which employees are entitled.

"11.3 Appeals.

"Within fifteen (15) business days of the Association's receipt of notice of disciplinary action (except for discharge), the Association may appeal the discipline by filing a notice of appeal of discipline with the OSP Human Resources Services Section. The notice of appeal shall state the date the disciplinary action notice was received by the Association, article(s) and an explanation of why the discipline was not for just cause. Within ten (10) business days of the receipt of the notice, the Superintendent or designee shall meet to discuss the appeal. The Superintendent or his designee shall respond within fifteen (15) business days from the meeting date. The Association may advance the grievance appeal to arbitration within fifteen (15) business days of the date of response or the date the response is due whichever is sooner. The arbitration appeal must be contemporaneously submitted to the Department of Administrative Services (DAS) Chief Human Resource Office, Labor Relations Unit in writing, and include a copy of the discipline, the response of the Department and a statement of the response for the appeal. The parties agree to schedule arbitration as soon as is practicable. Verbal reprimands or lower forms of informal corrective action cannot be grieved. Personnel investigations and the resulting corrective action when the employee has stipulated to the conduct pursuant to Article 9, Section 9.3.3 and 9.4.4 cannot be grieved. Any personnel investigation which results in a verbal reprimand will be documented on the personnel complaint form and a copy of the complaint form sent to the Association. Discharge from employment may be appealed directly to arbitration (within fifteen (15) business days of the effective date of the discharge) as provided herein."

6. Article 12 of the parties' CBA sets forth the grievance procedure for disputes other than discipline and discharge, and states, in relevant part:

"ARTICLE 12 - SETTLEMENT OF DISPUTES

"12.1 Grievance Procedure.

"The parties agree that for the purpose of this Agreement, a grievance shall be defined as a dispute regarding the meaning, interpretation or application of this Agreement and that such dispute shall be settled as provided in this Article. Discipline and discharge shall be handled as described in Article 11. In the event that the matter being grieved involves the act or failure to act of the supervisor of the employee, the Association may elect to skip Step 1 of the grievance procedure and file the grievance at Step 2.

"Step 1. The affected employee and/or the Association shall submit the grievance in writing to a supervisor of the employee, with a copy to Human Resources within twenty (20) business days after the grievant becomes aware of its occurrence * * *."

7. Complainant was a Trooper with OSP, a position represented by the Association. Complainant also had legal insurance with the Fraternal Order of Police Legal Defense Plan Inc. (Plan). The Plan is a self-funded benefits plan that provides an attorney to covered officers in connection with civil, criminal, or administrative proceedings, depending on the level of coverage elected. The Plan is not a labor organization or union. Individual officers, such as Complainant, may request attorneys from a list of Plan attorneys. The attorneys represent the individual officer and do not represent either the Plan or any labor organization or union. Plan attorneys are paid through a benefits administrator.

8. On February 11, 2022, Complainant was placed on Administrative Leave with pay. That same day, Plan attorney Daniel E. Thenell from Thenell Law Group P.C., informed OSP through its counsel, Sylvia Cramond, that Complainant was not a member of the Association.

9. On May 25, 2022, Complainant retained Thenell Law Group to represent him through the Plan.

10. On June 27, 2022, OSP emailed Complainant and Plan attorney Thenell a letter notifying Complainant of his status on paid administrative leave. The Association was not copied on the email.

11. On August 17, 2022, Complainant and Plan attorney Kirsten L. Curtis of Thenell Law Group attended a meeting with OSP.

12. On September 29, 2022, Complainant received a notice of proposed discipline.

13. On October 13, 2022, Plan attorney Curtis sent OSP and its counsel a letter on behalf of Complainant.

14. On October 31, 2022, OSP terminated Complainant.

15. On November 17, 2022, Complainant, through Thenell Law Group sent a letter titled "Appeal of Discharge to Arbitration."

16. On November 21, 2022, OSP informed Thenell Law Group that Complainant did not have an individual right to appeal a discipline to arbitration. Accordingly, OSP denied the request for arbitration.

17. On November 22, 2022, Thenell Law Group sent a letter on behalf of Complainant to John R. Nees, the State Labor Relations Manager, arguing that Complainant may bring his own grievance to arbitration.

18. OSP has refused to participate in arbitration regarding Complainant's grievance of his termination.

19. On April 25, 2023, Complainant filed this unfair labor practice complaint, alleging that OSP violated ORS 243.672(1)(a) and (f) by refusing to arbitrate Complainant's appeal of his termination.

DISCUSSION

The complaint in this case alleges that, by refusing to recognize the advancement of Complainant's grievance to arbitration, OSP violated Complainant's First Amendment rights, as well as ORS 243.672(1)(a) and (f). Complainant argues that he has the right to pursue his own grievance under ORS 243.666(2) and has a right to a representative of his choosing under ORS 236.360(2)(b). Complainant also asserts that by refusing to process his grievance, "[h]e was deprived of a benefit because he chose to associate with the [Plan]" and that requiring him to pursue his grievance through his exclusive representative (the Association) violates the First Amendment. Complainant further contends that because OSP accepted his Plan attorney as his representative throughout the investigation, it waived any argument that Complainant is not entitled to proceed on his own.

The legal arguments in this complaint are effectively the same as those asserted in *Linn County Sheriff's Office*, UP-002-23 and *M.K. v. Oregon State Police*, UP-003-23, both of which this Board dismissed, finding that there was no issue of fact or law that warranted a hearing. As noted above, Complainant argues that this case is distinguishable because: (1) the relevant CBA language in this case is different than *Linn County Sheriff's Office*; and (2) Complainant was not a member of the Association, and this Board "has yet to opine on how an opted-out Association member's rights interact with his membership within a fraternal organization."

We first address Complainant's argument that this complaint should proceed to a hearing because the relevant CBA language is different than the CBA language that was at issue in *Linn County Sheriff's Office*. Complaint is correct that the CBA language at issue in this complaint is different than the language at issue in *Linn County Sheriff's Office*. However, the relevant CBA language in this complaint is found in the same CBA that the Board addressed in *M.K. v. Oregon State Police.* In that case, we concluded that the relevant language "provides no greater individual right to advance a grievance under ORS 243.666(2) than existed under the CBA in *Linn County Sheriff's Office*." UP-003-23 at 6. Specifically, we found that the relevant provision of the CBA,

Article 11, was clear and unambiguous that only the Association (as opposed to the individual employee) is entitled to appeal a disciplinary action through the grievance process, including appeals to arbitration. *Id* at 7. We further determined that the CBA explicitly limited appeals of discipline (including discharge) to the grievance process in Article 11. *Id*.

Furthermore, we found that the CBA included a *separate* grievance process for disputes that did not arise from discipline or discharge, which permitted the "affected employee and/or the Association" to file grievances. That provision also expressly distinguished "[d]iscipline and discharge" grievances as being "handled as described in Article 11," which allowed only the Association to appeal such matters. *Id.* Accordingly, we concluded that the CBA language did not enable an individual employee to advance their discharge grievance and therefore that the complainant was not entitled under ORS 243.666(2) to pursue their own grievance. It is undisputed that this case concerns the same CBA at issue in *M.K. v. Oregon State Police*. Therefore, for those same reasons, we conclude that there is no disputed issue of fact or law that warrants a hearing in this case.[1]

Next, Complainant argues that this case is distinguishable from *M.K. v. Oregon State Police* because, unlike the complainant in that case, Complainant here is not a member of the Association. Thus, Complainant avers, this case should proceed to hearing so that the Board can "give clarity on the issue of an employee who has opted out of an association and into a fraternal organization, and how those roles intersect when an arbitration is requested by the employee." Complainant further asserts that he has the right to "not be a part of the Association" under *Janus v. AFSCME Council 31*, 585 US __, 138 S Ct 2448, 2478 (2018), and that he "has a First Amendment right to join a fraternal organization" under *Americans for Prosperity Foundation v. Bonita*, 594 US __, 141 S Ct 2373, 2382 (2021).

However, aside from these conclusory allegations, Complainant fails to explain why the fact that he was not a member of the Association has any impact on the legal analysis in this case. Indeed, the arguments and legal authority cited in the complaint (and reiterated in Complainant's response to the order to show cause) are the same arguments and legal authority asserted in both *Linn County Sheriff's Office* and *M.K. v. Oregon State Police*. Likewise, in *Linn County Sheriff's Office,* this Board determined that the "[c]omplainant's argument that he has the right under the First Amendment to choose his representative for the purposes of the contractually bargained grievance process misconstrues *Janus*." UP-002-23 at 8. We explained that the Court in *Janus* "explicitly acknowledged that exclusive representation is and remains constitutionally permissible" and "expressly reaffirmed that, '[s]tates can keep their labor-relations systems exactly as they are—only they cannot force nonmembers to *subsidize* public-sector unions.'" *Id*. (quoting *Janus*, 138 S Ct at 2485 n 27) (emphasis added). We further explained that "the Ninth Circuit has interpreted *Janus* to address compelled speech (as opposed to association), concluding that a state's authorization of the exclusive bargaining representative did not infringe on union

[1]The complaint in this case also alleges the same "waiver" argument asserted in *M.K. v. Oregon State Police*. In that case, we determined that there were no well-pleaded facts establishing that OSP's conduct created ambiguity about the grievance process by simply following the clear CBA language set forth in Article 11. *Id*. at 8. Complainant has not alleged any well-pleaded facts that distinguish this case from *M.K v. Oregon State Police*. To the contrary, the allegations in both cases are identical. We therefore do not further address that argument in this order.

nonmembers' First Amendment rights." *Id*. (citing *Mentele v. Inslee*, 916 F3d 783, 789 (9th Cir 2019)). Thus, we find no distinction between members and nonmembers in this context, and Complainant does not otherwise articulate any distinction. Accordingly, we find no basis set forth in the complaint or otherwise, that a hearing is warranted merely because Complainant is not a member of the Association.

Consequently, we conclude that Complainant does not provide sufficient well-pleaded facts to adequately allege that OSP violated ORS 243.672(1)(a) or (f). Because there is no issue of fact or law that warrants a hearing, we dismiss the complaint. *See* ORS 243.676(1)(b).

ORDER

The complaint is dismissed.

DATED: August 16, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UP-045-20 and UP-004-21

(UNFAIR LABOR PRACTICE)

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 555, Complainant, v. BAY AREA HOSPITAL, Respondent, and BAY AREA HOSPITAL, Complainant, v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 555, Respondent.	)	ORDER ON PETITION FOR RECONSIDERATION AND REHEARING

On July 10, 2023, this Board issued a final order concluding that Bay Area Hospital (Hospital) violated ORS 243.672(1)(a), (b), (e), and (i) and ORS 243.670(2) as alleged in the complaint filed by United Food and Commercial Workers, Local 555 (Union). We also dismissed the Hospital's complaint against the Union.

On July 24, 2023, the Hospital filed a petition seeking reconsideration and rehearing on specific portions of the final order. The Union responded to the Hospital's petition on August 3, 2023. The Hospital requested that it be permitted to file a reply to the Union's response to the petition, which the Board granted on August 4, 2023. The Hospital filed its reply to the Union's response on August 11, 2023.

The Hospital's petition requests that the Board reconsider that portion of our order directing the Hospital to bargain in good faith with the Union over an appropriate make-whole remedy for the Hospital's recission of funding for the certification pay plan, consistent with the Remedy section of that order. That Remedy section ordered the parties "to bargain in good faith to finalize the details of the certification pay bonus that the Hospital was scheduled to pay to its eligible employees before December 31, 2020," and "to bargain in good faith to determine which employees would have received compensation under the certification pay plan in 2021 and 2022, had the Hospital not rescinded funding for the certification pay plan." The Remedy section further ordered the Hospital "to make all affected bargaining unit employees whole for any loss of compensation they suffered because of the Hospital's recission of funding for the certification pay plan, from the date of the violation to the date that the Hospital complies with this order." The Hospital's petition also requests rehearing on that same remedial order for the purpose of introducing new evidence that the Hospital asserts obviates a need to comply with the ordered remedy. Specifically, the Hospital seeks rehearing to introduce new evidence concerning the parties' recently negotiated successor agreement, which includes an article on the subject of certification pay.

The Union opposes both the petition for reconsideration and the petition for rehearing. On the petition for reconsideration, the Union asserts that the Hospital has not identified a proper reason for granting the petition. On the petition for rehearing, the Union asserts that the evidence that the Hospital seeks to admit is not relevant to the remedy directed by our order. Specifically, the Union argues that the successor agreement concerns an agreement on certification pay for the term of that agreement, but that such an agreement has no bearing on the remedy for the Hospital's violations that affected certification pay in 2020, 2021, and 2022.

For the following reasons, we deny the petition for reconsideration and rehearing.

Request for Reconsideration

Under OAR 115-010-0100(3)(c), a petition for reconsideration in a case where we have issued a final order should be limited to: (1) a claim of factual error; (2) a claim that there has been a change in the statutes or case law since issuance of the final order that affects the case; or (3) a claim that the Board erred in construing or applying the law. Our rules further provide that "[a] claim addressing legal and factual issues already argued and addressed in the Final Order is disfavored." OAR 115-010-0100(3)(c)(C).

The Hospital's petition did not clearly assert a basis for its petition under OAR 115-010-0100(3)(c). Rather, the argument addressed in this ruling was asserted in the Hospital's reply to the Union's response. Because we ultimately deny the petition on the arguments raised, we do not address the issue of whether the argument was properly raised in the petition. In arguing that our remedy was improper, the Hospital argues that our determination that it committed an unfair labor practice was incorrect. The basis for that argument is the same as that "already argued and addressed" in our final order, and therefore provides no legitimate basis for reconsideration. *See*

OAR 115-010-0100(3)(c)(C).[1] Consequently, we decline to grant the Hospital's petition for reconsideration.

Request for Rehearing

The Hospital seeks to reopen the record in order to submit evidence relating to the parties' successor bargaining that occurred in 2023, for the July 1, 2022 - June 30, 2025 collective bargaining agreement. The Hospital asserts that the evidence is relevant to the Board's ordered make-whole remedy requiring that the parties bargain over certification pay. The remedy in our final order specifically requires, in relevant part, that the parties bargain in good faith to "finalize the details of the certification pay bonus that the Hospital was scheduled to pay to its eligible employees before December 31, 2020," and "to determine which employees would have received compensation under the certification pay plan in 2021 and 2022, had the Hospital not rescinded funding for the certification pay plan."

Under OAR 115-010-0100(2)(b), a "petition for rehearing shall be granted only if the petitioner establishes that the petitioner would be unduly prejudiced if the petition was denied."[2] Here, the Hospital argues that it would be unduly prejudiced if we do not grant the petition for rehearing because "the Union would be provided an additional opportunity to bargain" the issue of certification pay, which was addressed during successor bargaining. The Union argues that the petition should be denied, as the Board's remedy regarding certification pay "clearly requires the parties to bargain over those details that had yet to be finalized for 2020, 2021, and 2022" and that "what the parties proposed and agreed to for the 2022-2025 [collective bargaining agreement] is immaterial to the issues in dispute in this ULP proceeding."

We agree with the Union. There is simply no indication that the evidence that the Hospital seeks to submit (successor bargaining proposals, and the parties' 2022-2025 successor agreement) are material to the make-whole remedy regarding certification pay set forth in our final order. Indeed, neither the successor agreement nor any of the related bargaining proposals include language regarding certification pay for any period before the effective date of the successor agreement.[3] There is also no proffer of any evidence that the Union, in bargaining, expressly waived its right to remedies that it was seeking in this case regarding certification pay in 2020-2022. We therefore find no basis for reopening the record in this case and consequently deny the Hospital's petition for rehearing.

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[1]Specifically, the Hospital argues that "the Board's make whole remedy relating to certification pay was improper because it was based upon the incorrect premise that the parties had reached an agreement" on that issue. Our final order explains why we rejected that argument when previously raised, and the Hospital's petition contains no new argument or basis for reaching a different conclusion.

[2]That rule further provides that "[i]f the basis for the petition is based on previously unavailable evidence, the petitioner must establish that the evidence could not reasonably have been discovered and produced at the hearing." Here, there is no dispute that the petition is based on the identified evidence being previously unavailable and that the evidence could not reasonably have been produced at the hearing (because the evidence did not yet exist). Therefore, the petition satisfies that portion of our rule.

[3]The Hospital submitted the parties 2022-2025 collective bargaining agreement and related bargaining proposals regarding certification pay, as an attachment to its petition.

ORDER

1. The Hospital's petition for reconsideration is denied.

2. The Hospital's petition for rehearing is denied.

DATED: August 18, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

*Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

*Member O'Glasser did not participate in the deliberations of this case.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-015-23

(UNFAIR LABOR PRACTICE)

SALEM KEIZER EDUCATION ASSOCIATION, Complainant, v. SALEM-KEIZER SCHOOL DISTRICT, Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On June 22, 2023, this Board issued an order holding that the Salem-Keizer School District (District) violated ORS 243.672(1)(e) through its actions regarding FTE calculations, as alleged in the complaint filed by the Salem Keizer Education Association (Association). The appeal period under ORS 183.482 has run without either party filing an appeal. Consequently, this Board now issues this order for representation costs. *See* OAR 115-035-0055(2)(a).

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

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

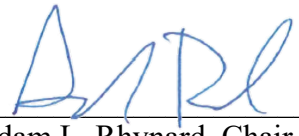
2. This case required one day of hearing.

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 (the hearing need not last a full day). *See* OAR 115-035-0055(1)(b)(C).

ORDER

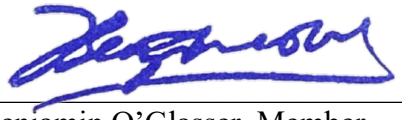
The District shall remit $3,000 to the Association within 30 days of the date of this order.

DATED: August 28, 2023.



Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-011-23

(UNIT CLARIFICATION)

SEIU LOCAL 503, OPEU, Petitioner, v. STATE OF OREGON, OREGON HEALTH AUTHORITY, Respondent.	)	ORDER ADDING UNREPRESENTED EMPLOYEES TO EXISTING UNIT

On July 26, 2023, SEIU Local 503, OPEU (SEIU) filed a unit clarification petition under ORS 243.682(2)(a) and OAR 115-025-0050(4) to add certain unrepresented employees (described below) in the Government Relations Program of the Oregon Health Authority (OHA) to SEIU's current bargaining unit, which includes employees at OHA and other state agencies. On July 27, 2023, 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 16, 2023). On August 9, 2023, OHA requested to extend the time to file objections until September 1, 2023. SEIU did not oppose that request, which the Election Coordinator granted.

On August 10, 2023, SEIU clarified the description of the unrepresented employees that it sought to add to its existing unit. Specifically, SEIU described those employees as all unrepresented but eligible public employees in the Government Relations Program of OHA. A majority of eligible employees specified in the petition signed valid authorization cards designating SEIU as the exclusive bargaining representative. No objections to the petition or a request for an election were filed.

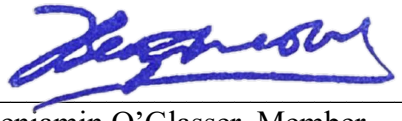
ORDER

Accordingly, it is certified that all unrepresented but eligible public employees in the Government Relations Program of OHA are added to the existing bargaining unit represented by SEIU.

DATED: September 5, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-012-23

(UNIT CLARIFICATION)

OREGON SCHOOL EMPLOYEES ASSOCIATION, CAMAS VALLEY CHAPTER 68 (OSEA),	)	
Petitioner,	)	
v.	)	ORDER REVOKING CERTIFICATION OF EXCLUSIVE BARGAINING REPRESENTATIVE
CAMAS VALLEY SCHOOL DISTRICT #21,	)	
Respondent.	)	

On August 4, 2023, Oregon School Employees Association, Camas Valley Chapter 68 (OSEA) filed a petition under OAR 115-025-0050(12) seeking to revoke certification of its role as the exclusive bargaining representative for all regular classified employees, excluding substitute, temporary, part-time, supervisory, and confidential employees, of the Camas Valley School District #21. The Board's Election Coordinator directed that a notice of the petition be emailed or posted in work areas to give maximum access to affected employees. *See* OAR 115-025-0060(1). That notice informed any interested person that objections to the petition needed to be filed with this Board by September 5, 2023. No objections were filed.

This Board will order revocation of recognition or certification of an exclusive representative only if (1) no collective bargaining agreement is in effect, and (2) the labor organization disclaims further interest in representing the bargaining unit or the labor organization is defunct. OAR 115-025-0050(12)(b). Here, the petition was accompanied by evidence satisfying both criteria. Accordingly, we grant the petition.

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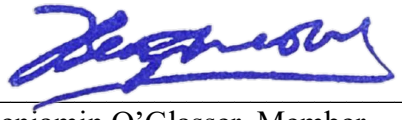
ORDER

The petition is granted. The certification of Oregon School Employees Association, Camas Valley Chapter 68 (OSEA) as the exclusive representative of all regular classified employees, excluding substitute, temporary, part-time, supervisory, and confidential employees, of the Camas Valley School District #21, is revoked.

DATED: September 6, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-018-22

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION, Complainant, v. CLACKAMAS COUNTY, Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On June 29, 2023, this Board issued an order holding that Clackamas County (County) violated ORS 243.672(1)(e) by inadequately responding to a March 2022 information request of the Clackamas County Employees' Association (Association) and making a unilateral change in wages. 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. *See* OAR 115-035-0055(2)(a).

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

1. The Association is the prevailing party. Only a prevailing party in an unfair labor practice case is entitled to representation costs. ORS 243.676(2)(d), (3)(b); OAR 115-035-0055(1)(a). The prevailing party is "the party in whose favor a Board Order is issued." OAR 115-035-0055(1)(d). Here, the Association is the party in whose favor our order was 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 (the hearing need not last a full day). *See* OAR 115-035-0055(1)(b)(C).

ORDER

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

DATED: September 6, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, 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. OREGON HEALTH & SCIENCE UNIVERSITY, Respondent.	Case No. UP-033-23

Julie D. Reading, Bennett Hartman, LLP, Portland Oregon, represented the Complainant, Oregon Nurses Association.

Dan Rowan, CDR Labor Law, LLC, Portland Oregon, represented the Respondent, Oregon Health & Science University.

On May 31, 2023, the Oregon Nurses Association ("the ONA" or "Complainant") filed an unfair labor practice complaint against Oregon Health & Science University ("OHSU" or "Respondent") alleging that OHSU committed violations of ORS 243.672(1)(a) and ORS 243.672(1)(c).

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 ONA is a labor organization as defined by ORS 243.650(13). OHSU is a public employer as defined by ORS 243.650 (20).

2. The ONA and OHSU are parties to a series of successive collective bargaining agreements going back decades. The agreement in effect for all relevant periods herein was/is effective from January 4, 2021 to June 30, 2023 ("the Agreement").

3. [Employee Name Redacted] ("SM") is a registered nurse at OHSU. SM is a member of the ONA.

4. SM works in the Diagnostic Imaging Unit at OHSU and has served as a unit representative in that unit for approximately ten years. Before 2022, SM had a successful work history with no discipline.

5. In October 2021, Katie Veysey ("Veysey") became the Diagnostic Imaging manager. Karen Jones ("Jones") was the interim assistant manager for periods relevant to this grievance.

6. A Critical Need Incentive ("CNI") is a negotiated increased pay rate to reduce the use of local agency and traveling nurses and to recognize OHSU nurses when covering difficult-to-fill shifts and peaks in census and acuity, which have been identified and posted by OHSU. Any shifts that are down at least one staff person is a CNI shift.

7. Shortly after assuming her role as manager, Veysey stopped designating shifts as eligible for CNI pay that had previously been so designated consistent with the language of the Agreement.

8. SM approached Veysey about the Agreement violation concerning the CNI shifts. Veysey was not receptive and did not adjust the practice. In February 2022, the ONA filed a grievance, and SM actively participated in the filing and supporting of that grievance.

9. Following the grievance filing, SM was singled out for negative feedback, and Veysey often expressed frustration toward her. For example, in one grievance meeting, Veysey expressed with irritation that SM "only works for premium pay."

10. In May 2022, SM had her annual review meeting, known as the GROW conversation. At the end of what would be a standard evaluation meeting, Veysey confronted SM about some emails she had sent to the nursing team to provide some helpful hints for using a new catheter. Veysey also told SM confrontationally that she was talking too much because she was making people uncomfortable.

11. Veysey also included in SM's written evaluation that she needed to "be careful what she says about other people as this can affect what others are comfortable telling her and how they look at her as a team member."

12. Around July 2022, SM contacted the ONA representatives to inform them that it appeared that the evening shift differential was not being calculated from the correct time of day, and employees were not being paid for the full amount. The ONA raised this with management and began obtaining additional information in support of a potential grievance.

13. On February 7, 2023, Jones sent SM a text at 8:15 p.m. telling her she did not get some CNI shifts offered earlier in the day. Veysey was copied on the message.

14. Responding to both Jones and Veysey, SM asked about four hours on another date that had been offered earlier. Veysey responded that if SM took only four hours, she could get bumped if someone else took the whole shift. SM responded that she had never heard of bumping someone and wondered if it was in the Agreement. Veysey responded that it was almost 9 p.m., and SM wanted to talk more she should email in the morning that she and Jones need their work-life balance too.

15. Feeling unfairly reprimanded, when SM saw Jones the next day, she asked that, if Jones did not want to text late in the evening, please not start a text thread then. Jones apologized and said she didn't realize that it was that late. SM explained that she was uncomfortable being accused of ruining Jones and Veysey's work-life balance. Jones explained that she had texted Veysey to tell Veysey she had started the text thread. SM said she wished Jones had included her on that text so that she would have felt more supported by her. SM said she did not feel very supported. The whole conversation was spoken quietly in the control room.

16. Two days later, on February 9, 2023, Jones called SM to come up to Jones' office to speak with her and Veysey (via video conferencing). SM asked what it was about, and Jones said it was about the conversation they had just had. SM hung up and called Veysey to ask if it was disciplinary. Veysey said it was "counseling." SM said that sounded disciplinary and wanted someone with her. SM asked one employee to attend as a witness, and he said, "no way, I've seen what happens, and I don't want a target on my back." SM then asked Renae Bedolla to come as a witness, and she said yes.

17. At the meeting, SM explained she was giving Jones feedback about not starting threads at times that were too late to be talking. Veysey began yelling at SM, saying she was attacking and bullying Jones and disrupting the whole unit. Veysey continued in her raised voice that no one works full time like Jones and her, and sometimes they work 40, 50, 60, 70, and even 80 hours a week.

18. Veysey continued to say that every conversation with SM is an argument about the contract, meaning the Agreement. SM stated that was a broad accusation and clarified whether it was truly every conversation. Veysey responded that yes, every conversation with you is an argument about the contract.

19. On February 10, 2023, ONA filed a grievance (Shift Differential Grievance), stating that:

> "Nurses in units that should be deemed inpatient due to having shift lengths of greater than 10 hours were deemed outpatient in February 2022. This has caused nurses to not receive evening shift differential for all hours worked when working past 3 pm and not receiving night shift differential for all hours worked when working past 11 pm. The nurses were under the impression that HR/ Payroll was working on this but have not been compensated for all the evening/

night shift hours worked in the last year. The departments this affects includes, but is not limited to, Radiology Clinical Support."

20. On February 17, 2023, a full eight days after the initial discussion and seven days following the filing of the grievance initiated by SM, Veysey sent her an email that stated the following:

> "Thank you for coming to talk to me on 2.9.2023 regarding your interaction with Karen in the CT control room that same day and your ongoing discussions about OHSU and DI leadership while at work and in public staff spaces. As we discussed, it is your responsibility to follow the code of conduct at all times while at work at OHSU. This includes behaving in a professional, honest, and ethical manner and being courteous, honest, and respectful in our verbal and nonverbal interpersonal behavior. In the future, if you have questions or concerns with RN leadership you wish to discuss, you should do so in a private space away from other staff. I also am encouraging you to bring your concerns about RN leadership or OHSU to the people you have an issue or concerns with and refrain from Criticizing others' performance or competency in a public or an inappropriate manner not aimed at performance improvement. Please let me know if you have further questions or concerns. Thanks."

21. The shift differential grievance was ultimately sustained, and OHSU was liable to reimburse approximately 24 employees a total of $7,800.

22. On May 22, 2023, SM noticed that some of her pay coding had not been recorded correctly, and she would receive a shorter paycheck on the following Friday.

23. SM emailed Veysey along with Tanya Tlusty, a Kronos assistant, and JacQualine Abbe, a nursing manager, requesting updates. Veysey indicated that she would get to it later in the day when she had time.

24. SM was eager to have the matter resolved because if the time coding was not corrected by the end of the day Monday, she would not receive her full paycheck on Friday.

25. SM checked on Tuesday morning and noticed that her pay coding was incorrect. She contacted the general emails for Paycheck Help, Kronos Helpdesk, and Ask Payroll, stating:

> "Hi, my manager (time keeper) did not put in two dates of CNI
> despite me asking and telling her about them in email before 10am
> on 5/22.
> Is there anyway for you to help me so I can get paid for these.
> 5/12 add cni to all hours to 32207001

5/14 add cni 34810001
I really need to get paid for these on Friday.

Best, SM"

26. Kronos/Payroll help responded that they would need confirmation from Veysey regarding that the shifts were designated as CNI before they could change them, and they were waiting to hear from her.

27. Veysey then admonished SM, stating:

> "Just an FYI, I do get put on all of these requests, so you might want to be careful of how you phrase your requests/comments. First, I want to point out that mistakes do happen, and like I treat each of you when mistakes happen, I would hope you could return the same sentiment and not accuse someone of something without knowing all of the facts. Second, Kronos is not a perfect system, and it does not always save things the first time, which is why you are just as responsible for your timecard as I am. Please be mindful of what you say and how you say it when interacting with other members of the OHSU community.
>
> Sincerely,
>
> Katie Veysey"

28. SM responded:

> "Hi Katie, I'm open to feedback. How would you suggest I should have worded this. I find nothing offensive, accusatory or inflammatory in what I said. I put my corrections in by the time stated in your emails that they are due. You said the corrections were done. I could not reach you for resolution once I discovered they were not in kronos and it is definitely time sensitive to get paid by Friday. I then reached out to payroll/Kronos for help.
>
> Can you tell me what you would have done differently. I'm including Sheven and Michael since this is along the lines of other feedback you have given to me so we are all on the same page."

29. Additionally, SM was upset by Veysey's email, and she reached out to Sheven Thorson, Interim Director of Diagnostic Imaging. SM forwarded the email from Veysey chastising her. Thorson and Veysey exchanged some emails allowing Thorson to obtain some clarification reading the situation. Finally, Thorson stated:

> Hi [SM] –

No need for anymore responses - outside of your acknowledgement (which you already did) of the signing of the paperwork. You didn't do anything incorrectly, either in your timing/communication/escalation and this has all been addressed accordingly with Katie as well as the tone/tenor of her email.

Apologies for this incident but thanks for including me so I can address and hopefully right the path moving forward.

Thanks!

Sheven"

STIPULATED CONCLUSIONS OF LAW

1. The Board has jurisdiction over these parties and subject matter.

2. OHSU interfered with, restrained, or coerced employee SM because of and in the exercise of her protected rights in violation of ORS 243.672(1)(a).

3. OHSU agrees that employees, including SM, may not be subject to adversarial treatment from managers based on their involvement in the ONA activities, including the advancement of grievances.

4. OHSU agrees to remove all references to the coaching from SM's file.

5. OHSU will reimburse the ONA's filing fee and pay the ONA $1,500 for its reasonable representation costs incurred to litigate this matter.

DATED this 14th day of September, 2023.

Julie D. Reading, OSB No. 165824
Of Attorneys for Complainant, Oregon Nurses Association

Dan Rowan, OSB No. 115081
Of Attorneys for Respondent, Oregon Health & Science University

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BOARD CONSENT

This Consent Order is approved and adopted by the Board.

DATED this 18 day of September, 2023

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-011-23

(REPRESENTATION)

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, Petitioner, v. CITY OF JOHN DAY, PUBLIC WORKS DEPARTMENT, Respondent.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE

On August 14, 2023, International Union of Operating Engineers, Local 701 (IUOE), filed a petition under ORS 243.682(2) and OAR 115-025-0030 to certify (without an election) IUOE as the exclusive representative of the following bargaining unit of City of John Day, Public Works Department (City) employees: all utility workers, record keepers, record retention clerks, secretaries, accountants, wastewater operators, code enforcement officers, and public works foremen. A majority of eligible employees in the proposed bargaining unit signed valid authorization cards designating IUOE as the exclusive representative of the proposed bargaining unit.

On August 15, 2023, the Board's Election Coordinator provided a notice of the petition to be posted. The City failed to post timely. On August 30, 2023, an amended notice of petition was provided, and the City has filed a Certificate of Posting reflecting that it was posted on that date. Pursuant to the terms of the amended notice posting and OAR 115-025-0060, objections to the proposed bargaining unit or a request for an election were due within 14 days of the date of the notice posting (*i.e.*, by September 19, 2023). There were no objections to the petition or a request for an election.

ORDER

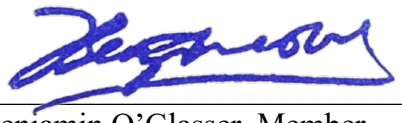
Accordingly, it is certified that International Union of Operating Engineers, Local 701, is the exclusive representative of the following bargaining unit for the purpose of collective bargaining:

> All utility workers, record keepers, record retention clerks, secretaries, accountants, wastewater operators, code enforcement officers, and public works foremen at the City of John Day, Public Works Department.

DATED: September 20, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-007-23

(REPRESENTATION)

YAMHILL COUNTY DEPUTY SHERIFF'S ASSOCIATION, Petitioner, v. YAMHILL COUNTY SHERIFF'S OFFICE, and TEAMSTERS LOCAL 223, Respondents.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE (ELECTION RESULTS)

On May 1, 2023, Yamhill County Deputy Sheriff's 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 full-time employees in the positions of Records Clerk, Medical Technician, Control Room Technician, Senior Records Clerk, Property Evidence Technician, Animal Control Officer, Civil Process Server, Jail Nurse (LPN), Corrections Deputy, Patrol Deputy, Detective, and Jail Nurse (RN) at Yamhill County Sheriff's Office. The petition was accompanied by a sufficient showing of interest to order an election. *See* OAR 115-025-0035(2).

On August 21, 2023, the Board's Election Coordinator sent ballots to eligible voters, pursuant to the terms of a consent election agreement. Forty-six (46) valid ballots were returned by the deadline of September 11, 2023, which constitutes the date of the election. *See* OAR 115-025-0072(1)(b)(A). A tally of ballots was held on September 12, 2023, and the majority of valid votes counted were cast for Teamsters. The tally of ballots was provided to the parties on September 12, 2023.

Objections to the conduct of the election, or conduct affecting the results of the election, were due within 10 days of furnishing the ballot tally to the parties (*i.e.*, by September 22, 2023). *See* OAR 115-025-0075. No objections were filed. Accordingly, it is certified that:

TEAMSTERS LOCAL 223

is the exclusive representative of the following bargaining unit:

> All full-time employees in the positions of Records Clerk, Medical Technician, Control Room Technician, Senior Records Clerk, Property Evidence Technician, Animal Control Officer, Civil Process Server, Jail Nurse (LPN), Corrections Deputy, Patrol Deputy, Detective, and Jail Nurse (RN) at Yamhill County Sheriff's Office.

DATED: September 26, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-013-23

(UNIT CLARIFICATION)

GENERAL TEAMSTERS LOCAL 324, Petitioner, v. CITY OF AUMSVILLE POLICE DEPARTMENT, Respondent.	)	ORDER REVOKING CERTIFICATION OF EXCLUSIVE BARGAINING REPRESENTATIVE

On August 29, 2023, General Teamsters Local 324 filed a petition under OAR 115-025-0050(12) seeking to revoke certification of its role as the exclusive bargaining representative for all employees in the City of Aumsville Police Department. The Board's Election Coordinator directed that a notice of the petition be emailed or posted in work areas to give maximum access to the affected employees. *See* OAR 115-025-0060(1). That notice informed any interested person that objections to the petition needed to be filed with this Board by September 27, 2023. No objections were filed.

This Board will order revocation of recognition or certification of an exclusive representative only if (1) no collective bargaining agreement is in effect, and (2) the labor organization disclaims further interest in representing the bargaining unit or the labor organization is defunct. OAR 115-025-0050(12)(b). Here, the petition was accompanied by evidence satisfying both criteria. Accordingly, we grant the petition.

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ORDER

The petition is granted. Certification of General Teamsters Local 324 as the exclusive representative of all employees in the City of Aumsville Police Department is revoked.

DATED: September 29, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD OF

THE

STATE OF OREGON

Case No. UP-039-21

(UNFAIR LABOR PRACTICE)

KLAMATH FALLS ASSOCIATION OF CLASSIFIED EMPLOYEES, Complainant, v. KLAMATH FALLS CITY SCHOOLS, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 6, 2023, this Board heard oral argument on Complainant's objections to a December 8, 2022, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe, after a hearing on June 2, 2022. The record closed on September 2, 2022, upon receipt of the parties' post-hearing briefs. After hearing oral argument, we invited interested parties to file *amicus curiae* briefs regarding the impact, if any, of ORS 243.804(5)(c) on the issues in this case. We also allowed the named parties to file supplemental briefs concerning those same issues and to address any issues raised by any *amici*.[1] Those supplemental briefs were due on September 22, 2023. Having considered the evidence and arguments of the named parties and the *amicus curiae* brief, we proceed with our consideration.[2]

Margaret S. Olney, Attorney at Law, Bennett Hartman, LLP, Portland, Oregon, represented the Complainant.

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

[1]The Oregon School Employees Association (OSEA) filed an *amicus curiae* brief. Neither named party filed further briefing after our invitation of *amicus curiae* briefs.

[2]Before the record closed, the parties jointly requested and obtained extensions of the deadline for post-hearing briefs. Subsequently, Respondent moved (without objection) to extend the time to file objections to the recommended order, until January 5, 2023, with any cross-objections from Complainant due by January 12, 2023. The Board offered oral argument dates as early as February 2023, and the parties mutually selected April 6, 2023. Due to a vacancy on the Board at the time of oral argument, the Board delayed its consideration of the parties' arguments until after May 1, 2023, to allow for a full three-member Board to participate in the decision of this case. That consideration prompted our invitation of *amicus curie* briefing.

On September 20, 2021, the Complainant, Klamath Falls Association of Classified Employees (KFACE or Association), filed an unfair labor practice complaint with the Employment Relations Board (Board) against the Respondent, Klamath Falls City Schools (District). On May 16, 2022, the District filed a timely answer.

The issues are:

(1) Did the District violate ORS 243.672(1)(a), (b), and (c) by searching Tanya Thornton's emails to discover union communications, and by threatening Thornton's job security?

(2) Did the District violate ORS 243.672(1)(a), (b), and (c) by disciplining union leader Lisa Danskin for using the District's email system for union communications?[3]

(3) Is KFACE entitled to a civil penalty?

As set forth below, we conclude that (1) the District violated ORS 243.672(1)(a) and (c), but not (1)(b), when it threatened Thornton's job security[4]; (2) the District violated ORS 243.672(1)(a) and (b) by disciplining Danskin for using the District's email system for union communications; and (3) KFACE is entitled to a civil penalty for its actions regarding Thornton.

RULINGS

1. Before the hearing, the District asked the ALJ to defer ruling on the first issue identified above, concerning the District's response to Tanya Thornton blind carbon copying (BCC'ing) an email to KFACE, because a related grievance was awaiting a hearing by an arbitrator. The District also asked the ALJ to place in abeyance the second issue identified above, concerning the District's response to Lisa Danskin's election-related email to her bargaining unit, until a related Oregon Secretary of State complaint filed against Danskin was resolved. The ALJ rejected both requests and set the matter for hearing. Upon review, we conclude that the ALJ acted properly and within his discretion. The complaint does not allege an ORS 243.672(1)(e) failure to bargain in good faith violation or an ORS 243.672(1)(g) contract violation. Further, neither Danskin nor the Secretary of State is a party to this case.

2. ORS 243.672(6) requires an injured party to file a complaint by 180 days following the occurrence of an unfair labor practice. The District has consistently objected to "any consideration" of events that occurred outside of that statutory 180-day filing period, including the events of the parties' "bonus days dispute" that is described in detail below, as well as other events that occurred in March 2021 but were outside of the relevant period. Upon review, we conclude that the ALJ properly overruled the objection.

[3] Although the ALJ included in the proposed issue statement a question as to whether the District violated ORS 243.672(1)(a), (b), or (c) when it questioned Danskin about who wrote the email at issue, we do not see such a separate claim alleged in the complaint. Moreover, the Association did not brief that issue. Accordingly, we do not see it as a litigated issue in this case and we do not address it.

[4] As detailed below, because it would not affect our remedy, we decline to reach the separate question of whether the District's search of emails as part of its investigation constituted an independent violation of ORS 243.672(1)(a), (b), or (c).

The complaint in this case was filed on September 20, 2021.[5] 180 days before that date is March 24, 2021. Accordingly, the District is correct that any claim that Complainant knew of or reasonably should have known of before March 24, 2021, is time-barred. KFACE does not dispute that the bonus days dispute took place more than 180 days before its complaint was filed. Nevertheless, importantly, KFACE does not seek to assert claims that arise out of that dispute as the basis for its unfair labor practice claim. As KFACE explained in its opening statement, KFACE seeks to use the earlier incident as context for Thornton's conduct in March 2021, to demonstrate a general hostility and a lack of understanding of union rights, and as an example of the District's efforts to curb union activity. Put another way, and as stated in KFACE's post-hearing brief (at 13), it seeks to use the bonus days dispute as evidence of anti-union animus. Upon review, we generally agree with KFACE's position on this issue. The 180-day statute of limitations limits filings and claims, but does not bar evidence or background that is relevant to a timely-filed claim. *See Gault v. Portland Firefighters' Association, Local 43 and City of Portland Fire and Rescue Bureau*, Case No. FR-003-20 at 13 (2022); *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05 at 10, 22 PECBR 911, 920, *recons*, 23 PECBR 34 (2009), *aff'd*, 250 Or App 681, 282 P3d 2 (2012); *Grants Pass Association of Classified Employees/OEA/NEA and Bullington v. Grants Pass School District No. 7*, Case No. UP-05-07 at 34-35, 22 PECBR 806, 839-40 (2008). We also conclude that the ALJ correctly permitted the testimony and evidence in dispute.

Having addressed the issue of relevance, we turn to the question of whether KFACE's central claims were timely. Regarding the claims related to Thornton, the record indicates that the District searched Thornton's emails sometime between March 17 and 24, and that KFACE did not learn about the search until it was revealed to Thornton during the affiliated investigatory meeting that occurred on March 24, 2021, which is the date that we have determined is the cutoff date for this case. Notably, the Board applies a "discovery rule," which means that the limitations period begins to run when a party knew or reasonably should have known 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). The record otherwise indicates that, during that same meeting, Thornton was also warned that her job could "be in jeopardy," which logically serves as the factual basis for the claims regarding Thornton. Under those circumstances, we conclude that the claims regarding Thornton are timely. Regarding the claims concerning Danskin, the record shows that the District inquired about the author of Danskin's email in a June 2, 2021, investigatory meeting, and then

[5]The filing date was determined as follows. The complaint was signed and submitted to the Board on September 17, 2021, a Friday, via the Board's online case management system. That system's records indicate that the complaint and/or the associated filing fee was not received until after 5:00 p.m. that day. OAR 115-010-0033(1)(b) provides, "A complaint or answer will not be considered filed until the filing fees required by ORS 243.672(6) have been paid." When the complaint was filed in September 2021, the corresponding OAR still included a deadline of 5:00 p.m. *See Alexander v. Amalgamated Transit Union, Division 757*, Case No. UP-022-20 at 1-2 (2021) (citing *AFSCME Council 75, Local 2503 v. Hood River County (Public Works)*, Case No. UP-005-20 (2021)). OAR 115-010-0033(1)(d) has since been updated and provides, in relevant part, "If a document is filed by email, fax, or the Board's online case management system, and the Board's record indicates that the Board received the document on or before 11:59 p.m. Pacific Time on a business day, then the document is considered filed on that business day." OAR 115-010-0033(1)(d) (effective December 1, 2021). Under the then-current rules, the complaint was filed on Monday, September 20, 2021, which was the next business day after the evening that the complaint was submitted.

disciplined Danskin later that same day. Therefore, we also conclude that the claims concerning Danskin are timely.

3. During the hearing, the ALJ admitted all the exhibits that were offered by the parties except for Exh. R-12. That exhibit appears to be a copy of a September 8, 2020, letter to Oregon Education Association (OEA) members from "OEA General Counsel" Adam Arms titled "Political and Ideological Expression Questions and Answers." As indicated below, KFACE is an OEA "affiliate." KFACE objected to the exhibit's admission and claimed that the document was protected by attorney-client privilege. KFACE also described the exhibit as an "internal" communication and described General Counsel Arms as OEA's "in-house attorney." Relatedly, in the District's opening statement, the District's own attorney described the exhibit as "advice" from "the attorney for OEA." On its face, the exhibit purports to provide "legal guidance."

At the conclusion of the hearing, in response to KFACE's objection, the ALJ asked the District how it had acquired the document, and noted that he did not have any evidence of a waiver. The District simply responded that District Human Resources (HR) Director Renee Clark received the document from another school district. The District did not establish a foundation for the offered exhibit, either by witness testimony or other evidence. After considering the parties' positions on the matter, the ALJ deferred ruling on the objection until he issued his recommended order. At this time, we recognize that neither party has disputed the authenticity of the document. However, we also note that there is no evidence that the document was reviewed or relied on by Danskin or Clark during the events of this case, or any testimony regarding who was sent the document. Under the circumstances presented, we decline to admit Exh. R-12.

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

FINDINGS OF FACT

Background

1. The District is a "public employer" within the meaning of ORS 243.650(20). It employs around 400 to 450 employees in total.

2. KFACE is a "labor organization" within the meaning of ORS 243.650(13). It is the exclusive representative of a bargaining unit that includes certain (but not all) "classified" District employees. Supervisors, confidential employees, substitutes, teachers, and temporary employees are specifically excluded from the unit.

3. At all times material, KFACE and the District were parties to a collective bargaining agreement (CBA). By its terms, the CBA was effective from July 1, 2018, through June 30, 2022.

4. KFACE is one of a number of local, affiliated unions that make up a "coordinating body" known as the Klamath-Lake UniServ Council. KFACE is also affiliated with OEA, the Oregon Association of Classified Employees, and the National Education Association. Ryan Olds has worked for OEA as a "UniServ Consultant," which is essentially a union representative or field representative, since February 2019. One of his assignments is to serve the KFACE bargaining unit.

5. Outside of the KFACE bargaining unit, certain other "classified" District employees are unrepresented, while certain other "classified" employees are part of a separate unit/union of fewer than 40 custodial and maintenance employees known as "CPOKF." A third unit/union, the Klamath Falls Education Association (KFEA), includes the District's teachers and has been described as the "certified union." Like KFACE, KFEA is also an OEA affiliate/unit, and is part of the UniServ Council. Each of the District's two non-KFACE units/unions has its own CBA with the District.

Bonus Days Dispute (Tanya Thornton)

6. Tanya Thornton currently works for the District as the Payroll Lead in the District's Business Office in the Payroll Department. She has held that position since February 2020. In May 2018, Thornton started working for the District as a Payroll Specialist. Thornton has never been reprimanded.

7. As Payroll Lead, Thornton is generally responsible for, among other things, making sure that payroll is accurate and timely, answering employees' questions about payroll, and training and leading the Payroll Specialists of the Payroll Department. The Payroll Lead is also responsible for "the interpretation and the effective implementation of several different salary and labor contracts for administrators, teachers, classified and other employees * * *."

8. Thornton is an active member of KFACE, and is currently on KFACE's bargaining team.

9. Neither party considers Thornton a "confidential employee" within the meaning of ORS 243.650(6).[6] Nevertheless, in Thornton's current role of Payroll Lead, she has access to some confidential employee information. For example, Thornton has access to employees' Social Security numbers, personal telephone numbers, home addresses, and certain benefits-related information. As stated in a 2020 job posting for the position, the Payroll Lead "performs technical and confidential accounting work * * *."

10. Article 8, Section I, of the parties' CBA addresses "bonus days" for KFACE bargaining unit employees. It states,

> "Employees with perfect attendance for the previous school year (July 1-June 30) shall have the option of three (3) days of salary or three (3) days off with pay during the subsequent year.
>
> "Employees with one (1) day absence for the previous school year (July 1-June 30) shall have the option of two (2) days of salary or two (2) days off with pay during the subsequent year.

[6]ORS 243.650(6) defines a "confidential employee" as "one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining."

"Employees with two (2) days absence for the previous school year (July 1-June 30) shall have the option of one (1) day of salary or one (1) day off with pay during the subsequent year.

"Absences due to work injuries will not count as absences in this section."

11. The CBA between the District and the District's custodial and maintenance employees union (a copy of which is not in the record) contains language that resembles that of the KFACE CBA's Article 8, Section I, and similarly provides for bonus days. However, that CBA specifically uses October 1 through June 30 as its designated time period (rather than July 1 through June 30, as KFACE's CBA does), specifically requires that someone be *hired* at the outset of that particular period, and is uniquely based on accident-free days rather than attendance. The language of Article 8, Section I, of KFACE's CBA only alludes to *attendance* and does not overtly reference a date of hire as the custodial and maintenance union's CBA does. The teachers/certified union's CBA does not address bonus days at all.

12. Every July, including July 2020, the District has determined which employees qualify for bonus days for the new school year. In or around October 2020, Cheryl Reinhardt, who at the time was the Head Secretary at Klamath Union High School, contacted Thornton via email, questioned whether a particular KFACE-represented employee had been awarded bonus days in error, and asked Thornton's department to investigate the issue. Subsequently, Thornton reviewed the relevant "past practice," some related notes left by a predecessor, and KFACE's CBA. Thornton ultimately concluded that, according to that past practice, the employee at issue qualified for the allotted bonus days. For the previous two years or more, Thornton and the Payroll Department had consistently used October 1 as the relevant *date of hire* when considering bonus days, without any issues. The relevant part of KFACE's CBA had not been changed during that period. After Thornton formed her conclusion, she shared her perspective with Reinhardt.

13. The District's HR Director, Renee Clark, eventually looked into the bonus days dispute as well, after receiving a telephone call about it from Head Secretary Reinhardt. Clark has been the District's only HR Director since she started working for the District at the end of June 2019. Clark regularly works with the Payroll Department and Thornton. However, Clark has never been Thornton's supervisor, and, as indicated, Thornton does not work in the HR Department.

14. After Director Clark reviewed the bonus days issue, Clark discussed the subject with Thornton (some or all of which occurred through email) and asked why Thornton was using the October 1 date when, at least according to Clark, KFACE's CBA used July 1 through June 30 as the relevant period. During their discussion, Thornton explained that she had used October 1 as the relevant date of hire in accordance with the past practice that she had identified using her predecessor's notes. Before that discussion, Clark was unaware of a past practice of using October 1 as the date of hire, and Clark and Thornton had never discussed how to award bonus days. On October 16, 2020, after some back and forth, Clark ultimately decided that the affected District employees should have the bonus days that had been awarded to them rescinded. Clark then directed Thornton to notify those employees of that decision, and to explain the change and note that there had been an error. By the time that Clark gave Thornton that direction, Clark understood that, historically, the October 1 date had been used as the relevant date of hire. Clark also understood that she was changing the date of hire to July 1 to align with her own interpretation of the bonus days provision of the current KFACE CBA.

15. On October 27, 2020, Thornton sent a letter to the affected employees via email as directed. It stated, in relevant part,

> "Because our contract (KFACE) does not have language that speaks directly to the hire date of the employee a decision has been made by our Human Resource[s] department that affects the bonus days you have been awarded this year and therefore those days have been adjusted accordingly and are no longer available for you to use.
>
> "You must now be hired prior to the July 1st date and still qualify for all the other parameters of the contract to be eligible to receive bonus days in the new upcoming fiscal year. Because you were hired after that date I have been informed to remove those days on your available leave plans.
>
> "* * * * *
>
> "If you have questions or concerns please feel free to contact myself or you may reach out to Renee Clark in Human Resources.
>
> "I apologize for the confusion or inconvenience this may cause.
>
> "Thank you and have a great day!"

All of the language that was included in the October 27, 2020, letter was written by Thornton.

16. After emailing the October 27, 2020, letter, Thornton informed Director Clark that she had done so. Clark then thanked Thornton for doing so. Clark was not sent a copy of the letter at that time. Later, Clark received calls from employees who were upset about the rescissions, and Clark got a copy of Thornton's letter. Around the same time, KFACE filed a grievance concerning the rescissions, as KFACE viewed the matter as a change in practice.

17. During the events of this case, Jeanne Morgan was a Business Manager for the Payroll Department, and was Thornton's supervisor/manager. As of the hearing for this case, however, Morgan's job title was Director of Business Affairs.

18. On November 4, 2020, then-Business Manager Morgan emailed Thornton a "letter of expectations" that was signed by Morgan. The email stated:

> "Because of how you chose not to follow H.R. directions related to the eligibility for bonus days for KFACE employees based on work attendance, a number of unnecessary consequences resulted including staff being angry at our human resources department and a grievance filed with the union. The grievance potentially will now take a great deal of time to resolve from our H.R. department, our superintendent, and our school board. This could have been avoided if certain steps had been followed. It is my expectation that in the future these steps will be followed or further discipline could result. These are my expectations:

"1. When unsure about how to interpret and implement contract provisions, always check with the Human Resources Director.

"2. Once direction is given from him/her on a contract provision follow it exactly as directed.

"3. In communicating to employees about contract provisions such communication will not be done in a way that could lead to defraying blame to any individual or department.

"4. This communication will always be done in an honest straightforward manner and include the contract information to facilitate understanding by the employee.

"Again, it is my expectation that you follow these expectations in all future incidents related to implementing all district contracts and working with employees of the district."

19. Although then-Business Manager Morgan emailed and signed the November 4, 2020, letter of expectations, it was authored by Paul Hillyer, who was the District Superintendent at the time. Hillyer also instructed Morgan to deliver the letter to Thornton. Director Clark was not involved in drafting the letter. Additionally, as of the hearing, Clark believed that the portion of the letter that alleged that Thornton "chose not to follow H.R. directions" was inaccurate. Clark also believed that the portion of the letter that spoke of "staff being angry" at the HR Department was the result of the bonus days being rescinded. That said, according to Clark, Thornton was issued the letter because of the "tone" of Thornton's email and the "accusation" made therein.

20. The District does not consider letters of expectations to be discipline. The District uses such letters in order to help an employee understand that they need improvement in some area. If the issue with an employee is more egregious, the District will use a written reprimand or more serious discipline.

21. Dawn English worked for the District for 24 years, then retired from the District in June 2020. When English retired, she was KFACE's President. Later, English was one of the candidates in the District's 2021 Board of Education election (which is discussed below), which English did not win. She currently works as "cadre" for the OEA, where she started working in August 2020.

22. After Thornton received the letter of expectations, Thornton contacted then-KFACE President English, explained the situation, shared that she felt that she was being "retaliated against," and asked for KFACE to look into the matter for her. When Thornton received the letter, Thornton was "very upset." Thornton also felt like Director Clark was "out to get [her]," and that Clark was looking for mistakes so that Clark could "get rid of" Thornton. After communicating with Thornton, English told UniServ Consultant Olds about the issue, then Olds exchanged emails with Clark about possibly rescinding the letter of expectations.

23. On November 13, 2020, in one email to Olds regarding the letter of expectations, Director Clark wrote:

> "We have the managerial right to give employees the expectation that they communicate honestly, accurately, and in accordance with contract language. That is what we told her she needs to do. Since it was not disciplinary and not a part of her official personnel record, it is not a union issue. We do have a right to direct employees."

24. After her November 13, 2020, email, Director Clark met with KFACE about the letter of expectations. By that time, Clark knew that KFACE was "very concerned" about the issue.

25. On December 3, 2020, the parties signed a memorandum of understanding (MOU) regarding how Article 8, Section I, of the KFACE CBA would be applied in the 2020-2021 school year. That MOU stated, in part:

> "While there is disagreement over the contract language of when an employee must have perfect attendance from July 1 – June 30, * * * and regardless of past practice, the District agrees to utilize the date of October 1, 2019, as the date in which an employee must be employed by to be eligible for Bonus Days in the 2020-21 school year. * * * Both parties agree to discuss this item during contract negotiations for future years and that this does not set a past practice or intent to extend."[7]

26. Neither Thornton nor former KFACE President English was involved in the parties' discussions that resulted in the MOU.

27. As of the hearing, the parties had not yet reached a tentative agreement over the bonus days/date of hire issue.

28. On December 8, 2020, Director Clark sent an email to Thornton. It stated:

> "After today's discussion, the District is rescinding the Letter of Expectations that you were issued on November 4, 2020. That being said, we want [to] reiterate that from here on out when a change is made to an employee's payroll ([whether] that is a result of an error or directive from a supervisor/administrator), an email must be composed and approved by the HR Director that will be sent to the affected employee and you must copy both [Jeanne Morgan] and myself on such communications. Failure to do so, will result in disciplinary action."

Blind Carbon Copy (BCC) Email Dispute (Tanya Thornton)

29. Some District employees are considered "permanent" employees. Others are considered "temporary" employees. According to Article 1, Section B of the parties' CBA, temporary employees are not intended to work for more than "90 continuous working days." Further, if a temporary employee works for more than 90 days, the employee's position is supposed to become a permanent one.

30. In March 2021, Thornton determined that a District employee had likely been working in a temporary position for more than 90 days. On March 17, 2021, Thornton sent an email to Director Clark asking Clark for direction regarding how to proceed. Thornton used her

[7]This exhibit is labeled as indicated above but was misfiled by the District as part of Exh. R-6.

District email account to send the email, which she simultaneously BCC'd to then-KFACE President Heather Wisener. Wisener is a District employee, but she does not work in HR or Payroll. Because Thornton's March 17, 2021, email was BCC'd to Wisener, Clark was not immediately aware that Wisener had also received the email. Afterward, Clark and Thornton exchanged a number of additional emails about how to calculate the 90 days.

31. Thornton sent the email to KFACE President Wisener because Thornton did not believe that the HR Department would have brought the issue to KFACE's attention on its own, and because Thornton believed that KFACE needed to be made aware of the matter. In addition, Thornton intentionally BCC'd Wisener (instead of simply carbon copying her) because Thornton was worried that Director Clark would retaliate against her for alerting KFACE of the issue. Thornton based her worry about retaliation on her "past experiences" with Clark, including but not limited to the 2020 bonus days dispute.

32. At some point on or around March 17, 2021, KFACE President Wisener spoke with Director Clark about the temporary employee issue and indicated to Clark that Wisener had learned of the issue through an email that Wisener had received from the District's Business Office. Shortly thereafter, Clark spoke with the District's legal counsel, and then directed the District's IT department to search Thornton's email account to see if Thornton had ever shared information with "anyone else" on other occasions via a BCC. Clark did not specifically direct IT to limit the search for other union communications. At the time, Clark was unaware that Thornton was an active KFACE supporter. Before Clark heard about the email being shared with Wisener, Clark believed that all her exchanges with Thornton had been kept confidential. Eventually, IT informed Clark that Thornton had only sent a BCC as part of the bonus days matter. During the period in which IT's search occurred, Clark did not discuss the matter with Thornton or ask Thornton how Wisener had received a copy of the March 17, 2021, email.

33. On March 24, 2021, Thornton was invited to an investigatory meeting with Director Clark and Thornton's supervisor, Business Manager Morgan, that would occur the same day. Thornton was not told that the meeting was going to be about the BCC'd email until right before the meeting was scheduled to begin, after Thornton asked if she needed to have union representation for the meeting.

34. During the March 24, 2021, investigatory meeting, Thornton asked Director Clark how Clark had learned of the BCC to KFACE. In response, Clark told Thornton that she had had IT review all of Thornton's emails, and that Clark did so because she wanted to know whether there were other BCCs and to whom those emails had been sent. Thornton then told Clark "to have at it," as Thornton did not feel that she had anything to hide. During the same meeting, Clark also instructed Thornton that Thornton could only share information that she had learned of as Payroll Lead with KFACE if that information related to Thornton "directly" and "personally"; that Thornton's concerns about other employees should only be shared with Clark directly and not with KFACE; and that if Thornton shared anything with KFACE that did not relate to Thornton directly, Thornton would be violating the law and Thornton's "job would be in jeopardy." Ultimately, however, Thornton was not disciplined for BCC'ing KFACE.

35. Director Clark believes that it is her job, not Thornton's, "to interact with the union." Clark also believes that interacting with KFACE is not a "position requirement" for Thornton, and that doing so is "beyond [Thornton's] capacity" in Thornton's position. Director

Clark also testified to her concern about whether Thornton was sharing information with or BCC'ing KFACE or other people on a regular basis.

36. UniServ/OEA tells employees represented by its affiliated unions that, when using a work email account, they "run the risk" of those emails being searched. Further, the District's staff handbook explicitly warns that District email accounts "are not private and may be subject to monitoring" and that electronic communications may be reviewed by school administrators (as detailed below). When Thornton learned that Director Clark had IT search Thornton's emails, Thornton felt that the search was a violation of her privacy, and that Clark was looking for something that would enable Clark to "get rid of" her.

37. In the spring of 2021, after Thornton's meeting with Director Clark about the BCC, and while English was still KFACE President, English encouraged Thornton to run to become an elected officer for KFACE. Later, Thornton told English that she would not do so because Thornton did not want "backlash" or "grief" from the District's HR Department, because Thornton did not want Clark to blame Thornton when KFACE learned more information, and because Thornton wanted to avoid having a "confrontation" and "drama" with Clark.

School Board Election Email Dispute (Lisa Danskin)

38. Lisa Danskin currently works for the District as a "special education paraprofessional" in a special education classroom at Klamath Union High School (the District's only high school). Danskin has held her current position for four years, but she started working for the District nine years ago. Danskin currently works with the same students throughout her entire workday.

39. Danskin has been a member of KFACE since she started working for the District. During Danskin's third year with the District, she became an active KFACE member. In or around 2018, Danskin became an elected "building rep" for KFACE and held that position for three years. During the 2020-2021 school year, Danskin became the Vice President of KFACE. On July 1, 2021, she started a term as KFACE's President.

40. Among other things, UniServ recruits and endorses "pro-labor, pro-education" candidates for the District's school board, which is called the Board of Education. In early 2021, UniServ, KFACE, and other local unions decided to become involved in the District's school board elections, and formed a school board committee that was "made up of elementary, high school, classified, and college staff." At some point, Danskin joined that committee and it chose to endorse and recommend a number of specific candidates, including former KFACE President English.

41. On April 23, 2021, at 10:37 a.m., while on a mid-workday break, Danskin used her personal laptop and District email account address to send an email to everyone in the KFACE bargaining unit (a group that included about 165 other employees). The subject of Danskin's email was "Why we recommended the following candidates…" In summary, the email noted that the District's school board election would occur on May 18, 2021, shared that the UniServ school board committee was recommending or endorsing three particular candidates for that election, and explained why the committee had chosen those three candidates. In particular, the email states:

> "We need board members who will support our workers and unions as well as our families. These are the reasons:

"**These candidates Support Unions and Working Families:**
" ● Each of these candidates understands and APPRECIATES the strength of unions.
" ● They care about working families.
" ● We did not support either incumbent in Zone 6 or 7 because they consistently do not listen to our voices and vote against our interests.
" ● One of them only responds to people he wants to. School Board members should be responsive to ALL constituents.
" ● While Tonie Kellom, who is running in Zone 7, is well known and beloved, however she has worked against our unions when she was part of the district negotiating team. She was often late, did not show up, or was not prepared. We need a strong union leader: Dawn English. Dawn will support classified and certified wage increases. Don't expect to see that from Tonie.
" ● We need board members who will support us in negotiations. It is clear the negotiations during the 2021/22 school year will be hard fought. We will need board members who support us."

At the end of the email, Danskin's signature block noted, among other things, that she was KFACE's Vice President.

42. Danskin had access to the email addresses of the recipients of her April 23, 2021, email because she was KFACE's Vice President at the time. The email was not sent to anyone in the custodial/maintenance bargaining unit.

43. In a subsequent email thread, Danskin wrote that the language used in the April 23, 2021, email was not "her words." In fact, Danskin did not write the April 23, 2021, email herself (other than her signature), and the email did not contain Danskin's "personal opinion." Rather, Danskin copied and pasted the entire email message from a single email that she had received from someone else. Moreover, Danskin was asked by someone else to send out the April 23, 2021, email, and that email included the agreed-upon views of the UniServ school board committee.

44. District employees in KFACE's bargaining unit regularly use their District email accounts to communicate with one another about "union business," and UniServ Consultant Olds frequently advises KFACE members to do so. One reason for that is because KFACE knows every bargaining unit employee's District email address, but does not have a complete list of employees' personal email addresses. In addition, many "classified" employees do not have personal email addresses. Furthermore, KFACE does not know how often employees check their personal email accounts, but presumes that employees generally do check their District email accounts.

45. After the May 18, 2021, school board election, on May 24, 2021, Reinhardt forwarded Danskin's April 23, 2021, email to Director Clark, who had not yet seen the email. When Danskin originally sent that email, Reinhardt was still the Head Secretary at Klamath Union High School. However, on May 24, 2021, Reinhardt worked in the District's HR Department in what the parties agree is a "confidential" position as defined by ORS 243.650(6). After reviewing Danskin's email, Clark spoke about it with District Superintendent of Schools Keith A. Brown, Klamath Union High School Principal Tony Swan (Danskin's supervisor), and Nancy J. Hungerford (the District's attorney).

46. Shortly after May 24, 2021, Danskin was called into a June 2, 2021, investigatory meeting with Director Clark by Principal Swan. The meeting was attended by Principal Swan (who appeared as Danskin's supervisor), Clark, Heather Wisener (who was still KFACE's President at the time), Danskin, and UniServ Consultant Olds. The meeting occurred in person, but Olds, who represented Danskin during the meeting, attended the meeting via telephone.

47. During the June 2, 2021, investigatory meeting, Director Clark asked Danskin when Danskin sent the April 23, 2021, email, and Danskin replied that she sent it during her break period. Clark also asked Danskin who wrote the email. In response to that question, UniServ Consultant Olds interjected and recommended to Danskin that she not answer it. Clark asked Danskin who wrote the email because Clark believed that the email was too long to have been written during an employee's break, and because previously Clark had heard that Danskin had indicated that she had not written the email. In accordance with Olds' advice, Danskin did not tell Clark who had authored the email. Shortly after that, the interview ended. In Clark's view, the tone of the interview was "very tense."

48. UniServ Consultant Olds recommended that Danskin not reveal who wrote the April 23, 2021, email because, in his view, Danskin's email was permissible "internal union correspondence" about KFACE bargaining unit employees' "bosses," and because the email was part of a larger collective bargaining campaign. Additionally, Olds believed that revealing the email's author could risk getting another bargaining unit employee "in trouble." According to Olds, KFACE is permitted to use the District's email system for internal union correspondence "on any subject" as long as the unit employees do not do so "on the clock" and the usage does not interfere with or disrupt District operations. Moreover, as indicated above, Olds encourages KFACE-represented employees to use the District's email system for all internal union communications.

49. Director Clark believes that Danskin's April 23, 2021, email was a violation of District policy and the law because the email had "political association." During the June 2, 2021, meeting, Clark was also concerned that Danskin's email was being read and discussed by other District employees during work hours.

50. On June 2, 2021, at the end of the investigatory meeting, Principal Swan and Director Clark issued Danskin a letter of reprimand for her April 23, 2021, email.[8] In part, the letter stated that Danskin had violated Board Policy IIBGA-AR and ORS 260.432 "by promoting and opposing the election of candidates during the workday on District owned IMTC services and equipment." Among other things, Board Policy IIBGA-AR "strictly prohibits" using the District's electronic communications system for the "[t]ransmission of any materials regarding political campaigns," and states that "[t]ransmission of any communications or materials regarding political campaigns prohibited by ORS 260.432 is not allowed."[9] The Policy also states that "[s]taff who

[8]The parties' pleadings and Danskin's testimony indicate that this meeting occurred on June 1, 2021. However, Director Clark testified to drafting the letter in the evening of June 1, 2021, and delivering it the next day. Danskin and Clark similarly testified that the letter was given to Danskin right after the investigatory meeting. Therefore, we find that the letter was delivered on June 2, 2021.

[9]The letter of reprimand also indicated that Board Policy IIBGA-AR references ORS 260.462. That appears to be a typographical error; the portion of Board Policy IIBGA-AR that is quoted in the letter of reprimand references ORS 260.432.

violate general system user prohibitions shall be subject to discipline up to and including dismissal in accordance with Board policy, collective bargaining agreements and applicable provisions of law." ORS 260.432 generally establishes restrictions on political campaigning by public employees. The letter was signed by Clark and Swan, but was authored by Clark.

51. The District's employee/staff handbook outlines Board Policy IIBGA-AR and contains the following language regarding computer usage:

> "Staff may be permitted to use the District's electronic communications system for personal use, in addition to official District business, consistent with Board policy, the general use prohibitions/guidelines/etiquette and other applicable provisions set forth in administrative regulations. Personal use of District-owned computers including internet and email access by employees, is prohibited during the employee's work hours. Additionally, employee use of District-owned computers may be permitted only when such use does not violate the provisions of ORS 244.040[10] and use is under the same terms and conditions that access is provided to the general public under the District's policy governing use of District equipment and materials.
>
> "Staff who violate Board policy or administrative regulations, including general system user prohibitions, shall be subject to discipline up to and including dismissal. Violations of law will be reported to law enforcement. Violations of applicable Teacher Standards and Practices Commission (TSPC) and Standards for Competent and Ethical Performance of Oregon Educators will be reported to TSPC.
>
> "The District retains ownership and control of its computers, hardware, software and data at all times. All communications and stored information transmitted received or contained in the District's information system are the Districts property and are to be used for authorized purposes only. Use of District equipment or software for unauthorized purposes is strictly prohibited. To maintain system integrity, monitor network etiquette and ensure that those authorized to use the District's system are in compliance with Board policy, administrative regulations and law, school administrators may routinely review user files and communications.
>
> "Files and other information, including email, sent or received, generated or stored on District servers are not private and may be subject to monitoring. By using the District's system, individuals consent to have that use monitored by authorized District personnel. The District reserves the right to access and disclose, as appropriate, all information and data contained on District computers and District-owned email systems."

The staff handbook does not specifically address sending emails involving union business.

[10]ORS 244.040 generally prohibits a public official from using his or her position or office to obtain financial gain.

52. Policy IIBGA-AR applies to all District employees who use the District's email system. Further, District employees receive training regarding the contents of the District's staff handbook, Board Policy IIBGA-AR, and the use of the District's email system. Moreover, Danskin has received such training, and also has read the staff handbook on or around August 24, 2020. Later, on October 29, 2020, Director Clark emailed District staff a reminder about ORS 260.432, which, as noted above, restricts the political activities of public employees.

53. When Danskin sent her April 23, 2021, email, Danskin was already aware of the District's policy banning the use of District resources for political activities, which she knew banned sending out political emails. However, Danskin did not view her April 23, 2021, email as political activity, as it did not concern candidates like "Trump or Biden." Instead, Danskin viewed the email as "union/school business."

54. Article 4, Section G, of the parties' CBA states, in part, "[U]se of school buildings, bulletin board, and mail facilities including e-mail shall be limited to Association business and shall not be [used] to espouse a political candidate, cause, measure, or any religious point of view."

55. Upon receiving the letter of reprimand, Danskin became apprehensive and nervous about sending out union-related email, including meeting announcements. Nevertheless, since receiving the letter of reprimand, Danskin has continued to use her work email account to conduct some union business. Further, KFACE continues to be interested in school board elections and maintain its position that Danskin's April 23, 2021, email was lawful.

56. Before the June 2, 2021, investigatory meeting, Danskin had not had much interaction with Director Clark. However, at the time of the meeting, Danskin was aware of some aspects of Clark's interactions with Thornton.

57. On June 3, 2021, KFACE and Danskin filed a grievance concerning the letter of reprimand. The grievance asserted that Danskin was disciplined without just cause in violation of the Public Employee Collective Bargaining Act (PECBA) and Article 7(a) (concerning "just cause") and Article 1 (titled "Recognition") of the parties' CBA. The grievance also asserted that Danskin had been disciplined "for concerted, protected activity for an internal union correspondence," and noted that she sent the email as the Vice President of KFACE.

58. On or around June 18, 2021, Tonie Kellom, who was an unsuccessful candidate in the May 2021 Board of Education election (and ran for the same open seat as former KFACE President English, who also lost the election), filed a written complaint against Danskin with the Oregon Secretary of State alleging a violation of ORS 260.432. Subsequently, Danskin received a letter from the Secretary of State notifying Danskin of the complaint. Although the District was aware that Kellom had filed the complaint, KFACE and Danskin were not told who filed complaint until the hearing for this case. As of the hearing, no known action had been taken on that complaint.

59. On June 22, 2021, Director Clark denied the Danskin grievance (at Level One) via an email.

60. On July 1, 2021, Danskin became KFACE's President.

61. On July 30, 2021, Superintendent of Schools Brown denied Danskin's grievance (at Level Two) via a letter.

62. On August 9, 2021, Olds and Danskin presented their case regarding Danskin's grievance to the District's Board of Education during a school board meeting. During that meeting, the Board of Education voted in open session and unanimously denied the grievance and upheld the Superintendent's earlier decision.

63. On August 11, 2021, Lori Theros, the Chair of the Board of Education, issued a letter that formally denied Danskin's grievance (at Level Three) and upheld Superintendent Brown's related decision.

64. On or around August 12, 2021, KFACE moved Danskin's grievance to the arbitration stage of the parties' grievance procedure (Level Four).

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)(a) and (c), but not (1)(b), by threatening Thornton's job security because she engaged in protected activity.

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 "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." 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." The language of ORS 243.672(1)(a) provides two distinct prongs, one of which prohibits interference, restraint, and coercion "because of" the exercise of protected rights. Put another way, the "because of" prong prohibits the employer from basing its actions on an employee's protected activity. The other prong of ORS 243.672(1)(a) prohibits actions that interfere with, restrain, 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). Under either prong, and for all of the claims in the complaint, the burden of proof is on KFACE, while the District has the burden of proving affirmative defenses. *See* ORS 183.450(2); OAR 115-010-0070(5)(b).

To determine if an employer violated the "because of" prong, we ordinarily examine the employer's motives or reasons for the disputed action. However, it is unnecessary for a complainant to prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. *Mult. Sch. Dist. No. 1*, 171 Or App at 623; *Lebanon Community School District*, UP-4-06 at 29, 22 PECBR at 351. Stated differently, evidence of employer hostility or anti-union animus regarding the activity that prompted the employer's action is unnecessary to establish a claim under the "because of" prong. *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05 at 22-23, 22 PECBR 372, 393-94 (2008). When presented with "because of" claims, we typically examine the record as a whole to determine what motivated the employer to act. *Mult. Sch. Dist. No. 1*, 171 Or App at 626 ("The ultimate issue of whether an employer acted

coercively and was motivated to do so by the exercise of protected activity is a factual determination, one that ERB must make considering the nature of the action taken and the circumstances in which it was taken."). Our role, broadly, is to decide which party's explanation of the employer's reasons we believe. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan District*, Case No. UP-48-97 at 8, 17 PECBR 780, 787 (1998).

When we analyze an employer's actions under the "in" prong, we focus on the likely consequences or effects of the employer's actions on employees. An employer commits an "in" the exercise violation if the employer's conduct, when viewed objectively under the totality of the circumstances, has the natural and probable effect of deterring employees from engaging in activity protected by PECBA. Because this standard is objective, neither the employer's motive nor the extent to which employees actually were coerced is controlling. *Mult. Sch. Dist. No. 1*, 171 Or App at 623-24; *Service Employees International Union Local 503, Oregon Public Employees Union v. City of Tigard*, Case No. UP-040-13 at 8-9, 26 PECBR 131, 137-38 (2014). Put simply, our test for this prong is: Would a reasonable employee be chilled from exercising PECBA rights by the employer's conduct? *Oregon Public Employees Union v. Jefferson County*, Case No. UP-55-98 at 14, 18 PECBR 109, 122, *recons*, 18 PECBR 199 (1999). Additionally, an employer that commits a "because of" violation also generally commits a derivative "in" violation because the natural and probable effect of the employer's unlawful action is to chill the exercise of protected rights. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-42/50-12 at 28, 25 PECBR 640, 667 (2013) (citing *Clackamas County Employees' Assn. v. Clackamas County*, 243 Or App 34, 259 P3d 932 (2011)).

KFACE alleges that the District violated both prongs of ORS 243.672(1)(a) through the various statements that Director Clark made during the March 24, 2021, investigatory meeting. It is well settled that a public employer's directive to a bargaining unit member not to discuss a work-related incident or workplace concerns with coworkers or their exclusive representative violates ORS 243.672(1)(a). *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, *amended*, 10 PECBR 437 (1988). This Board has emphasized that the purposes of PECBA "can be attained only when employes are free to discuss with other unit members and union representatives any matters arising out of the employment relationship." *Id.*

Here, as detailed above, during that meeting Clark instructed Thornton that (1) Thornton could only share information that she had learned of as Payroll Lead with KFACE if that information related to Thornton directly and personally; (2) that Thornton's concerns about other employees should only be shared with Clark directly and not with KFACE; and (3) that if Thornton shared anything with KFACE that did not relate to Thornton directly, Thornton would be violating the law and Thornton's job would be in jeopardy. We conclude that these instructions were given because of—and, indeed, in direct response to—Thornton's communication with a union representative about a contractual issue, specifically one involving Article 1, Section B, of the parties' CBA. We also conclude that Clark's instruction effectively threatened Thornton's employment over this communication and plainly misstated Thornton's PECBA rights. Such a threat is a blatant violation of ORS 243.672(1)(a). *See Sandy Union High School District No. 2*, UP-42-87 at 9, 10 PECBR at 397.

In arguing to the contrary, the District contends that it had the right to expect that Thornton would defer to a director's CBA interpretations, as directed, when performing her work. That

argument, however, does not address the core legal issue before us. Under PECBA, represented employees are generally free to discuss with other bargaining unit members and their union representatives any matter arising out of the employment relationship—not just those that affect an employee personally. Moreover, public employees generally have the right to participate in a union investigation of possible employer wrongdoing. *See* ORS 243.662; *Roseburg Education Association v. Douglas County School District*, Case No. UP-16-96 at 7-9, 16 PECBR 868, 874-76 (1996); *Sandy Union High School District No. 2*, UP-42-87 at 9, 10 PECBR at 397. Had KFACE approached Thornton to ask if she was aware of any employees who had been temporarily assigned for longer than 90 days, Thornton would have been able to respond to that inquiry. Correspondingly, Thornton was similarly permitted to alert KFACE to the issue. The fact that communicating with Thornton's union is not a job "requirement" for Thornton's position (as Director Clark put it) has no bearing on this issue. As both parties agree, Thornton is not a "confidential employee" as defined by PECBA. Therefore, she generally has the right to inform her union of any suspected contract violations and other workplace concerns. *Id.*

In reaching this conclusion, we recognize that a public employer may generally enforce reasonable policies governing the release of information, direct employees to follow those policies, and reasonably investigate suspected violations of those policies. However, when doing so, a public employer must also account for employees' PECBA rights. Here, there is no indication that Thornton failed to adequately perform her assigned tasks. Nor is there any indication that her communication related to any personal or confidential information of another employee or that otherwise invoked genuine data security concerns. Rather, the topic of the email was an arcane contractual issue, and PECBA plainly protects KFACE's right as the exclusive representative to interface with unit members about whether the contract language was being followed. Although Clark expressed some generalized concerns about information security, those concerns do not credibly relate to the substance of the information that was at issue. Moreover, Clark's instructions, which were given after the District confirmed that Thornton had sent a single email on the contract question, were broadly restrictive and made no distinctions relative to the type of information involved.

We also are not persuaded by the District's argument that Clark was concerned that Thornton was using her regular "work time" to communicate with the union president. It is not clear how much time the District believes that Thornton spent to send her email to the union president, and we see no indication that it could have taken more than mere seconds to add an email address to the BCC line. Nor is there any clear evidence that that specific concern was ever emphasized during the March 2021 meeting or a subsequent instruction. Instead, the emphasis was on the subject matter of Thornton's communication.

The District also disputes that an employee in Thornton's position could legitimately feel threatened or have been coerced. To begin, it is not necessary that a complainant prove that an employee was actually coerced or actually felt threatened to establish a "because of" violation of ORS 243.672(1)(a). Regardless, we disagree with the District's argument. The evidence establishes that Director Clark explicitly warned that Thornton's job would be "in jeopardy" if Thornton repeated her actions, and that Clark alleged that Thornton's actions were illegal. Under similar circumstances, that kind of language would, at a minimum, deter a reasonable employee from speaking with their union about issues that did not directly involve them. It also follows that someone in Thornton's position would naturally tend to follow Clark's instructions once they were given.

Finally, we reject the District's arguments that rely on our precedent in *Elgin Education Association and Wilson v. Elgin School District, No. 23*, Case No. UP-44-90, 12 PECBR 708, *recons*, 12 PECBR 768 (1991). The facts of that case do not resemble those presented here. At its core, that order stands for the proposition that "employees are not protected by the PECBA when using the authority and office granted to them by the employer to foment *public* anxiety and confusion over employer operations." UP-44-90, *recons*, at 1, 12 PECBR at 768 (emphasis added). Here, however, there is no indication that Thornton's email was sent "to foment public anxiety and confusion over [the District's] operations." *See id.* Thornton simply emailed her union president about a potential contract violation involving a single employee. Such internal union communications do not logically broadcast information to the public or otherwise adversely impact public perception. Moreover, there was no evidence presented that Thornton's actions had any effect on public understanding or perception of the subject matter. For the reasons addressed above, Thornton's activity was protected under PECBA, and Clark's threat that Thornton would lose her job if she engaged in that activity again is unquestionably a violation of the "because of" prong of ORS 243.672(1)(a).

Having concluded that the District interfered with, restrained, or coerced Thornton because of her protected activity, we also find a derivative "in" violation. A "because of" violation "almost always restrains, coerces, or interferes in the exercise of protected rights." *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-2-08, at 20, 23 PECBR 108, 127 (2009) (citing *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 42, 22 PECBR 323, 351 (2008)). Here, the District's conduct provides no exception to that general principle, and we find that the District's conduct would have the natural and probable effect of deterring employees from engaging in the protected activity of discussing employment matters with their exclusive representative. Because our remedy would not be affected, we do not address the question of whether the District also committed an independent "in" violation of subsection (1)(a). *See AFSCME Local 189 v. City of Portland*, Case No. UP-7-07 at 43, 22 PECBR 752, 794 (2008) (citing *Lebanon Community School District*, UP-4-06 at 42, 22 PECBR at 354).

KFACE also asks us to conclude that the District separately violated ORS 234.672(1)(a) because Clark decided to search Thornton's emails as part of her inquiry that resulted in the March 24, 2021, investigatory meeting.[11] We have already concluded that Clark's conduct at the meeting violated ORS 243.672(1)(a). We find it unnecessary to separately determine whether an additional action leading up to the unlawful conduct also independently violated that provision, as doing so would not affect our remedy. *See id.*

ORS 243.672(1)(c)

ORS 243.672(1)(c) states, in relevant part, that it is an unfair labor practice for a public employer or its designated representative to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of discouraging membership in an employee organization." In this context, we have defined the word "membership" very broadly to protect a wide variety of union activities. Our test for determining whether a violation of subsection (1)(c)

[11]Clark maintained that she only directed a search to determine whether Thornton had blind copied others on emails, whereas KFACE asserted that Clark directed the search to uncover other union communications.

has occurred is similar to the one we use in determining a violation of the "because of" prong of subsection (1)(a). In short, an employer's conduct violates ORS 243.672(1)(c) if there is a causal connection between an employee's protected activity and the employer's action. *Tri-County Metropolitan Transportation District of Oregon*, UP-62-05 at 34, 22 PECBR at 944 (citing *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02 at 16, 20 PECBR 337, 352, *recons*, 20 PECBR 388 (2003)); *State of Oregon, Department of Corrections, Santiam Correctional Institution*, UP-51-05 at 25, 22 PECBR at 396 (citing *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06 at 12, 22 PECBR 212, 223 (2007)).

In this case, there is a clear causal connection between Thornton's protected activity, which was Thornton communicating with her union president about a potential contract dispute, and the District's action, which was Director Clark's instruction and threat that limited Thornton's PECBA-protected communications with her union. For that reason, we also conclude that District violated ORS 243.672(1)(c).[12]

ORS 243.672(1)(b)

ORS 243.672(1)(b) makes it 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." Fundamentally, subsection (1)(b) is concerned with the rights of the union itself, rather than the rights of the bargaining unit employees. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07 at 43, 22 PECBR 752, 794 (2008). To prevail on a (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 the exclusive representative. *Clackamas County Employees' Association v. Clackamas County*, Case No. UP-030-20 at 8 (citing *State of Oregon, Department of Corrections, Santiam Correctional Institution*, UP-51-05 at 26, 22 PECBR at 397). Stated differently, the complainant must prove that the employer's actions resulted in some actual interference with its existence or administration. *City of Portland*, UP-7-07 at 43, 22 PECBR at 794. A (1)(b) violation is not proven by a showing that the action *may* have a foreseeable effect on a labor organization. *Sandy Union High School District No. 2*, UP-42-87 at 10, 10 PECBR at 398 (citing *Oregon State Employees Association v. Coos Bay-North Bend Water Board*, Case No. C-122-80, 5 PECBR 4047 (1980)).

For this claim, KFACE argues that the District violated ORS 243.672(1)(b) because Thornton decided not to run for an elected office in KFACE due to Clark's unlawful statements described above. As set forth above, a violation of (1)(b) requires evidence that the District's actions actually, directly, and adversely affected KFACE's ability to serve as the exclusive representative. KFACE's claim rests on testimony that then-President English met with Thornton in the spring of 2021, after the March 2021 investigatory meeting, and approached Thornton to see

[12]Where a subsection (l)(a) violation has been proven, we need not consider a parallel (l)(c) claim that is based on the same facts. *State Teachers Education Association/OEA/NEA and Andrews et al. v. Willamette Education Service District and State of Oregon, Department of Education*, Case No. UP-14-99 at 33, 19 PECBR 228, 260 (2001), *aff'd without opinion*, 188 Or App 112, 70 P3d 903 (2003), *rev den*, 336 Or 509, 87 P3d 1136 (2004). Here, the ALJ reached the parallel (1)(c) claim and determined (correctly) that a (1)(c) claim was established. The District did not object or cross-object to that conclusion, and we adopt and affirm it. As noted above, with respect to any separate parallel (1)(c) claim based independently on Clark's search of emails, our remedy would not be affected, and we decline to address that issue.

if she would be interested in running for a KFACE office position. At some later point, Thornton told English that she did not want to do so because Thornton wanted to avoid having a "confrontation" and "drama" with Clark. Although we do not discount that Clark's unlawful actions in March 2021 may have influenced Thornton's subsequent decision to not want to run for a KFACE elected office, we find the evidence insufficient to establish actual, direct, and adverse interference with KFACE's ability to serve as the exclusive representative. In reaching that decision, we note that there was no pending union election or even an identified union office that Thornton might be considering. Rather, the evidence is that English thought that Thornton might make a good candidate at some point for being an elected officer and approached her to consider that possibility. Thornton's desire to avoid drama and confrontation with Clark, if she were elected to an office, does not establish the requisite interference with the administration of KFACE. Simply put, the connection between Clark's unlawful conduct and any potential interference with KFACE's ability to serve as the exclusive representative is too speculative and attenuated on this record for us to find that KFACE met its burden of proof on this claim. We require greater evidence than was presented here of actual, direct, and adverse interference with the exclusive representative's ability to perform its legally-protected functions. *Cf. State of Oregon, Department of Corrections, Santiam Correctional Institution*, UP-51-05 at 29, 22 PECBR at 400 (employer's statements that an active candidate for union office was "evil" and that a bargaining unit member should vote for his opponent in the election violated ORS 243.672(1)(b)); *Sandy Union High School District No. 2*, UP-42-87 at 10, 10 PECBR at 398 (employer's directive that employee refrain from communicating with union officials violated ORS 243.672(1)(b) because evidence established that the employee later refused to cooperate with the union such that it impaired the union's ability to administer the collective bargaining agreement and carry out other representational functions). Accordingly, we dismiss the allegation under ORS 243.672(1)(b).[13]

3. The District violated ORS 243.672(1)(b) by disciplining Danskin for using the District's email system for her April 23, 2021, email.

We turn to whether the District's disciplinary action against Danskin, KFACE's then-Vice President, interfered with administration of KFACE, in violation of ORS 243.672(1)(b). We briefly recount the relevant facts. On April 23, 2021, Danskin, while on a midday break from work, sent an email from her personal laptop to the approximately 165 members of the KFACE bargaining unit using her District email account. At the time, Danskin was KFACE's Vice President (she became President, effective July 1, 2021). The subject of Danskin's email was "Why we recommended the following candidates…" and the body of the email communicated UniServ's recommendation or endorsement of three candidates for an upcoming District school board election. The email explained why the committee had chosen those three candidates, and why it opposed other candidates. At the end of the email, Danskin's signature block noted, among other things, that she was KFACE's Vice President. The District subsequently issued a letter of reprimand to Danskin for violating Board Policy IIBGA-AR and ORS 260.432.

The record establishes that KFACE understood that the composition of the school board potentially affected its ability to effectively represent its members, particularly in negotiating collective bargaining agreements that would garner the necessary approval of the school board.

[13]With respect to any argument that the search of Thornton's emails also violated ORS 243.672(1)(b), the record evidence on direct, actual, and adverse interference with KFACE's ability to serve as the exclusive representative is even more lacking.

Thus, as a union officer, Danskin sent the email to notify the membership of the UniServ Council's endorsement and position on school board candidates for the upcoming election. KFACE argues that by disciplining and attempting to curb Danskin from that activity as a union officer, the District interfered with the administration of KFACE, which necessarily involves communicating with its members on matters related to its role as the exclusive representative. KFACE further argues that, as an officer of the exclusive representative, Danskin had a right under ORS 243.804(5) to use the District's email system to send the email.

The District does not dispute that it disciplined Danskin for sending the email, but argues that its discipline did not violate ORS 243.672(1)(b) because: (1) KFACE waived the right to use the District's email system under the terms of the parties' CBA; (2) the email was prohibited under a separate law, ORS 260.432; and (3) ORS 243.804(5) does not apply to Danskin's email, which means that the District could discipline Danskin for violating its internal policy prohibiting using the District's email system for sending materials on political campaigns.[14]

We begin with the District's waiver argument. "Waiver" is an affirmative defense that must be pleaded. *See Portland Fire Fighters' Association, IAFF Local 43 v. City of Portland*, 302 Or App 395 (2020) (holding that ERB erred in finding that the Association waived its right to bargain by inaction where the City did not plead the affirmative defense of waiver by inaction). Here, the District did not plead a waiver by contract in its answer. Therefore, we do not consider it. *See id.*

We next address the District's argument that it disciplined Danskin to comply with ORS 260.432, which provides:

> "No public employee shall solicit any money, influence, service or other thing of value or otherwise promote or oppose any political committee or promote or oppose the nomination or election of a candidate, the gathering of signatures on an initiative, referendum or recall petition, the adoption of a measure or the recall of a public office holder while on the job during working hours. However, this section does not restrict the right of a public employee to express personal political views."

By its terms, ORS 260.432 only prohibits public employees from engaging in the proscribed activity "while on the job during working hours." Here, the record establishes that Danskin sent the email while on a midday break from work. We reject the argument that an employee who is on a bona fide break from work may be deemed "on the job during working hours" within the meaning of the statute. To the contrary, when an employee is on a break, whether it be a meal break or other sanctioned break, they are not "on the job." *Cf.* 38 Op Atty Gen 526, 526-527 (1977) (analyzing ORS 260.432 and stating "The use of the words '... while on the job...' indicates legislative recognition that an employe is within the law if, for example, he or she devotes the lunch hour to a political task. In brief, the law allows public employes to voluntarily engage in political activities on their own time.") The District has not cited any statutory or legal authority for concluding that

[14]Because we conclude, as set forth below, that Danskin's email was protected by ORS 243.804(5), any argument that the District could discipline her based solely on its unilateral internal policy is foreclosed.

an employee remains "on the job" under ORS 260.432 when they are on a sanctioned work break.[15] Nor has the District presented persuasive evidence or argument that Danskin was not on a work break when she sent the email. Accordingly, we disagree with the District's argument that Danskin's otherwise protected activity was unlawful (or lost its protection) under ORS 260.432.

Finally, we turn to whether Danskin's email was authorized under ORS 243.804(5). This is the first occasion that this Board has had to interpret that statute, which provides:

> "(5) 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."

KFACE argues that Danskin, as KFACE's then-Vice President, used the District's electronic mail system to communicate with employees in KFACE's bargaining unit regarding a matter involving the governance or business of KFACE. Therefore, KFACE argues that Danskin had the statutory right under ORS 243.804(5)(c) to send the email, and that the District's discipline because of that email interfered with the administration of the union, in violation of ORS 243.672(1)(b). Likewise, the *amicus curiae* brief of OSEA argues that school board elections are vital and essential business matters for labor organizations representing K-12 school employees in Oregon. It argues that the role of the school board in administering CBAs and making decisions regarding grievances makes school members "decision-makers in the most consequential matters of OSEA business." More generally, it also argues that votes on levies and bonds have a direct impact on school budgets and, by extension, on the bargaining process. Therefore, it argues that the exclusive representative's right to use a public employer's electronic mail system, as set forth in ORS 243.804(5), must be extended to such communications. The District contends that the subject of the email was not a matter involving the governance or business of the union under the statute.

To determine whether Danskin's email is covered by ORS 243.804(5), we must interpret that statute. When this Board interprets and applies statutes, our goal is to determine and give effect to the legislature's intent. ORS 174.020. *See also Comcast Corp. v. Dept. of Rev.*, 356 Or 282, 295-97, 337 P3d 768 (2014) (citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) ("Our goal in interpreting a statute is to determine what meaning the legislature intended in drafting the statute.")). In doing so, we apply the analysis supplied by *PGE,* 317 Or 606, as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Because the words chosen

[15]We note that ORS 260.432 was amended in 2023 by SB 168 to expressly state that "'[w]hile on the job during working hours' does not include periods of time during which a public employee is taking time off for a meal break or rest break or periods of time during which a public employee is utilizing otherwise allowable time off in accordance with the labor laws of this state." Although that amendment, which takes effect January 1, 2024, is not controlling here and does not impact our statutory analysis, we note that it is consistent with our interpretation of the version of the statute that was in effect at the time of this case.

by the legislature are the best evidence of its intent, we first review the text and context of the statute in question. *Gaines*, 346 Or at 171-72. We then review any relevant legislative history. *Id.* If we are still unable to determine the legislature's intent, we then apply maxims of statutory construction. *Id.*

We begin with the context that ORS 243.804(5) is part of PECBA, ORS 243.650-243.809, which governs public-sector collective bargaining in Oregon. ORS 243.804(5) was enacted in 2019 as part of HB 2016 and was a legislative response to the decision of the Supreme Court of the United States in *Janus v. AFSCME, Council 31*, 585 US__, 138 S Ct 2448 (2018). In *Janus*, the Court ruled that it was unconstitutional for a public employee to have any agency fee or any other payment to a union deducted from the employee's wages, unless the employee affirmatively consented to that deduction or payment.[16] In reaching that conclusion, the Court took great pains to emphasize the distinction between public-sector and private-sector collective bargaining. Specifically, the Court emphasized that "collective bargaining with a government employer, unlike collective bargaining in the private sector, involves 'inherently "political"' speech." 138 S Ct at 2480 (quoting *Abood v. Detroit Bd. of Ed.*, 431 US 209, 97 S Ct 1782, 52 L Ed 2d 261 (1977)). The Court added that " 'decisionmaking by a public employer is above all a political process' driven more by policy concerns than economic ones," and further distinguished public-sector bargaining from private-sector bargaining by reasoning that "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues * * *." 138 S Ct at 2480 (quoting *Harris v. Quinn*, 573 US 616, 134 S Ct 2618, 189 L Ed 2d 620, 646 (2014)).

Because HB 2016 was enacted as a response to *Janus*, which was premised in part on public-sector bargaining being "inherently political," KFACE argues that this context sheds important light on the meaning and scope of the text of ORS 243.804(5). We agree that the context in which HB 2016 was enacted is relevant to assessing the legislative intent of ORS 243.804(5). It is not hyperbole to say that *Janus* fundamentally changed core concepts under PECBA, and there is no dispute that HB 2016, including ORS 243.804(5), was enacted as a direct response to *Janus*. *See*, *e.g.*, Staff Measure Summary, Senate Committee on Workforce, HB 2016, May 21, 2019 (discussing the purpose of HB 2016 with reference to the impacts of the *Janus* decision).

With that context in mind, we turn to the text of the statute. As set forth in the parties' briefings, the operative statutory phrase at issue is "[m]atters involving the governance or business of the labor organization," and particularly the terms "governance" and "business." As the court explained in *Comcast*, when the legislature does not define a statutory term, "we ordinarily look to the plain meaning of a statute's text as a key first step in determining what particular terms mean[,] * * * frequently consult[ing] dictionary definitions of the terms, on the assumption that, if the legislature did not give the term a specialized definition, the dictionary definition reflects the meaning that the legislature would naturally have intended." 356 Or at 295-96. However, "[a]n exception to that approach arises when the legislature uses technical terminology—so-called

[16]Before *Janus*, PECBA authorized "fair share" and "agency shop" arrangements. In short, those types of arrangements required public employees who were represented by a labor organization, but who chose to not be members of the labor organization, to pay their "fair share" to the labor organization for the reasonable costs of being represented by the organization. In that arrangement, the nonmember fair-share payer could be compelled to pay for chargeable costs related to the labor organization's representation of the employee, but could not be compelled to pay for non-chargeable costs related to, among other things, the labor organization's political activities.

'terms of art'—drawn from a specialized trade or field." *Id.* at 296. "In that circumstance, we look to the meaning and usage of those terms in the discipline from which the legislature borrowed them." *Id.* (citing examples). We "determine[] the meaning of those terms based on how they are used and understood in the specialized field, trade, or profession, and using sources that best accord with the legislature's intent." *Id.* Where the legislature uses words of common usage, we give them their "plain, natural, and ordinary meaning," *PGE*, 317 Or at 611, using a dictionary of common usage, *Pete's Mt. Homeowners Assn. v. Or. Water Res. Dept.*, 236 Or App 507, 516-17, 238 P3d 395 (2010).

We proceed to parse the language of ORS 243.804(5), and specifically "[m]atters involving the governance or business of the labor organization." The definition of "governance" is "the act or process of governing: GOVERNMENT," and "government" means, among other things "ADMINISTRATION." *Webster's Third New Int'l Dictionary* 982-83 (unabridged ed 2002). The definition of "business" includes "ROLE, FUNCTION" and "an activity engaged in toward an immediate specific end and usu. extending over a limited period of time: TASK, CHORE, MISSION, ASSIGNMENT." *Id.* at 302. "Involve" means "to have within or part of itself: CONTAIN, INCLUDE." *Id.* at 1191. Thus, the text of the statute indicates that the legislature intended to give an exclusive representative under PECBA the right to use the email system of the respective public employer to communicate with its represented employees regarding matters involving, containing, or including the administration, role, or functions of the exclusive representative as it relates to a specific goal. We further conclude that when we assess whether a communication falls within this provision that we do so through the lens of public-sector collective bargaining, as distinct from private-sector collective bargaining. In other words, we recognize that the administration, role, and function of a public-sector exclusive representative may be different from that of a private-sector exclusive representative.

As that definition relates to the instant case, the question is whether Danskin's email, as an officer of KFACE, constituted a communication with KFACE's represented employees involving, containing, or including the administration, role, or function of KFACE, with respect to the District.[17]

In answering that question, we recognize the role of the District's school board as it relates to KFACE and its role as the exclusive representative. As described above, District school-board members have the authority to ratify (or not) tentative agreements reached by KFACE's and the District's bargaining teams. Thus, part of KFACE's role as the exclusive representative is to work toward having a school board more willing to ratify agreements that KFACE's bargaining team reaches with the District's bargaining team. Danskin testified expressly about this function being of increased importance to KFACE in its role as exclusive representative. Danskin further testified that the email communication to its represented employees was in furtherance of that role. Moreover, the email itself expressly linked the candidates at issue to the role of the exclusive

[17]We reject any argument that, as an elected KFACE officer, Danskin's email was not sent on behalf of the exclusive representative merely because the UniServ Council committee generated the recommendations in the email. KFACE is one of several unions that make up a coordinating body that is known as UniServ. Thus, KFACE was merely transmitting recommendations related to its home district that it and other unions had agreed on. The involvement of other unions in generating these collective recommendations does not then deprive KFACE of its status as the exclusive representative or otherwise deprive it of its right, afforded under ORS 243.804(5), to communicate with unit members.

representative and its function of bargaining terms and conditions of employment on behalf of KFACE-represented District employees. Specifically, the email emphasized that one endorsed candidate would "support classified and certified wage increases" whereas another would not. The email identified a need for "board members who will support us in negotiations. It is clear the negotiations during the 2021/22 school year will be hard fought. We will need board members who support us."

The District does not deny, and the record supports, that the District's school board plays a meaningful (and often determinative) role in the collective bargaining relationship between KFACE and the District. Put another way, the District's school board has decision-making authority that directly impacts KFACE's ability, as the exclusive representative, to perform its function of negotiating contracts on behalf of its represented employees. The April 23, 2021, email communicated KFACE's perspective on candidates for that school board to its represented employees in furtherance of KFACE's role or function as the exclusive representative. Thus, we conclude that the email was about a matter involving, containing, or including the administration, role, or function of the exclusive representative as it relates to a specific goal (*i.e.*, the composition of a board with decision-making authority relative to KFACE's functioning as the exclusive representative of District-represented employees). On these facts, we conclude that the April 23, 2021, email fell under the protection of ORS 243.804(5)(c), meaning that KFACE (via its then-Vice President) had the statutory right to use the District's email system to send that communication. Because Danskin, in her capacity as a KFACE officer, had the statutory right to send the April 23, 2021, email, the District's discipline of her interfered with the administration of KFACE, in violation of ORS 243.672(1)(b).[18]

In reaching this conclusion, however, we do not go so far as to say, as KFACE (and, to a lesser extent, the *amicus curiae* brief) argues, that *any* communication regarding *any* election (be it local, state, or federal) would constitute a matter involving the "governance or business" of KFACE, within the meaning of ORS 243.804(5). Rather, we limit our conclusion to the case before us, which concerns an email regarding elected officials who have direct control and oversight in the ratification and administration of KFACE's collectively-bargained agreements. Additionally, we note that there is no evidence of a pattern of abusing or overtaxing the District's email system, or that this single email created any undue disruption in the workplace. We also reiterate that it was sent while the employee/union officer was off duty (on a break from work). Additionally, the record does not support that the text of the email contained material that would cause it to lose its protection under PECBA. *See Lane County Peace Officers Association v. Lane County Sheriff's Office*, Case No. UP-32-02 at 15 and n 12, 20 PECBR 444, 458 n 12 (2003) (finding that activity can lose its protected status if it is pursued in a seriously inappropriate manner, such as criminal misconduct, violent conduct, contract breach, and inexcusable disparagement of the employer). Accordingly, for the reasons explained above, we conclude that Danskin's email was protected by ORS 243.804(5)(c), and that the District violated ORS 243.672(1)(b) when it disciplined her for sending that email.

[18]As noted, the District failed to plead any affirmative defenses arising under the parties' CBA and only pleaded an affirmative defense that was based on ORS 260.432. Therefore, we do not have occasion to analyze whether KFACE contractually waived the rights granted under ORS 243.804.

4. The District violated ORS 243.672(1)(a) by disciplining Danskin for using the District's email system for her April 23, 2021, email.

We next address whether the District's discipline of Danskin also violated ORS 243.672(1)(a). KFACE asserts that the email constituted protected activity under PECBA, and that the District disciplined her because of that protected activity, therefore violating ORS 243.672(1)(a).

As discussed earlier in this order, ORS 243.672(1)(a) prohibits a public employer from interfering with, restraining, or coercing employees in or because of the exercise of rights guaranteed by ORS 243.662, which consist of the right of public employees "to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." As also discussed above, this Board has long held that participating in the activities of labor organizations under the statute includes the right to discuss matters concerning those activities. Moreover, an employee serving as a union officer is engaged in protected activity when communicating with represented employees regarding the activities of the labor organization for the purpose of representation and collective bargaining. *See*, *e.g.*, *City of Portland*, UP-7-07, 22 PECBR 752 (discipline of employee/union officer for sending email protected by PECBA violated both ORS 243.672(1)(a) and (b)).

We first address whether Danskin was engaged in protected activity when she sent the email. We conclude that she was. First, as explained above, the email was permitted under ORS 243.804(5)(c). As an elected KFACE officer, Danskin had a statutory right to send the email in that capacity. As an employee, Danskin also enjoys the protections of ORS 243.672(1)(a), which includes participating in the activities of KFACE for the purpose of representation. As detailed above, the record establishes that the school board ultimately approves all agreements between KFACE and the District. As Danskin put it, and as the record supports, the members of the school board act as the District's "boss," and membership on that board directly impacts KFACE, because of the Board's role in approving and administering the parties' CBA, and thus constitutes an important issue to KFACE and its represented employees. There is no dispute that Danskin sent the email to KFACE's membership for the purpose of providing information pertinent to KFACE's represented employees on that issue. On this record, we find that Danskin's email constituted participating in the activities of KFACE within the meaning of ORS 243.662. Accordingly, the activity is protected.

We next turn to whether the District's discipline of Danskin constituted interference with, restraint, or coercion in or because of the exercise of that protected activity. *See* ORS 243.672(1)(a). Here, the record is unrebutted that the District disciplined Danskin because of that email, which we have found to be protected activity. In arguing against finding a violation, the District advances the same arguments that we have rejected above regarding the claim under ORS 243.672(1)(b). Specifically, the District asserts that: (1) KFACE waived the right to use the District's email system under the terms of the parties' CBA; (2) the email was prohibited under ORS 260.432; and (3) ORS 243.804(5) does not apply to Danskin's email, which means that the email was unprotected and the District could discipline Danskin for violating its internal policy regarding email usage. For the same reasons expressed above, we reject these defenses and arguments and conclude that the District disciplined Danskin because of the exercise of protected PECBA rights. The discipline therefore violated the "because of" prong of ORS 243.672(1)(a). We also find a derivative violation of the "in" prong of ORS 243.672(1)(a) because the natural and

probable effect of the District's action would be to chill the exercise of protected rights. *Tri-County Metropolitan Transportation District of Oregon*, UP-42/50-12 at 28, 25 PECBR at 667. Because the remedy would not change, we do not address whether there was an independent violation of the "in" prong of ORS 243.672(1)(a). Likewise, because we have found a subsection (l)(a) violation, we exercise our discretion to not consider the (1)(c) violation that is based on the same facts. *Willamette Education Service District and State of Oregon, Department of Education*, UP-14-99 at 33, 19 PECBR at 260.

Remedy

Because we have found that the District violated ORS 243.672(1)(a) and (c) with respect to Thornton, and violated ORS 243.672(1)(a) and (b) regarding Danskin, we order the District to cease and desist from engaging in that unlawful conduct. ORS 243.676(2)(b).

We also order affirmative action necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c). Specifically, we order the District to post a notice of its violations. This order is consistent with our established approach to violations of this type. We will generally order an employer to post an official notice when its unlawful actions were: (1) calculated or flagrant; (2) part of a continuing course of illegal conduct; (3) perpetuated 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 those 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, *aff'd without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). Here, we find the District's directive to Thornton that she not communicate workplace concerns with her coworkers or the exclusive representative, and the subsequent threat to Thornton that her job would be "in jeopardy" if she disobeyed that directive, to be a flagrant violation of ORS 243.672(1)(a). Additionally, we conclude that the District's discipline of Danskin in violation of ORS 243.672(1)(a) and (b) potentially impacted the functioning of the exclusive representative, in that it interfered with the exclusive representative's rights under ORS 243.804(5).

In addition to a physical posting, we order the District to distribute the notice by email to bargaining unit employees because the record establishes that email was a common method of communication between the District and its employees. *See Oregon Tech American Association of University Professors v. Oregon Institute of Technology*, Case No. UP-023-20 at 37 (2020).

5. KFACE is entitled to a civil penalty for the District's discipline of Thornton.

Under ORS 243.676(4)(a)(A) "The [B]oard 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 * * * [t]he complaint has been affirmed * * * and the [B]oard finds that the person who has committed, or is engaging, in an unfair labor practice has done so repetitively, knowing that the action taken was an unfair practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious

* * *." In this context, the statutory term "person" can apply to a public employer. ORS 243.676(5). Previously, we have defined the term "egregious" as "conspicuously bad" and "flagrant." *East County Bargaining Council (David Douglas Education Association) v. David Douglas High School District*, Case No. UP-84-86 at 11, 9 PECBR 9184, 9194 (1986).

As previously stated, we conclude that the District's violation of ORS 243.672(1)(a) and (c) regarding Thornton was flagrant. Accordingly, we award a civil penalty of $1,000.

ORDER

1. The District violated ORS 243.672(1)(a) and (c) when it directed Thornton not to communicate workplace concerns with her exclusive representative, and when it threatened her job if she did so again.

2. The District violated ORS 243.672(1)(a) and (b) when it disciplined Danskin for sending an email that was authorized under ORS 243.804(5).

3. The District shall cease and desist from violating ORS 243.672(1)(a) and (c) by threatening Thornton's job security because she engaged in protected activity.

4. The District shall cease and desist from violating ORS 243.672(1)(a) and (b) by disciplining Danskin for sending an email authorized by ORS 243.804(5).

5. Within 10 days of the date of this order, the District shall post and email the attached notice to bargaining unit employees.

6. The District shall pay KFACE a civil penalty of $1,000, within 30 days of the date of this order.

7. The claim that the District violated ORS 243.672(1)(b) when it directed Thornton not to communicate workplace concerns with her exclusive representative is dismissed.

DATED: October 16, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, 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-039-21, *Klamath Falls Association of Classified Employees v. Klamath Falls City Schools*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that the Board found that Klamath Falls City Schools (District) committed an unfair labor practice in violation of ORS 243.672(1)(a) and (c) when it directed an employee (Thornton) not to communicate workplace concerns with her exclusive representative, and when it threatened her job if she did so again. The Board also found that District violated ORS 243.672(1)(a) and (b) when it disciplined an employee and union officer (Danskin) for sending an email that was authorized under ORS 243.804(5). To remedy this violation, the Board ordered the District to:

1. Cease and desist from violating ORS 243.672(1)(a) and (c) by threatening an employee's (Thornton's) job security because she engaged in protected activity.

2. Cease and desist from violating ORS 243.672(1)(a) and (b) by disciplining an employee and union officer (Danskin) for sending an email authorized by ORS 243.804(5).

3. Post and email this notice to bargaining unit employees within 10 days of the date of the Board's October 16, 2023, Order.

4. Based on its actions towards Thornton, pay Klamath Falls Association of Classified Employees a civil penalty of $1,000, within 30 days of the date of the Board's order.

Dated_____, 2023

EMPLOYER
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, 1225 Ferry Street S.E., Salem, Oregon, 97301-3807, phone 503-378-3807, EmpRel.Board@ERB.Oregon.gov.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-005-22

(MANAGEMENT SERVICE REMOVAL AND DISMISSAL)

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

JB, Oregon City, Oregon, represented herself.

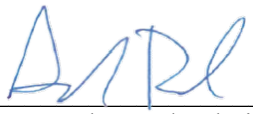
Margaret Wilson, Senior Assistant Attorney General, and Joy Clark, Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, represented the Respondent.

On September 25, 2023, Administrative Law Judge (ALJ) 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). OAR 115-010-0090(5) allows the Board to limit the precedential value of the final order in these circumstances, and 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

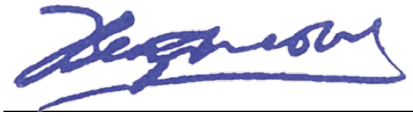
The appeal is dismissed.

DATED: October 20, 2023.



Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. MA-005-22

(MANAGEMENT SERVICE REMOVAL AND DISMISSAL)

JB, 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 February 21 and 22 and May 24, 2023, in Salem, Oregon. The record closed on June 30, 2023, upon receipt of the parties' post-hearing briefs.

JB, Oregon City, Oregon, appeared *pro se*.

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

On August 29, 2022, the Appellant, JB (whose initials are used herein to maintain her 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 Ch 240 by terminating JB's employment because of JB's gender or because of a retaliatory motive? As set forth below, we conclude that the DOC did not violate ORS Ch 240.

RULINGS

All rulings of the ALJ were reviewed and are correct.[1]

[1]All of the parties' exhibits are admitted in this case. During the hearing, there were no objections to any of the exhibits presented. (2/21/23 at 10:05 a.m., 11:10 a.m., 12:05 p.m., 12:11 p.m.) Moreover, none of the exhibits or any of the ALJ's rulings are disputed in the parties' post-hearing briefs.

FINDINGS OF FACT

Background

1. The DOC's Coffee Creek Correctional Facility (Coffee Creek) is a 1,468-bed State prison located in Wilsonville, Oregon. Coffee Creek has a number of units for female adults in custody as well as an intake center for male adults in custody. (Exh. R-11 at 1; 5/24/23 at 9:19-9:21 a.m., 9:26 a.m., 1:00 p.m.)

2. Nichole Brown has been the Superintendent of Coffee Creek since December 8, 2020. As Superintendent, Brown directly supervises a number of Coffee Creek employees including the Assistant Superintendent of Correctional Rehabilitation, the Assistant Superintendent of General Services, and the Assistant Superintendent of Security. She also indirectly supervises a large number of other Coffee Creek Food Services employees and positions, including Appellant JB's position. (Exh. R-3 at 1; 2/21/23 at 12:25-26 p.m.; 5/24/23 at 12:57-1:02 p.m.)

3. JB started working for the DOC on December 10, 2017. Until JB was dismissed on August 3, 2022 (as detailed below), JB was a "Food Services Manager/Principal Executive Manager-D, in Management Services," at Coffee Creek. (Exh. R-1 at 1, Exh. R-2 at 1, Exh. R-6 at 1, 2/21/23 at 12:28 p.m., 5/24/23 at 11:48 a.m.)

4. JB's Food Services Manager position is affiliated with Coffee Creek's General Services division and Food Services section, and reports directly to Coffee Creek's Assistant Superintendent of General Services. During most of the events of this case, Polly Rowland was the Assistant Superintendent of General Services and JB's direct/immediate supervisor.[2] (Exh. R-11 at 1.)

5. JB's Food Services Manager position directly supervises an Assistant Food Services Manager (a "management service" employee like JB) and a Food Services Office Support Specialist 2 (OS-2). Additionally, JB's position indirectly supervises around 15 other employees indirectly through its direct reports. During the central events of this case, "EP" (a pseudonym) was JB's Assistant Food Services Manager and David Hirschfelt was JB's OS-2. (Exh. R-2 at 1; Exh. R-11 at 2, 6-9; Exh. R-21 at 28, 50, 59; 2/21/23 at 10:36 a.m., 11:45 a.m., 1:59 p.m.; 2/22/23 at 12:11-12:13 p.m.; 5/24/23 at 10:43-10:47 a.m., 3:37 p.m.) Although JB did not supervise them, JB also regularly interacted and worked with Coffee Creek employees who worked in other divisions, including Security. (2/21/23 at 11:48-11:50 a.m.)

[2]As of February 21, 2023, Rowland had been the Assistant Superintendent of Correctional Rehabilitation at Coffee Creek for around two months. Immediately before that, Rowland was the Assistant Superintendent of General Services at Coffee Creek – a role that Rowland started on November 1, 2019. (Exh. R-3 at 1; 2/21/23 at 11:06-11:07 a.m., 11:12-11:14 a.m., 11:51-11:52 a.m., 11:59 a.m.; 5/24/23 at 12:57-1:02 p.m.)

6. While a DOC employee, JB completed hundreds of hours of coaching and training. That coaching/training concerned ethics, maintaining a professional and respectful workplace, preventing discrimination and harassment in the workplace, how to effectively communicate and interact with employees, leadership, and other management-related topics. (Exh. A-1; Exh. R-1 at 1, Exh. R-2 at 1; Exh. R-5; Exh. R-12; 2/21/23 at 10:37-10:38 a.m., 10:53 a.m., 11:25-11:43 a.m.)

7. "Leadership attributes" are an important part of the Food Services Manager position. Relatedly, Assistant Superintendent Rowland expects her managers to lead with integrity and care and compassion for their employees; to behave in a professional and respectful way; to have emotional intelligence; to interact with colleagues effectively, cohesively, and collaboratively; and to be able to deescalate conflict in the workplace. (Exh. R-2 at 123-138; 2/21/23 at 10:35-10:36 a.m., 11:46-11:51 a.m.; 5/24/23 at 1:49-1:50 p.m.)

8. According to the DOC's Code of Conduct policy, DOC managers need to be "above reproach," and a failure to follow that policy "may result in appropriate disciplinary action, up to and including dismissal." DOC Managers are also generally held to a "higher standard" than non-managers. (Exh. R-1 at 2; Exh. R-2 at 2, 5; 5/24/23 at 1:35 p.m.)

9. Ordinarily, records of a DOC manager's discipline remain in his or her file/record for two years. (5/24/23 at 11:33-11:34 a.m.) The DOC does not consider letters of expectations to be discipline. Moreover, letters of expectations are generally removed from a manager's file upon the manager's annual performance evaluation or after a period of one year if no similar issues occur. (Exh. A-5, 2/21/23 at 11:58 a.m.)

JB's First Investigation and Written Reprimand

10. On February 15, 2018, JB issued Assistant Food Services Manager EP a written reprimand. (Exh. A-5.)

11. On June 20, 2018, JB issued EP a work performance plan. (Exh. A-5.)

12. On December 17, 2019, JB issued EP a letter of expectations. (Exh. A-5.)

13. On March 11, 2020, then-Superintendent Paula Myers (who was later replaced by Superintendent Brown) issued JB, EP, and every other manager under Myers' authority a letter of expectations. In part, the letter notes that managers and supervisors are expected to be "building positive relationships with others, communicating in a respectful manner, holding [themselves] accountable and pursuing change within the agency." It also states that they are "held to a higher standard" and "expected to be proactive in creating and maintaining a discrimination and harassment free workplace." JB signed the letter of expectations later the same year. (Exh. A-5 at 1; Exh. R-19; 2/21/23 at 11:52-11:53 a.m., 1:20-1:21 p.m.)

14. Shortly before August 11, 2020, JB and EP filed hostile work environment complaints against one another. Subsequently, both were investigated by Human Resources (HR). During those investigations, JB and EP were removed from the kitchen at different times to keep the two apart. On October 20, 2020, during an interview regarding EP's complaint against JB, JB

confirmed that there were ongoing issues between her and EP. (Exh. A-5, Exh. R-1 at 2, Exh. R-2 at 3.)

15. As noted, on December 8, 2020, Nichole Brown became the Superintendent of Coffee Creek. Soon after that, Superintendent Brown conducted meetings with various Coffee Creek employees in order to give them an opportunity to speak with her and address existing issues. During each of those meetings, Brown reminded employees that she expected them to be professional and maintain a respectful workplace. Coffee Creek HR Manager Kathryn Dodge and Assistant Superintendent of General Services Rowland were present for the initial meetings with Brown. During this period, some employees told Brown that the environment in the Food Services section was "toxic." Further, during a meeting in a "gatehouse conference room" (that took place before JB received the letter of reprimand addressed below), among other things, some employees told Brown that that the division between JB and EP was "like a mom and dad kind of a thing," that they "did not know who to go to" about it, and that they just wanted JB and EP's "arguing" and "fighting" to stop. (Exh. R-1 at 2, 5/24/23 at 1:05-1:09 p.m., 2:54-2:57 p.m.)

16. On July 23, 2021, Superintendent Brown issued JB a written reprimand. The stated basis ("grounds") of the reprimand was "ORS 240.570(3) – Inability or unwillingness to fully and faithfully perform the duties [o]f the position satisfactorily."[3] (Exh. R-1 at 1.) The stated charges supporting the discipline were (1) "You have been curt and unpleasant during your interactions with Assistant Food Services Manager[EP]" and (2) "The relationship between you and Assistant Food Services Manager[EP] is tense and causing division and a toxic work environment in Food Services." (Exh. R-1 at 2, 5/24/23 at 1:02-1:05 p.m.) Near the end of the written reprimand, the letter stated,

> "I expect you to hold yourself to a professional and ethical standard of conduct and treat all staff with professionalism and respect. You must immediately stop the above-mentioned behavior. Failure to follow Department policies, procedures, and directives will lead to further discipline up to and including the implementation of the dismissal process."

(Exh. R-1 at 3.)

17. JB refused to sign her written reprimand when Superintendent Brown presented it to her. In addition, around the time when the reprimand was issued, JB told Brown that she did not feel that she had done the things that she was accused of in the written reprimand, that the related investigation was "tainted," and that the investigator (a "Ms. McCoy") did not talk to all of the people involved. (Exh. R-1 at 3; 5/24/23 at 1:02-1:06 p.m., 1:09-1:15 p.m.)

18. Before Superintendent Brown issued JB the written reprimand, Brown reviewed the related Investigative Report. Brown personally presented the discipline to JB because JB had

[3]ORS 240.570(3) states that, after completing a trial service period, a management service employee "may be disciplined by reprimand, salary reduction, suspension or demotion or may be removed or dismissed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily."

previously expressed concerns about Assistant Superintendent Rowland's involvement in the investigation. (5/24/23 at 1:09-1:12 p.m.)

19. Superintendent Brown also gave Assistant Food Services Manager EP a written reprimand on July 23, 2021 (the same day that JB received a written reprimand) as a result of EP's anger and his issues with JB.[4] Around the same time, Brown gave Assistant Superintendent Rowland (JB's direct supervisor) a written reprimand because Rowland did not respond after JB reported feeling fearful of EP to Rowland.[5] (Exh. A-5; Exh. R-11; 2/21/23 at 12:06-12:07 p.m.; 5/24/23 at 1:12-1:18 p.m., 2:48-2:49 p.m., 3:20 p.m.)

20. On or around July 28, 2021, JB and EP were issued revised position descriptions during a meeting as part of an effort to improve and "reset" JB, EP, and Assistant Superintendent Rowland's relationships with each other. The revised position descriptions included specific leadership attributes, and JB's position description lists providing leadership to the Assistant Food Services Manager and the Food Services OS-2 as an "essential function." JB and EP signed their revised position descriptions. (Exh. R-2 at 2; Exh. R-11 at 1-6; 5/24/23 at 1:11-1:18 p.m., 1:49-1:52.)

JB's Second Investigation and Dismissal/Removal

21. For an unknown amount of time, JB stopped working primarily in Coffee Creek's kitchen, and instead performed COVID-19-related duties as a "COVID Enforcement Manager" and/or "COVID Enforcement Officer" for Coffee Creek. While JB did not work in the kitchen, she was not managing employees as usual. JB eventually returned to her earlier role of working in the kitchen in or around August 2021 and, around that time, stopped performing her COVID-related assignment. (2/21/23 at 11:59 a.m., 12:26-12:27 p.m., 12:34-12:36 p.m., 12:51 p.m., 5:18 p.m.; 2/22/23 at 4:24 p.m.; 5/24/23 at 9:35-9:38 a.m.) JB and EP also started working in the kitchen together again in August 2021. (Exh. R-2 at 3, Exh. R-21 at 45.)

BS Incident

22. On January 19, 2022, JB and Correctional Officer "BS" (a pseudonym) had a public verbal dispute in the kitchen area, where BS had been posted that day. During the dispute, JB questioned why BS was there, stated that BS could not be in the area, defended herself, and told BS that he was being unprofessional. The interaction occurred in front of adults in custody and other DOC employees. The dispute frustrated BS and made Food Services Coordinator "SC" (a pseudonym) and Assistant Food Services Manager EP uncomfortable, and caused those three to leave the room. A short while later the same day, BS asked Lieutenant Justin Harlon (a management service employee who was acting as the Assistant Officer-in-Charge and Harlon's Field Training Officer at the time) to intervene. Harlon then went to the kitchen area with BS and attempted to discuss JB and BS's dispute with the pair. During that follow-up discussion, BS

[4]EP's 2021 written reprimand states that EP started working for the DOC on June 21, 2004. (Exh. A-5.)

[5]At some point, JB requested to not be alone with EP, and that request was denied by the agency. (Exh. A-3.)

attempted to speak to JB about how JB had treated him and "explained that he didn't appreciate how she spoke to him earlier in the evening." JB also spoke to BS with hostility and a derogatory tone, told BS that she did not appreciate how BS was talking with her, and "demanded to see Capt. [Thomas] Jost." At some point in the later exchange, BS became "chippy" and upset with JB, then Harlon asked BS to leave the area. Upon hearing part of this second conversation, EP left the area again because the situation and the apparent tension made EP "very uncomfortable." Food Services Coordinator SC also left the area. Subsequently, BS was moved from his assigned post in the kitchen because BS felt that JB created a hostile work environment for him. (Exh. R-2 at 48-49; Exh. R-3 at 2; Exh. R-4 at 84; Exh. R-21 at 47; Exh. R-23 at 14-16, 25-26, 40-41, 63; 2/21/23 at 12:43-12:46 p.m.; 2/22/23 at 11:12-11:23 a.m., 11:26-11:59 a.m., 3:31-3:32 p.m.; 5/24/23 at 10:47-10:55 a.m., 12:01-12:02 p.m.)

EP Incident

23. On February 7, 2022, at around 9:50 a.m., EP offered JB his thoughts about a work schedule and/or union-related matter. In response, JB told EP, with a "slightly agitated" and upset tone of voice, "I don't care what you thought. We have to get a schedule. We are up against the union."[6] When EP heard JB say that to him, it upset him and was "a breaking point" for EP's morale. JB's words to EP were overheard by Corporal Karl Harry while Harry was escorting some adults in custody. To EP, Harry appeared to be "dumbfounded" by JB's comments. EP felt that JB's comments were disrespectful. (Exh. R-2 at 34-35; Exh. R-23 at 12-13, 28-29, 42; 2/22/23 at 10:41-10:48 a.m., 11:02 a.m.; 5/24/23 at 11:04-11:08 a.m., 11:59 a.m.-12:00 p.m., 12:05-12:06 p.m.) Later on in the same day, JB, EP, and Lead Food Services Coordinator Teresa Falconer had a meeting. During that meeting, JB was, in EP's view, "inappropriate" and "belittling and degrading" toward EP. (Exh. R-23 at 11-13, 17; 5/24/23 at 11:18-11:29 a.m.)

24. On February 8, 2022, the DOC started a second investigation of JB, following new accusations/reports that JB had been unprofessional and had continued to be disrespectful toward EP and others. EP was also investigated again based on new reports about his own behavior. (Exh. R-2 at 3; 2/21/23 at 11:49-11:50 a.m.5/24/23 at 1:12-1:18 p.m.)

SC Incident

25. On February 14, 2022, shortly after 11:30 a.m., Food Services Coordinator SC began a conversation with JB (who indirectly supervised SC) about whether paper or plastic trays should be used for the day's lunch meal. During that conversation, JB told SC, among other things, "You're being hostile" and "We are not doing this right now." Shortly after that, JB "abruptly" shut her office door on SC, leaving SC standing just outside JB's closed office. At that point, SC left the facility upset and in an emotional state. OS-2 Hirschfelt and Assistant Food Services Manager EP witnessed JB and SC's exchange. (Exh. R-3 at 3, 5; Exh. R-23 at 65-66; 2/21/23 at 11:24-11:26 a.m.; 2/22/23 at 12:36-12:41 p.m., 12:47 p.m., 12:52-12:55 p.m., 1:17-1:33 p.m., 3:35-3:28 p.m., 3:46-3:47 p.m.; 5/24/23 at 10:55-10:59 a.m.)[7]

[6]During JB's March 22, 2022 interview, JB denied making this type of statement to EP. (Exh. R-21 at 16-20.) JB did not testify about the exchange during the Board hearing.

[7]The walls of JB's office were made of glass. (2/22/23 at 10:18 p.m., 1:33 p.m.)

26. On February 28, 2022, SC met with Assistant Superintendent Rowland in her office and discussed SC and JB's February 14, 2022 exchange. During the meeting, a "tearful and emotional" SC told Rowland that SC "felt like [JB's] behavior was uncalled for and [that he had] never been treated that way by a manager." SC also told Rowland that "he had a panic attack following that situation and ended up in the hospital as a result." (Exh. R-20; 2/21/23 at 11:17-11:26 a.m.; 2/22/23 at 3:25-3:30 p.m., 3:44-3:48 p.m.)

Hirschfelt Incident

27. In or around February 2022, OS-2 Hirschfelt (again, one of JB's two direct reports) jokingly pointed out to a group of three Food Services Coordinators (including Michael Keller) who were mingling in front of Hirschfelt's office that, at the time, none of the three were working in their assigned area "on the floor." Shortly after that, JB swiftly approached the same three Food Services Coordinators, and said (something to the effect of), "Don't you know you outrank Hirschfelt?" Moments later, when Hirschfelt asked JB to clarify what she had just said to the three, JB responded to Hirschfelt and the three Food Services Coordinators, "Oh, nothing. Just starting fights," then laughed and returned to her office. JB's comments made Hirschfelt upset, and Hirschfelt found the comments to be disrespectful and offensive.[8] (Exh. R-23 at 21, 27-28; 2/22/23 at 12:27-12:31 p.m., 1:11-1:17 p.m., 1:45 p.m., 4:02-4:10 p.m.)

Blackburn Incident

28. At some point between March 7 and 10, 2022, Correctional Officer Aaron Blackburn brought a cart with him to Coffee Creek's "meat room" to pick up sack lunches for some adults in custody entering the institution. Shortly after Blackburn entered the room, JB entered the same room and, with an "angry look on her face" and a "stern and accusatory" tone, told Blackburn that he needed to make sure that he returned the cart because JB's section's carts had been disappearing. However, Blackburn was using one of his own division's carts at the time. In response to JB's statement, Blackburn told JB that she should "get her food carts tagged if she wasn't getting them back." At that point, JB turned away from Blackburn and spoke with someone else. Subsequently, Blackburn left the room, upset. Food Services Coordinator Falconer was present for Blackburn and JB's exchange. (Exh. R-2 at 41-43; Exh. R-22 at 6-7; Exh. R-23 at 35-36, 37-38; 2/21/23 at 5:13-5:15 p.m.; 2/22/23 at 2:51-2:56 p.m., 3:00-3:01 p.m., 3:06-3:10 p.m., 3:16-3:17 p.m.)

29. On March 22, 2022, DOC HR Investigator KayAnn Smith conducted an "administrative interview" with JB regarding a number of reports about JB. (Exh. R-21 at 1, 45-46.) On April 5, 2022, Smith conducted a follow-up interview with JB regarding some additional concerns. (Exh. R-22.) Later that month, Smith completed then shared her related Investigative Reports with Superintendent Brown and HR Manager Dodge. The Investigative Reports included, among other things, summaries of Smith's numerous interviews with employees. As noted in the

[8]During JB's March 22, 2022 interview and her July 18, 2022 pre-removal/mitigation meeting, JB denied making a comment about rank. (Exh. R-3 at 4, Exh. R-21 at 55-57.) JB did not testify about this matter during the hearing.

Reports, Smith determined that some (but not all) of the allegations against JB had been substantiated. Subsequently, Brown reviewed Smith's Reports. (Exh. R-2, Exh. R-23, Exh. R-24.)

30. In the first week of May 2022 (after a "series of complaints" were filed against and by JB, and after "a number of investigations" involving JB), Westside Institutions Administrator Kennith Jeske[9] had a lengthy conversation with Brown and JB in Brown's office to talk "about how to get along" and about "reacting versus responding." During that conversation, JB expressed that she felt that she was a good manager and that she was not being supported. Jeske and Brown consider this conversation with JB "coaching and mentoring." At the time, Jeske believed that the meeting with JB was productive. Around the same time, Jeske and Brown also separately met and spoke with EP and Assistant Superintendent Rowland. (Exh. R-10 at 20; 5/24/23 at 8:56-8:59 a.m., 9:03-9:07 a.m., 1:45 p.m., 2:39-2:40 p.m.)

Pre-Removal Letter

31. On June 23, 2022, Superintendent Brown hand delivered a letter to JB announcing the "Commencement of Pre-removal from Management Service." The pre-removal letter was signed by Brown and included applicable rules and policies, a list of required leadership attributes, and the related Investigative Reports. It also noted that a pre-removal meeting would be taking place in July 2022 that would afford JB the opportunity to discuss the charge against her and "present mitigating circumstances." (Exh. R-2, 6; 5/24/23 at 1:18 p.m., 1:47-1:49 p.m.)

32. In the pre-removal letter, the stated basis of the proposed dismissal/removal (as with JB's written reprimand) was "ORS 240.570(3) - Unable or unwilling to fully and faithfully perform the duties of the position satisfactorily." (Exh. R-2 at 1.) In addition, the letter identified and described five key alleged policy violations:

(1) "On January 19, 2022, it was substantiated that you were unprofessional towards Officer [BS] in front of adults in custody (AICs) and Food Services Staff." (Exh. R-2 at 3.)

(2) "On February 14, 2022, it was substantiated that you were unprofessional towards Food Services Coordinator [SC] by shutting the door on him during a conversation in your office." (Exh. R-2 at 4.)

(3) "It has been substantiated that since returning to the kitchen in August 2021 you have continued to be disrespectful to Mr. [EP]." (Exh. R-2 at 4.)

(4) "It was substantiated that you made a disrespectful comment about David Hirschfelt, Office Support Specialist to other staff." (Exh. R-2 at 4.)

(5) "It was substantiated that between March 7 -10, 2022 you had an unprofessional interaction with Officer Aaron Blackburn regarding food carts." (Exh. R-2 at 5.)

[9]Westside Institutions Administrator Jeske oversees the six state prisons on the west side of the state. The Superintendents of those prisons report directly to Jeske. (5/24/23 at 8:53-8:54 a.m.)

33. According to the pre-removal letter, the five actions listed above were "in violation of DOC Policy 20.1.1, 20.1.2, 20.1.3 and ORS 240.570(3)." DOC Policy 20.1.1 is titled, "Department Mission, Vision and Core Values." DOC Policy 20.1.2 is the "Code of Ethics." DOC Policy 20.1.3 is the "Code of Conduct." The letter also referenced DOC Policy 20.1.7, which is titled, "Promotion and Maintenance of a Professional Workplace." (Exh. R-2 at 2, 5-6.)

34. Superintendent Brown personally delivered the pre-removal letter instead of someone else because JB had previously shared concerns about HR Manager Dodge and Assistant Superintendent Rowland. (5/24/23 at 1:18 p.m.)

35. On July 14, 2022, Superintendent Brown gave EP a one-week suspension without pay (*i.e.*, a "salary sanction"), effective July 17 through 23, 2022. The suspension was issued because of EP's interactions with JB, and because EP continued to be disrespectful toward JB. EP was not dismissed or removed from state service (as JB would later be) because, during the affiliated investigation and the subsequent pre-discipline/mitigation process, EP admitted to and "accepted full responsibility" for the behaviors that he was formally accused of. At the time, Brown also saw that EP was attempting to change his behavior, and that EP's behavior was actually changing. Additionally, while considering how to discipline EP, Brown worked with HR and considered how other employees with similar issues had been disciplined. (Exh. R-25 at 1; 5/24/23 at 11:34-11:37 a.m., 1:18-1:24 p.m., 2:50-2:51 p.m.)

Pre-Removal/Mitigation Meeting

36. On July 15, 2022 (a Friday), HR Manager Debbie Navarro received an email from her supervisor, Joe Saltarello, directing Navarro to participate in the upcoming pre-removal/mitigation meeting for JB. Saltarello directed Navarro to do so because, previously, JB had alleged that Coffee Creek HR Manager Dodge (who would normally have been assigned the matter) was biased against JB. Before receiving the mail, Navarro did not know or work with JB or EP. Furthermore, Navarro ordinarily does not work at Coffee Creek. To prepare for the upcoming meeting, Navarro reviewed JB's pre-removal letter and some elements of the related Investigative Reports. (2/21/23 at 10:19-10:25 a.m., 10:37 a.m., 10:48-10:50 p.m.)

37. Before JB's mitigation meeting, and before it was determined that removal was an option, Superintendent Brown considered the number of infractions that JB had been accused of and had purportedly been substantiated through the investigation. The details that troubled Brown the most were (1) JB's failure to deal with issues at the lowest level possible and (2) the fact that JB was having issues with employees who worked for divisions/sections outside of Food Services, including Security and "R&D" (Receiving and Discharge). At the time, Brown was concerned about the toxicity of the kitchen staff spreading to other areas of Coffee Creek. During the same period of time, Brown also informed Westside Institutions Administrator Jeske that she was leaning toward dismissing JB. (2/22/23 at 10:31-10:32 a.m.; 5/24/23 at 9:26 a.m., 1:29-1:36 p.m.,1:45-1:46 p.m., 2:51 p.m.)

38. On July 18, 2022 (a Monday), at 8 or 9 a.m., JB's pre-removal/mitigation meeting occurred as scheduled.[10] The meeting was attended by JB, Superintendent Brown (via video due to a COVID-related quarantine), HR Manager Navarro, and Assistant Superintendent Rowland. JB chose not to have a management representative or an attorney represent her at the time. During the meeting, among other things, JB acknowledged that she had reviewed the pre-removal letter and the affiliated documents, explained her views regarding the relevant events and the five key allegations against her, alleged that a group of employees was "out to get her," and provided over 200 pages of assorted documents (Exh. R-4). JB did not discuss how she was going to improve her communication and working relationships on her own. However, JB did assert that she had not received enough training, and that she had repeatedly asked for help from HR Manager Dodge and Rowland to no avail. JB also claimed that she wanted to make EP a "strong manager." (Exh. R-3; Exh. R-6 at 5; 2/21/23 at 10:21-10:27 a.m., 10:34 a.m., 10:41 a.m., 10:56 a.m.; 5/24/23 at 1:28-1:29 p.m.)

39. During the pre-removal/mitigation meeting, when discussing the allegation against JB involving Officer BS, JB stated, in part, "This is something that I will own. I - I - I will own it to a point." (Exh. R-3 at 3.) When discussing the allegation against JB involving OS-2 Hirschfelt, JB stated, in part, "The part that I - that I guess I should own is that I don't know what was said that day that insulted him. I don't know. And maybe as a manager, I should know that. I don't know." (Exh. R-3 at 4.) In the typed materials that JB provided as part of the pre-removal/mitigation meeting, JB asserted, "I am accountable for my actions," and admitted that communication is not her "strong [suit]." (Exh. R-4 at 3, 4.)

Superintendent Brown's Determination

40. Superintendent Brown (the "appointing authority" for the discipline) was ultimately responsible for determining whether to discipline JB and what level of discipline (if any) was appropriate for her. However, before Brown made her final decision, Brown discussed the matter with HR Manager Navarro and DOC Westside Institutions Administrator Jeske. (2/21/23 at 10:47 a.m., 11:57 a.m.; 5/24/23 at 8:54-8:56 a.m., 1:43-1:46 p.m., 2:13-2:14 p.m.)[11]

41. By the end of the July 18, 2022 pre-removal/mitigation meeting, Assistant Superintendent Rowland was unconvinced that anyone was retaliating against JB. After the meeting, on July 21, 2022, Rowland gave Superintendent Brown a memorandum in which Rowland disputed some of the things that JB said during the meeting about Rowland's management of JB. (Exh. R-5; 2/21/23 at 11:29-11:33 a.m., 11:44 a.m.)

[10]The August 3, 2022 dismissal/removal letter indicates that JB's pre-removal/mitigation meeting took place on July 15, 2022 at 9 a.m. (Exh. R-6 at 5.) HR Manager Navarro and Superintendent Brown's notes indicate that the same meeting began at 8 a.m., without referencing a date. (Exh. R-7, Exh. R-9 at 1.) The DOC's brief (at 4) contends that the meeting occurred on July 15, 2022. However, Navarro's testimony and other evidence plausibly indicate that the meeting actually occurred on July 18, 2022. (Exh. R-5, 2/21/23 at 10:19-10:25 a.m.) The transcript of the meeting (Exh. R-3) is undated.

[11]HR Manager Navarro was not involved with EP's investigation or the July 14, 2022 discipline. (2/21/23 at 10:55-10:56 a.m.)

42. Immediately after the July 18, 2022 pre-discipline/mitigation meeting, HR Manager Navarro told Superintendent Brown that Navarro was confused by what JB had shared in the meeting. Subsequently, Navarro spent the rest of the week reviewing the Investigative Reports and all of the documents that JB had shared. Navarro also listened to the audio recording of the pre-discipline/mitigation meeting a couple of times, and looked at JB's training record (Exh. R-12), JB's prior discipline (which as noted included a written reprimand), and the relevant DOC HR policies. (2/21/23 at 10:25-10:27 a.m., 10:43 a.m., 10:49 a.m., 10:54-10:56 a.m., 11:02 a.m.) During Navarro's review of the items collected in the investigation, Navarro was particularly struck by (as Navarro put it) the unnecessarily "defensive" tone of some emails that JB had sent to Coffee Creek Assistant Superintendent of Security Chad Naugle on February 17, 2022.[12] Navarro saw no evidence of anyone retaliating against JB. (Exh. R-23 at 59-62; 2/21/23 10:27-10:34 a.m., 10:54-10:55 a.m.)

43. After HR Manager Navarro completed her review, Navarro met with Superintendent Brown, and the two discussed what the next steps would be as well as Navarro's impressions of the investigation and the pre-removal/mitigation meeting. Among other things, Navarro noted that, during the meeting, JB repeatedly "deflected" and made what Navarro viewed as unrelated "personal attacks" and "personal allegations" against other DOC employees. Brown and Navarro also discussed whether the allegations made against JB were founded, whether any amount of additional training would permit JB to continue to do her job, what level of discipline should be used for JB, and how other DOC employees had been disciplined under comparable circumstances (*i.e.*, "comparables"). Navarro otherwise noted that JB never meaningfully took responsibility for her actions, and that it did not appear that JB was capable of changing her behavior. Navarro recommended to Brown that JB be terminated. (2/21/23 at 10:34-10:35 a.m., 10:38-10:44 a.m., 10:47 a.m., 10:55-10:57 a.m., 11:02 a.m.)

44. After the pre-removal/mitigation meeting, Superintendent Brown also spoke with Westside Institutions Administrator Jeske about JB's potential discipline, and the two discussed the likelihood of JB changing her behavior and whether any additional training could assist JB. Together, Brown and Jeske determined that no additional training would result in improvement. The two also considered whether lesser discipline would be appropriate, JB's ostensibly mitigating information, and the fact that JB's position description had already been revised. In the end, Jeske supported Superintendent Brown's determination to terminate JB. Jeske did so because he believed that JB had sufficient training to do her job, that JB was not trying hard enough to "get a grip" on her problematic behavior and communication issues, and that JB continued to fail to do what was expected of a manager (*e.g.*, maintaining a respectful workplace and modeling that respectful behavior). Additionally, Jeske considered the steps that had already been taken to help JB, the number of investigations involving JB, and the findings of those investigations. (5/24/23 at 8:59-9:03 a.m., 9:09-9:10 a.m., 1:43-1:47 p.m.)

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[12]Naugle has been the Assistant Superintendent of Security at Coffee Creek since September 2021. Before that, he was a Captain at Coffee Creek. (5/24/23 at 9:19-9:22 a.m.) Regarding the "defensive" emails referenced above, on February 17, 2022, one of Assistant Superintendent Naugle's employees (Sergeant Rob Cooley) once sent JB a short email notifying her that some food provided by the kitchen that day was "rancid" and needed replacing. In response, JB sent some emails to Naugle about the notification, describing it as "disrespectful," "hostile," unprofessional, and an "attack." (Exh. R-23 at 16-17, 59-62, 5/24/23 at 9:28-9:31 a.m.)

45. When considering what level of discipline was appropriate for JB, Superintendent Brown considered that JB had committed a number of infractions, and that those infractions did not involve just EP or Food Services. Brown otherwise concluded that JB had failed to mitigate any of the allegations against her, and that (unlike EP) JB did not take any meaningful accountability or responsibility for her actions or her employees' perception of her actions. In Brown's view, during the pre-removal/mitigation meeting, JB largely "deflected and blamed others" (including other managers and employees who did not work in Food Services) and inappropriately lodged unrelated "personal attacks" against others (including one involving Officer Blackburn).[13] Under those circumstances, Brown could not envision JB returning to work and maintaining a respectful workplace as required by Oregon Department of Administrative Services policy. By that time, Brown had also lost trust in JB's ability to effectively lead the Food Services section, and saw continuing to employ JB as a manager as a risk to the agency. In addition to the foregoing, Brown considered JB's years of service for the DOC, the training and assistance that JB received during that time, and (as noted) how the DOC had disciplined other employees. Brown also wanted to make sure that the JB's discipline was progressive. Brown strongly considered whether a salary sanction and/or a suspension would be appropriate for JB. However, Brown ultimately determined that such lesser discipline would not be effective, and that JB's behavior would not change. Brown also felt that JB was exhibiting the same problematic behavior that was at issue in (as Brown put it) JB's still "active" written reprimand. (5/24/23 at 1:04-1:05 p.m., 1:20, 1:24-1:27 p.m., 1:31-1:37 p.m., 1:43-1:47 p.m., 2:28 p.m., 2:34 p.m., 2:46-2:50 p.m.)

JB's Dismissal and Removal from Management Service

46. On August 3, 2022, in the morning, Superintended Brown hand delivered a letter to JB that dismissed JB and removed JB from management service. It was signed by Brown. (Exh. R-6.) Brown delivered the letter in a meeting in JB's office that, in addition to Brown and JB, was attended by HR Manager Navarro and Assistant Superintendent Rowland. Some or all of the meeting's attendees were wearing masks to protect against COVID-19. During the meeting, Brown informed JB that she was being dismissed and read the dismissal/removal letter aloud. Upon learning of her dismissal, JB was "surprised" and "obviously shocked." JB stated that she was going to appeal and get a lawyer, and shared that she had already done background checks on the meeting's attendees. JB also looked "directly" at Rowland and "very angrily" told Rowland (something to the effect of), "I am going to rip that mask off your face." In reply, Brown immediately told JB that her mask comment was "highly inappropriate" and stated, "Everyone is going to be professional today." JB's mask comment was "visibly upsetting" to Rowland and Navarro, and Brown considered it a "concerning," "threatening comment."[14] JB refused to sign

[13]At the time, Superintendent Brown was "stunned" that JB shared her issue with Officer Blackburn during the meeting. (5/24/23 at 1:31-1:33 p.m.)

[14]During the hearing (before JB was sworn in and testified), JB indicated that she was shocked by the termination/dismissal at the time, and that her mask comment was not intended to be a physical threat directed at Assistant Superintendent Rowland or refer to an actual facemask. JB also indicated (but did not testify) that, through the mask comment, she actually meant to assert that she would reveal that Rowland was "lying and railroading." (2/21/23 at 1:23-1:27 p.m., 5/24/23 at 2:29-2:31 p.m., 3:07-3:08 p.m., 3:23 p.m.) In her post-hearing brief (at 8), JB alleges that Superintendent Brown, HR Manager Navarro, and Rowland "constructed a story, after the fact, that I threatened Polly Rowland during the meeting when they

the dismissal/removal letter. At the end of the meeting, when Brown was escorting JB out of the room, JB told Rowland that Rowland should not have taken sides, that JB would see Rowland again, and that JB would "expose" Rowland. Rowland did not reply to any of JB's statements. (Exh. R-7; Exh. R-8; 2/21/23 at 10:44-10:47 a.m., 11:53-11:57 a.m., 1:23-1:27 p.m.; 5/24/23 at 1:38-1:39 p.m., 2:29-2:31 p.m., 3:04-3:09 p.m., 3:23 p.m.)

47. Immediately after leaving Superintendent Brown's office on August 3, 2022, Brown escorted JB to JB's office in the Food Services area for JB to collect her personal items. While that was happening, JB said a number of things to Brown, including, "I can't believe you would do this to me," "You guys are really going to regret this decision," and once again mentioned getting a lawyer. In response, Brown reminded JB that JB had appeal rights. Afterward, when JB was turning in her identification badge to Brown, JB told Brown something to the effect of, "You must have a wall of shame that you put people's nametags on." Brown denied the accusation. (Exh. R-8; Exh. R-9; 5/24/23 at 1:38-1:43 p.m., 2:37-2:39 p.m.)

48. The August 3, 2022 letter dismissing JB and removing her from management service (which was effective immediately) listed "ORS 240.570(3) - Unable or unwilling to fully and faithfully perform the duties of the position satisfactorily" as the basis of the discipline (as in JB's written reprimand and the pre-removal letter). The letter also listed and described the applicable rules and polices, noted the DOC's required leadership attributes, identified and described the same five key policy violations included in the pre-removal letter (and listed above), and detailed JB's purportedly inappropriate treatment of EP – including inappropriately blaming and correcting EP, rolling her eyes at him, and using a dismissive tone with him. In addition, the dismissal/removal letter noted JB's "history of problems" with JB and JB's 2021 letter of reprimand involving her treatment of EP, summarized the July 2022 pre-removal/mitigation meeting, provided Superintendent Brown's conclusions, and noted JB's right to appeal the discipline with the Board. In the letter's conclusions, Brown wrote, in part, "During your mitigation you did not accept ownership that any of your actions may have contributed to any of these challenges. You did not provide any self-reflection about how you could learn from any of these situations and modify your response." (Exh. R-6.)

49. On August 9, 2022, JB returned her work laptop to Superintendent Brown offsite and "without incident." (Exh. R-9.)

50. On August 29, 2022, JB filed an appeal of her dismissal/removal. The appeal included a variety of attachments including some "letters of support" from others (none of whom testified). (Exh. R-10.)[15]

terminated me." For this matter (which notably occurred after the discipline at issue was decided upon and effectuated), we credit the testimony that was presented during the hearing.

[15]On August 27, 2022, JB emailed an appeal of her dismissal/removal to the Board. Because August 27, 2022 was a Saturday, the appeal was deemed to have been filed on the next business day, Monday, August 29, 2022.

51. JB does not want to work at Coffee Creek again, and does not believe that she is capable of working there now. However, for some time after her dismissal/removal, JB was willing to be transferred to another DOC institution in Oregon (*e.g.*, the Snake River Correctional Facility) and be demoted (*e.g.*, to Food Services Supervisor). (Exh. R-10 at 2, 6; 5/24/23 at 3:21 p.m., 3:24-3:36 p.m.) According to JB, "The staff at Coffee Creek are different. They are different from any other institution. They will eat their own children." As of the end of the Board's hearing, JB was a "food service manager again in an institution" (though that institution is not named or described in the record). (5/24/23 at 3:17-3:18 p.m., 3:34 p.m.)

52. After JB was dismissed/removed, Kent Fanger, who ordinarily oversees the DOC's Food Services program statewide as the Food Services Administrator, filled JB's vacant Food Services Manager position for around three months on an interim basis.[16] After that, Matthew Vester (formerly of the DOC's Two Rivers Correctional Institution) permanently took over as Food Services Manager, and Fanger returned to his regular Food Services Administrator role. (2/21/23 at 11:33-11:36 a.m., 2:02 p.m., 2:06 p.m.; 5/24/23 at 9:01 a.m., 11:32-11:33 a.m.)

53. Since JB's dismissal/removal, the communication, mood, and morale in Coffee Creek's Food Services section have significantly improved. (2/21/23 at 11:35-11:36 a.m., 2:01-2:06 p.m., 4:24-4:25 p.m.; 2/22/23 at 9:59-10:04 a.m., 10:49-10:51 a.m., 10:59-11:01 a.m., 11:10-11:16 a.m., 11:24-11:25 a.m., 12:49-12:51 p.m., 3:02-3:03 p.m., 3:38-3:39 p.m., 4:16-4:19 p.m.; 5/24/23 at 9:01 a.m., 9:31-9:33 a.m., 11:32-11:33 a.m., 3:33 p.m.)

JB's Reputation as a Manager

54. In Correctional Officer Blackburn's view, JB was "very gruff" and difficult to interact with. Moreover, Blackburn has seen JB be "rude to a lot of staff." Blackburn believes that Assistant Food Services Manager EP is more approachable, respectful, and professional than JB, and that EP is easier to talk to and work with than JB. (2/22/23 at 2:46-2:51 p.m., 2:57-3:03 p.m.)

55. In Food Services Coordinator Katherine Brown's view, JB was "cruel and mean," "very abrupt," "very rude," and condescending to staff. Brown also felt like she was "walking on eggshells" when she was around JB. Further, Brown believes that JB treated EP rudely and dismissively. Brown has also seen JB roll her eyes at EP "quite a bit," and once saw JB criticize and reprimand EP in front of staff. Brown believes that JB "should not be in a management position." (Exh. R-24 at 2-3; 2/21/23 at 2:22-2:29 p.m., 2:32-2:40 p.m.)

56. Superintendent Nichole Brown believes that JB was proficient in her "technical duties" as Food Services Manager, and that JB had a good partnership with the budget and payroll offices. Brown is also unaware of JB treating Coffee Creek's adults in custody disrespectfully. Brown's central issues with JB were JB's supervisory, leadership, and communication skills. (5/24/23 at 1:52-1:53 p.m., 2:57-3:04 p.m.)

57. Food Services Coordinator SC feels that working with JB was "pretty much like walking on eggshells" and that JB demeaned him and other employees. SC also observed JB and

[16]All Food Services Managers report directly to Assistant Superintendents at their institutions, and indirectly to the DOC's Food Services Administrator. (2/21/23 at 1:56-1:57 p.m.)

EP having "a lot of disagreements" and noticed "a lot of friction between the two." Further, SC saw JB roll her eyes at EP "on a regular basis," and observed JB demean and blame EP. SC also observed JB using a dismissive tone with EP, SC, other staff members, and adults in custody. In SC's view, EP is a more approachable manager than JB, and is more professional and respectful and easier to talk to and work with than JB. SC cannot see himself working with JB again "at all." (2/22/23 at 3:20-3:24 p.m., 3:33-3:39 p.m.)

58. Food Services Coordinator Leanne Edison believes that JB was unapproachable sometimes, that JB has "attacked" Edison for asking JB a question, and that JB closed her office door to avoid talking to Edison. Edison also noticed tension between JB and EP, observed JB using a dismissive tone with EP sometimes, and frequently saw JB roll her eyes at EP. In Edison's view, EP was a more approachable manager than JB. Edison cannot see herself working with JB again. (Exh. R-24 at 3-4; 2/22/23 at 9:46-10:06 a.m., 10:23-10:24 a.m.)

59. Food Services Administrator Fanger feels that his working relationship with JB "was, for the most part, okay." Fanger also feels that JB was only unprofessional with him in two instances. In one instance, Fanger felt that JB was dismissive of him. In the other, Fanger felt that JB would not admit to a mistake. (2/21/23 at 1:56-2:01 p.m., 2:09-2:12 p.m.)

60. According to Food Services Coordinator Falconer, Falconer and JB "had a pretty good working relationship" with JB "in the beginning" of their time working together. However, their relationship changed for the worse once JB returned to working in the kitchen. Additionally, Falconer has seen JB roll her eyes at EP in a couple of meetings, and be "stern" with and "accusive" of EP in a meeting. That said, Falconer has not otherwise witnessed JB being unprofessional or inappropriate toward EP. (Exh. R-23 at 17-18; 2/21/23 at 4:56-5:13 p.m., 5:17-5:19 p.m.)

61. Lieutenant Harlon of Coffee Creek has had positive and negative interactions with JB. However, Harlon also feels that, sometimes, working with JB was "arduous." Further, Harlon believes that, between JB and EP, EP is more approachable, professional, and respectful, and easier to talk to and work with than JB. (2/22/23 at 11:13-11:15 a.m., 11:24-11:26 a.m., 11:29-11:34 a.m.)

62. OS-2 Hirschfelt feels that JB was "vindictive" and "tense" at times, and that JB did not treat all of her employees equally. Hirschfelt also feels that JB often interrupted him. Beyond that, Hirschfelt has observed that JB did not get along with EP, and that JB was often "rude" to and "dismissive" of EP. Hirschfelt has also seen JB "chastise" and "disrespect" EP in front of employees. Hirschfelt once heard JB give EP a "snide response" after EP asked her a work-related question. Additionally, Hirschfelt has seen JB roll her eyes at EP and at other employees. In Hirschfelt's view, EP was more approachable, professional, and respectful, and easier to work with and talk to than JB. Hirschfelt cannot see himself working with JB again. He is also worried about JB retaliating against him for testifying. (Exh. R-23 at 18-21; 2/22/23 at 12:14-12:33 p.m., 12:45-12:51 p.m., 1:20-1:27 p.m.)

63. Food Services Coordinator Michael Keller believes that JB was a "standoffish" manager. (2/2/23 at 3:57-4:01 p.m.) In one instance, after Keller asked JB for help with a work issue, JB (as Keller put it) "barked" something to the effect of, "If I wasn't too busy doing everyone

else's job, maybe I could do my own." Keller considered the comment to be an inappropriate "angry remark." (Exh. R-23 at 27-28; 2/22/23 at 4:10-4:13 p.m.) Separately, Keller once saw JB roll her eyes when she was telling Keller that EP had called in sick. (Exh. R-23 at 27-28, 2/22/23 at 4:13-4:16 p.m., 4:27-4:28 p.m.) In Keller's view, EP is more approachable, easier to talk to and work with, and more professional and respectful than JB. If Keller could choose, Keller would not work with JB again. (2/22/23 at 4:16-4:19 p.m.)

64. EP did not trust JB as a manager, or have confidence in JB's ability to carry out all of her managerial duties. Likewise, EP does not have confidence in JB's ability to treat all of her staff with respect and professionalism. EP characterizes his working relationship with JB as "a tremendous struggle" and "unpleasant," and contends that the years that he spent working under JB were "heinous," "traumatizing," "grueling," and "painful" for him. EP believes he was "quite often * * * undermined, gaslit[, and] talked to negatively" by JB. In EP's view, JB regularly treated him "pretty much like a second-class citizen." EP also feels that he was not free to make decisions in front of JB, despite being a manager himself. Additionally, EP has seen JB roll her eyes at him in front of others at least three times. EP regularly experienced JB blaming him for perceived mistakes with schedules and sack lunches that EP does not believe were actually his fault. EP cannot see himself working with JB again. (Exh. R-23 at 11-14; 5/24/23 at 10:59-11:04 a.m., 11:07-11:18 a.m., 11:30-11:33 a.m., 11:55-11:56 a.m.)

65. In Assistant Superintendent Rowland's view, JB ran a "tight ship" at Coffee Creek and was "very task driven," "detail oriented," and "procedure driven." Further, Rowland believes that JB interacted collaboratively and successfully with some DOC employees, but that other employees "were more of a struggle for [JB]." Rowland also feels that, at times, JB could be considered abrasive, critical, defensive, or rude. According to Rowland, when JB felt like she was being questioned or challenged, JB would act more defensively, speak "with a little sharper tone," or be more argumentative. Rowland believes that some staff had difficulty communicating with JB. Rowland also contends that JB did not always have a good relationship with the leadership of the Security division. However, Rowland believes that, most of the time, JB's communication with Rowland was appropriate and respectful. (2/21/23 at 11:14-11:26 a.m., 11:49-11:50 a.m., 12:30 p.m., 1:14 p.m.)

66. According to former Coffee Creek Food Services Coordinator Jason Roy, JB had a "very toxic" leadership style, belittled and demeaned staff, and fostered an environment "that did not welcome any sort of feedback or criticism or questioning." Roy also observed that JB's interactions with EP were "cold" and "sometimes pretty disrespectful." Roy frequently observed JB using a dismissive tone with EP, and saw JB roll her eyes at EP "more than two or three times." Separately, Roy has witnessed JB "denigrating" Hirschfelt. Between EP and JB, Roy believes that EP was the more approachable manager, was easier to talk to and work with, and was more professional and respectful at work. Roy does not want JB to return to Coffee Creek as a manager. (Exh. R-23 at 24-25; 2/21/23 at 3:56-3:59 p.m., 4:03-4:12 p.m., 4:16-4:28 p.m., 4:41 p.m., 4:44 p.m., 4:52-4:53 p.m.)

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 Ch 240.

Legal Standards

The issue in this case is whether the DOC violated ORS Ch 240 by terminating JB's employment because of JB's gender or because of a retaliatory motive. ORS Ch 240 is known as Oregon's State Personnel Relations Law. ORS 240.005. It establishes a system of personnel administration based on merit principles. ORS 240.010. 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." 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." As noted above, the August 3, 2022 letter dismissing JB and removing her from management service listed ORS 240.570(3) as the grounds for the discipline. That statute provides that, after completing a trial service period, a management service employee "may be disciplined by reprimand, salary reduction, suspension or demotion or may be removed or dismissed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily."

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)).

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). 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)).

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).

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 and, therefore, the extent to which the employee's capacity to act as a member of the "management team" has been compromised. 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. *Salchenberger v. State of Oregon, Department of Corrections*, Case No. MA-19-12 at 11 (July 2013) (citing *Lucht* at 24).

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?

As indicated above, JB's dismissal/removal letter asserted that the discipline was issued because she was "[u]nable or unwilling to fully and faithfully perform the duties of the position satisfactorily," and specifically referred to ORS 240.570(3). (Exh. R-6 at 1.) More specifically, the dismissal/removal letter also described five specific interactions that purportedly violated DOC policy, and concluded that JB inappropriately blamed and corrected EP, rolled her eyes at him, and used a dismissive tone with EP. (Exh. R-6 at 3.) Upon review, we conclude that all of those

specific allegations were supported by numerous witness statements (including those statements given during HR interviews as well as those given under oath during the Board's hearing). Although JB generally denied the allegations against her during the hearing, her relatively brief testimony was greatly outweighed by the testimony of many others. We are also unpersuaded by the similar statements that JB made during the latest HR investigation.

In summary, JB contends that all or most of the witnesses who testified about her were retaliating against her because of her involvement in earlier discipline or complaints, biased against her because of her gender, or had some other improper motive for not supporting her. She also claims that there was a secret pact to get her terminated (or a similar "clique"). However, after careful review, we conclude that JB has not presented any compelling evidence to support such serious contentions. Moreover, the testimony presented in the hearing essentially refutes JB's theories. (2/21/23 at 12:15-12:18 p.m., 12:33 p.m., 4:30 p.m., 4:45 p.m., 5:20-5:23 p.m.; 2/22/23 at 10:24-10:25 a.m., 12:33-12:35 p.m., 12:56-1:05 p.m.; 5/24/23 at 11:52-11:53 a.m., 2:52-2:53 p.m.) JB herself also testified, "I don't know if it's my gender. I don't know what it is." (5/24/23 at 3:24-3:25 p.m.) Further, many of the individuals who JB accuses of having a retaliatory or another improper motive were not decision-makers in this case, and HR Manager Navarro had no prior knowledge of JB or EP before her limited involvement in this case. We also note that many of the key facts outlined above are not in dispute. For example, there is no dispute that JB and EP's issues were not kept private, or that their tension was felt by other employees. Under those circumstances, we conclude that the DOC has proven its charges.

JB testified that the DOC terminated her just four days before her written reprimand would have "rolled off [her] file," implying an improper motive. (5/24/23 at 3:18-3:19 p.m.) As noted, normally, a DOC manager's discipline remains in his or her file/record for two years. (5/24/23 at 11:33-11:34 a.m.) To that extent, if JB had not been terminated on August 3, 2022 as she was, the DOC would probably not have removed JB's July 23, 2021 written reprimand from her record until July 23, 2023. Nevertheless, according to JB's appeal and her post-hearing brief, at some point after receiving the written reprimand, JB and the Oregon Department of Justice reached a settlement that would have removed JB's July 23, 2021 reprimand from JB's record after a year. (Exh. R-10 at 2, JB Brief at 3.) We do note the timing that JB has highlighted, but ultimately conclude that the record fails to demonstrate anything inappropriate about the timing of JB's final discipline. To the contrary, the evidence provided generally suggests that, before JB's latest discipline was issued, a "series of complaints" were filed against JB after she returned to the kitchen, and that the DOC subsequently followed all of its normal investigatory procedures. After that, JB's discipline was issued in a timely fashion.

JB also contends that the DOC "banned" certain people (*e.g.*, HR Manager Dodge, Officer BS) from testifying. (JB Brief at 1.) However, there is no evidence of that in the record. Further, as ALJ Kehoe explained during the hearing, the DOC was free to call any witness it wished, or call no witnesses. (2/22/23 at 11:49-11:50 a.m.) The same was true for JB, who notably did not subpoena or call any witnesses (or serve subpoenas for documents). In addition, a party may properly choose not to call someone who has been listed in that party's witness list, or was involved in the events of the case.

Did the DOC act reasonably?

The record shows that the DOC's performance expectations were provided to JB and clearly defined. JB was also told that those performance expectations were not being met and warned about what would happen if that continued. There is no indication that JB was unaware of the DOC policies at issue in her discipline. Over the years, JB also completed a significant amount of training involving ethics, maintaining a professional and respectful workplace, preventing discrimination and harassment in the workplace, how to communicate with employees, leadership, and other management-related topics. Moreover, in 2020, JB received a letter of expectations (which she later signed) informing her that managers and supervisors are expected to be "building positive relationships with others, communicating in a respectful manner, holding [themselves] accountable and pursuing change within the agency." (Exh. A-5 at 1.)

After Superintendent Brown started working at Coffee Creek, Brown informed her employees that she expected them to be professional and maintain a respectful workplace. Later, Brown issued JB a written reprimand that included specific charges and expectations and warned that failure to follow DOC policies, procedures, and directives would lead to further discipline "up to and including the implementation of the dismissal process." (Exh. R-1 at 3.) That discipline specifically highlighted issues JB was having with EP. After that, JB received and signed a revised position description that included "essential" leadership expectations. Westside Institutions Administrator Jeske and Brown subsequently gave JB related "coaching and counseling." JB was purportedly "shocked" and "surprised" upon learning that she was terminated. However, before JB's dismissal/removal, Brown gave JB a letter specifically noting the "Commencement of Pre-removal from Management Service." (Exh. R-2 at 1.) Further, during the pre-removal/mitigation meeting, JB acknowledged that she had reviewed the pre-removal letter and the affiliated documents. (Exh. R-3.)

Regarding whether JB's discipline was appropriately progressive and proportionate to her offenses, we recognize that termination is the most severe form of discipline available, and that JB was never suspended as one might expect under standard progressive discipline. However, we also recognize that JB was previously reprimanded because of her treatment of EP, and that the issues detailed in that reprimand plainly remained issues after that discipline was issued. Likewise, there is no clear evidence in the record that suggests that, after a suspension or another written reprimand (for example), JB's behavior or performance would have improved or that her offenses would not have been repeated. JB and EP's issues lasted for years, despite clear efforts to change that. JB also testified that she does not want to return to work at Coffee Creek, further signaling that a suspension or salary reduction would be inappropriate here. JB contends that she could have been transferred to another DOC institution, but there is little or no evidence that clearly indicates she would have been more successful or receptive to feedback there (particularly when another DOC institution will presumably be following the same policies). Even after JB was terminated, she made at least one comment that was perceived as inappropriate and threatening by her colleagues. ORS 240.570(3) also does not include a transfer as an option. We recognize that the magnitude of each of the alleged actions or behaviors may not be especially significant when viewed in isolation. However, we are ultimately moved by the number and consistency of the types of issues presented in this case (demonstrating a continuing course of conduct), and by the many witnesses who

consistently testified about JB's poor performance. Under those circumstances, we conclude that removal/dismissal was proportionate to the offenses at issue.

We recognize that JB earned a number of certificates and awards while working for the DOC, and that JB had some good relationships with some employees (including certain Security employees, for example). (Exh. A-1, Exh. R-10, 5/24/23 at 3:15 p.m.) We also note that JB started working for the DOC on December 10, 2017, and was issued her pre-removal letter on June 23, 2022, which amounts to around four and a half years of state service. However, it is clear that JB's time at Coffee Creek was not free of prior discipline, as noted. Moreover, it appears that, for some time during or around the period in which JB was acting as a COVID Enforcement Officer for Coffee Creek, JB was not actually managing employees in the traditional sense. Similarly, during a lengthy investigation concerning a hostile work environment claim, JB was intentionally kept apart from EP. Notably, working "collaboratively with the Assistant Food Services Manager" was one of JB's "primary responsibilities." (Exh. R-11 at 2.) JB testified that she spent many years working in corrections in Idaho, and that those years were free of discipline. (5/24/23 at 3:11 p.m., 3:29 p.m., 3:32 p.m.) However, we find that those details are not particularly compelling in this context, and it appears that some of those years were not spent as a manager. (Exh. R-10 at 11-13.) We also note that many DOC managers have plainly lost trust and confidence in JB (and that JB has lost trust and confidence in them).

In her appeal, JB wrote that "male managers are disciplined significantly lighter than female managers in DOC." (Exh. R-10 at 2.) However, that allegation is unsupported by the evidence presented. We acknowledge that JB was terminated while EP was merely suspended without pay for one week, despite EP's more significant discipline history (assuming that discipline over two years old may be considered). However, the record indicates that, during EP's investigation and the subsequent pre-discipline/mitigation process, EP admitted to and accepted full responsibility for the behaviors that he was formally accused of. Superintendent Brown also credibly believed that EP was attempting to change his behavior, and that EP's behavior was actually changing. JB did technically accept some responsibility in passing during her pre-removal/mitigation meeting and in her supporting materials. But those particular comments are readily drowned out by JB's many other statements and allegations and do not show meaningful contrition or signal improvement. Moreover, it is clear that JB and EP were not disciplined for the exact same issues, and it is undisputed that Brown reviewed "comparables" before disciplining the two. There is also no indication that Coffee Creek management similarly lost trust and confidence in EP. Finally, we note that EP has been a DOC employee since 2004, while JB started working for the DOC in 2017.

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Conclusion

For the reasons outlined above, we conclude that the DOC has established that the dismissal/removal letter was issued "in good faith for cause." We also conclude that the DOC proved all of its charges against JB and that, in light of JB's actions and all other circumstances, the DOC acted reasonably in removing JB from management service and dismissing her from state service. Accordingly, JB's removal and dismissal are affirmed.

PROPOSED ORDER

The appeal is dismissed.

SIGNED AND ISSUED on September 25, 2023.

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 Nos. UP-045-20 and UP-004-21

(UNFAIR LABOR PRACTICE)

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 555, Complainant, v. BAY AREA HOSPITAL, Respondent, and BAY AREA HOSPITAL, Complainant, v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 555, Respondent.	)	SUPPLEMENTAL ORDER ON REMEDY

Noah Barish, Attorney at Law, McKanna Bishop Joffe, LLP, Portland, Oregon, represented United Food and Commercial Workers, Local 555 during the remedy stage.

John M. Stellwagen, Attorney at Law, Miller Nash LLP, Portland, Oregon, and Dennis Westlind, Attorney at Law, Alifanz & Westlind, Portland, Oregon, represented Bay Area Hospital during the remedy stage.

On July 10, 2023, this Board issued an order holding, as relevant to this supplemental order on remedy, that Bay Area Hospital (Hospital) violated ORS 243.672(1)(a) by rescinding funding for a certification pay plan for employees represented by United Food and Commercial Workers, Local 555 (Union) (as described in detail in that July 10, 2023, order). As a remedy for that violation, we ordered a make-whole remedy that directed the parties to bargain in good faith to

finalize the details of the certification pay bonus that the Hospital was scheduled to pay to its eligible employees before December 31, 2020. We also ordered the parties to bargain in good faith to determine which employees would have received compensation under the certification pay plan in 2021 and 2022, had the Hospital not rescinded funding for the certification pay plan. Furthermore, we ordered the Hospital to make all affected bargaining unit employees whole for any loss of compensation they suffered because of the Hospital's recission of funding for the certification pay plan, from the date of the violation to the date that the Hospital complied with our order. If the parties were unable to reach agreement on an appropriate make-whole remedy after 60 days of bargaining, we directed each party to submit to the Board the last offer made to the other party, within seven days of the conclusion of bargaining. We specified that the Board may choose the Union's or Hospital's final offer or craft an alternate remedy that best effectuated the purposes and policies of the Public Employee Collective Bargaining Act.

On July 24, 2023, the Hospital filed a petition seeking reconsideration and rehearing on specific portions of the final order. The Union responded to the Hospital's petition on August 3, 2023. The Hospital requested that it be permitted to file a reply to the Union's response to the petition, which the Board granted on August 4, 2023. The Hospital filed its reply to the Union's response on August 11, 2023. On August 18, 2023, we denied the petitions for rehearing and reconsideration.

Thereafter, the Board granted two requests to extend the time to comply with the make-whole remedy regarding certification pay (described above). On October 20, 2023, the parties jointly submitted a stipulated make-whole remedy and jointly requested that this Board issue a supplemental order effectuating the stipulated remedy.

Having reviewed the jointly stipulated make-whole remedy, the Board grants the joint request and issues this order effectuating the stipulated remedy, which is appended to this order as Appendix A.

ORDER

Appendix A is ordered as a make-whole remedy.

DATED: October 24, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

*Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

*Member O'Glasser did not participate in the deliberations of this case.

JOINTLY STIPULATED MAKE-WHOLE REMEDY

CERTIFICATION PAY. Bargaining unit employees in specified departments who hold or obtain a certification or license relevant to their job which is beyond what is required for their job code shall receive certification pay in the manner and amount described below. Employees may only receive certification pay for one qualifying certification or license and will not receive additional certification pay if they hold multiple qualifying certifications and/ or licenses. The Hospital will cooperate with the Union in collecting information regarding employees' certifications and/or licenses to determine the extent of their eligibility for certification pay. Certification pay bonus amounts will be prorated for any portion of the relevant fiscal year the employee holds the certification, or for any portion of the fiscal year that the holder of the certification is an employee. The Hospital will make all payment of certification bonuses described in paragraph (i) and (ii) below to eligible employees within 90 days of this order.

i) Annual Certification Bonus for 2021 and 2022 Fiscal Years.
For the 2021 fiscal year (July 1, 2020 through June 30, 2021) and for the 2022 fiscal year (July 1, 2021 through June 30, 2022), BAH will pay an annual certification pay bonus of $1,500 per year, minus applicable payroll deductions and withholdings, to each employee in the following departments who held one or more of the following qualifying certification types.

Department	Certification Type	Organization/Occupation
Admitting	CHAA Certified Healthcare Access Associate	NAHAM
Admitting	CHAM Certified Healthcare Access Manager	NAHAM
Patient Accounts	Certified Revenue Cycle Representative	HFMA
Patient Accounts	Certified Revenue Cycle Specialist	AAHAM
IS	CompTIA (Computing Technology Industry Association)	A+
IS	CompTIA (Computing Technology Industry Association)	Network+
IS	CompTIA (Computing Technology Industry Association)	Security+
IS	$(ISC)^2$ International Information System Security Certification Consortium	SSCP (Systems Security Certified Practitioner)

IS	$(ISC)^2$ International Information System Security Certification Consortium	CISSP (Certified Information Systems Security Professional)
IS	Cisco	CCENT (Cisco Certified
		Entry Networking Technician)
IS	Cisco	CCNA (Cisco Certified Network Associate) (Multiple concentrations)
IS	VmWare	VCP (Vmware Certified Professional) (Multiple concentrations)
IS	Microsoft	MOS (Microsoft Office Specialist) (Multiple Concentrations)
IS	Microsoft	MTA (Microsoft Technology Associate) (Multiple concentrations)
IS	Microsoft	MCP (Microsoft Certified Professional)
IS	Microsoft	MCSA (Microsoft Certified Solutions Associate) (Multiple concentrations)
IS	Microsoft	MCSE
IS	EC Council	CEH (Certified Ethical hacker)
Pharmacy	BCPS Board Certified Pharmacotherapy Specialist	Pharmacist
Pharmacy	CDE	Pharmacist
Pharmacy	SIDP	Pharmacist
Pharmacy	BCOP Board Certified Oncology Pharmacy	Pharmacist
Pharmacy	CSPT Certified Compounded Sterile Preparation Tech	Tech
Pharmacy	Chemo Certification Course	Tech
Rehab	Certified Lymphedema Specialist	Occupational Therapist
Rehab	Board Certification (OT)	Occupational Therapist

Rehab	Gerontology (BCG)	Occupational Therapist
Rehab	ABPTS	Physical Therapist
Rehab	Feeding, Eating and swallowing (SCFES or SCFES-A)	Occupational Therapist
Resp	ACCS- Adult Critical Care Specialist	RT
Resp	CPT-Certified Pulmonary Tech	CPT
Resp	RPT-Registered Pulmonary Tech	RPT
Resp	Neonatal-Pediatric Specialist	AARC

ii) Annual Certification Bonus for 2023 and 2024 Fiscal Years.

For the 2023 fiscal year (July 1, 2022 through June 30, 2023) and for the 2024 fiscal year (July 1, 2023 through June 30, 2024), BAH will pay an annual certification pay bonus of $1,500 per year, minus applicable payroll deductions and withholdings, to each employee in the departments listed above in paragraph i) holding one or more of the qualifying certification types listed in paragraph i). In addition, for those same fiscal years (2023 and 2024), BAH will also pay an annual certification pay bonus of $1,500 per year, minus applicable payroll deductions and withholdings, to each employee in the BioMed department and the Surgery department (including surgery techs and sterile processing) who holds one or more of the qualifying certification types, which will be mutually agreed upon by the parties. Within 60 days, the parties will meet and agree upon the list of all certification types which will qualify for certification pay in the BioMed and Surgery departments.

iii) Certification Pay Differential for 2025 Fiscal Year and Future Years.

For the 2024 fiscal year (July 1, 2024 through June 30, 2025) and future years, BAH will pay a certification pay differential of an additional $1.00 per hour above the contractual pay rate to each employee in the departments listed above in paragraphs i) and ii) (i.e. Admitting, Patient Accounts, IS, Pharmacy, Rehab, Resp, BioMed, and Surgery) who holds one or more of the qualifying certification types. These certification pay differentials will continue as described herein unless modified through the collective bargaining process.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-042-22

(UNFAIR LABOR PRACTICE)

WASHINGTON COUNTY POLICE OFFICERS ASSOCIATION, Complainant, v. WASHINGTON COUNTY SHERIFF'S OFFICE, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Traci Anderson, Attorney at Law, Public Safety Labor Group, Portland, Oregon, represented Complainant.

Derek Budzik and Rachel Timmins, Attorneys at Law, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Portland, Oregon, represented Respondent.

On October 6, 2023, Administrative Law Judge Jennifer D. Kaufman issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4).

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

ORDER

1. The Washington County Sheriff's Office (Sheriff's Office) shall cease and desist from violating ORS 243.672(1)(a) and (c).

2. The Sheriff's Office shall rescind the written reprimand that was issued to Patrick Altiere and reduce the discipline to an oral reprimand, remove all references to the written reprimand from Altiere's personnel file and all other records maintained by the Sheriff's Office, and notify Altiere in writing that this has been done, within 30 days of the final order in this matter.

DATED: October 31, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-042-22

(UNFAIR LABOR PRACTICE)

WASHINGTON COUNTY POLICE OFFICERS ASSOCIATION, Complainant, v. WASHINGTON COUNTY SHERIFF'S OFFICE, Respondent.	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

A hearing was held before Administrative Law Judge (ALJ) Jennifer D. Kaufman on May 17 and 18, 2023, in Hillsboro, Oregon. The record closed on June 30, 2023, upon receipt of the parties' post-hearing briefs.

Traci Anderson, Attorney at Law, Public Safety Labor Group, Portland, Oregon, represented Complainant.

Derek Budzik and Rachel Timmins, Attorneys at Law, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Portland, Oregon, represented Respondent.

On November 14, 2022, Washington County Police Officers Association (Association) filed an unfair labor practice complaint against Washington County Sheriff's Office (WCSO). On February 7, 2023, the WCSO filed a timely answer.

The issues in this case are:

1. Did the County compel Association officers to participate in an investigative interview about protected Association activity, including questioning officers about confidential Association communications and finances, and thereby:

a. Interfere with, restrain, or coerce Association members in or because of the exercise of rights guaranteed in ORS 243.662, in violation of ORS 243.672(1)(a), and/or

b. Dominate or interfere with the administration of the Association, in violation of ORS 243.672(1)(b)?

2. Did the County discipline the Association President because of his protected Association activity, and thereby:

a. Dominate or interfere with the administration of the Association, in violation of ORS 243.672(1)(b), and/or

b. Discriminate in regard to any term or condition of employment for the purpose of discouraging Association membership, in violation of ORS 243.672(1)(c)?

For the reasons set forth below, we conclude that the WCSO violated ORS 243.672(1)(a) and (c), but not ORS 243.672(1)(b).

RULINGS

The rulings of the ALJ were reviewed and are correct.[1]

FINDINGS OF FACT

The Parties

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

2. The president of the Association is Detective Patrick Altiere. Altiere has been the Association's president since about 2014. Altiere has worked for the WCSO for over 19 years and has worked as a detective for over 9 years.

3. The WCSO is a public employer within the meaning of ORS 243.650(20).

4. The Sheriff of Washington County is Patrick Garrett. Garrett has been the Washington County Sheriff for 11 years.

5. The Association represents a bargaining unit of approximately 350 sworn and non-sworn employees at the WCSO. The current collective bargaining agreement between the parties is effective July 1, 2022, through June 30, 2025.

[1]The Association's exhibits 1-19 (identified herein as Exh. C-1 through Exh. C-19) and the Respondent's exhibits 1-13 (identified herein as Exh. R-1 through Exh. R-13) were admitted into the hearing record.

August 18, 2022 Bargaining Session

6. The parties entered into successor contract bargaining during the spring of 2022. The negotiations were contentious at times. Among the issues between the parties was a dispute over paid administrative leave. In particular, the parties disagreed whether time that officers spent on felony indictment leave would be counted as hours worked and whether the WCSO had unilaterally changed its past practice, an issue that affected bargaining unit members' eligibility for leave under the Family and Medical Leave Act. In July 2022, in a separate case, the Association filed an unfair labor practice charge against the WCSO related to the dispute over paid administrative leave.

7. On August 18, 2022, the parties met for a successor bargaining session in a training room at the WCSO. The Association was represented by attorney Mark Makler, President Altiere, Senior Division Representative and WCSO Deputy Frank Ward, Secretary-Treasurer and WCSO Deputy Bryan Danner, and Senior Division Representative and WCSO Deputy Sheriff Joshua Starr. The WCSO was represented by lead negotiator Paul Hathaway, Human Resources Representative Dale Yee, Undersheriff John Koch, Chief Deputy Al Roque, and Executive Assistant Sharon Gray.

8. The Association presented the WCSO with a written proposal regarding felony indictment leave. Hathaway stated that the WCSO was not ready to respond to the Association's proposal. Hathaway further stated that a countywide administrative leave policy was being developed, that the WCSO did not want to put language in the contract that would contradict the countywide administrative leave policy, and that it wanted to maintain the status quo.

9. President Altiere objected to the WCSO's unwillingness to bargain over the Association's leave proposal. Altiere regarded the proposal as an issue of high importance to his members, and he was frustrated by the WCSO's response. Altiere became angry and stood up out of his chair. Altiere raised his voice, uttered some expletives, and exited the training room. Altiere forcefully opened the door on his way out of the training room by pushing on the "crash bar" of the door, causing the door to strike the wall behind it and hit a magnetic card reader that was mounted on the wall. The magnetic card reader was pushed into the wall, leaving a hole and a two-foot crack in the plaster of the wall. The card reader was still operational.

10. After Altiere exited the training room, Association attorney Makler and WCSO lead negotiator Hathaway engaged in heated argument over whether the WCSO had an obligation to bargain the indictment leave policy as a part of the contract negotiations, and whether the WCSO was bargaining in good faith. Makler and Hathaway both shouted. The bargaining session concluded shortly thereafter.

11. Altiere did not intend to damage the wall when he forcefully exited the training room.

12. The door to training room A opens next to the office of a WCSO employee. No employees were standing near the training room at the time that Altiere exited.

13. Later that day, Secretary-Treasurer Danner sent a memo to Undersheriff Koch stating that the Association would pay for the accidental damage to the wall.

14. The cost of the repairs to the wall amounted to $421.92.

The Investigation and Discipline of Altiere

15. After Sheriff Garrett learned of the August 18, 2022 incident causing damage to the wall, he concluded that an internal investigation was necessary to determine whether President Altiere should be subject to discipline. Pursuant to Article 31.1 of the collective bargaining agreement, any disciplinary action taken by the WCSO must be supported by just cause.

16. On August 23, 2022, the investigation of Altiere was assigned to Sergeant Cliff Lascink. Lascink was assisted in the investigation by Brad King, a sergeant in the Professional Standards Unit with expertise in conducting internal investigations.

17. On August 24, 2022, Sergeant Lascink and Sergeant King jointly interviewed President Altiere, Secretary-Treasurer Danner, Senior Division Representative Ward, and Chief Deputy Roque. Lascink interviewed lead negotiator Hathaway on his own.

18. At the beginning of the interview of Altiere, Sergeant King stated that "you are being ordered to be here … you are ordered to answer our questions truthfully and honestly and completely," and that "failure to do so could result in insubordination." (Exh. C-8 at 1-2.) At the beginning of the interview of Danner, King stated that Danner was "ordered to be here and you are ordered to answer our questions." (Exh. C-9 at 2.) At the beginning of the interview of Ward, King stated that "we're ordering you to be here [and] you're ordered to answer questions," and that "if you refuse to answer questions, that could be insubordination." (Exh. R-10 at 1-2.) Chief Deputy Roque was not given such a warning during his interview.[2]

19. For at least the past five years, it has been the WCSO's practice to notify officers who are witnesses in internal investigations that they may be subject to discipline if they refuse to answer the questions presented to them. That practice resulted, at least in part, because there was a history of represented employees refusing to answer questions during their internal investigation interviews. The WCSO does not limit the practice to investigations involving potential criminal charges against an officer, in which officers are compelled to answer questions to protect themselves from potential criminal prosecution.

[2]Sergeant King testified that he did not advise Chief Deputy Roque that a failure to cooperate with the investigation could lead to discipline because in his experience management employees were typically willing to cooperate with investigations, and it was evident that Roque was willing to cooperate with the Altiere investigation. Sergeant Lascink, who had limited experience conducting internal investigations before the investigation of Altiere, deferred to King regarding which employees would be given notification that a failure to answer questions could lead to discipline. Since the investigation of Altiere, it has become King's standard practice to notify all employees, including managers, that the failure to cooperate with internal investigations may lead to discipline.

20. A transcript of the interview of President Altiere captures the following exchange regarding the Association's offer to pay for the damage to the wall:

"CL [W]hat was your understanding of the communication between there being damage and notification to the Sheriff's Office about the damage?

"PA Um, well, I…

"CL If that makes sense.

"PA Yeah. And I don't know, because I wasn't back there then. But what I surmise is everybody saw it, everybody saw what happened, they saw the…the damage, they…you know, people from the Sheriff's Office took pictures of it. Um, and I know that Danner sent a letter basically immediately that said hey, yeah, this accidental damage happened and fix it and send us a bill and we'll pay for it.

"CL Okay.

"BK Did you…did you direct Danner to send that or did he do that on his own?

"PA Um, I…I told…I…I said…I didn't tell Danner specifically to do anything. I basically said from…told Frank like, 'Tell 'em we'll fix it.'

"BK So you…so you…it's your understanding Frank probably told him hey.

"PA [F]rank…Frank probably went back and said yeah, hey, just tell 'em we'll …we'll fix it and Danner decided to put it on letterhead instead of just sending an email. I…I…I don't know anything about any of that process, so.

"CL Okay. So notification [ ] to the Sheriff's Office, though, was made to your opinion that there was County property that was damaged and…

"PA Yep. And it was (unintelligible—speaking at same time)

"CL …people were…

"PA …immediately.

"CL …notified.

"PA Yeah."

(Exh. C-8 at 6-7.) Lascink also asked Altiere whether he had notified his immediate supervisor about what had happened.[3]

21. A transcript of the interview of Secretary-Treasurer Danner captures the following exchange regarding the damage to the wall:

"CL [A]t some point did you learn that there was damage to the…to the wall?

"BD Yes.

"CL How did you learn that?

"BD I received a text from Frank Ward.

"CL When was that text?

"BD Uh, I don't know. It would have been within five minutes, ten minutes of…

"CL Yeah, just like right around the same…

"BD Yeah, yeah.

"CL …time.

"BD It wasn't…it wasn't a prolonged period of time, and the Undersheriff at some point got up and went and looked. I remember him getting up and they were looking at the wall. That was probably the first indication that anything had been damaged.

"CL Okay. Did anybody say anything about the damage when they were looking at it all?

"BD Not during that time, no.

"CL Okay. What was the conversation that happened that you remember about the damage to the wall?

"BD Well, that would come later. Um, Frank Ward sent me a picture of it.

"CL And what was your response to receiving that text?

[3]During the hearing, Sergeant Lascink testified that he questioned Altiere about the Association's offer to pay for the damages because he wanted to ensure that a WCSO policy regarding the reporting of property damage had been complied with.

"BD Uh, amusement. Honestly, yeah.

"*****

"CL [D]id you have any kind of written correspondence regarding the damage to the door at all?

"BD I did.
"CL And what was that?

"BD I sent a, I believe it's to the Undersheriff, I may have cc'd Al Roque, I don't remember if I did or not, um, basically, that the accidental damage to the door, I was…I being the treasurer of the Association, was…was gonna cover any damages.

"CL And was that a decision that you made or…

"BD Yes.

"CL …how did that decision come about?

"BD Yes, I'm the custodian of all our assets, so that would have to go through me. I have the final word on that.

"CL Yeah, I guess the question is whose idea was that to pay for the damages?

"BD Well, I think it was Frank's, cuz he is sending the text that we have damage to pay for."

(Exh. C-9 at 4-5.)

22. During the interview of Senior Division Representative Ward, Ward stated that he had told Chief Deputy Roque that the Association would pay for the damage to the wall. Sergeant King responded by asking, "Did you make that statement on our own or did Altiere direct you?" King added, "I don't want to get into your conversation with Altiere of any protected stuff, but do you recall him, uh, when you told him that hey, there's damage to the wall, did he make any utterances about it…like 'Good,' or did he…did he…did he say it was an accident? Did he…did you guys talk about that at all?" (Exh. C-10 at 6-7.)

23. Association representatives have the right to object to questions that are asked of employees during internal investigation interviews. Neither Altiere, Danner, nor Ward objected to any of the questions asked of them during their interviews in the Altiere investigation.

24. On September 1, 2022, Lascink completed his preliminary investigation and recommendation in a "Service Related Inquiry Memo" (SRIM). Lascink's report contained the following findings:

- "Witnesses to the incident stated Altiere's physical actions when he left that resulted in damage were unprofessional.
- "Altiere admitted being angry and opening the room door with an amount of force.
- "Staff could have been standing at the mag card reader and would have been hit by the door swinging open with force.
- "Altiere's physical actions resulted in visible damage to county property in the presence of other nine (9) other WCSO employees and members of the community.
- "The location of the incident was in a hallway of the Sheriff's Office that is open to the public. This conduct could have been witnessed by additional staff or members of the community."

(Exh. R-9 at 10; Exh. C-11 at 10.) The report also contained a determination that the damage caused by Altiere was unintentional.

25. Sergeant Lascink concluded that the appropriate level of discipline for Altiere was an oral reprimand, and that was the level of discipline that Lascink recommended in his initial report. As explained below, Lascink's recommendation was changed to a written reprimand during the review process for the SRIM.[4]

26. On September 22, 2022, Chief Deputy Erroll McCrea emailed the SRIM to Chief Deputy Roque and Sheriff Garrett. McCrea stated that the SRIM had been reviewed. McCrea also stated that Lascink had recommended an oral reprimand, but that, "given the behavior of Detective Altiere and the fact that this area is open to the public during regular business hours," he believed the level of discipline should be elevated. McCrea explained, "the WCSO recruitment office is near this location. Therefore, potential new employees could be in the area, and non-certified staff are also working in an adjacent office to the training room. I believe these circumstances aggravate or increase the likelihood of damaging the positive public image of the WCSO to elevate this to a written reprimand." (Exh. R-8 at 1.)

27. Sheriff Garrett was the ultimate decisionmaker regarding what level of discipline to issue to President Altiere. Garrett was aware that Sergeant Lascink had recommended an oral reprimand, and that Lascink's recommendation was changed by a superior during review of the SRIM.

[4]The record does not conclusively establish which of Sergeant Lascink's superiors edited the SRIM and changed the recommended level of discipline to a written reprimand.

28. In determining what level of discipline to issue to President Altiere, Sheriff Garrett weighed the mitigating and aggravating factors. Garrett considered the mitigating factors to be Altiere's 19 years of unblemished service with the WCSO, Altiere's forthrightness in the statements he provided regarding the incident, Altiere's regretfulness over the incident, and that the property damage was unintentional. Garrett considered the aggravating factors to be that Altiere's conduct was willful, that his conduct was arguably workplace violence, and that losing his temper and causing property damage because of a disagreement was contrary to a workplace culture where people feel safe. Garrett determined that an oral reprimand was insufficient because of the level of property damage caused and because Altiere's conduct was motivated by anger.

29. On September 28, 2022, Sheriff Garrett issued a letter of reprimand to President Altiere. The letter states, in part, "I appreciate your straight-forward description of events and forthright account of your actions. You acknowledged you regret getting that angry, and that such an incident will not be repeated." The letter further states, "[T]he proximate cause of your actions that damaged county property was because you became angry during a business meeting. Accordingly, your actions could reasonably be perceived to be violent in nature, occurring in the workplace. My duties require I clearly address it, and is so memorialized by this letter of reprimand." (Exh. R-11 at 1, Exh. C-12 at 1.) Garrett notes that Altiere had served "reliably and commendably" during his 19 years of service, and that the incident took place "while you were engaged in collective bargaining in your role as President of WCPOA, which I understand is a mitigating factor, and that certain actions may be protected if engaged in while in that role vs. in your role as a detective. However I believe, given that your actions were aggressive enough to result in damage to property, that they go beyond the conduct that is generally permitted in collective bargaining." (Exh. R-11 at 2; Exh. C-12 at 2.)

30. The letter of reprimand cites the violations of three policies as grounds for the discipline: (1) WCSO Policy 207-R10, General Conduct, Section 1, Professional Conduct; (2) WCSO Policy 207-R10, General Conduct, Section 27, Use and Care of Property and Equipment; and (3) Washington County Personnel Rules and Regulations, Section 5.1(12), Damage to or negligence in the care and use of County property, or improper or unauthorized use of County vehicles or equipment.

31. WCSO Policy 207-R10, Section 1, Professional Conduct, states in relevant part: "Staff will conduct themselves in the discharge of their duties and their relations with the public and each other in a tactful and professional manner." The policy further states, "Staff must conduct themselves, on duty and off duty, in a manner that, in the mind of a reasonable person, does not damage the positive public image, integrity, or reputation of the WCSO." (Exh. R-3 at 1.)

32. WCSO Policy 207-R10, Section 27, Use and Care of Property and Equipment, states: "Staff will properly use and care for WCSO and county-owned property and equipment. They also must properly care for all property the WCSO must hold in custodial status, such as evidence and the personal property of persons in custody. Staff must not duplicate a WCSO or county key. Staff must not loan a WCSO or county key to a person who is not authorized to possess it. Staff members may not use keys in a way that breaches workplace security." (Exh. R-3 at 6.)

33. Washington County Personnel Rules and regulations, Article 5.1, Prohibited Conduct and Cause for Disciplinary Action, states:

> "Any action that reflects discredit upon the County service or is a hindrance to the effective performance of County functions shall be considered Cause for disciplinary action. Improper action by an employee in an official capacity, any action by an employee not connected with official duties that bring the County into discredit, any action that affects the employee's ability to perform the duties of the employee's position, or improper use of the employee's Position for personal advantage shall also be considered Cause for disciplinary action. Cause may include, but is not limited to the following:
>
> "*****
>
> "12) Damage to or negligence in the care and use of County property, or improper or unauthorized use of County vehicles or equipment."

(Exh. R-4 at 1-2.)

34. Article 31 of the collective bargaining agreement covers discipline. Article 31.1 states, in part: "Discipline shall be limited to oral reprimand, written reprimand, demotion, suspension and discharge or an alternative form of disciplinary sanction. Disciplinary action shall be progressive in nature but may be imposed at any level as determined by the severity of the conduct involved and all relevant circumstances." Article 31.1 further states, "No career employee shall be disciplined without just cause." (Exh. R-1 at 49).

35. WCSO Policy 503-R05, Taking Disciplinary Action, Section 5, Formal Discipline, states, in part, "An oral reprimand is a written record of corrective action delivered verbally to an employee." The policy further states that a written reprimand is a "formal written notice to the employee that specific corrective action must be taken in order to avoid more serious discipline" and that it is "generally appropriate for repeated policy violations of situations where counseling, training or lower levels of discipline have not resulted in corrected performance." (Exh. R-13 at 2.)

36. Detective Altiere had no disciplinary history with the WCSO before he was issued the written reprimand on September 28, 2022.

37. The WCSO has disciplined employees for unintentional property damage on at least four previous occasions.

38. On March 7, 2018, the WCSO issued an oral reprimand to a corporal who lost control of his vehicle and crashed while responding to a situation involving a suicidal person. The investigation found that "the crash was the direct result of excessive speed and poor decision-making, but while his driving was egregious, it was without malice." (Exh. R-10 at 1.)

39. On March 26, 2018, the WCSO issued an oral reprimand to a deputy who crashed into a mailbox. The deputy had two prior preventable crashes. The investigation found that "the crash was the direct result of poor decision-making and inattentiveness, but it was without malice." (Exh. R-10 at 2.)

40. On May 11, 2020, the WCSO issued an oral reprimand to a deputy who "totaled" his vehicle. The investigation found that "even though [the deputy] said he felt in control of his vehicle, he was traveling at excessive speed. Looking at the [mobile data terminal] was a contributing factor in the crash. The vehicle crash was preventable." (Exh. R-10 at 3.)

41. On June 3, 2020, the WCSO issued an oral reprimand to a deputy who crashed his patrol car while responding to a vehicle crash. The investigation found that "even though [the deputy] felt he was in control of his vehicle, the speed he was traveling on Highway 47 prior to crashing was excessive. The speed as well as recent hailstorm were contributing factors to this preventable crash." (Exh. R-10 at 4.)

42. Sheriff Garrett views Altiere's conduct as distinguishable from the other incidents where the WCSO has disciplined employees for unintentional property damage because in Altiere's case the property damage was caused by a violent outburst resulting from the loss of his temper.

CONCLUSIONS OF LAW

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

2. The WCSO violated ORS 243.672(1)(a) during its questioning of employees about the August 18, 2022, incident.

Under the Public Employee Collective Bargaining Act (PECBA), it is an unfair labor practice for a public employer or its designated representative to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.672(1)(a). ORS 243.662 guarantees public employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." Subsection (1)(a) has two prongs, commonly referred to as the "because of" and "in" prongs.

To determine if an employer interfered with, restrained, or coerced employees "because of" the exercise of protected rights, we examine the employer's motives or reasons for the employer's action. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12 at 18, 25 PECBR 871, 888 (2013). If an employer takes action "because of" employees' exercise of protected rights, the employer's actions are unlawful. It is not necessary for a complainant to prove that the employer acted with hostility or union animus, or prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. *Id.*

We determine the employer's reason for acting by examining the record as a whole. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 626, 16 P3d 1189, 1195 (2000). After we make that factual determination, we decide whether the reasons were lawful or unlawful. *Id.* at 639. If, after considering the evidence from both parties, the facts persuade us that the employer acted for lawful reasons, the "because of" claim must be dismissed. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03 at 9, 20 PECBR 733, 741 (2004). If the record persuades us that the employer acted for unlawful reasons, including that the employer's stated reasons were a pretext for unlawful conduct, we will find a "because of" violation of subsection (1)(a). If we find the employer acted for both lawful and unlawful reasons, we apply a mixed motive analysis. In that analysis, we determine whether the employer would have taken the same action in the absence of the protected activity. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-39-10 at 15-16, 25 PECBR 325, 339-40 (2012) (*Tri-County*).

When we analyze whether an employer's actions restrained, interfered with, or coerced employees "in" the exercise of their protected rights, "the employer's motive is irrelevant." *Id*. at 15, 25 PECBR at 339. "We focus only on the effects of the employer's actions on the employees. If the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity," the employer violates the "in" prong of subsection (1)(a). *Id*. A violation of the "in" prong of subsection (l)(a) may be either derivative or independent. An employer who commits a "because of" violation also generally commits a derivative "in" violation because an action taken in response to employees' exercise of protected rights has the natural and probable effect of chilling the exercise of those rights. *Tri-County*, UP-39-10 at 15, 25 PECBR at 339. An independent violation is typically "based on an employer's threat or implied threat of interference with employees' exercise of protected rights." *Tigard Police Officers' Association v. City of Tigard*, Case No. UP-59-10 at 11, 24 PECBR 927, 937 (2012). In order for a reasonable employee to be chilled in the exercise of protected activity, that employee must see some relationship between the protected activity and the employer's actions or statements. *Id*. (citing *Teamsters Local 223 v. Tillamook County Emergency Communications District*, Case No. UP-46-95 at 8, 16 PECBR 397, 404 (1996)).

The WCSO is entitled to investigate employee misconduct, and to interview employee witnesses about alleged employee misconduct. In *Klamath County Peace Officers Association v. Klamath County and Klamath County Sheriff's Office*, Case No. UP-18-97 at 11, 17 PECBR 515, 525 (1998), this Board found that a sheriff was "entitled to conduct an investigation into possible misconduct by a County sergeant" by interviewing a union's executive board members. The Board noted that the questions "were reasonably limited to determining the source of the rumor" about the potential misconduct. *Id.* In *Lane County Peace Officers Association v. Lane County Sheriff's Office*, Case No UP-32-02 at 18-19, 20 PECBR 444, 461-62 (2003), an employer directed union officers to divulge information that was irrelevant to the investigation of misconduct that took place during employees' protected activity, and that concerned the internal organization of the union. This Board found that the questioning violated ORS 243.672(1)(a) because questions concerning union activities "could reasonably be expected to interfere with or restrain employees' willingness to participate in PECBA-protected activities." *Id.*

Here, the investigator's questions went beyond the scope of what was necessary to determine whether Altiere had engaged in misconduct, and probed into internal union matters including whose decision it was for the Association to offer to pay for the damage to the wall, how that decision came about, and what those conversations were. The WCSO contends that those questions were relevant to determine whether Altiere took accountability for his actions by offering to pay for the damage. We do not agree that this inquiry necessitated probing into the Association officers' internal union conversations. There is no suggestion in the record that Altiere disavowed his responsibility for the damage to the wall in any way. The WCSO also argues that the investigators' questions were relevant to determine whether Altiere timely reported the damage to the wall to his supervisor. Here again, we do not agree that this query warranted probing into internal union conversations, because there were multiple WCSO representatives who witnessed the incident and there was no question that the WCSO was aware of the damage and the cause of the damage. Under these circumstances, we conclude that the WCSO's conduct in ordering employees to answer questions about internal union communications could reasonably be expected to interfere with employees' willingness to engage in protected activity, such as serving as a member of a bargaining team or holding union office.

The complaint alleges that the WCSO's questioning of employees during its investigation of Altiere violated both prongs of subsection (1)(a). It is undisputed that Altiere, Danner, and Ward were engaged in protected activity during the bargaining session. Participating in contract negotiations and serving as a member of a labor organization's bargaining team are core activities protected under PECBA. Furthermore, the employees' conversations among themselves after the bargaining session about what transpired during those negotiations are a logical extension of that activity, and were part and parcel of their role as Association officers. Therefore, we conclude that the conversations among Altiere, Danner, and Ward that took place in the aftermath of the bargaining session about what happened during bargaining are also protected activity. Because the WCSO questioned the employees about and in response to their protected activity, we conclude that both the "in" and "because of" prongs are satisfied. We therefore find that the WCSO violated ORS 243.672(1)(a) as alleged.

3. The WSCO violated ORS 243.672(1)(c) when it issued a written reprimand to Altiere.[5]

ORS 243.672(1)(c) provides that it is an unfair labor practice for a public employer or its designated representative to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization." Analysis of a potential violation of subsection (1)(c) is similar to our analysis under the "because of" prong of subsection (1)(a). A complainant proves a violation of subsection (1)(c) by showing protected activity, employer action, and a causal connection between the two.

[5]In its post-hearing brief, the Association argues that the discipline of Altiere violated ORS 243.672(1)(a). The WCSO's discipline of Altiere was not pled as a violation of ORS 243.672(1)(a) in the complaint and that allegation was not set for hearing, as reflected by the issue statement that was agreed to by the parties and read into the record by the ALJ at the beginning of the hearing. Therefore, we address the lawfulness of Altiere's discipline under the framework for finding a violation of ORS 243.672(1)(c), the allegation that was pled in the complaint and set for hearing in this matter.

International Longshore and Warehouse Union, Local 28 v. Port of Portland, Case No. UP-35-10 at 14-15, 25 PECBR 285, 298-99 (2012).

Here, there is no dispute that Altiere was engaged in protected activity during the August 18, 2022, bargaining session. Furthermore, Altiere's outburst resulted from his belief that the WCSO was not bargaining fairly, and the damage to the wall happened moments after Altiere stormed away from the bargaining table, in the res gestae of his protected activity. In these circumstances, Altiere's protected activity is inextricably intertwined with the misconduct over which he was disciplined. Accordingly, the evidence establishes a causal connection between Altiere's discipline and his protected activity. The question presented is whether Altiere's conduct was so egregious as to lose its protected status.

Altiere's conduct does not automatically lose protection simply because it was heated or ill-tempered, as our cases have permitted leeway for heated conduct in the context of protected activity. *E.g.*, *Wy'East Education Association/East Country Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District*, Case No. UP-16-06 at 32-34, 22 PECBR 668, 699-701 (2008), *rev'd and rem'd* 244 Or App 194, 260 P3d 626 (2011), order on remand, 24 PECBR 786 (2012) (aggressive picket-line shouting at school administrators is protected activity so long as there is no violence or credible threat of violence); *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95 at 17, 17 PECBR 54, 70 (1997), *aff'd* 155 Or App 92, 962 P2d 763 (1998) (rude, discourteous, or impolitic behavior in pursuing protected rights does not remove the activity from the protection of the PECBA); *International Association of Fire Fighters, Local 1395 v. City of Springfield*, Case No. UP-48-93 at 11, 15 PECBR 39, 49 (1994) (otherwise lawful union activities do not lose protection under the PECBA simply because they are exercised in a way that fails to meet the employer's expectation of proper decorum and diplomacy); *Lane Unified Bargaining Council v. McKenzie School District # 68*, Case No. UP-14-85 at 39, 8 PECBR 8160, 8198 (1985) ("Emily Post-approved deportment is not a requirement of good-faith bargaining"). An employer may impose discipline, however, for serious misconduct that takes place during otherwise protected activity, such as violence. *Lane County Sheriff's Office*, Case No. UP-32-02 at 15, 20 PECBR at 458 (public nudity, fighting, gross intoxication in public, and inappropriate sexual contact that took place in the course of a union party was not protected conduct).

Here, the WCSO argues that the property damage caused by Altiere in this case exceeded the bounds of what was reasonably permissible in the course of protected activity, and warrants corrective action. We agree that some corrective action may be warranted. Nonetheless, any corrective action taken by the WCSO must still be free from unlawful discrimination. The record in this case demonstrates that the WCSO's discipline of Altiere was not proportionate to the discipline it has imposed on other employees for accidental property damage, giving rise to an inference that the level of discipline imposed was discriminatorily motivated. The WCSO contends that the disparate level of discipline does not reflect discrimination because Altiere's situation is distinguishable from those cases in which its employees received an oral reprimand. In Altiere's case, the WCSO argues, the damage was caused because he lost his temper, which cannot be condoned in a workplace setting. We are not persuaded by this distinction because it mischaracterizes the context in which Altiere's conduct took place. Altiere's outburst did not happen during his performance of his duties as an officer. Altiere was not engaging with the public,

and he was not interacting with colleagues in his capacity as a detective at the time that he caused the accidental damage to the wall. When Altiere lost his temper, he was acting in his capacity as the Association's president, and he was engaged in protected activity which resulted in a heated disagreement – a context which is afforded more leeway. Accordingly, we are not convinced that the WCSO's concern for decorum in a workplace setting explains the higher level of discipline. Furthermore, to the extent that the WCSO relies on the potential impact that Altiere's conduct could have on the WCSO's public image, we note that Altiere's conduct, which took place inside of the WCSO's office and away from public view, is less likely to damage the WCSO's image than preventable vehicle accidents that took place on public roads in full view of the public. In these circumstances, we conclude that the WCSO's decision to discipline Altiere more harshly than it has disciplined other employees for unintentional property damage supports an inference that the discipline was discriminatorily motivated.[6] Consequently, we find that the WCSO violated ORS 243.672(1)(c) as alleged.

4. The WCSO's actions did not violate ORS 243.672(1)(b).

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).

Here, the record does not contain concrete evidence reflecting that the WCSO's actions impeded or impaired the Association's ability to perform its representative functions. For example, the record does not establish that Altiere was placed on leave or was denied access to the facility or to any employees during the investigation. Furthermore, the Association does not point to specific facts in the record to demonstrate that the WCSO's actions had an actual impact on the administration of the Association, or specifically articulate in its post-hearing brief how the WCSO's actions actually impacted the administration of the Association.[7] Consequently, we find insufficient evidence in the record to support a violation, and we dismiss this allegation.

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[6] *Hotel, Motel Restaurant Employees and Bartenders Union, Local No. 9*, Case No. UP-6-78 at 7, 4 PECBR 2562, 2568 (1980), relied on by the WCSO in its post-hearing brief, is distinguishable. In that case, this Board found that there was inadequate evidence of discriminatory motivation where "the suspicion [that the discharge could have been motivated by union activity] arises primarily from the timing of the discharge action." In the present case, we do not rely on timing alone.

[7] In the Association's post-hearing brief, in support of its (1)(b) allegation, the Association argues that the WCSO failed to provide the Association with relevant information that was requested by the

Remedy

Because the WCSO violated ORS 243.672(1)(a) and (c), a cease-and-desist order is required. ORS 243.676(2)(b). We must also take such affirmative action as necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c). Therefore, we order the WCSO to rescind the written reprimand that was issued to Altiere and reduce it to an oral reprimand, and to remove any references to the written reprimand from Altiere's personnel file and any other records maintained by the WCSO.

The Association has requested that the WCSO be required to post a notice of the violations found. We generally order the posting of a notice if were determine that a party's violations of PECBA: (1) were calculated or flagrant; (2) were part of a continuing course of illegal conduct; (3) were 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 Oregon Trail School District No. 46*, Case No. UP-16-06 at 47, 22 PECBR at 714 (2008), *rev'd and remanded on other grounds*, 244 Or App 194, 260 P3d 626 (2011). Here, although we have concluded that the WCSO violated the PECBA by questioning employees regarding internal union matters, and that the WCSO discriminatorily imposed a higher level of discipline on Altiere than what was warranted, the record does not support a finding that the WCSO's actions were calculated or flagrant. The record also does not establish a history of unfair labor practices by this employer,[8] or that a significant number of the WCSO's personnel were involved in perpetrating the unlawful conduct. Only three bargaining unit employees were involved in the unlawful conduct, and we have not found that the unlawful conduct had an impact on the functioning of the Association. Consequently, we decline to order a notice posting.

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Association in preparation for hearing, and thereby violated ORS 243.672(1)(e). We decline to address this allegation, which was not included in the complaint or among the issues set for hearing in this matter. The proper mechanism for the Association to pursue that allegation would have been to request leave to amend its complaint, or to file a separate unfair labor practice complaint pleading that allegation.

[8]At the time of issuance of this recommended order, the unfair labor practice complaint in *Washington County Police Officers Association v. Washington County Sheriff's Office*, Case No. UP-023-22, was still pending, and no determination had been made as to whether the WCSO had engaged in bad faith bargaining.

We decline to issue a reimbursement of the Association's filing fee for its complaint. PECBA authorizes us to order reimbursement to the prevailing party "in any case in which the complaint or answer is found to have been frivolous or filed in bad faith." ORS 243.672(6). The record does not establish that the WCSO's answer was either frivolous or filed in bad faith.

PROPOSED ORDER

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

2. The WCSO shall rescind the written reprimand that was issued to Patrick Altiere and reduce the discipline to an oral reprimand, remove all references to the written reprimand from Altiere's personnel file and all other records maintained by the WCSO, and notify Altiere in writing that this has been done, within 30 days of the final order in this matter.

DATED: October 6, 2023.

Jennifer D. Kaufman
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date 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-006-23

(REPRESENTATION)

UNIVERSITY OF OREGON STUDENT WORKERS, Petitioner, v. UNIVERSTIY OF OREGON, Respondent.	)	ORDER CERTIFYING EXCLUSIVE REPRESENTATIVE (ELECTION RESULTS)

On April 7, 2023, Petitioner University of Oregon Student Workers (UOSW) filed a petition under ORS 243.682(1) and OAR 115-025-0031(1) to request an election to be certified as the exclusive representative for a bargaining unit of certain student employees of the University of Oregon (University).

On May 19, 2023, Respondent University filed timely objections to the petition. The matter was assigned to Administrative Law Judge (ALJ) Jennifer Kaufman to conduct a hearing on the objections to the petition. *See* ORS 243.682(1)(b); OAR 115-025-0063(7). ALJ Kaufman set the hearing for July 19 and 20, 2023. On July 18, 2023, UOSW advised ALJ Kaufman that the parties had agreed to enter into a consent election agreement and that a hearing would not be necessary.

On September 13, 2023, the parties entered into a consent election agreement to hold an electronic-ballot election from October 5, 2023, through October 24, 2023. That consent election agreement also stipulated to the appropriate bargaining unit (described below) and the eligible voters. By the deadline of October 24, 2023, 1085 valid ballots were cast.

On October 25, 2023, the Election Coordinator received and reviewed the final tally of 1,055 ballots cast for UOSW and 30 ballots cast for no representation. Thirteen provisional ballots were also cast and set aside; because those ballots will not affect the outcome of the election, they will not be resolved. *See* OAR 115-025-0072(1)(b)(C); OAR 115-025-0073(2)(b). On that same date (October 25, 2023), the Election Coordinator provided the parties

with the tally of ballots. OAR 115-025-0073(1). Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by November 6, 2023). OAR 115-025-0075(1)(a). No objections were filed. Accordingly, it is certified that:

UNIVERSITY OF OREGON STUDENT WORKERS

is the exclusive representative of the following bargaining unit:

> "All student employees of the University of Oregon (meaning all employees holding any position designated as a 'student employee' position in the University's [Enterprise Resource Planning (ERP)] system, as well as resident assistants), with the following exclusions: The bargaining unit excludes all supervisory and confidential employees, as well as employees holding positions that are included in other bargaining units under existing certification or recognition clauses. The bargaining unit also excludes any 'short-term' position, meaning a position that has an intended duration of less than 30 calendar days of compensable work."

DATED: November 7, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-019-21

(UNFAIR LABOR PRACTICE)

WASHINGTON COUNTY POLICE OFFICERS ASSOCIATION, Complainant, v. WASHINGTON COUNTY SHERIFF'S OFFICE, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 22, 2023, this Board heard oral argument on the objections of Complainant Washington County Police Officers Association (WCPOA) and the cross-objection of Respondent Washington County Sheriff's Office (Sheriff's Office) to a March 23, 2023, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe after a hearing held on September 6 and 7, 2022, and November 7, 2022.[1] The record closed on December 16, 2022, upon receipt of the parties' timely post-hearing briefs.

Mark Makler, Attorney at Law, Code 3 Law LLP, Portland, Oregon, and Chris Wyrostek, Attorney at Law, Public Safety Labor Group, Portland, Oregon, represented the Complainant.

Kyle T. Abraham and Rachel E. Timmins, Attorneys at Law, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Portland, Oregon, represented the Respondent.

[1]The Sheriff's Office moved to exclude WCPOA's objections based on an alleged failure to properly serve the Sheriff's Office with its objections and to timely provide proof of service. As part of those objections, the Sheriff's Office explained that it had not received an automated notification of the objections being filed from this Board's Case Management System (CMS). WCPOA averred that it had timely submitted the objections and served them via CMS because both parties were using CMS. *See* OAR 115-010-0033(1)(a), (f), (2)(a). In response to those submissions, this Board contacted the CMS vendor and ultimately determined that the system had not properly functioned on that day and did not send a notification to the Sheriff's Office, despite the objections being timely uploaded into CMS. Because both parties were using the agency's CMS, we find that WCPOA's objections were timely filed and served. *See id.* Therefore, we deny the Sheriff's Office's motion to exclude the objections.

On April 27, 2021, the WCPOA, filed an unfair labor practice complaint with the Employment Relations Board (Board) against Respondent, Sheriff's Office. On October 10, 2021, the WCPOA submitted an amended complaint. On October 11, 2021, the Sheriff's Office filed a timely answer to the original complaint. On October 26, 2021, the ALJ allowed and accepted the amended complaint. On November 2, 2021, the Sheriff's Office filed a timely amended answer.

The issues are:

(1) Did the Sheriff's Office violate ORS 243.672(1)(a), (b), (c), (d), (i), and/or (j) when, in March 2021, it emailed employees subpoenaed by the WCPOA?

(2) Did the Sheriff's Office violate ORS 243.672(1)(a) or (b) when Sergeant Cliff Lascink refused to participate in a WCPOA investigation in February 2021, or violate ORS 243.672(1)(g) by depriving Tyler Whitely of specialized training in April 2021?

(3) Did the Sheriff's Office violate ORS 243.672(1)(e) and (f) when, in March 2021, it unilaterally included disputed language in a job classification?

(4) Did the Sheriff's Office violate ORS 243.672(1)(e) and (f) when it unilaterally created and swore-in a new detective position that was not represented by the WCPOA in February 2021, and/or violate ORS 243.672(1)(a) when it excluded the WCPOA from communications associated with the position?

(5) Did the Sheriff's Office violate ORS 243.672(1)(a) and (b) during Sergeant Jeremy Braun's January 27, 2021, telephone conversation with Deputy Sheriff NH (a pseudonym)?

(6) Did the Sheriff's Office violate ORS 243.672(1)(a), (b), and (e) by failing to adequately respond to the WCPOA's various information requests regarding the discipline of Whitely?

For the reasons set forth below, we dismiss the complaint.[2]

RULINGS

1. On August 30, 2022, the Sheriff's Office filed a motion to quash two subpoenas that had been issued by the WCPOA. Those two subpoenas were for Elmer Dickens and Adriana Ortega, both of whom were "Senior Assistant County Counsel" for Washington County (County). In the motion, the Sheriff's Office argued that the two subpoenas were improper because those

[2]The only legal issues preserved for Board review are: (1) the WCPOA's objections on whether the Sheriff's Office violated ORS 243.672(1)(b) when it emailed employees subpoenaed by the WCPOA; (2) the WCPOA's objections on whether the Sheriff's Office violated ORS 243.672(1)(b) when Sergeant Lascink refused to participate in a union investigation in February 2021; (3) the WCPOA's objections on whether the Sheriff's Office violated ORS 243.672(1)(f) regarding its placement of certain language in a job classification; and (4) the Sheriff's Office's cross-objection on whether it violated ORS 243.672(1)(e) via its actions regarding the job classification language. Any other objections to the conclusions of law on the litigated issues are invalid and unpreserved. *See* OAR 115-010-0090(3).

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individuals' testimony would improperly intrude on its attorney-client privilege and would otherwise be irrelevant. The motion also correctly noted that neither attorney is referenced in the WCPOA's amended complaint.

On September 5, 2022, the day before the hearing began, the ALJ sent the parties an email. In his email, the ALJ wrote that he would not quash the two subpoenas at that time. However, the ALJ also wrote that he would be willing to consider the Sheriff's Office's attorney-client privilege and relevance arguments during the hearing, as those issues arose.

On September 6, 2022, at the outset of the hearing, the Sheriff's Office reiterated its concerns about Ortega testifying at all, and the WCPOA reiterated its own arguments on the matter. Later, the Sheriff's Office repeatedly objected to Ortega testifying, continually asserting that her testimony would be irrelevant. The ALJ again opted to let Ortega testify and to address the Sheriff's Office's concerns as they arose. Ortega's testimony established that Ortega was first hired by the County on September 30, 2021, after any of the events referenced in the October 11, 2021, amended complaint, and well after the March 2021 email involved in Issue 1 that the WCPOA purportedly sought to have Ortega testify about. In addition, Ortega testified that she was not involved with any aspect of this case until it was scheduled for hearing. After listening to and considering both parties' positions on the relevance issue, the ALJ sustained the Sheriff's Office's relevance objections for the reasons outlined above.

During the afternoon of September 6, 2022, the WCPOA announced that it intended to call County Counsel Dickens as a witness and ask him about "advice that he gave the County in directing Sergeant Cliff Lascink not to be interviewed by WCPOA." The Sheriff's Office objected based on "attorney-client privilege, attorney work product, and relevance." The ALJ indicated that he would probably sustain the attorney-client privilege objection if the WCPOA simply asked about Dicken's legal advice, suggested that other testimony and Exh. C-14 could establish what the WCPOA had claimed that it was going to seek from Dickens, and invited the WCPOA to make an offer of proof. The WCPOA made such an offer, and Exh. C-14 was admitted into evidence minutes later. Dickens was not called to testify.

The WCPOA objected to the ALJ's proposed order, asserting that the ALJ erred in sustaining objections to Ortega's testimony and excluding her testimony. The WCPOA argues that Ortega's testimony was central to its allegation under ORS 243.672(1)(a).[3] Specifically, the WCPOA contends that Ortega's testimony would be directly relevant to whether the subpoenaed witnesses felt intimidated or had their desire to participate in the hearing chilled.

[3]The WCPOA's memorandum in aid of objections and for oral argument, which was filed on August 16, 2023, contends that Ortega's testimony would be relevant to its claim under ORS 243.672(1)(b). However, the WCPOA's objections, which were filed on or about April 11, 2023, did not contain an objection to the ALJ's ruling on Ortega's testimony relating to its (1)(b) claim. To the extent that the memorandum purports to assert an additional objection, we do not consider that new objection because it is untimely. *See* OAR 115-010-0090 (requiring objections to be filed within 14 days of the date of service of the ALJ's recommended order). The WCPOA therefore only properly asserted an objection to the ALJ's recommended ruling on its (1)(a) claim, regarding the exclusion of Ortega's testimony.

Under OAR 115-010-0050, we will admit "[e]vidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs" and exclude evidence that is irrelevant, immaterial, or unduly repetitious. However, the pleaded allegations concern the lawfulness of a March 15, 2021, email sent by Chief Deputy Degman, and Ortega was not hired until over six months later. We are not persuaded that the testimony of an employee, hired over six months after an email was sent, is material or relevant as to whether that email interfered with, coerced, or restrained employees in violation of ORS 243.672(1)(a), as alleged in the complaint. WCPOA has not demonstrated how Ortega's testimony is material or relevant to the pleaded allegation. If WCPOA's theory of its case revolved around Ortega's actions, then it could have pleaded that specifically in an amended complaint or filed a separate complaint. WCPOA did neither and failed to satisfactorily demonstrate the materiality or relevance of Ortega's testimony regarding the (1)(a) allegation concerning the March 15, 2021, email. Accordingly, we agree with the ALJ's decision regarding Ortega's testimony.

2. During the hearing, the ALJ admitted WCPOA's Exhs. C-1 through C-9, C-11, C-13 through C-49, C-51 through C-56, C-58 through C-68, and specifically rejected Exh. C-50, C57, and Exhs. C-69 through C-72. The ALJ also admitted Exhs. C-10 and C-12, but only the portions of those two exhibits that include Chief Deputy Degman's March 15, 2021, email. Additionally, the ALJ admitted all of the Sheriff's Office's exhibits. Upon review, we conclude that those rulings were correct.

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

FINDINGS OF FACT[4]

The Parties

1. The Sheriff's Office is a law enforcement agency, and a "public employer" within the meaning of ORS 243.650(20). It is a department of the County. Another County department is the District Attorney's (DA's) Office.

2. The Sheriff's Office is led by the Sheriff, who is elected. The Sheriff's Office's second-highest rank is Undersheriff. Its third-highest rank is Chief Deputy. The Sheriff's Office has a "traditional," non-military organizational hierarchy.

3. During the time relevant to this dispute, Patrick (Pat) Garrett was the Sheriff, a role that he had occupied since 2011. The current Undersheriff is John Koch, who had had that role for "a little under two years" as of the second day of the hearing for this case. Karlyn Degman is currently one of the Sheriff's Office's Chief Deputies. Another Chief Deputy is Al Roque.

4. The Sheriff's Office has an Investigations Division, a Jail Division, a Patrol Division, and a Services Division. The Sheriff's Office also has an Internal Affairs/Professional Standards Unit that handles all of the Sheriff's Office's internal complaints and all investigations involving Sheriff's Office staff.

[4]WCPOA objected to the placement of certain factual findings within footnotes. We have reviewed those objections, find them to be without merit, and exercise our discretion to forego further discussion.

5. The WCPOA, a union, is a "labor organization" within the meaning of ORS 243.650(13). As of the hearing for this case, the WCPOA represented two distinct bargaining units of Sheriff's Office employees. The first WCPOA unit includes employees/classifications in the Patrol, Jail, and Investigation Divisions (and is described as the Patrol/Jail unit below). The second, newer WCPOA unit includes employees/classifications in the Sheriff's Office's Criminal Records Unit and has been described as the "Support Group."

6. As of the hearing, the Sheriff's Office and the WCPOA were parties to a collective bargaining agreement (CBA) that established the terms and conditions of employment for the WCPOA's Patrol/Jail bargaining unit. By its terms, that CBA ran from 2019 through 2022. As of the hearing, the parties were still negotiating a successor CBA for the Patrol/Jail unit.

7. Article 1 of the parties' 2019-2022 CBA, which is the CBA's "recognition" clause, specifically states that the County recognizes the WCPOA as the exclusive bargaining agent for all "full-time employees" in certain classifications, including Recruit Deputy, Deputy, Corporal, Detective, Jail Recruit Deputy, Jail Deputy, Jail Corporal, Forensic Technician 1, Forensic Technician 2, Forensic Analyst, Civil Recruit Deputy, Civil Deputy, Evidence Officer 1, Evidence Officer 2, and Senior Evidence Officer. Article 1 also states, "Temporary, part-time, seasonal, variable hour, confidential and supervisory employees shall be excluded from the bargaining unit and not covered by this Agreement." The rank of Corporal is a higher rank than the rank of Deputy.

8. As noted, currently, the WCPOA is also the exclusive representative of a separate bargaining unit of Sheriff's Office employees in the Sheriff's Office's Criminal Records Unit. As of the end of the hearing for this case, the parties had finished bargaining for the Criminal Records bargaining unit (though that unit's CBA and precise unit composition are not included in the record).

9. At all times material, the WCPOA's President has been Patrick Altiere. He is also a WCPOA-represented Detective in the Sheriff's Office's Investigations Division.

Chief Deputy Degman's Email (Issue 1)

10. On January 19, 2021, the WCPOA filed a representation petition with this Board to certify a new bargaining unit, in Case No. RC-002-21. Through that petition, the WCPOA sought to represent a new bargaining unit of approximately 29 to 33 Sheriff's Office employees who worked in the Sheriff's Office's Criminal Records Unit as a Criminal Records Specialist 1, Criminal Records Specialist 2, or Criminal Records Senior. As indicated, that new unit would be distinct from the WCPOA's existing unit of Sheriff's Office employees.

11. On January 21, 2021, the Board sent the Sheriff's Office a copy of the WCPOA's representation petition. Afterward, the Sheriff's Office objected to the petition.

12. On February 22, 2021, the Board notified the Sheriff's Office and the WCPOA that a hearing regarding the WCPOA's representation petition had been scheduled for March 9, 2021.

The same day, the WCPOA's attorney, Mark Makler, issued subpoenas commanding the subpoenaed individuals to appear at the March 9, 2021, Board hearing.

13. On February 23, 2021, the WCPOA gave the County a list of Sheriff's Office employees that the WCPOA had subpoenaed for the Board hearing to potentially act as a witness. The witness list included 31 employees in total. Most of those employees were petitioned-for individuals who worked in the Criminal Records Unit.[5] Subsequently, the hearing was rescheduled to June 15 and 16, 2021, and updated subpoenas were served. At all times, the Board hearing was scheduled to occur during traditional work hours.

14. After Chief Deputy Degman received the WCPOA's witness list, she spoke about it with Dale Yee. Yee works in the County's Human Resources (HR) Department as a Senior HR Analyst. Yee is also the Sheriff's Office's HR Liaison, and has been working closely with the Sheriff's Office and its employees in that role since 2018.

15. During their conversation, Yee told Chief Deputy Degman that, because of the number of people on the witness list, the two should probably let the witnesses know, "as a courtesy," that they were on the list and that subpoenas were coming. At the time, Yee was concerned about the listed individuals being pulled from work and having their personal lives interrupted. Yee also believed that alerting the employees would help with "operational planning," and was concerned that having such a large number of employees off of work at the same time could negatively impact the Sheriff's Office's "operational functions." Yee was aware of the Sheriff's Office's minimum staffing requirements, and was concerned that several of the listed employees worked the same shift, that some employees might be on leave at the time, and that HR would have to schedule people to make sure that the group's work was done.

16. On March 15, 2021, Chief Deputy Degman sent an email (the Degman email) to most of the Sheriff's Office employees included in the WCPOA's witness list, using the recipients' work email addresses. That group included petitioned-for employees as well as President Altiere.[6]

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[5]Exh. C-56 (like Exh. C-9, the witness list) indicates that the WCPOA subpoenaed 31 Sheriff's Office employees to appear at the March 9, 2021, Board hearing (rather than 35, as suggested by the Sheriff's Office's post-hearing brief. Two of the subpoenas included in Exh. C-56 do not state who is being subpoenaed, and the end of that exhibit also includes two blank pages.

[6]The WCPOA asserts that Chief Deputy Degman's email was not sent to "WCPOA counsel or WCPOA leadership," and that it "was directed solely to the class of employees seeking WCPOA representation." A comparable assertion was made in the amended complaint . However, as noted, the email was also sent to WCPOA President Altiere, who is a Detective and was already part of the WCPOA's preexisting Patrol/Jail bargaining unit. The WCPOA is correct, however, that the same email was not simultaneously sent to the WCPOA's attorney, Makler (who had personally subpoenaed the emailed employees in the first place and would already have been aware of the upcoming hearing date). Degman's email also was not simultaneously sent to Sheriff Garrett, Undersheriff Koch, or Records Manager Melaney Koch, despite those "managers" being subpoenaed by the WCPOA as well. That said, those particular individuals were separately emailed by Yee on March 12, 2021, regarding their availability for the then "tentatively" scheduled June 15 and 16, 2021, hearing.

The subject of the Degman email was "Save The Date: June 15 & 16." The Degman email stated, in its entirety:

> "Greetings;
>
> "Your name has been submitted as a potential witness for a legal proceeding involving the Employment Relations Board to be held on June 15 & 16, 2021. As with any legal proceeding, we do not know exactly what time you will be called, or how long it may take. I wanted to let you know to save the dates, and you should be expecting a subpoena as we get closer.
>
> "We will let you know more as we approach the actual hearing. If you have any questions, you may contact Dale Yee, Senior Human Resources Analyst at (***) ***-****.[7]
>
> "Kind Regards,
>
> "*Karlyn Degman*
> "*Chief Deputy*
> "*Washington County Sheriff's Office*
> "***.***.****"

(Emphasis in original.)

17. The County has sent out emails resembling the Degman email when it intended to pull employees away from their normal duties. For example, similar emails were sent out when employees were going to receive subpoenas in a criminal case, when employees were going to receive a subpoena while they were out on FMLA leave or were going to be on vacation, and when employees were going to have to attend a training. By doing so, the County seeks to encourage employees to let it know if there are going to be any conflicts.

Responses to Chief Deputy Degman's Email

18. When the Degman email was sent, Yee did not initially believe that the email's recipients would be concerned about the email. In Yee's view, everyone on the witness list was likely part of the WCPOA's effort to certify the bargaining unit and would already have received a subpoena, and therefore would already have been aware of the upcoming hearing.

19. Shortly after the Degman email was sent, one of the recipients (who is unnamed in the record) contacted Yee about the email. That particular employee asked Yee what the email was about, and expressed that she had concerns about the timing because she had a vacation scheduled for the same days as the scheduled hearing. In response, Yee told the employee that the Degman

[7]Troublingly, the WCPOA repeatedly inaccurately asserts that the Sheriff's Office "specifically and deliberately directed recipients of the WCPOA issued subpoenas *to not contact WCPOA* and instead to contact County HR with questions about the WCPOA issued subpoenas." Similar inaccuracies are included in the amended complaint and in some of the testimony.

email concerned the WCPOA's representation petition, that the WCPOA issued the subpoenas, and that she could contact the WCPOA for further details.

20. When Criminal Records Specialist 2 Lisa K. Asp received the Degman email, Asp found the email to be "confusing" and "uncomfortable," and Asp "didn't really know what to think of it." Subsequently, Asp spoke with Criminal Records Specialist 2 Jaclyn Kearns about the email to clarify what the email meant. During the organizing drive for the WCPOA's new bargaining unit, Kearns was one of the leaders of the group's organizing efforts. Asp did not contact Yee or HR about the Degman email.

21. When Kearns received the Degman email, Kearns was "pretty shocked." Kearns also felt that the email was "intimidating," and that she "was being backed into a corner [that she] didn't want to be in." Further, Kearns felt that the email implied that she needed to communicate with HR and not with the WCPOA. Nevertheless, Kearns did not communicate with Yee or HR about the Degman email. However, she did speak with President Altiere about the Degman email and her coworkers' concerns.[8]

22. When Criminal Records Specialist 2 Shannon Mahaffey received the Degman email, Mahaffey was "a little bit confused." Mahaffey also felt that Degman's email implied that Mahaffey was supposed to ask HR questions about her subpoena instead of the WCPOA. However, Mahaffey did not contact Yee after receiving the email.

23. When Criminal Records Specialist 2 Olivia Remington received the Degman email, Remington thought that the email was "confusing." Additionally, Remington went on to speak with Kearns about the email, and asked Kearns for clarification regarding whether the subpoenaed employees should be asking HR or the WCPOA about the subpoenas. Remington did not speak to Yee about the email.

24. When Criminal Records Specialist 2 Dee Dee Turner received the Degman email, Turner's "stomach dropped a little bit" because Turner didn't understand why HR was involved. HR's involvement also "kind of scared" Turner "a little bit." However, after receiving the Degman email, Turner "didn't do anything about it" other than speak about the email with Asp, Kearns, and Mahaffey to "vent" and see what they thought about it. Turner did not contact Yee after receiving the Degman email, and Turner's feelings about participating in the hearing did not waver as a result of the email.

25. None of the Sheriff's Office employees who received the Degman email contacted President Altiere with questions about when the hearing would occur.

[8]President Altiere testified that some unnamed individuals shared their concerns with Kearns, and that Kearns then shared some of those concerns with him. We conclude that that particular testimony was overly vague and amounts to unreliable hearsay within hearsay. On the same subject, Kearns simply testified that Mahaffey, Asp, Turner, and some unnamed others were "really confused" about why they were being told to talk to HR about the subpoenas.

Whitely-Related Disputes (Issues 2, 5, and 6)

26. Cliff Lascink is a Sergeant for the Sheriff's Office. He is a supervisor in the Sheriff's Office's Investigations Division, which includes the Sheriff's Office's WCPOA-represented Detectives. Lascink also supervises the Sheriff's Office's Crisis Negotiation Unit (CNU).

27. On November 11, 2020, Sergeant Lascink sent an email to the rest of the CNU. That group included, among others, Patrol Corporal Tyler Whitely. In the email, Lascink wrote of the 35th Annual Western States Hostage Negotiators' Association Seminar and Hostage Negotiation Team Competition in Boise, Idaho, which was set to run from May 2 through 5, 2021. In previous years, the CNU had regularly attended the seminar/competition (which takes place in a different city each year).

28. On November 22, 2020, Corporal Whitely submitted a training/travel request for the 2021 Boise seminar/competition. The request form indicated that the training was not required for Whitely to maintain certification.

29. On January 10, 2021, Corporal Whitely had an exchange with a female subordinate, Deputy Sheriff NH. During that exchange, Whitely made a statement that NH took as sexual harassment. Whitely and NH are both represented by the WCPOA.

30. On January 16, 2021, Corporal Whitely called his CNU supervisor, Sergeant Lascink, while Lascink was off duty. During the brief conversation that followed, Whitely told Lascink about the potentially harassing comment that Whitely had recently made to Deputy NH. Lascink did not immediately formally report the incident as required by County policy, but Lascink did take notes about his conversation with Whitely.

31. On or around January 27, 2021, Sergeant Jeremy Braun had a telephone conversation/interview with Deputy NH. During that conversation, NH shared that a coworker had made unwanted sexual comments to her. NH also told Braun, "I've done this before. I don't trust the Sheriff's Office, I don't trust the union."[9]

32. After Sergeant Braun's initial conversation/interview with Deputy NH, Braun interviewed NH again. During that second interview, Braun told NH:

> "Take somebody you trust to your meeting with [Chief Deputy Degman]. And it does not have to be a union rep. * * *
>
> "* * *

[9]According to the amended complaint, during Sergeant Braun's January 27, 2021, telephone conversation with Deputy NH, NH did not disclose to Braun that her complaint related to Corporal Whitely. That detail is generally supported by the affiliated exhibits.

> "I am saying that because knowing that you don't trust the union. * * * I don't know who you have [a] relationship with but take somebody with you. Somebody that you trust to keep their mouth shut but somebody that you trust to go, 'That's not what was said. That's not what she said. That's not what was alleged.' And somebody's just gonna sit there and take notes and be your friend."[10]

33. Around the time that Deputy NH discussed the alleged harassment with Sergeant Braun, NH separately reported to Chief Deputy Degman that Whitely had sexually harassed her. After that, on January 29, 2021, Degman reported the incident to the Professional Standards Unit.

34. On January 29, 2021, after Deputy NH had made her report, the Sheriff's Office formally opened an Internal Affairs investigation regarding Corporal Whitely's alleged harassment. Later the same day, upon Whitely's arrival at work, Chief Deputy Degman served Whitely a memorandum notifying Whitely that Whitely was the subject of such an investigation.[11] Among other things, the memorandum noted that Degman had assigned Lieutenant Joe Noffsinger and Sergeant Tony Bass (who oversaw the Professional Standards Unit) to investigate the complaint against Whitely. The affiliated "Service Related Inquiry Memo" (SRIM), which was also provided to Whitely at the time, noted, "A [Sheriff's Office] employee reported Cpl. Tyler Whitely sexually harassed her." A completed SRIM outlines the details of a personnel complaint, the subsequent investigation of the complaint, and the results of the investigation.

35. On January 29, 2021, Corporal Whitely was also served a letter, signed by Chief Deputy Degman, placing Whitely on paid administrative leave. That letter stated:

> "This letter is to inform you that you are the subject of the above-listed internal affairs investigation. The investigation involves allegations of serious misconduct. Because of the seriousness of the situation, I am placing you on paid administrative leave effective January 29, 2021, while the investigation is ongoing.
>
> "During your administrative leave period, you must contact Sgt. Tony Bass twice each weekday, Monday through Friday, at 8:30 a.m. and at 1:30 p.m. Sgt. Bass can be reached at ***-***-****. He may have instructions for you regarding meetings and interviews to be conducted. Your shift will be Monday through Friday, 8:00 a.m. to 4:00 p.m. with Saturday and Sundays off. While on administrative leave, during your new shift hours you must carry the PSU-issued cell phone (***-***-

[10]Neither Deputy NH nor Sergeant Braun testified. Nevertheless, the ALJ admitted WCPOA's Exh. 38, which is a WCPOA-made transcript of the pair's later discussion, over the Sheriff's Office's multiple objections. We separately note that, in its post-hearing brief, WCPOA inaccurately restates the contents of the transcript that it introduced into evidence when it asserts that Braun told NH "not to trust WCPOA and not to use a WCPOA representative when [NH] meets with Chief Deputy Degman concerning her complaint against Whitely." A similar assertion was made during the WCPOA's opening statement.

[11]The case number for the Internal Affairs investigation regarding Corporal Whitely's alleged sexual harassment was "IA2021-0001." The case number for the separate Internal Affairs investigation regarding Sergeant Lascink's failure to report Whitely's self-reporting (discussed in detail below) was "CC2021-0017."

****) and be able to respond to the Sheriff's Office upon request within one hour between the hours of 8:00 a.m. to 4:00 p.m.

"Furthermore, if you have a need to come to any of the Sheriff's Office buildings during your administrative leave period, unless directed to respond by a command officer, you are to contact Sgt. Noffsinger to arrange that visit.

"Until you are notified that this investigation is complete, I am ordering you to not discuss the incident with anyone except the Executive Command staff (Chief Deputy, Undersheriff, or Sheriff), the assigned investigators, a Human Resources representative, legal counsel, Chaplain Pau Lyda, a WCPOA representative, or an EAP representative.

"While on administrative leave, your commission as a deputy sheriff is suspended. You are not authorized to carry a concealed weapon or take any actions that would normally be expected of an actively commissioned deputy sheriff. If you have any questions regarding the meaning of these instructions, please contact me or any command officer for clarification.

"Upon receipt of this letter, you are ordered to surrender all firearms, mag cards, keys, identification cards, County-owned cell phone (along with the password), County-owned laptop/computers/iPads (along with the password), and any other items requested by a supervisor, that were issued by or represent this agency to the senior ranking person present."

36. On February 1, 2021, at 9:40 a.m., Sheriff's Office Executive Assistant Sharon Gray sent an email out to Sheriff's Office staff including Corporal Whitely. The email had "Modified Duty Assignment" as its subject and, at the end, a photograph of Whitely. The email stated:

"Greetings,

"Effective February 1, 2021 and until further notice, Corporal Tyler Whitely will be working a Modified Duty Assignment.

"Modified Duty Assignments are a temporary change in a person's normal work assignment, in order to support the staff member and/or legitimate business needs of the Office. Reasons for a modified duty assignment include:

"• An injury or other health related matter
"• Implementation of the Critical Incident Protocol
"• Personnel Investigations
"• Other administrative needs of the Office

"Please respect the privacy of all staff members working in modified duty assignments. In some cases, they will have been instructed not to discuss details

> and in other cases, they may simply wish not to divulge personal and private information. So, please refrain from asking questions; staff who want (and are allowed) to share information must be afforded the opportunity to do so on their own terms and of their own volition.
>
> "Lieutenant Joe Noffsinger and Sergeant Tony Bass are available as points of contact for any needs that arise."

37. At the Sheriff's Office, the terms "administrative leave" and "modified duty" have related but different meanings. Administrative leave is a type of leave of absence, and it is usually paid leave. Normally, an employee is put on administrative leave when he or she has been alleged to have committed "serious misconduct." Often, an employee is put on administrative leave to separate the employee from the workplace during the course of the related personnel investigation. Moreover, while the employee is on administrative leave, he or she is generally not supposed to perform their normal work/duties. Whether someone can go to a paid conference while on administrative leave is handled on a case-by-case basis. However, normally, while an employee is on administrative leave because of alleged serious misconduct, he or she cannot attend training. The Sheriff can make exceptions to those policies, but that rarely happens. Whenever an employee is put on administrative leave, the employee is given a letter that notifies him or her of the leave, provides the reason for the leave, and describes the restrictions placed on the employee during the period of leave.

38. When an employee is put on administrative leave during a personnel investigation, the Sheriff's Office may tell staff that the employee has been given a "modified duty" (or a "temporary work assignment"), rather than state that the employee is on administrative leave. The more generic/umbrella "modified duty" term is used in order to be relatively transparent with staff while also protecting the privacy of the person being investigated and/or the person who filed a complaint. The same approach is taken when someone is out on medical leave because of an injury or other health-related issue (as was the case with Whitely as of the hearing, following an injury), and when the Sheriff's Office has an "administrative" or "business need" for doing so.

39. On February 1, 2021, at 9:46 a.m., Sergeant James Uglesich, who was also the Field Training Supervisor, sent an email to Sergeant Bass and others in response to the above-referenced "Modified Duty Assignment" email. Therein, Uglesich wrote, "Cpl. Whitely is scheduled to attend FTO School next week. I am not sure what the issues are surrounding this but will he be able to attend that training?" At 10:50 a.m., Bass responded, writing, "Sorry I was away from email, but I did talk to Sgt. Martin about this and confirmed it with Lt. Noffsinger. He will not be able to attend FTO school next week."

40. On February 3, 2021, Sergeant Lascink spoke with his immediate supervisor, Lieutenant Ed Rowlinson, about Lascink's January 16, 2021, conversation with Corporal Whitely. By that point, Lascink was already aware that Whitely had been placed on administrative leave as a result of the investigation about Whitely's alleged harassment.

41. After the Sheriff's Office started its investigation of Corporal Whitely's alleged sexual harassment, the WCPOA assigned Patrol Corporal Brad King to represent Whitely and give

Whitely advice and counsel throughout the investigation. At the time, King was also an elected "Senior Division Representative" for the bargaining unit. As part of his work with Whitely, King conducted an "independent investigation" of Whitely's alleged sexual harassment, on behalf of the WCPOA. After King was assigned to Whitely, Whitely told King that he had self-reported the exchange with Deputy NH to Sergeant Lascink.

42. On February 11, 2021, in the morning, Sergeant Bass called and interviewed Corporal Whitely about Whitely's alleged sexual harassment. During that interview, Whitely disclosed that, previously, he had self-reported his allegedly harassing comments to Sergeant Lascink. After and because of that interview, Bass reached out to Lascink, via email, about interviewing him later that same day in the afternoon (once Lascink had started his shift).

43. On February 11, 2021, after Sergeant Bass emailed Sergeant Lascink, Corporal King sent a text message to Lascink, asking Lascink if Lascink would be willing to provide a statement to King before Lascink spoke with the Professional Standards Unit. In response, Lascink shared that he needed to ask his supervisor, Lieutenant Rowlinson, for guidance first because Lascink had not spoken with the Professional Standards Unit yet and Lascink had never before been asked to make such a statement. When Lascink asked Rowlinson about it, Rowlinson responded that he would check on it. An hour or so later, Commander John Bennett called Lascink and told Lascink that, "per protocols," Lascink was not allowed to talk about the Internal Affairs investigation with "anybody" who was not in the Professional Standards Unit or part of command staff. After that, Lascink shared Bennett's limiting directions with King, and also told King that he was going to be interviewed by Bass that afternoon. Upon hearing that, King asked Bass if King could sit in on Bass's interview of Lascink. However, King's request to Bass was also denied.

44. On February 11, 2021, at 4:46 p.m., Sergeant Bass and Sergeant Todd Baker interviewed Sergeant Lascink, via Teams, as part of the existing investigation of Corporal Whitely's alleged sexual harassment.

45. On February 13, 2021, Sergeant Bass interviewed Sergeant Braun as part of the continuing investigation of Corporal Whitely. In that interview, Braun spoke of his conversations with Deputy NH.

46. On February 17, 2021, Sergeant Lascink signed and approved Corporal Whitely's November 22, 2020, training travel request for the Boise seminar/competition, along with comparable requests from other employees.[12]

47. On February 20, 2021, Sergeant Bass interviewed Sergeant Lascink a second time as part of the investigation of Corporal Whitely.

48. On February 24, 2021, President Altiere told Sheriff Garrett that Corporal King had asked Sergeant Lascink to participate in an interview as part of the WCPOA's independent

[12]The Sheriff's Office incorrectly asserts that Corporal Whitely was initially *approved* for the training on November 22, 2020, citing to an exhibit that reflects that was the date that Whitely *requested* the training. The testimony at hearing is that Sergeant Lascink "digitally signed" and thereby approved the request form on February 17, 2021, after Whitely was on put on administrative leave.

investigation of the Whitely matter, and that Lascink had been told not to talk to anyone about the investigation except the Professional Standards Unit's investigators. In response, Garrett explained that that was the standard instruction that is given to staff, but also stated that he "was happy to look into it and follow up." At that point, Garrett (like Lascink and King) had never dealt with the issue before. After speaking with Altiere, Garrett spoke about the issue with the County's legal advisors to make sure that the Sheriff's Office was "on the right track." County Counsel told Garrett that whether Lascink could be interviewed by the WCPOA was, in essence, entirely up to Lascink. It then became clear to Garrett that the Sheriff's Office needed to correct the initial instruction that it had given Lascink.

49. On February 24, 2021, at 5:29 p.m., after the above-referenced conversation with County Counsel, Sheriff Garrett sent an email response to WCPOA President Patrick Altiere. The subject of the email was "Following Up; WCPOA Interview Request to SGT Lascink." Therein, Garrett wrote:

> "Hi Patrick
>
> "As we chatted a short time ago, thank you for raising the matter of WCPOA wanting to interview SGT Lascink for a parallel investigation. I understand when SGT Lascink checked with PSU about the WCPOA request, he was advised to not speak with anyone about the investigation. When we met yesterday, you expressed your belief our instruction to SGT Lascink was improper. I committed to revisiting our instructions.
>
> "After our meeting with you, we consulted county counsel. I learned that instructions provided to SGT Lascink to not discuss the matter with anyone came from *initial* county counsel advice. County Counsel informed us this afternoon that they further researched the question and conclude that WCPOA may request non-represented staff members to be interviewed absent involvement by [the Sheriff's Office]. To be clear, [the Sheriff's Office] has no role in WCPOA's request to interview a non-represented staff member, or that staff member's decision to grant the interview. After consulting with County Counsel, I feel it appropriate that a WCPOA interview of a non-represented staff member take place when the non-represented staff member is off duty.
>
> "I appreciate you raising the question. I do not recall this issue being raised before. It's helpful to our staff and process to clarify.
>
> "I am happy to entertain additional questions or opinions, as necessary, regarding this matter."

(Emphasis in original.)

50. On February 25, 2021, President Altiere responded to Sheriff Garrett's February 24, 2021, email, writing:

> "I wanted to get back with you regarding the counties [*sic*] take on interviewing non-WCPOA folks. I understand what you're saying is you acknowledge we can interview anyone and if they are not WCPOA members, it must be on their off duty time.
>
> "I agree with that to an extent. For example, that person could choose to take their lunch or a break… that person could choose to ask their boss if they can chat with WCPOA rep on-duty and the boss could say YES or NO - and because it is [Sheriff's Office] work time and that person is NOT represented or covered by a CBA then that person would have to comply with that directive while on duty.
>
> "But there is NO control and no limitation off duty and the [Sheriff's Office] and Washington [C]ounty cannot influence/shade/cajole/wink as to the direction and decision that person makes in discussion anything with WCPOA. This goes so far to fostering an anti-labor or anti-WCPOA culture that would cause a non-represented employee to fear retaliation if they spoke with us. We would look very closely at any communication with a non-represented employee regarding their interaction with us when conducting our due diligence during an investigation as interfering.
>
> "That's it. It[']s essentially the same thing, but with caveats that I basically have to state.
>
> "Thank you!"

51. On March 3, 2021, Patrol Division Commander Gil MacGregor sent an email to Sergeant Bass and others. It stated, "Can one of you reach out to Corporal Whitely an[d] ensure that he knows that he is not approved to attend the WHSNA training." On March 4, 2021, at 11:00 a.m., Bass responded, "I called Whitely and gave him this notice. For clarification, is this because of COVID and out of state travel restrictions or because of his modified duty status?" At 11:01 a.m., MacGregor responded to Bass, writing, "Because of this current work status."

52. On March 12, 2021, Sheriff Garrett responded, via email, to President Altiere's February 25, 2021, email about the WCPOA's request to interview Sergeant Lascink. Garrett wrote:

> "Thank you for the discussion just now. As we chatted, it's reasonable that WCPOA could ask a non-represented staff member if they would be willing to answer questions during their break, or take-a-break and answer questions provided it's generally within the break period. It will take us a few weeks to inform the groups – commanders through sergeants.
>
> "Thank you for raising the break possibility. It's something we didn't envision, but it is quite consistent with the law."

53. Before Sheriff Garrett sent his March 12, 2021, email, representatives from the Sheriff's Office and the WCPOA had a "robust discussion" about the WCPOA's right to interview Sergeant Lascink during a morning labor-management meeting. In that meeting, both sides agreed that Lascink would be permitted to speak with the WCPOA, but also agreed that the interview had to happen on Lascink's own accord during Lascink's breaktime.

54. On March 18, 2021, Commander Bennett called Sergeant Lascink on the telephone. During their call, Bennett told Lascink that, after some discussions, it had been determined that Lascink could be interviewed by a WCPOA representative if that representative asked Lascink for it. Bennett also added that Lascink was under no obligation to provide the WCPOA with a statement if Lascink did not wish to do so. By that time, Lascink had been interviewed twice by the Professional Standards Unit (as detailed above). Subsequently, Lascink agreed to be interviewed by the WCPOA, after Corporal King reached out to Lascink again and asked for a statement.

55. On March 19, 2021, at around 1:00 p.m., Corporal King interviewed Sergeant Lascink, as requested, as part of the WCPOA's independent investigation of Corporal Whitely's alleged sexual harassment. Lascink's statements during that interview were consistent with the statements that Lascink made in his earlier interviews with the Professional Standards Unit regarding Lascink's conversation with Corporal Whitely, and consistent with what King had already heard from Whitely. During King's interview with Lascink, the two also discussed what Lascink's superiors had told Lascink about whether he could be interviewed by the WCPOA.

56. On April 9, 2021, Commander MacGregor sent an email to Corporal Whitely. In the email, MacGregor wrote:

> "Tyler, I apologize for not circling back with you on this training earlier.
>
> "Your training request is still approved for the [Western States Hostage Negotiators' Association] training in May. Your hotel, conference fees, etc., are still in place, the only thing that will need to be purchased is an airline boarding pass. Because of your Modified Duty status, I could not sign the counties [*sic*] travel authorization paperwork at the time it was presented.
>
> "Once your modified duty status changes back to full duty we can review this request again."

57. On April 12, 2021, Corporal Whitely forwarded Commander MacGregor's April 9, 2021, email to Sergeant Lascink.

58. On April 22, 2021, at 9:00 a.m., Sergeant Lascink sent an email to Sergeant Bass. Therein, Lascink wrote:

> "I spoke to LT Weston about the upcoming CNU conference in Boise, and he made the decision to send another deputy in Whitely's place. At this point, the conference is one week out and there's a small window of ability to change registration/lodging

without losing training funds. Also, airfare was never purchased for Tyler [Whitely] due to his modified duty status. We have to purchase those ASAP while there's still time and costs are reasonable.

"I spoke to Tyler and he's already aware of the decision. He's obviously disheartened about it. Just FYI if something is brought up to you."

59. On April 22, 2021, at 2:06 p.m., Sergeant Bass sent an email to Undersheriff Koch that stated:

"FYI – Sgt. Lascink just called me for an update because Whitely is still scheduled through training for a flight and hotel for a CNU conference out of state. I advised Cliff [Lascink] to talk to training and find out when the last day would be to cancel without any fees and if this was not resolved by that date training should cancel it."

60. On April 22, 2021, at 2:43 p.m., Brad King, who was a Patrol Corporal at the time, sent an email, on behalf of the WCPOA, to Sergeant Baker. King's email included a variety of assertions regarding "*Loudermill*" rights that King had purportedly received from the WCPOA's legal counsel.[13]

61. In short, a "*Loudermill* meeting" is a meeting during which the employee and his or her union representative are given the opportunity to provide the employer's decision-makers mitigating, exculpatory, or other relevant information (including naming additional witnesses) and evidence to consider. The meeting takes place before the employer determines whether and what level of discipline should be imposed.

62. Before a *Loudermill* meeting takes place, the Sheriff's Office usually shares certain documents and information with the employee (including a summary of allegations, for example). For over a year and a half before the hearing, for every Internal Affairs investigation of a WCPOA-represented employee, the Sheriff's Office has been giving the WCPOA everything in the employee's Professional Standards Unit file on a thumb drive, before the employee's pre-disciplinary/*Loudermill* meeting. Moreover, the Sheriff's Office has been doing so "automatically" (without a request being made by the WCPOA), in accordance with an agreement of the parties. When a broad information request is made, and is purportedly made pursuant to the Public Employee Collective Bargaining Act (PECBA), the Sheriff's Office may opt to check with its legal counsel to see whether PECBA actually requires the Sheriff's Office to provide the requested information. After that, the Sheriff's Office follows its legal counsel's advice and attempts to provide information that is responsive to the PECBA information request.

<u>WCPOA's First Information Request (1/3)</u>

63. On April 23, 2021, WCPOA's attorney, Makler, sent a PECBA information request to Sergeants Bass and Baker, via email, in preparation for the upcoming pre-disciplinary/*Loudermill* meeting. The information request specifically sought:

[13] *See Cleveland Board of Education v. Loudermill*, 470 US 532, 105 S Ct 1487 (1985).

"1. A copy of any and all materials, interviews, audio/video, transcripts, texts, email, summaries, reports - everything that [the Sheriff's Office] and investigators associated with this matter have collected, created, reviewed and/or relied upon as to this Whitely matter and investigation;

"2. A copy of Whitely's training records, including anything related to harassment training;

"3. A copy of Whitely's last five performance evaluations (2017, 2018, 2019, 2020, 2021);

"4. A copy of Whitely's discipline history while employed at [the Sheriff's Office]."

64. On April 26, 2021, Patrol Division Commander MacGregor sent an email to Corporal Whitely with the subject of "May WSNIA training." MacGregor wrote, "Tyler [Whitely], as of today, 26, April 2021, your modified duty status has not changed so I am denying your participation in the WSNIA conference in Boise, Idaho." In Whitely's view, at the time, Whitely had not yet been given a clear opportunity to discuss whether he should be able to attend the conference.

65. On April 29, 2021, Corporal Whitely was issued a notice of pre-disciplinary/*Loudermill* meeting. The notice was signed by Undersheriff Koch, and served on Whitely by Sergeant Bass. The notice listed the policies that Koch believed Whitely had violated and provided a date and time for the pre-disciplinary/*Loudermill* meeting. According to the notice, the purpose of that meeting was to allow Whitely an opportunity to provide his description of the relevant events and any information or evidence he may have to refute, mitigate, or otherwise explain the matters or incidents described in the notice. The meeting was initially scheduled to take place on May 10, 2021.

66. On April 29, 2021, at 9:31 a.m., Sergeant Bass sent Corporal King and others an email with three attachments. The email stated, "Here is a PDF copy of the signed Pre-Disciplinary Notice that was served to Cpl. Whitely this morning along with the SRIM and Summary of Allegations, which were also provided to Cpl. Whitely." That information was sent to the WCPOA in response to the WCPOA's initial information request.[14]

67. On April 30, 2021, Makler sent an email to Undersheriff Koch. In that email, Makler asked to have Corporal Whitely's pre-disciplinary/*Loudermill* meeting rescheduled to May 13, 2021, emphasized that the WCPOA needed the "PECBA info" that Makler had requested on

[14]In its amended complaint, the WCPOA acknowledges that, on April 22, 2021, the Sheriff's Office provided the WCPOA a pre-disciplinary/*Loudermill* notice, a summary of the investigation, and the SRIM, as requested. However, the WCPOA also asserts that the Sheriff's Office "did not provide all of the PECBA information" that it had requested on April 22 or 23, 2021.

April 23, 2021, and asked what level of discipline the Sheriff's Office was considering for Whitely.[15]

68. During April 2021, while Corporal Whitely was still on administrative leave, Whitely was allowed to attend 20 hours of training that would let Whitely retain his certification as a critical incident de-escalation trainer. Initially, the Sheriff's Office opted not to let Whitely attend that training in accordance with their normal administrative leave policy. However, in the end, Sheriff Garrett made an exception for that specific training.

69. In late April 2021, Sheriff Garrett spoke with the Sergeants, Lieutenants, and Commanders of Patrol and Jail during "supervisor meetings" about the WCPOA's right to ask unrepresented employees to be interviewed as part of a parallel investigation of a personnel matter that is also being investigated by the Sheriff's Office, as well as unrepresented employees' right to participate in those interviews if they choose to do so. Garrett also spoke about the same topic with other "senior leaders" in the Sheriff's Office.

70. On May 3, 2021 (a Monday), at 9:17 p.m., Undersheriff Koch responded to Makler's April 30, 2021, email. In the email, Koch agreed to the May 13, 2021, date that Makler had proposed for Whitely's pre-disciplinary/*Loudermill* hearing. Koch's email also stated, in part, "Cdr. Bennett should have the disks with the additional information your [*sic*] requested through the PECBA request by Tuesday or Wednesday this week. We will let you know when it is ready." At 9:20 p.m. the same day, Makler responded, writing, "If it would help facilitate this request I can deliver a blank jump drive to Cmdr Bennett tomorrow 5/4/21 in the AM."

71. On May 4, 2021, at 7:44 a.m., Commander John Bennett emailed Corporal King and others, writing, "Thank you all for your responses. We will get all the information on a thumb drive today. Whom shall we deliver it to?" At 7:45 p.m. the same day, King responded via email, writing, "I can pick it up sir." At 7:46 p.m., Bennett responded, "Thanks Brad. I'll let you know as soon as its ready to go." Subsequently, before Whitely's pre-disciplinary/*Loudermill* meeting took place, either Executive Assistant Sharon Gray or Bennett gave King a thumb drive that included, among other things, audio files, transcriptions, and summaries of interviews that were part of Whitely's investigation. At least one of those files was an audio recording of Sergeant Bass interviewing Sergeant Lascink.[16]

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[15]The WCPOA inaccurately asserts that this email from Makler was sent on *May* 30, 2021, when it was actually sent on *April* 30, 2021, as noted in Exh. C-43 and in the amended complaint.

[16]The record does not specify whether this particular audio recording was of Sergeant's Lascink's February 11, 2021, interview, his February 20, 2021, interview, or a combination of both. However, testimony regarding Exh C-50, which was unadmitted, suggests that audio of the February 11, 2021, was shared. In its amended complaint, the WCPOA alleges that the batch of materials that the Sheriff's Office provided the WCPOA on May 4, 2021, did not include "any information and/or reference included to any WHITELY – LASCINK SRIM investigation and/or a LASCINK discipline and/or LASCINK interviews associated with the WHITELY investigation and/or discipline." (Emphasis in original.) Later on in the amended complaint, the WCPOA makes a similar claim about what the Sheriff's Office provided the WCPOA in response to a June 10, 2021, information request.

72. On May 13, 2021, the pre-disciplinary/*Loudermill* meeting for Whitely occurred as scheduled. Corporal King was present for that meeting, but during the meeting he did not speak or present any information.

73. On June 1, 2021, the Sheriff's Office started a new and separate Internal Affairs investigation regarding Sergeant Lascink's apparent failure to report Whitely's January 16, 2021 conversation, when Whitely self-reported his potentially harassing comments.

74. On June 4, 2021, Undersheriff Koch served Corporal Whitely a discipline letter. The letter listed the policies that Koch believed Whitely violated, what factors Koch considered in the decision to discipline Whitely, and Koch's final disposition. As stated in the letter, Whitely was demoted to the classification/rank of Deputy from Corporal, and Whitely's "collateral duties" (which included training) were suspended for one year (a period that ended on June 12, 2022).

75. Undersheriff Koch made the final decision regarding whether to discipline Corporal Whitely and what level of discipline was appropriate. When Koch was making those decisions, Koch did not consider, review, or rely on anything that was part of the investigation of Sergeant Lascink. Moreover, in Koch's view, the outcome of the separate investigation of Lascink (which was not concluded until June 30, 2021), had no bearing on the Whitely case. Sheriff Garrett did not participate in the decision-making process in Whitely's investigation and subsequent discipline (but Garrett was involved in the grievance and arbitration process that stemmed from Whitely's discipline). Garrett delegated responsibility for Whitely's investigation to Koch.

WCPOA's Second Information Request (2/3)

76. On June 10, 2021, Makler (WCPOA's attorney) sent Undersheriff Koch a second PECBA information request related to Whitely's demotion, via email. Therein, Makler asked for the following:

> "1. A copy of the actual discipline letters (non-redacted) of ANY WSCO employee who has been demoted during the time that Pat Garrett has been the Sheriff, this includes sworn and non-sworn and civilian and ALL ranks and positions and classifications in the Sheriff's Office;
>
> "2. A copy of the actual discipline letter (non-redacted) of ANY WSCO employee who has been demoted during the time that Pat Garrett has been the Sheriff, this includes sworn and non-sworn and civilian and ALL ranks and positions and classification in the Sheriff's Office for violation of the following WSCO and/or County Policies:
>
> "A. WSCO HARASSMENT-FREE WORKPLACE POLICY #211 (all revisions);
> "B. Washington County Personnel Rules & Regulations 5.1
> "C. Washington County Harassment Policy 301[.]"

77. On June 11, 2021, Undersheriff Koch sent a detailed response to Makler's new information request. Koch's email stated, in relevant part, "[W]e will provide the relevant information on an external thumb drive."

78. On June 15, 2021, Makler replied to Undersheriff Koch's response to the new information request. Makler wrote that the WCPOA had decided to move forward with a grievance regarding the Whitely dispute. Makler asserted that his email constituted "Step 2" of the parties' contractual grievance procedure (though it was actually the "initial" filing) and detailed the WCPOA's positions regarding Whitely's discipline. Makler also noted that the WCPOA was still "expecting to receive" additional "PECBA info." After that, Makler asserted that the Sheriff's Office had failed to provide "background and historical context for discipline imposed at the Sheriff's Office associated with the policies investigated," and noted that the Sheriff's Office had failed to provide that specific information to the WCPOA "prior to the pre-disciplinary meeting."

79. In June or July 2021, after Corporal Whitely's pre-disciplinary/*Loudermill* meeting, King was promoted from Corporal to Sergeant. Once that happened, King was no longer part of the WCPOA and stopped representing Whitely.

80. On June 30, 2021, at the end of the investigation of Sergeant Lascink, Commander David Marzilli determined that Lascink should receive training and counseling because of Lascink's failure to act on Whitely's self-reporting. The Sheriff's Office does not consider either of those options to be "formal discipline." Moreover, the lowest form of discipline for the Sheriff's Office's is an oral reprimand.

81. Article 31 of the 2019-2022 CBA that governs the WCPOA's Patrol/Jail bargaining unit (and thus would not have covered Sergeant Lascink) addresses discipline and discharge. Article 31.1 states, in part, "Discipline shall be limited to oral reprimand, written reprimand, demotion, suspension and discharge or, with the concurrence of the employee, and an alternate form of disciplinary sanction. Disciplinary action shall be progressive in nature but may be imposed at any level as determined by the severity of the conduct involved and all relevant circumstances. * * * No career employee shall be discipline without just cause." Article 31.3 provides, in part, "Internal investigations will be conducted in accordance with the WSCO Internal Affairs Investigations Policy * * *."

WCPOA's Third Information Request (3/3)

82. On October 4, 2021, Makler signed a confidentially agreement regarding some additional information that the WCPOA had requested (detailed below) after the WCPOA learned of the separate Lascink investigation.[17] On October 5, 2021, Adam Collier, an attorney representing the Sheriff's Office, signed the same agreement. The confidentiality agreement stated that the WCPOA had requested (at an undisclosed time) the following documents:

[17]In the amended complaint, the WCPOA asserts that, in mid-to-late September 2021, after the grievance regarding Whitely's discipline was scheduled for arbitration, the WCPOA discovered that Sergeant Lascink had been "disciplined" for his interactions with Whitely.

"• Any SRIM files and materials initiated and/or related to and focused on Sgt Cliff Lascink and his interactions with Tyler Whitely and/or [NH]

"• Any PSU investigation files, materials initiated and/or related to and focused on Sgt Cliff Lascink and his interactions with Tyler Whitely and/or [NH]

"• Any performance documentation, counseling, discipline, work-plan or the like initiated and/or related to and focused on Sgt Cliff Lascink and his interactions with Tyler Whitely and/or [NH][.]"

The confidentiality agreement also noted, among other things, that the County had "agreed to disclose the requested documents if the [WCPOA] agrees to enter into a confidentiality agreement."

83. On October 5, 2021, the Sheriff's Office gave the WCPOA a number of documents, including: (1) a transcript of Sergeant Lascink's February 11, 2021, interview; (2) the questions that Sergeant Bass had prepared to ask Lascink during that February 11, 2021, interview; (3) Bass's summary of the February 11, 2021, Lascink interview; (4) the SRIM/personnel complaint against Lascink; and (5) Bass's summary of the second interview of Lascink that took place on February 20, 2021.[18]

84. The provided summary of the second interview of Sergeant Lascink that took place on February 11, 2021, was officially part of the investigation of Whitely (IA #: 2021-0001). However, that particular document was not created until June 2021, and thus could not have been considered in advance of Whitely's May 13, 2021, pre-disciplinary/*Loudermill* hearing. Moreover, the SRIM/personnel complaint against Lascink was not created until June 1, 2021. (The record does not reveal when the transcript of the February 11, 2021, interview or the summary of that interview were created.)

New Job Description Language (Issue 3)

85. On January 29, 2021, Senior HR Analyst Yee sent an email to WCPOA President Altiere. Yee's email included, as attachments, job descriptions for the WCPOA-represented Deputy Sheriff and Jail Deputy classifications that had recently been revised by the County.[19] At the end of the email, Yee wrote, "If possible, I'd like to try and wrap these up in the next couple of weeks and get them published on our public website in time for the next recruitment push." Before Yee sent the January 29, 2021, email, Yee and Altiere had discussed changing the job descriptions during a telephone call.

[18]This Finding of Fact is confirmed by the Sheriff's Office's post-hearing brief, the WCPOA's post-hearing brief, and the amended complaint. In addition, the amended complaint claims that, upon request, the Sheriff's Office provided the audio of Sergeants Bass and Baker's February 11, 2021, interview of Sergeant Lascink; a copy of Lascink's SRIM complaint (that was assigned on June 1, 2021); and Bass's summary of his February 20, 2021, interview of Lascink. The amended complaintalso asserts, however, that a *recording* of the February 20, 2021, interview had not yet been provided.

[19]In practice, Sheriff's Office's job descriptions are regularly called "job classifications."

86. On February 1, 2021, President Altiere responded to Yee's January 29, 2021, email. Altiere's email included the WCPOA's own revised versions of the Deputy Sheriff and Jail Deputy job descriptions as attachments.

87. On February 4, 2021, Yee responded to President Altiere's February 1, 2021, email. In Yee's email, Yee noted that "Command" had come back with one additional proposed change to the job descriptions. (The term "Command" generally refers to all of the Sheriff's Office's Commanders and Lieutenants.) The change referenced in Yee's email was made to make it easier for the Sheriff's Office to bring in lateral hires. Later the same day, Yee and Altiere exchanged other emails addressing the proposed change.

88. On February 26, 2021, Yee sent an email to President Altiere that included the County's proposed "final edits" to the Deputy Sheriff and Jail Deputy job descriptions. One of those changes involved the addition of "language related to County-wide equity, diversity and inclusion initiatives" to the "essential job duties" section in each of the job descriptions. Specifically, that proposed additional language stated, "assist in creating a positive and supportive work environment; enforces a safe workplace; establishes a culture of teamwork and communication; creates a workplace that promotes organizational values of workplace equity, diversity and inclusion and actively promotes an environment respectful of living and working in a multicultural society." In practice, the words "equity, diversity, and inclusion" are commonly referred to collectively as EDI (or ED&I or DEI). As indicated, the EDI initiative was a County-wide initiative/resolution, and it began in 2020. It was not only a Sheriff's Office initiative.

89. On February 27, 2021, President Altiere responded to Yee's latest email. Altiere wrote:

> "Hi Dale!
>
> "WCPOA objects to your paragraph 5 being included under 'essential job duties' as it is not one of those. It is more along the lines of a mission statement/something we should ALL strive to do every day. Therefore we think it is more appropriate that it is included at the beginning under 'distinguishing characteristics' or if you find that inappropriate another section at the beginning under a name we can agree on.
>
> "I have edited just ONE of the classifications and attached it for simplicity sake for your review but we make the same objection/suggestion to both classifications.
>
> "My team is happy to begin bargaining this if this is not acceptable.
>
> "Thank you!"

90. On March 9, 2021, at 4:57 p.m., Yee responded to President Altiere. Therein, Yee wrote, "Just FYI – I referred your concerns to Eva LaBonte. She desires to set up a time with you

to discuss. Do you know what your availability looks like the rest of this week and into the next?" LaBonte is the HR Director and is Yee's supervisor.

91. On March 11, 2023, President Altiere met with Yee and LaBonte, via videoconference, in a meeting set up by Yee. During that meeting, Altiere reexplained the WCPOA's position on the EDI language (including that it should go in the "distinguishing characteristics" section), and the two sides discussed the County's position. Yee and/or LaBonte also explained why the County wanted to include the EDI language at all, explained why the County wanted to include the EDI language in the "essential job duties" section, and explained that the EDI language was being included in all of the County's job descriptions. At the end of the meeting, LaBonte told Altiere that the County had decided that it would be moving forward with including the EDI language in the "essential job duties" section (without reaching a full agreement on the matter with the WCPOA).

92. The County contends that it did not engage in "formal bargaining" or bargain to impasse regarding the inclusion of EDI language. Rather, when the County decided to include the EDI language, it invoked Article 9 of the parties' 2019-2022 CBA (though the record does not reveal when, how, or if that position was shared with the WCPOA). Article 9, which concerns "Management Rights," lists, as one of a range of areas of responsibility that are reserved to the employer "and not subject to negotiation," "the determination of the duties and qualifications of job classifications." In the County's view, the EDI language is a "job duty."

93. On March 11, 2021, at 4:02 p.m. (after the above-referenced meeting), President Altiere sent a follow-up email to Yee concerning the County's proposed changes to the job descriptions. In that email, Altiere reiterated that the County's proposed EDI language should not be included in the "essential job functions" sections of the job descriptions, and should instead be included in the "distinguishing characteristics" sections of the same. In the same email, Altiere also wrote:

> "The [distinguishing characteristics] section is much more appropriate for such a broad immeasurable specific essential job duty. It is indeed something we should all already be doing and should do every day. It is encompassed by the Sheriff's Office core values of 'Do your best. Do the right thing. Treat others the way you want to be treated.' It is also part of the oath of office we all take from the Sheriff when we swear to uphold the laws of the State of Oregon. There are numerous polices already in place that cover all potential misconduct that could be represented by that [EDI] paragraph.
>
> "The WCPOA fully endorses and supports the inclusion of that [EDI] paragraph in every WCPOA job description under the 'Distinguishing Characteristics' section. We also fully support and endorse holding every employee of Washington County responsible for conducting themselves every day in a way that reflects the spirit of that paragraph."

94. On or before March 12, 2021, the County posted a job description for Deputy Sheriff on the County's hiring website. The job description included the disputed EDI language.

95. On April 2, 2021, at 2:47 p.m., Yee sent an email to President Altiere. In that email, Yee wrote:

> "Sorry for the delay, but I am following up in response to your feedback below. I appreciate your willingness to provide your thoughts on the matter and I have referred it to my leadership for consideration. After further consideration, we have decided to proceed with inclusion of the EDI language as Essential Job Duty #5. Again, we feel this is more appropriate as it indicates that this is a key essential job duty, and we intend it to be the same for all County classifications moving forward – including all job classifications represented by WCPOA."

96. On April 2, 2021, at 2:55 p.m., President Altiere responded to Yee's email, writing:

> "Yeah I know I saw the change was implemented that day (of the meeting we had via Zoom), if not earlier, on the [C]ounty website indicating HR had no intention of bargaining it with the WCPOA per the PECBA. The ULP lawsuit is being drafted. ERB I believe will notify Washington County when it is filed.
>
> "As a matter of fact it[']s probably best you consider this a notice to save any and all material that pertains to the job description change, when it was uploaded to the [C]ounty website in its current format, etc… All the records, drafts, emails… the usual deal."

97. The WCPOA did not object to the inclusion of the disputed EDI language in the job descriptions. However, the WCPOA objected to *where* the County proposed to place the EDI language within the job description. Sheriff's Office employees can be subject to discipline for not meeting expectations that are specified anywhere within their job description. Likewise, an employee can be disciplined for violating County policies that are not spelled out in a job description, including preexisting policies that already addressed EDI.

98. Since the County implemented the changes to all of its job descriptions on or around March 11, 2022, no Patrol/Jail bargaining unit employees have been disciplined or demoted for not following the new EDI language.

2021 Sergeant Applications and EDI Feedback

99. In April and/or May 2021, a number of WCPOA-represented Sheriff's Office employees applied to become either a Patrol Sergeant or a Jail Sergeant. As indicated above, Sergeants are not included in the WCPOA's Patrol/Jail bargaining unit.

100. Ordinarily, when someone wants to promote to Sergeant, the applicant completes and submits an application (which includes a cover letter, references, and a resume) through the County's hiring website. Applicants who meet the essential qualifications are then interviewed by a panel of assessors. Those interviews can include "tabletop exercises" that may include roleplaying or responding to hypotheticals. After an interview, applicants are given a document

that includes a verbatim transcription of all of the comments and feedback that was written down by the various assessors who interviewed the applicants. That document can include comments about the applicant's performance and/or suggestions regarding how the applicant can improve. However, the document that is given to the applicants is anonymized and accordingly does not specify which assessor wrote which comment or response.

101. Applicants are eventually given a numerical score/percentage for their written materials and assessment/oral interview performances, and eventually all of the applicants' scores are compiled and ranked in an "eligibility list." Veterans' points may also be added to applicants' scores. In general, openings are filled by the applicants in the order that they were ranked (with the highest-ranking applicant getting the first opening, etc.). In order to be placed on the eligibility list and be eligible for a promotion, an applicant needs to score at least 70 percent. Further, even when an applicant is qualified and at the top of the eligibility list (*e.g.*, Matt Prince), he or she can only promote when there is an available opening. For the 2021 Sergeant applications, Yee determined applicants' scores and coordinated the verbatim transcription of the assessors' comments.

102. During the 2021 Sergeant application process, three assessors were used for every panel interview. One of those assessors (whose name is not provided in the record) noted in his or her feedback for nearly "every single applicant" that the applicant "[d]id not demonstrate any equity, diversity, or inclusion awareness and may need training" and recommended that they "[s]peak to values around EDI in leadership" (with minor changes in the precise language used). The same negative feedback was given to those applicants who were ultimately promoted to Sergeant (*e.g.*, Brad King, Nicholas Jones, Alex Noli, and Amanda Werder), and at least one applicant who had previously received EDI training (Matt Prince).

103. After the 2021 applicants completed their interviews, each applicant received a copy of the feedback for his or her interview and was given his or her score, as usual. After receiving that feedback, many applicants assumed that they had been graded negatively (and that their overall score and rank had been negatively affected) because of the anonymous assessor's noted EDI concerns, and believed that that was unfair because they had not been warned that EDI would be an element of the application/assessment. However, applicants had not been told how or whether any EDI concerns affected their scores, or even how the scoring had been done. Moreover, initially, applicants were only given their own personal scores (rather than the ranked "aggregate" eligibility list).

104. A number of concerned applicants shared their concerns about the EDI feedback with President Altiere. Altiere subsequently shared those concerns with Chief Deputy Roque. Additionally, some of the applicants contacted Senior HR Analyst Yee about the issue, and Yee responded to each in turn.

105. On July 30, 2021, Yee responded to the concerns of one 2021 applicant named Matt Prince, who is currently a Corporal and (at least as of the hearing) is temporarily acting as a Sergeant. In that email, Yee wrote:

> "I appreciate your concern and your response. This was overall feedback/observation by one assessor and I can assure you that, as I did the final score review, [EDI] was not a scored component of the process. The intent was not to question your value or beliefs, but rather to serve as a recommendation for further insight/encouragement of development in this area by our organization as a whole.
>
> "I hope that helps clarify, and I do apologize for any negative impact it may have caused."

106. For the 2021 Sergeant application process, the County deliberately included assessors who were not County employees. The assessor who gave the EDI feedback was an "outside observer" and was not employed by the County. Further, despite that assessor's feedback, applicants were not specifically scored on EDI. Nevertheless, some "components" of the exercises and some supplemental questions had EDI-related aspects built into them.

New Cold Case Detective/Investigator Classification (Issue 4)

107. In October 2020, the Washington County DA's Office was awarded a competitive $470,000 federal grant called "Prosecuting Cold Cases Using DNA" that is funded by the U.S. Department of Justice's Bureau of Justice Assistance. The grant specifically only funds the investigation of violent crime "cold cases" that involve DNA associated with a possible suspect. In short, a cold case may be defined as a case that is "three or more years old that is not under active investigation." The grant's award is also limited in duration, only lasting for three years.

108. On February 9, 2021, Sheriff Garrett administered the oath of office "granting peace officer authority" to Kevin Winfield, who had previously retired from the Tualatin Police Department in 2020. Officially, Winfield was sworn in as a "Peace Officer (Reserve Deputy) Sheriff."[20] The same day that Winfield was sworn in (which was also Winfield's official start date), the DA's Office issued a press release (written by the Sheriff's Office) announcing the swearing in. That press release specifically identified Winfield as a "Detective."[21] Moreover, Winfield's "working title" is "Investigator/Detective," and his position has also been referred to as "Cold Case Detective" or "Cold Case Investigator." However, the County does not consider Winfield's position to be part of the WCPOA's Patrol/Jail bargaining unit, which includes Detectives, and does not consider Winfield's position to fall under the Detective classification. Unlike what happened with Winfield, when WCPOA-represented Detectives are sworn in, they are officially sworn in as "Detectives."

109. The County did not bargain with the WCPOA regarding the creation, terms, or conditions of Winfield's position. Instead, the County relied on the exclusionary language in the parties' CBA. Moreover, Winfield was hired by the DA's Office, not the Sheriff's Office.

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[20]Winfield's position has a specific end date, but that date is not apparent in the record. However, the record indicates that the federal grant is a three-year grant, and that the position became funded in October 2020. Moreover, Winfield's oath is set to expire in January 2025.

[21]The Sheriff's Office did not identify Winfield as a "Reserve Deputy" in the press release because the Sheriff's Office did not believe that doing so would make sense to the public.

110. Unlike a WCPOA-represented Detective, Winfield is not a regular, full-time employee. Instead, Winfield is a variable hour, part-time employee. Winfield's position is also a temporary (as opposed to "permanent") one, as it only endures for the three years that the grant is funded. As noted above, the recognition clause in Article 1 of the parties' 2019-2022 CBA states, "Temporary, part-time, seasonal, variable hour, confidential and supervisory employees shall be excluded from the bargaining unit and not covered by this Agreement." The Sheriff's Office has also previously employed other variable hour "Cold Case Investigators," all of whom have been excluded from the WCPOA's Patrol/Jail unit. Because of those details, the County determined and continues to believe that Winfield's position must be excluded from that WCPOA unit.

111. Winfield reports to Senior Deputy District Attorney Allison Brown, who works in the DA's Office (not the Sheriff's Office). Brown also signs Winfield's timesheets, which are handwritten on generic County timesheets. Although Winfield does not report to anyone in the Sheriff's Office, he has trained with Sheriff's Office employees. However, Brown did not assign or require that training.

112. The DA's Office transfers the relevant grant funding to the Sheriff's Office to pay Winfield's wages. Additionally, the DA's Office does not handle Winfield's employment benefits.

113. Winfield is paid by the hour, and does not have a set schedule or hours of work. Instead, Winfield can choose which hours and which days to work, as long as he stays within the parameters of the grant. In practice, Winfield has largely chosen to work 10 hours every Tuesday and Wednesday each week, for a total of 20 hours a week on average. If Winfield determines that he has to work 40 hours in a single week, he will take the next week off. Winfield does not earn vacation or holiday leave, compensatory time, or health insurance, but he does accrue sick leave through the County.

114. Winfield does not get a uniform or clothing allowance and buys his own work pants.

115. The Sheriff's Office has a "longstanding past practice" (lasting at least 20 years) of employing part-time, variable hour, and/or temporary employees. Moreover, some of those employees similarly performed Detective or Investigator work, and some were recently-retired police officers who performed "temporary grant work." As he did with Winfield, Sheriff Garrett swears in other variable hour, part-time employees performing law enforcement work, as required by state law.

116. Since 1987 or earlier, the County has consistently employed and then excluded all temporary, variable hour, and part-time employees from the WCPOA's Patrol/Jail bargaining unit. Much like Article 1 of the parties' 2019-2022 CBA, Article 1 of the parties' 1987-1991 CBA stated, in part, "Temporary, part-time, seasonal, extra help, confidential and supervisory employees shall be excluded from the bargaining and not covered by this Agreement." Every one of the parties' subsequent CBAs governing the Patrol/Jail unit has included comparable exclusionary recognition clause language.

117. The County does not have an official job description for Winfield's new position. However, the position performs some, but not all, of the duties listed in the Detective classification's job description.

118. Winfield and Detectives can both work on cold cases. Winfield and Detectives also similarly wear badges that have the word "Detective" written on them and are paid a comparable hourly rate.[22] Additionally, Winfield and Detectives both can perform interviews, complete reports, maintain records, and testify in court. Winfield, like a Detective, is also armed. (That said, the grant and DA's Office do not require him to be armed.) Finally, like a Detective, Winfield is expected to follow all Sheriff's Office polices as well as all County policies.

119. Because of the limitations of the federal grant, Winfield cannot perform a number of a Detective's essential job functions. For example, unlike Detectives, Winfield does not serve subpoenas, transport prisoners, talk with public schools or civic groups, dust for latent prints, or "surveil," and does not have access to a "Detective vehicle."[23] Furthermore, Detectives can generally investigate any type of case, while Winfield can only investigate violent unsolved crimes (which can include homicides, violent sexual assaults and certain types of missing person cases) that involve DNA associated with a possible suspect. Winfield is also not assigned cases by anyone else, as Detectives are. Instead, Winfield chooses, on his own, whether to work a particular cold case.

120. Beyond the work that Winfield does that Detectives do, other Sheriff's Office variable hour employees also perform work that resembles that of WCPOA-represented, full-time employees. That includes, for example, variable hour Jail Deputies who perform jail transport, which is also performed by represented Jail Deputies. Additionally, variable hour and full-time Sheriff's Office employees have similarly performed jail phone monitoring. Previously, the Sheriff's Office has also hired retirees (other than Winfield) to do cold case work on a temporary basis.

121. When Winfield reports to work, he sits in an enclosed office across from Chief Deputy District Attorney Bracken McKey's office. Further, while in the office, Winfield regularly works on a computer, reading files from the 1970s and 1980s. When Winfield sees a promising lead, he determines whether any witnesses are still alive and what evidence might exist. He also interviews witness and can prepare reports. In general, Winfield attempts to put together enough evidence to allow prosecutors to present an old case to a grand jury.

122. When Winfield finds a promising cold case, he contacts the Washington County area law enforcement agency (*e.g.*, Washington County Sheriff's Office, Oregon State Police, Beaverton Police Department, Hillsboro Police Department, or Tigard Police Department)

[22]When Winfield was sworn in, he was given the choice of choosing a badge that said "Detective" or a badge that said "Deputy." He also has separate "identification" that says "Cold Case Detective, Peace Officer, Kevin Winfield, Sheriff, Washington County."

[23]According to the WCPOA's post-hearing brief, WCPOA-represented Detectives are uniquely assigned "take-home vehicles."

that is the "parent" of the case to determine whether the agency will let him "adopt" the investigation of the case. The parent agency can either agree to let Winfield adopt and work the case or deny his request. If the parent agency agrees, Winfield may work with the agency's "liaison detective/investigator," who will help Winfield access evidence and enter reports into the parent agency's report system. Winfield works on an adopted case until he has done all that he can do with the case, or until the case goes "hot." If a case goes "hot," Winfield will ask the parent agency whether it wants the case back or whether the agency wants Winfield to continue working on the case.

123. On February 10, 2021 (the day after Winfield was sworn in), Makler, the WCPOA's attorney, sent an email to Sheriff's Office representatives, including Sheriff Garrett, requesting a variety of information regarding the Sheriff's Office's "Variable Hour Jail Deputies," a list of retirees working for the Sheriff's Office including Winfield, a job description for Winfield's position, and other related information.[24]

124. On February 18, 2021, Christina Sallee, a Business Manager for the Sheriff's Office who is in charge of issuing and maintaining employees' work cellphones, sent an email to all Sheriff's Office employees. It identified Winfield as "Detective Kevin Winfield." In the same email, which also included Winfield's contact information as an attachment, Sallee wrote, "Kevin [Winfield] is working with the [Sheriff's Office] and the DA's office on our cold cases." Winfield's work telephone is a Sheriff's Office cellphone.

125. On February 24, 2021, at 5:26 p.m., President Altiere sent an email to Undersheriff Koch and Sheriff Garrett. In that email, Altiere wrote:

> "WCPOA understands that the WCDA has a need for investigators that are police officers and that the hiring of Kevin Winfield as a Detective directly associated with and assigned to the DA's [O]ffice is a positive move for increasing and enhancing case review and criminal justice priorities in Washington County.
>
> "The reason for this email is that Detective and investigator work via and through the Sheriff's Office and as a [Sheriff's Office] deputy – classified or identified as a Detective – is the work of the WCPOA and covered by the WCPOA CBA, regardless of whether it is full-time or part-time and regardless of where the funds that pays for the work from.
>
> "So, WCPOA welcomes the addition of Detective Winfield and WCPOA expects and believes that Detective Winfield is a represented employee of the WCPOA.
>
> "Please contact me directly so that we can discuss the issues associated with Detective Winfield in relation to his status as an employee represented by WCPOA. Like you, I want to do this discussion and dialog in a collaborative way rather than address this issue through a CBA grievance and/or ULP.

[24]The parties agree that this particular information request has nothing to do with Issue 6. There is also no evidence that the information requested, if it existed, was not provided.

> "If you disagree then please do me the courtesy of telling me that you disagree (in writing) and please accept this email as notice of a CBA grievance related to this issue and I will arrange for a formal CBA grievance to also be provided as well to discuss the necessity of filing a ULP with WCPOA General Counsel."

126. Despite the language in the last paragraph of President Altiere's February 24, 2021, email, the WCPOA has not specifically filed a grievance alleging that Winfield is performing bargaining unit work, or a grievance regarding the creation of Winfield's position. Moreover, the WCPOA has not filed a representation petition with the Board seeking to represent Winfield's position. Nevertheless, the Sheriff's Office is aware that the WCPOA wants to represent Winfield's position and is concerned about Winfield performing bargaining unit work. During the negotiations for the Patrol/Jail unit's successor CBA (which, as noted, remained ongoing as of the hearing), the WCPOA proposed including Winfield's position in the WCPOA's bargaining unit, but that proposal has not been accepted.

127. On March 1, 2021, Sheriff Garrett responded to President Altiere's February 24, 2021, email concerning Winfield's WCPOA membership. Therein, Garrett wrote:

> "Thank you for the call just now. I appreciate your email question and discussion so we could research and respond. As I think you are aware, Kevin Winfield is a part-time cold case investigator working for our office and funded by a WCDA grant. We discussed your question internally and asked county counsel and HR for their opinion. The consensus is Article 1.1 lists *full time* job classifications the county recognizes WCPOA as their exclusive bargaining agent. Also, Article 1.1 says, 'Temporary, part-time, seasonal, variable hour, confidential…employees shall be excluded from the bargaining unit and not covered by this Agreement.' Given the nature of Kevin's work, we're concluding the CBA does not cover his assignment.
>
> "I understand and appreciate you're looking out for his well-being in the event he's involved in a serious use of force event. We could not agree more that protecting him in such an instance (while very low probability) is our shared interest. I will ensure he is well represented if such an event occurs."

(Emphasis in original.)

128. On March 11, 2021, President Altiere sent another email to Sheriff Garrett about Winfield's WCPOA membership. In that email, Altiere wrote:

> "It may be that Article 1 has an exclusion that is currently in the CBA that was placed there years before part time detectives or deputies were even a consideration. Frankly, part time people doing any sort of law enforcement work was unheard of outside of reserves and considered a non-issue. Several years ago [Undersheriff] Mori wanted to negotiate part time police and out of a concern for professionalism and training we did not think it was wise. [The County] and [the Sheriff's Office] went ahead and did it anyway. That will be addressed in due time. For the time

being, the work that is being done by Winfield (and others) is WCPOA work and as indicated in an earlier email WCPOA agrees that the DA's Office can and should have this work done with agreement by WCPOA the WCPOA is willing to allow the work to be done by a retiree like Winfield.

"If the [Sheriff's Office] and County are going to take the position that Winfield is not a represented employee or in a classification that is represented by WCPOA - then the issue moves from one of representation by WCPOA to an unfair labor practice under ORS 243.672 (and PECBA in general) committed by the County in recruiting for and hiring a position like Winfield's.

"That position is WCPOA/Detective work and was done without bargaining with or agreement from WCPOA. Especially since this is special assignment work that could be allocated to a current regular represented employee of the WCPOA who can get compensation, overtime, plain-clothes work and all of the other benefits of being a Detective. That does not mean we disapprove of the hiring of Det. Winfield for this position, it means he is absolutely a member of the WCPOA. This does not even begin to talk about the considerations of current Detectives who might benefit from a rotation in a spot like that."

129. On March 17, 2021, Lieutenant Timothy Tannenbaum sent an email to Winfield and the entire Investigations Division.[25] Therein, Tannenbaum wrote:

"Good morning,

"I wanted to send out an update on the DA's Office cold case grant. The DA's office applied for and was awarded a grant to fund a cold case investigator. This position was filled by Kevin Winfield. You may have already seen him around the office. The position is somewhat of a hybrid in that he is commissioned by [the Sheriff's Office], but working for the DA's office under a grant. Allison Brown and I are coordinating his supervision. I believe Kevin is currently in the process of gathering information on cold cases. Please feel free to reach out to him if you have a case you think he would be interested in. There is no obligation to share a case, so if you are attached to a case and want to keep working it, do what's best for you and the case. Obviously, keep your sergeants in the loop as well. This position is new and continues to evolve, so please feel free to reach out to me if you have any questions."

130. As of the November 7, 2022, hearing for this case, the County had given an offer of employment to an individual named Murray Rau to be a second variable hour Cold Case Detective (the other being Winfield) without bargaining that action. Additionally, the proposed pay rate for that additional position, like Winfield's pay rate, is based off of the pay range of the WCPOA-represented Detective classification under the parties' CBA.

[25]Tannenbaum was a Lieutenant in the Investigations Division when he sent this email. He is currently the Commander of the Investigations Division.

CONCLUSIONS OF LAW

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

2. The Sheriff's Office did not violate ORS 243.672(1)(a), (b), (c), (d), (i), or (j) when, in March 2021, it emailed employees subpoenaed by the WCPOA.[26]

ORS 243.672(1)(a)

ORS 243.662 provides that "[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 243.672(1)(a) makes it an unfair labor practice for a public employer or its designated representative to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." The language of ORS 243.672(1)(a) provides two distinct prongs, one of which prohibits interference, restraint, and coercion "because of" the exercise of protected rights. Put another way, the "because of" prong prohibits the employer from basing its actions on an employee's protected activity. The other prong of ORS 243.672(1)(a) prohibits actions that interfere with, restrain, 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). Under either prong, and for all of the unfair labor practice claims in this complaint, the burden of proof is on the WCPOA, while the Sheriff's Office has the burden of proving affirmative defenses. *See* ORS 183.450(2); OAR 115-010-0070(5)(b).

To determine if an employer violated the "because of" prong, we ordinarily examine the employer's motives or reasons for the disputed action. However, it is unnecessary for a complainant to prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. *Mult. Sch. Dist. No. 1*, 171 Or App at 623; *Lebanon Community School District*, UP-4-06 at 29, 22 PECBR at 351. Stated differently, evidence of employer hostility or anti-union animus is unnecessary to establish a claim under the "because of" prong. *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05 at 22-23, 22 PECBR 372, 393-94 (2008). When presented with "because of" claims, we typically examine the record as a whole to determine what motivated the employer to act. *Mult. Sch. Dist. No. 1*, 171 Or App at 626. Our role, broadly, is to decide which party's explanation of the employer's reasons we believe. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan District of Oregon*, Case No. UP-48-97 at 8, 17 PECBR 780, 787 (1998).

When we analyze an employer's actions under the "in" the exercise prong, we focus on the likely consequences or efforts of the employer's actions on employees. An employer commits an

[26]We reiterate that the WCPOA only objected to the recommended order's conclusions regarding its claims under ORS 243.672(1)(b). Although this order includes conclusions of law regarding all of the WCPOA's claims, any objections to conclusions of law other than those concerning ORS 243.672(1)(b) are unpreserved and invalid. *See* OAR 115-010-0090(3).

"in" the exercise violation if the employer's conduct, when viewed objectively under the totality of the circumstances, has the natural and probable effect of deterring employees from engaging in activity protected by PECBA. *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-52-11 at 14, 25 PECBR 263, 276 (2012). Because the "in" the exercise prong's standard is objective, neither the employer's motive nor the extent to which employees actually were coerced is controlling. *Mult. Sch. Dist. No. 1*, 171 Or App at 623-24; *Service Employees International Union Local 503, Oregon Public Employees Union v. City of Tigard*, Case No. UP-040-13 at 7, 26 PECBR 131, 137 (2014). Put simply, our test for the prong is: Would a reasonable person be chilled from exercising PECBA rights by the employer's conduct? *Oregon Public Employees Union v. Jefferson County*, Case No. UP-55-98 at 14, 18 PECBR 109, 122, *recons*, 18 PECBR 199 (1999). Additionally, an employer that commits a "because of" violation also generally commits a derivative "in" violation because the natural and probable effect of the employer's unlawful action is to chill the exercise of protected rights. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-42/50-12 at 28, 25 PECBR 640, 667 (2013) (citing *Clackamas County Employees' Assn. v. Clackamas County*, 243 Or App 34, 259 P3d 932 (2011)).

We first note that Chief Deputy Degman was never called to testify about the email that she sent regarding the WCPOA's subpoenas. Further, unrefuted testimony from Yee, who was involved in the decision to send the email, credibly indicates that the Sheriff's Office was centrally concerned about "operational planning" and minimum staffing issues. Those are legitimate, nondiscriminatory motivations for sending the email. There is also no evidence that Yee or Degman harbored any inappropriate animus. We separately note that Yee credibly testified that the Sheriff's Office has sent out similar emails in other, comparable situations. President Altiere's testimony that the Sheriff's Office has not always similarly emailed employees subpoenaed by the WCPOA in other "litigation" is not compelling evidence of an improper motivation, given that those other cases were not described in detail, and it is unknown whether the witness lists in those cases were similarly "exhaustive and lengthy." Accordingly, we conclude that the "because of" prong of (1)(a) was not violated.

Additionally, under the circumstances, we do not see anything inherently inappropriate about the fact that the vast majority of the recipients of the email were petitioned-for employees. We also note that the email did not actually *require* anyone to contact Yee or HR (as WCPOA has repeatedly and inaccurately suggested), and certainly did not bar employees from testifying or contacting any WCPOA representatives. Indeed, the evidence shows that some of the email's recipients did reach out to WCPOA leaders instead of someone in HR. We also conclude that, under the circumstances, there is nothing threatening or otherwise inappropriate about a superior emailing subordinates and providing a telephone number that recipients could use "if" they had any questions. That seems particularly true here, where it appears that Yee was a regular point of contact for Sheriff's Office employees (and presumably is not in the recipients' chain of command), and there is no evidence that the employees involved had preexisting labor relations issues with Chief Deputy Degman or the Sheriff's Office.[27] Relatedly, it generally does not follow

[27]The Sheriff's Office's subsequent actions reinforce the innocuous nature of the email. Specifically, the County promptly responded to the WCPOA's inquiries about the email by providing the WCPOA with a list of recipients that allowed the WCPOA to follow up with recipients as the WCPOA saw fit (*e.g.*, if the WCPOA genuinely believed that the email created confusion).

that alerting employees of the date that they may need to testify will deter them from doing so (perhaps especially when those employees are being subpoenaed to testify by their group's own representative). This Board has held that distribution of factual information generally does not have the natural and probable effect of interfering with or restraining the exercise of protected rights. *Jefferson County*, UP-55-98 at 15, 18 PECBR at 123 (citing *Oregon Association of Classified Employees, Briggs and Ramsay v. Douglas School District No. 4*, Case No. UP-82-89 at 18, 12 PECBR 547, 564 (1990)).

We recognize that, as detailed above, certain recipients testified that they were confused, intimidated, or made uncomfortable by the email. However, the subjective impressions of employees do not, on their own, establish an "in" the exercise claim. Rather, as noted above, we apply an objective standard and consider the totality of the circumstances. Here, the record does not establish that Yee or Chief Deputy Degman had ever been anything other than respectful to them, and the record does not establish that the Degman email—either on its face or in context—was anything other than a proactive communication intended to avoid scheduling conflicts. The mere fact that the Sheriff's Office objected to the representation petition is not, in and of itself, evidence of a (1)(a) violation. Similarly, when objectively viewed, an employee's knowledge of the objection does not naturally amount to an implied threat (and the Sheriff's Office's general knowledge that some Criminal Records Unit employees wanted to be represented does not necessarily imply that the Sheriff's Office would improperly target those employees). As a result, we also conclude that the Sheriff's Office did not violate the "in" the exercise prong of (1)(a).

ORS 243.672(1)(b)

ORS 243.672(1)(b) makes it 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." Fundamentally, subsection (1)(b) is concerned with the rights of the union itself, rather than the rights of the bargaining unit employees. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07 at 43, 22 PECBR 752, 794 (2008). To prevail on a (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 the exclusive representative. *Clackamas County Employees' Association v. Clackamas County*, Case No. UP-030-20 at 8 (2022) (quoting *State of Oregon, Department of Corrections, Santiam Correctional Institution*, UP-51-05 at 26, 22 PECBR at 397 (2008)). Stated differently, "[t]o establish a subsection (1)(b) violation, '* * * a complaining labor organization must provide evidence to support the conclusion that *some actual interference* with its existence or administration occurred as a result of the employer's actions.'" *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 in original)). A (1)(b) violation is not proven by a showing that the action *may* have a foreseeable effect on a labor organization. *Sandy Education Association and Davey v. Sandy Union High School District No. 2 and Heaton*, UP-42-87 at 10 n 8, 10 PECBR 389, 398 n 8 (1988) (citing *Oregon State Employees Association v. Coos Bay-North Bend Water Board*, Case No. C-122-80, 5 PECBR 4047 (1980)).

In this case, the record does not establish that the Degman email actually, directly, or adversely affected WCPOA's ability to serve as the exclusive representative. To begin, the record

indicates that, despite the email, recipients of the email testified in the hearing and freely communicated with the union's representatives and one another. Moreover, as discussed above, the Degman email (the conduct at issue in this case) is facially innocuous and merely conveyed factual information to employees. Furthermore, WCPOA's position ignores the standard for (1)(b) claims as set forth above, which requires that complainant provide evidence that some *actual interference* with its existence or administration occurred because of the Sherrif Office's conduct. Here, WCPOA has not proven that the Degman email somehow impaired or interfered with WCPOA's existence or administration.

The WCPOA also takes issue with the fact that the email was not sent to the WCPOA's attorney. To this end, WCPOA argues in its objections that the Board's rules regarding subpoenas provide for "a reciprocal obligation on the parties to a representation change petition to communicate with each other about subpoenas and witnesses." Our rules do not explicitly state such an obligation. Furthermore, even if such an obligation were implied, there is no apparent connection (and WCPOA does not articulate any) between such an implied obligation and an interference claim under (1)(b).[28] We also note that although the email was not sent to WCPOA's attorney, the email was sent to WCPOA President Altiere. WCPOA has not otherwise demonstrated how the email actually, directly, or adversely affected the WCPOA's ability to serve as the exclusive representative. For these reasons, we conclude that the Sheriff's Office did not violate ORS 243.672(1)(b).

ORS 243.672(1)(c)

ORS 243.672(1)(c) states, in relevant part, that it is an unfair labor practice for a public employer or its designated representative to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of * * * discouraging membership in an employee organization." In this context, we have defined the word "membership" very broadly to protect a wide variety of union activities. Additionally, our test for determining whether a violation of subsection (1)(c) has occurred is similar to the one we use in determining a violation of the "because of" prong of subsection (1)(a). In short, an employer's conduct violates (1)(c) if there is a causal connection between an employee's protected activity and the employer's action. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05 at 34, 22 PECBR 911, 944, *recons den*, 23 PECBR 34 (2009) (citing *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02 at 16, 20 PECBR 337, 352, *recons*, 20 PECBR 388 (2003)); *State of Oregon, Department of Corrections, Santiam Correctional Institution*, UP-51-05 at 25, 22 PECBR at 396 (citing *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06 at 12, 22 PECBR 212, 223 (2007)). To be clear, we will find a (1)(c) violation only if the employer acted with a discriminatory motive, intending to undermine employees' exercise of PECBA-protected rights. *Tri-County Metropolitan Transportation District of Oregon*, UP-62-05 at 34, 22 PECBR at 944 (citing *City of Vale*, UP-14-02 at 16, 20 PECBR at 352).

[28]WCPOA also objected to the recommended order's purported failure to analyze the Degman email under two criminal law statutes, ORS 162.235 (obstructing governmental or judicial administration) and ORS 162.285 (tampering with a witness). This objection is without merit. This Board does not have jurisdiction to make findings of criminal law violations, which in any event would not be directly relevant to the question of whether a party's conduct violated PECBA.

For reasons that largely parallel those outlined above in our discussion of the WCPOA's ORS 243.672(1)(a) claim, we conclude that the Sheriff's Office did not violate ORS 243.672(1)(c) when Chief Deputy Degman sent her March 15, 2021, email. The record presents legitimate motives for the email, specifically for planning purposes because a large group of employees would potentially be pulled away from work at the same time. Additionally, there is no evidence that hiring, tenure, or any other terms or condition of employment were affected by the email.

ORS 243.672(1)(d)

ORS 243.672(1)(d) makes it an unfair labor practice for a public employer or its designated representative to "[d]ischarge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under ORS 243.650 to 243.809." To prove a subsection (1)(d) violation, a complainant must show discrimination because of the employee's role in proceedings before the Board. *International Association of Firefighters, Local 1817 v. Jackson County Fire District #3*, Case No. UP-130-91 at 14, 14 PECBR 111, 124 (1992); *see Kesterson and Laborers International Union of North America, Local 1400 v. Roberts Creek Water District and Laborers Local 1400 and Kimball*, Case Nos. C-11/27-77, 3 PECBR 1575 (1977).

Here, the WCPOA has presented no evidence that the Sheriff's Office discharged or otherwise discriminated against any employees because of their role in a proceeding before the Board. We also note that there is no evidence in the record illustrating that the any of the recipients of the Degman email signed the representation petition. Rather, the petition was digitally signed by Makler (though Altiere, who also received the email, was listed in the petition as the WCPOA's president). Further, the representation petition was a "card check" petition, and logically the Sheriff's Office would not have known whether specific individuals signed a card. Beyond that, when the email was sent, none of the recipients had had the opportunity to give testimony yet. Although certain managers were not sent the same email, those individuals were sent a similar email on March 12, 2021. Under those circumstances, we conclude that the Sheriff's Office did not violate ORS 243.672(1)(d) when Degman sent her email.

ORS 243.672(1)(i)

ORS 243.672(1)(i) makes it an unfair labor practice to violate ORS 243.670(2), which in turn provides that a public employer may not:

> "(a) Use public funds to support actions to assist, promote or deter union organizing; or
>
> "(b) Discharge, demote, harass or otherwise take adverse action against any individual because the individual seeks to enforce this section or testifies, assists or participates in any manner in an investigation, hearing or other proceeding to enforce this section."

Here, there is no evidence that the Sheriff's Office intentionally took any efforts to deter organizing. To the contrary, the evidence presented essentially shows that, through Chief Deputy

Degman's email, the Sheriff's Office simply alerted subpoenaed employees of the possibility that they might be called to testify at a Board hearing for a representation petition. We also conclude that the single, brief email was in no way "harassing." Strictly speaking, other than letting recipients know to "save the dates," the email did not even require a particular response. We likewise conclude that merely objecting to a representation petition is not evidence of a (1)(i) violation. *See* ORS 243.670(5)(b)(A) (a public employer may use public funds for the purpose of representing the public employer in a proceeding before the board). Moreover, none of the email recipients were discharged or demoted, there is no indication that any other "adverse actions" were taken against them, and (as noted above) none of those employees had testified yet. Accordingly, we conclude that the Sheriff's Office did not violate ORS 243.672(1)(i) by sending the Degman email.

ORS 243.672(1)(j)

ORS 243.672(1)(j) makes it an unfair labor practice for a public employer or its designated representative to "[a]ttempt to influence an employee to resign from or decline to obtain membership in a labor organization." In this case, there is no indication that, through Chief Deputy Degman's email, the Sheriff's Office was attempting to influence anyone to *resign* from a labor organization. Indeed, at the time the email was sent, nearly all of the email's recipients were still unrepresented. More importantly, there is also no evidence that the email was an attempt to get employees to eventually decline to obtain membership in the WCPOA's proposed bargaining unit. The email contained no clear or implied threat. Furthermore, there is credible evidence that the Sheriff's Office has sent comparable emails in other instances. On top of that, the Sheriff's Office, through Yee, credibly presented its legitimate motivation for why the email was sent. We also note that neither party called Chief Deputy Degman, the author of the email, to testify. Under those circumstances, we conclude that the Sheriff's Office did not violate ORS 243.672(1)(j) by sending the Degman email.

In sum, we conclude that the Sheriff's Office did not violate ORS 243.672(1)(a), (b), (c), (d), (i), or (j) when, in March 2021, it emailed employees subpoenaed by the WCPOA.

3. The Sheriff's Office did not violate ORS 243.672(1)(a) or (b) when Sergeant Lascink refused to participate in a WCPOA investigation in February 2021, and did not violate ORS 243.672(1)(g) by depriving Whitely of specialized training in April 2021.

The Sheriff's Office's Instruction to Sergeant Lascink[29]

As detailed above, on February 11, 2021, then-Corporal King, Corporal Whitely's WCPOA representative, asked Sergeant Lascink for an interview regarding the Internal Affairs investigation regarding Whitely. Lascink then consulted with his supervisor and was told not to discuss the investigation with anyone who was not in the Professional Standards Unit or part of command staff. Based on that supervisor's directions, Lascink declined to meet with King for an interview. On February 24, 2021, President Altiere raised the issue to Sheriff Garrett, and Garrett explained that the supervisor's direction to Lascink was the standard instruction, but also agreed

[29]The WCPOA objected only to the recommended conclusion of law that no (1)(b) violation occurred. As explained in this order, we find that objection to be without merit.

to investigate the issue further. Garrett then consulted with County Counsel and was told that it was up to Lascink whether to discuss the matter with WCPOA. Garrett communicated the correction to Altiere on the same day Altiere had raised the issue and confirmed that Lascink could speak with King, if Lascink agreed to do so and was off duty. WCPOA alleges that the Sheriff's Office's initial instruction to Lascink not to discuss the Whitely investigation with anyone who was not in the Professional Standards Unit or part of command staff violated ORS 243.672(1)(a) and (b) because it "deprived Whitely and the WCPOA of [the] ability to conduct a parallel investigation * * *."

We first address the alleged violation of ORS 243.672(1)(b). At the outset, we reiterate that to prevail on a (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 the exclusive representative. *Clackamas County*, UP-030-20 at 8. Accordingly, "a complaining labor organization must provide evidence to support the conclusion that some actual interference with its existence or administration occurred as a result of the employer's actions." *City of Portland*, UP-7-07 at 43, 22 PECBR at 794 (quoting *Junction City,* UP-18-89 at 10, 11 PECBR at 789). Thus, it is insufficient that the conduct at issue *may* have a foreseeable effect on a labor organization. *Sandy Union High School District No. 2 and Heaton*, UP-42-87 at 10, 10 PECBR at 398.

Applying these standards to this case, we do not find evidence that the Sheriff's Office actually, directly, and adversely interfered with the WCPOA's ability to serve as the exclusive representative. The supervisor's initial direction to Sergeant Lascink is insufficient to establish actual interference. Additionally, there is no evidence of any adverse impact to the WCPOA as a result of the two-week period between the initial instruction and Sheriff Garrett's correction. Indeed, the Sheriff's Office corrected the initial direction to Lascink *months* before Whitely's May 13, 2021, pre-disciplinary/*Loudermill* meeting (which occurred on a date suggested by the WCPOA's attorney). Moreover, Lascink's statements to King were consistent with the statements that Lascink gave the Sheriff's Office's interviewers, and consistent with what Whitely had already told King.

During the hearing, King speculated that not being able to interview Sergeant Lascink on February 11, 2021, deprived King of being able to get information from Lascink that King could subsequently have used to ask "clarifying questions" during Corporal Whitely's "investigatory interview" with the Professional Standards Unit. King also speculated that the same information could have been useful during the pre-disciplinary/*Loudermill* meeting or a grievance proceeding. However, King was able to interview Lascink on March 19, 2021, which, as noted above, was before the May 13, 2021, pre-disciplinary/*Loudermill* meeting, and before the grievance was filed on June 15, 2021. We do recognize that King did not interview Lascink until after Whitely was interviewed. But it appears that Whitely was interviewed during the morning of February 11, 2021, before King asked Lascink for an interview. The record evidence indicates that the Sheriff's Office's investigators were unaware of Whitely self-reporting to Lascink until Whitely told those investigators about it. In any event, we do not find the necessary interference with the administration of the WCPOA to establish a (1)(b) claim. For these reasons, we find that the WCPOA did not meet its burden of proof to establish that the Sheriff's Office actions actually,

directly, and adversely affected the labor organization's ability to serve as the exclusive representative.

We next turn to whether the Sheriff's Office's conduct violated ORS 243.672(1)(a), as alleged. To reiterate, an employer violates ORS 243.672(1)(a) if it takes action: (1) "because of" an employee's exercise of PECBA-protected rights, or (2) that interferes with an employee "in" the exercise of protected rights. *See*, *e.g.*, *Dallas Police Employees Association v. City of Dallas,* Case No. UP-33-08 at 12, 23 PECBR 365, 376 (2009).[30] We conclude that the Sheriff's Office did not temporarily bar Sergeant Lascink from speaking with King "because of" any protected activity. The instruction provided to Lascink was the "standard instruction" provided during Internal Affairs investigations. Indeed, when examined under the totality of circumstances, the Sheriff's Office's conduct and interactions with the WCPOA during this time are consistent with a legitimate, nondiscriminatory motive to follow standard protocols and maintain the integrity of its own Internal Affairs investigation. For example, the evidence does not indicate that Lascink was told that he could not speak with the WCPOA, specifically. Instead, Lascink was specifically told not to talk with "anybody" outside of the Professional Standards Unit or command staff. In short, there is no evidence that the instruction was issued because of PECBA-protected activity.

As for whether an "in" the exercise violation occurred, we conclude that no reasonable employee would be chilled from engaging in protected activity. The Sheriff's Office corrected its initial instruction to Sergeant Lascink within a two-week period, and the parties were able to reach an agreement regarding how such requests would be handled. Under these circumstances, we do not conclude that the Sheriff's Office conduct would have the natural and probable effect of chilling employees in the exercise of protected rights, and WCPOA fails to articulate any argument otherwise. Accordingly, we conclude that the Sheriff's Office did not violate ORS 243.672(1)(a).

Corporal Whitely's Specialized Training

The relevant facts in this case establish that on January 29, 2021, Corporal Whitely was placed on administrative leave and modified duty assignment. On or around February 17, 2021, Sergeant Lascink signed and approved Whitely's November 2020 training and travel request for the 2021 seminar and competition in Boise, along with comparable requests from other employees. However, according to the Sheriff's Office's standard policy, while an employee is on administrative leave, they cannot attend such training. Indeed, as noted in Chief Deputy Degman's January 29, 2021, letter to Whitely that outlined the terms of his administrative leave, Whitely was not authorized to "take any actions that would normally be expected of an actively commissioned deputy sheriff" during that leave. Those terms logically include representing the Sheriff's Office at a training and competition in another state. In short, the facts establish that because of the administrative leave and such policies, and "[b]ecause of the seriousness of the situation," it was

[30]We note that the allegations as set forth in the amended complaint concern the WCPOA's investigation in its role as Whitely's exclusive representative. Thus, the claim, as alleged, relates to the actions of the exclusive representative (protected under ORS 243.672(1)(b)), as opposed to the *employee's* exercise of protected rights, addressed under (1)(a). Nevertheless, and as addressed in this order, even assuming that the WCPOA adequately alleged that the conduct was connected to Whitely engaging with the WCPOA (and therefore related to exercising his rights under PECBA), there is simply no evidence that the Sheriff's Office provided the initial instruction to Lascink *because of* Whitely's protected activity.

determined that Whitely could not attend the Boise seminar and competition. The fact that Lascink initially approved Whitely's training after Whitely was placed on administrative leave and modified duty assignment appears to be, at most, either an oversight or a misunderstanding of Sheriff's Office policy and Whitely's "work status." Lascink also credibly testified that he believed that Whitely's investigation and the corresponding administrative leave could have ended by the start of the training, which was scheduled to begin months after the initial approval.

WCPOA alleges that by these actions the Sheriff's Office violated ORS 243.672(1)(g), which states, in relevant part, that it is an unfair labor practice for a public employer or its designated representative to "[v]iolate the terms of any written contract with respect to employment relations." Specifically, WCPOA argues that because Corporal Whitely was barred from attending specialized training in Boise, Idaho, Whitely was disciplined before the Sheriff's Office investigation was concluded and before Whitely had a pre-disciplinary/*Loudermill* meeting. WCPOA argues that this conduct violates Article 31 of the CBA, which outlines the discipline process, and therefore violates (1)(g).[31] That article, however, does not refer to training at all. Nor does it overtly address whether employees should be able to attend training while being investigated for allegedly sexually harassing a subordinate. In addition, WCPOA did not provide testimony or other extrinsic evidence to support its (1)(g) theory, and also did not address the precise contract terms in its brief.

The amended complaint also asserts that the denial of Corporal Whitely's specialized training, violated Article 3; Article 9, Section 9.1.D; and Article 31, Sections 31.1 and 31.3 of the CBA. Together, these CBA provisions generally stand for the proposition that the Sheriff's Office must maintain conditions of employment (including past practices), cannot discipline employees without just cause, and must abide by recognized investigation protocol before imposing discipline. Arguing from these contract provisions, WCPOA contends that when the Sheriff's Office barred Whitely from attending the Boise training, it thereby disciplined Whitely before the Sheriff's Office investigation was concluded and before Whitely had a pre-disciplinary/*Loudermill* meeting. However, the hearing evidence is that, when Sheriff's Office employees are put on administrative leave because of allegations of misconduct, they ordinarily do not attend training, and there is no extrinsic evidence to suggest that the Sheriff's Office approached its investigation of Whitely any differently. For these reasons, we do not view cancelling Whitely's trip to Boise to be a change from past practice or discipline. For these reasons, we conclude that the Sheriff's Office did not violate ORS 243.672(1)(g) by depriving Whitely of specialized training in April 2021.

Finally, the record establishes that by the time that the hearing took place, a grievance on the matter had been denied by an arbitrator. WCPOA has not contended that the award should be set aside under the standard set forth in *Willamina Education Association 30J and Lucanio v. Willamina School District No. 30-44-63J*, Case No. C-253-79, 5 PECBR 4086 (1980). *See also Portland Police Association v. City of Portland*, Case Nos. UP-25/26/27-11, 25 PECBR 481

[31]Article 31.1 of the CBA provides that "[d]iscipline shall be limited to oral reprimand, written reprimand, demotion, suspension and discharge or, with the concurrence of the employee, an alternative form of disciplinary sanction."

(2013). WCPOA also has not explained why we should relitigate the matter. This is an additional basis to dismiss the (1)(g) claim regarding Whitely's training.

4. The Sheriff's Office did not violate ORS 243.672(1)(e) or (1)(f) when, in March 2021, it included undisputed language in job classifications of WCPOA represented employees, despite WCPOA disagreeing with its ultimate placement within the job classifications.

ORS 243.672(1)(e)

ORS 243.672(1)(e) states 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" of its employees. A public employer commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change in the status quo concerning a mandatory subject of bargaining. *See Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (upholding the Board's authority to adopt the *per se* analysis in unilateral change cases and citing *Wasco County v. AFSCME*, 46 Or App 859, 613 P2d 1067 (1980)). Even if the change does not concern a mandatory subject of bargaining, the employer is still required to bargain with the exclusive representative concerning the impacts of the change, so long as it has more than a *de minimis* impact on any mandatory bargaining subject. *Portland Fire Fighters' Assoc., Local 43 v. City of Portland*, 245 Or App 255, 264-65, 263 P3d 1040 (2011). An employer, therefore, violates ORS 243.672(1)(e) if it unilaterally implements a decision that changes or derivatively impacts a mandatory subject of bargaining. *Id.* at 255.

Mandatory subjects of bargaining are generally those referenced in the definition of "employment relations" provided by ORS 243.650(7)(a), which states that the term "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." Subjects defined in ORS 243.650(7)(b) (subjects that the Board determined to be permissive before June 6, 1995) and ORS 243.650(7)(d) (subjects that have an insubstantial or *de minimis* effect) are considered permissive subjects of bargaining. To determine the status of subjects that PECBA does not expressly designate as mandatory or permissive, we use the balancing test set forth in ORS 243.650(7)(c), which states that "'employment relations' does not include subjects that the Employment Relations Board determines to have a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment." *See also Portland Fire Fighters Assoc. v. City of Portland*, 305 Or 275, 282-85, 751 P2d 770 (1988); *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99 at 14-17, 19 PECBR 76, 89-92 (2001).

When asserted in the context of a (1)(e) claim, the Board also considers an employer's affirmative defense of waiver. In short, a party may waive its right to bargain through: (1) "clear and unmistakable" contract language; (2) a bargaining history that shows the party consciously yielded its right to bargain; or (3) by the party's action or inaction. *Assn. of Oregon Corrections Emp.*, 353 Or at 177 (citing *Association of Oregon Correctional Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-03 at 10, 20 PECBR 890, 897 (2005)).

As described in more detail above, the Sheriff's Office modified the job descriptions of the Deputy Sheriff and Jail Deputy classifications to include County-wide equity, diversity and inclusion (EDI) initiatives within the "essential job duties" section in each of the job classifications. Specifically, the Sheriff's Office included language in its job classifications that it was an essential job duty for an employee to "create[] a workplace that promotes the organizational values of workplace equity, diversity and inclusion and actively promote[] an environment respectful of living and working in a multicultural society." WCPOA stated that it "fully endorse[d] and support[ed] the inclusion of that [EDI] paragraph in every WCPOA job description," but wanted that language in the "distinguishing characteristics" section of the description, rather than the "essential job duties section." WCPOA asserts that the Sheriff's Office's refusal to bargain the placement of that language constitutes an unlawful unilateral change.

We first address the subject of the changed job classifications and conclude that the subject at issue concerns the minimum qualifications necessary for a position. That subject is expressly identified as a permissive subject of bargaining under ORS 243.650(7)(g). We do not understand WCPOA to argue otherwise or to argue that the Sheriff's Office was obligated to bargain over whether the disputed language should be part of the Sheriff's Offices' determination for the minimum qualifications for a position. To the extent that WCPOA advances such an argument, that argument is foreclosed by ORS 243.650(7)(g).

WCPOA asserts that because the Sheriff's Office placed the EDI language in the essential job functions section rather than the "distinguishing characteristics" section (as proposed by WCPOA), that decision could "potentially" impact discipline or promotions, which are mandatory subjects of bargaining. Thus, the WCPOA contends that the Sheriff's Office's failure to bargain over the *placement* of the EDI language within the job description violates (1)(e) because the Sheriff's Office did not engage in impact bargaining regarding discipline and promotions.

WCPOA concedes, however, that there is no evidence that the *placement* of the EDI language within the job classifications has actually impacted discipline or promotion. Rather, WCPOA argues that the Sheriff's Office intended to use the placement of the EDI language to discipline employees. However, the uncontroverted evidence, including testimony of WCPOA witnesses, is that discipline could already be imposed for failure to comply with EDI expectations, regardless of *where* the disputed EDI language was placed within the job classifications. Indeed, during the parties' exchanges over the proposed EDI language, WCPOA contended that there were "numerous policies already in place that cover all potential misconduct that could be represented by [the proposed EDI language]." Put another way, WCPOA's acknowledgment that employees could already be disciplined for failure to comply with expectations around EDI, regardless of its inclusion in the job classifications, is fundamentally at odds with its position that the specific placement of the EDI language within the job classification impacts the mandatory subject of discipline at all, much less that it could have more than a *de minimis* impact on that subject.

In reaching this conclusion, we disagree with WCPOA's contention that the mere existence of a dispute between the parties over the placement of language within a job classification description is itself proof that the placement of the language would impact a mandatory subject of bargaining. As discussed above, there is no evidence that the placement of the EDI language has

the potential to impact discipline. Furthermore, the burden of proof is on the party that filed an unfair labor practice complaint to establish the existence of an impact that triggers the duty to bargain. *See* ORS 183.450(2); OAR 115-010-0070(5)(b). Moreover, and despite it not bearing the burden of proof on the WCPOA's claim, the Sheriff's Office presented compelling evidence that the disputed language was part of a County-wide initiative to ensure that all job classifications adequately reflected the County's equity, diversity, and inclusion priorities, and that the placement itself did not impact its authority or limitations on discipline.

Additionally, we disagree with the WCPOA's assertion that the placement of the new EDI language in the job description of represented employees affects promotions. The only relevant evidence presented on this claim was the promotional process for Patrol Sergeant and Jail Sergeant. That evidence established that, in 2021, WCPOA-represented applicants to the Sergeant positions were consistently given feedback regarding their apparent level of awareness of EDI-related topics, which could reasonably lead an applicant to *assume* that EDI was a component of their scores, especially when the scoring was not explained to them. However, the evidence also establishes that EDI was "not a scored component of the [Sergeant promotional] process." Consequently, the WCPOA did not establish that the placement of EDI language had any impact at all to the promotional application process for Sergeant (or other) positions.

In sum, the WPCOA did not establish that where the EDI language was placed within job descriptions would have any impact on the mandatory subjects of discipline or promotion. Therefore, WPCOA did not prove that the Sheriff's Office's conduct violated ORS 243.672(1)(e).[32]

ORS 243.672(1)(f)

ORS 243.672(1)(f) makes it an unfair labor practice for a public employer or its designated representative to "[r]efuse or fail to comply with any provision of ORS 243.650 to 243.809." Here, WCPOA argues that the Sheriff's Office was required to engage in midterm bargaining under ORS 243.698 regarding the changed job classifications. Because the Sheriff's Office did not do so, WCPOA argues that the conduct also violated ORS 243.672(1)(f). We have already concluded that the Sheriff's Office had no obligation to bargain over the decision or impacts of where the EDI language was placed in the job descriptions. Given that conclusion, the Sheriff's Office did not violate ORS 243.672(1)(f), as alleged.

5. The Sheriff's Office did not violate ORS 243.672(1)(e) and (f) by creating and swearing-in a new detective position that was not represented by the WCPOA and did not violate ORS 243.672(1)(a) by excluding the WCPOA from communications associated with the position.

ORS 243.672(1)(e) and (f)

WCPOA next argues that the Sheriff's Office violated ORS 243.672(1)(e) and (f) by creating and swearing-in a new detective position to work on cold cases. At the outset, we note that the DA's Office, not the Sheriff's Office, created Winfield's position and hired Winfield. The

[32]Because we reach this conclusion, we do not address the Sheriff's Office's affirmative defense of waiver.

record also clearly shows that, for decades, the Sheriff's Office has consistently excluded positions much like Winfield's from the Patrol/Jail bargaining unit, as outlined above. Moreover, the Sheriff's Office's actions are also firmly protected by the plain language of the parties' CBA. Indeed, at the time that Winfield's position was created, the parties' CBA unambiguously stated that temporary, part-time, and variable hour employees were *excluded* from the Patrol/Jail bargaining unit and not covered by the CBA (a point that the WCPOA concedes). That express, unambiguous contract language is coupled with the Sheriff's Office's "longstanding past practice" of creating and excluding similar positions.

In this context, it strains credulity to argue that someone (like President Altiere, for example) might not have contemplated Winfield's part-time position being created (particularly when we have little evidence addressing the negotiations that resulted in the CBA). Under these circumstances, we also are unmoved by the mere fact that Winfield's job title resembles that of a WCPOA-represented classification, or by the fact that Winfield performs some Detective duties. Likewise, there is no clear impact to be bargained here, given the past practice of parallel work being performed by similarly situated employees and the many unique features of Winfield's position and his work (particularly Winfield's placement in the DA's Office and his specialized work with other law enforcement agencies). Finally, we note that the WCPOA has not alleged that the Sheriff's Office unlawfully failed to respond to its February 10, 2021, information request that dealt with Winfield's position.

ORS 243.672(1)(a)

The WCPOA also argues that the Sheriff's Office violated ORS 243.672(1)(a) when it excluded the WCPOA from communications associated with Winfield's position. However, given our conclusions above that the Sheriff's Office did not unlawfully create the position or exclude it from the WCPOA's Patrol/Jail bargaining unit, it follows that the Sheriff's Office was not required to communicate with the WCPOA. Accordingly, we reject the (1)(a) claim.

6. The Sheriff's Office did not violate ORS 243.672(1)(a) and (b) during Sergeant Braun's January 27, 2021, telephone conversation with Deputy NH.

The WCPOA argues that Sergeant Braun "told [Deputy NH] not to trust WCPOA and not to use a WCPOA representative when [NH] meets with Chief Deputy Degman concerning her complaint against Whitely." The WCPOA alleges that this conduct violated ORS 243.672(1)(a) and (b) because it interfered with the WCPOA's ability to fully represent NH and its ability to fully represent Whitely.

As an initial matter, the record in this case simply does not support this allegation. Although WCPOA did not expressly abandon this claim, neither Sergeant Braun nor Deputy NH testified, and the exchange was not discussed in detail by any testifying witnesses. The only relevant evidence in the record is the transcript of Sergeant Braun's interview of NH, and a careful reading of that document reveals that, contrary to the WCPOA's assertions, Braun was simply repeating NH's own words/position back to her. It is also clear that Braun did not actually tell NH not to bring a union representative, as the WCPOA alleges here. Instead, the transcript reflects that NH told Braun that she did not trust the Sheriff's Office or WCPOA and was reluctant to report the

incident. In that context, Braun later stated in a follow-up conversation with NH that when she officially reported the incident, she should take someone she trusted to take notes and that "it does not have to be a union rep." Thus, WCPOA's arguments are not supported by the record. Braun's statements, as alleged by WCPOA, are fundamentally different from Braun's actual statements, as set forth in the transcript, which is the only record evidence of what Braun said.[33]

Furthermore, we do not find any basis for concluding that Sergeant Braun's statement, that Deputy NH did not have to take a union representative with her when reporting the allegation against Corporal Whitely, violated (1)(a). Even assuming that NH was engaged in PECBA protected activity, the statement advising NH that, in light of her hesitancy to report the incident due to her lack of trust with the Sheriff's Office and WCPOA, she did not have to bring a union representative when making the report, is not threatening or inherently coercive. Furthermore, there is no other indication in the rest of the record to support a finding that the statement was made because of protected activity. Additionally, Braun was assisting NH in her efforts to report sexual harassment, as opposed to notifying an employee of an investigatory interview, for example. For these reasons, we also do not find any evidence that the statement would have a chilling effect on reasonable employees. Again, simply conveying information generally does not have the natural and probable effect of interfering with or restraining the exercise of protected rights. *Jefferson County*, UP-55-98 at 15, 18 PECBR at 123, *recons*, 18 PECBR 199. Turning to whether the statement violated (1)(a) with regard to Whitely, there is no evidence that Whitely was engaged in any protected activity that would provide the basis for a (1)(a) claim. Furthermore, it does not appear that NH disclosed to Braun that her alleged harasser was a WCPOA-represented employee (which the WCPOA does not dispute). For these reasons, we conclude that the Sheriff's Office did not violate ORS 243.672(1)(a).

We also conclude that the statement did not violate ORS 243.672(1)(b). There is simply no basis for WCPOA's claim that Sergeant Braun's statement interfered with its role as the exclusive representative. Correspondingly, there is no evidence that the statement *actually, directly, and adversely* affected the labor organization's ability to serve as the exclusive representative. Furthermore, as discussed above, the statement is not threatening or coercive or otherwise violative of (1)(b). *Cf. State of Oregon, Department of Corrections, Santiam Correctional Institution,* UP-51-05 at 25, 22 PECBR at 398 ("certain employer statements are so inimical to the core values of the PECBA that they violate subsection (1)(b), even if there is no proof that these statements directly affected any union activity.")

7. The Sheriff's Office did not violate ORS 243.672(1)(a), (b), or (e) via its responses to the WCPOA's various information requests regarding the discipline of Corporal Whitely.

ORS 243.672(1)(e)

As part of the ORS 243.672(1)(e) "duty to bargain," a public employer is required to supply relevant information upon request to the exclusive representative when the information is sought for purposes of collective bargaining or representation of bargaining unit employees. *Multnomah*

[33]We also note that WCPOA did not object to the findings of fact or conclusion of law in the Recommended Order, that are relevant to this claim, which do not vary significantly from this order.

County Corrections Officers Association v. Multnomah County Sheriff's Office and Multnomah County, Case No. UP-21-86 at 27-28, 9 PECBR 9529, 9555-56 (1987). In such cases, relevance is ordinarily determined by the liberal "discovery-type" standard adopted in *NLRB v. Acme Indus. Co.*, 385 US 432, 435, 87 S Ct 565, 567 (1967). Under that standard, the duty to supply information arises so long as the information sought is of probable or potential relevance to a contractual or collective bargaining matter. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98 at 7, 18 PECBR 64, 70 (1999); *Washington County School District No. 48 v. Beaverton Education Association & Nelson*, Case No. C-169-79 at 6-8, 5 PECBR 4398, 4403-05 (1981).

Our analysis of a party's obligation to provide requested information begins with the premise of full disclosure. However, an exclusive representative's interest in information will not always predominate over other legitimate interests that weigh against disclosure. The employer may legally object to the release of requested information for certain reasons, including confidentiality and privacy claims and personnel information protected by statute, for example. Beyond that, this Board has recognized that, in appropriate cases, an employer may furnish relevant information to an exclusive representative in a form different from that sought by the representative. Additionally, there may be acceptable alternatives to complete disclosure. We urge the parties to take a common-sense approach. *Oregon AFSCME Local 3581 v. State of Oregon, Real Estate Agency*, Case No. UP-42-03 at 5, 21 PECBR 129, 133 (2005); *State of Oregon, Department of Corrections*, UP-7-98 at 7-8, 18 PECBR at 70-71; *Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81 at 5-7, 6 PECBR 5027, 5031-33 (1982).

In this context, the initial burden is on the exclusive representative to show that the requested information is relevant. If the exclusive representative fails to make a threshold showing, the employer's duty to provide the information does not arise. *Jackson County Sheriff Employees Association v. Jackson County and Jackson County Sheriff's Office*, Case No. UP-66-92 at 3, 14 PECBR 270, 270B (1992) (citing *Oregon School Employees Association v. Salem-Keizer School District 24J*, Case No. UP-135-86, 10 PECBR 635, *recons*, 10 PECBR 676 (1988), *aff'd*, 103 Or App 221, 797 P2d 375 (1990)). After the threshold requirement of relevance is met, we consider the totality of the circumstances. To do so, this Board has historically considered four factors: (1) the reason given for the request; (2) the ease or difficulty with which the information can be produced; (3) the kind of information requested, including an assertion of confidentiality; and (4) the history of the parties' labor-management relations. Those are frequently referred to as the *Colton* factors, based on the case in which the Board first described them, *Colton School District 53*, C-124-81 at 5-7, 6 PECBR at 5031-33. *See Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-014-17 (2021) (order on remand), *aff'd*, 327 Or App 149, 534 P3d 736 (2023); *Multnomah County Corrections Officers Association v. Multnomah County Sheriff's Office and Multnomah County*, Case No. UP-83-87 at 4, 10 PECBR 667, 670 (1988).

We analyze WCPOA's ORS 243.672(1)(e) information request claim by determining whether the Sheriff's Office provided *relevant* information that was actually *requested* by the WCPOA, and whether the Sheriff's Office did so in a *timely* manner. As outlined above, the WCPOA made three separate information requests concerning the Whitely investigation. We

address each in turn, below. For the reasons that follow, we conclude that the Sheriff's Office did not violate ORS 243.672(1)(e) via its responses to the WCPOA's information requests.

Information Request 1/3

The WCPOA's April 23, 2021, information request specifically sought:

> "1. A copy of any and all materials, interviews, audio/video, transcripts, texts, email, summaries, reports - everything that [the Sheriff's Office] and investigators associated with this matter have collected, created, reviewed and/or relied upon as to this Whitely matter and investigation;
>
> "2. A copy of Whitely's training records, including anything related to harassment training;
>
> "3. A copy of Whitely's last five performance evaluations (2017, 2018, 2019, 2020, 2021);
>
> "4. A copy of Whitely's discipline history while employed at [the Sheriff's Office]."

The WCPOA concedes that, on April 29, 2021, a mere six days after the first request was made, the WCPOA received the pre-disciplinary/*Loudermill* notice, a summary of the investigation, and the SRIM/personnel complaint intake form, as requested. The WCPOA also concedes that, on May 4, 2021, "additional materials were provided to WCPOA." There is no allegation or indication that the second, third, and fourth groups of documents were not provided in a timely manner.

The WCPOA centrally takes issue with the fact that the materials provided in response to the initial April 23, 2021, information request (detailed in Exh. C-40) "did not include any information or reference to a [Sheriff's Office] separate investigation of [Sergeant] Lascink, or interviews or other materials." The Sheriff's Office also takes issue with the fact that, at the pre-disciplinary/*Loudermill* meeting, the WCPOA was unaware of the Lascink investigation. However, the record (including Exh. C-52) indicates that the Sheriff's Office did not actually begin its investigation of Lascink until June 1, 2021, which was over a month after the April 23, 2021, information request and the Sheriff's Office's April 29, 2021, response. Likewise, the Lascink investigation began after the pre-disciplinary/*Loudermill* meeting. Accordingly, the document memorializing the beginning of that investigation would not have existed by the time the May 13, 2021, pre-disciplinary/*Loudermill* meeting occurred. The same document also reveals that the final disposition of the Lascink investigation was not made until June 30, 2021 (weeks after Whitely's June 4, 2021, discipline was issued). Moreover, it appears that, on May 4, 2021, mere days after the initial information request was made, the Sheriff's Office actually gave the WCPOA an audio recording of Sergeant Bass interviewing Lascink (which likely provided similar information as Exhs. C-49 and C-51, which are discussed further below). Finally, Undersheriff Koch, who ultimately decided whether to discipline Whitely, also testified without contradiction that he did not consider or rely on anything that was part of the investigation of Lascink.

The WCPOA otherwise specifically asserts that Exh. R-15 (a copy of Chief Deputy Degman's January 29, 2021, letter to Corporal Whitely notifying him that he was the subject of an Internal Affairs investigation) had not been shared in advance of the hearing. However, Exh. R-15 plainly includes Whitely's signature, which ostensibly "acknowledges receipt." Further, hearing testimony confirmed that Whitely received the letter. It also follows that the WCPOA was made aware of the Whitely investigation around the same time because shortly after that the WCPOA assigned King to represent Whitely. Furthermore, the record consistently indicates that the WCPOA was given the "complete investigatory file" for Whitely's investigation, which presumably would include the letter notifying Whitely of the investigation.

In addition to the foregoing, the WCPOA appears to claim that it was not provided Exhs. R-3, R-4, R-5, or R-6 in advance of the hearing. Exh. R-3 includes a chain of three emails: (1) Executive Assistant Gray's February 1, 2021, email to all Sheriff's Office staff stating that Whitely had been put on modified duty assignment; (2) Sergeant Uglesich's February 1, 2021, email to Sergeant Bass and others, asking if Whitely could attend "FTO School" the next week; and (3) Bass's February 1, 2021, email back to Uglesich stating that Whitely would not be able to attend. Exh. R-4 is a collection of training/travel requests (including Whitely's own request). Exh. R-5 includes a chain of four emails between Commander MacGregor, Sergeant Bass, Sergeant Baker, and Commander Bennett. Those emails include: (1) MacGregor's March 3, 2021, email asking the group to ensure Whitely knew he was not approved to attend the conference; (2) Bass's email to the group asking whether the denial was due to "COVID and out of state travel restrictions or because of [Whitely's] modified duty status"; (3) MacGregor's March 4, 2021, response answering that it was because of Whitely's current work status; and (4) Bass's April 22, 2021, email documenting his conversation with Lascink about the last day to cancel Whitely's flight and hotel for the conference. Exh. R-6 is an April 22, 2021, email from Sergeant Lascink to Sergeant Bass, stating that Lieutenant Weston had decided to send another Deputy to the conference in Whitely's place.

Upon review, we conclude that Exhs. R-3, R-4, R-5, and R-6 would not have been responsive to the initial information request. As stated elsewhere, we do not consider the decision to exclude Corporal Whitely from certain training while he was being investigated to be disciplinary in nature. We also conclude that such emails were not actually *part of the investigation of Whitely*. We can otherwise presume that Gray's February 1, 2021, email to all Sheriff's Office staff (included in Exhs. R-2 and R-3) was sent to King and WCPOA President Altiere, and testimony confirms that it went to Whitely. For those and all of the foregoing reasons, we conclude that the Sheriff's Office did not violate ORS 243.672(1)(e) via its response to the WCPOA's initial information request.

Information Request 2/3

The WCPOA's June 10, 2021, information request specifically sought:

> "1. A copy of the actual discipline letters (non-redacted) of ANY [Sheriff's Office] employee who has been demoted during the time that Pat Garrett has been the Sheriff, this includes sworn and non-sworn and civilian and ALL ranks and positions and classifications in the Sheriff's Office;

"2. A copy of the actual discipline letter (non-redacted) of ANY [Sheriff's Office] employee who has been disciplined during the time that Pat Garrett has been the Sheriff, this includes sworn and non-sworn and civilian and ALL ranks and positions and classification in the Sheriff's Office for violation of the following [Sheriff's Office] and/or County Policies:

"A. [Sheriff's Office] HARASSMENT-FREE WORKPLACE POLICY #211 (all revisions);
"B. Washington County Personnel Rules & Regulations 5.1
"C. Washington County Harassment Policy 301[.]"

The WCPOA has not specifically alleged that the information requested as part of this June 10, 2021, information request was not provided in violation of ORS 243.672 (1)(e). There is also no evidence indicating that the specific information sought by that second request was not provided in a timely manner. Instead, it appears that all of that information was provided on a thumb drive. The information requested above also does not logically include anything involving Sergeant Lascink, who notably was not demoted or otherwise officially disciplined (and was not ordered to get training and counseling until June 30, 2021, which was after the second information request was made). Simply put, those circumstances do not demonstrate a (1)(e) violation either.

Information Request 3/3

On or around October 4, 2021, the WCPOA requested the following documents:

"• Any SRIM files and materials initiated and/or related to and focused on Sgt Cliff Lascink and his interactions with Tyler Whitely and/or [NH]

"• Any PSU investigation files, materials initiated and/or related to and focused on Sgt Cliff Lascink and his interactions with Tyler Whitely and/or [NH]

"• Any performance documentation, counseling, discipline, work-plan or the like initiated and/or related to and focused on Sgt Cliff Lascink and his interactions with Tyler Whitely and/or [NH][.]"

The WCPOA concedes that, on October 5, 2021, the WCPOA received "investigation documents concerning the parallel and/or related WSCO disciplinary investigation of Sergeant Lascink for his role in the Whitely-[NH] investigation." That batch of information included, at least: (1) a transcript of Lascink's February 11, 2021, interview; (2) the questions that Sergeant Bass had prepared to ask Lascink during that February 11, 2021, interview; (3) Bass's summary of the February 11, 2021, Lascink interview; (4) the SRIM/personnel complaint against Lascink; and (5) Bass's summary of the second interview of Lascink that took place on February 20, 2021.

The information that was provided on October 5, 2021, generally appears to satisfy the first and third elements of the October 2021 information request. As for the second element of the third information request, the WCPOA alleges (in its amended complaint, at page 24, paragraph 92.F.)

that the Sheriff's Office did not share a *recording* of the February 20, 2021, interview. However, on its own, we do not consider that possibility to be significant evidence of a refusal to provide requested information, given that Bass's summary of the same interview was provided. Once again, an employer may furnish relevant information to an exclusive representative in a form different from that sought by the representative. There is also evidence that some recording was provided, as noted elsewhere. Moreover, a mere assertion by a party's attorney that a particular document was not provided does not satisfy that party's burden of proof (particularly when the testimony given does not firmly support the assertion).

The WCPOA argues that Exhs. C-49 through C-53 should have been provided before the May 13, 2021, pre-disciplinary/*Loudermill* meeting. However, only the initial April 23, 2021, request was made before that meeting, as the second request was made on June 10, 2021. Further, the record does not reveal precisely when Exhs. C-49, C-50,[34] and C-51 were made; Exh. C-52 and the corresponding investigation of Sergeant Lascink were not started until June 1, 2021, or completed until June 30, 2021; and Exh. C-53 was not created until June 2021. And as explained above, before the pre-disciplinary/*Loudermill* meeting took place, the WCPOA had already been given a recording of Lascink being interviewed. Under those circumstances, we must conclude that the Sheriff's Office's response to the third information request, like its responses to the earlier two, did not violate ORS 243.672(1)(e).

ORS 243.672 (1)(b)

Upon review of the facts detailed above, we see nothing in the Sheriff's Office's approach or responses to the WCPOA's various information requests that amounted to interference with WCPOA's role as the exclusive representative. Indeed, as the WCPOA concedes, the Sheriff's Office provided the WCPOA with a wide variety of information and documents in response to the WCPOA's multiple requests. WCPOA has failed to demonstrate what it could have gleaned from the investigation of Sergeant Lascink, in particular, that (1) was not provided and (2) would have affected how the WCPOA represented Corporal Whitely. We therefore conclude that the Sheriff's Office did not violate ORS 243.672 (1)(b) via its responses to the WCPOA's various information requests.

ORS 243.672(1)(a)

Finally, we turn to whether the Sheriff's Office's conduct as alleged violated ORS 243.672(1)(a). WCPOA's allegations in the amended complaint concern the information requests submitted by WCPOA, and its ability to adequately represent Corporal Whitely, as his exclusive representative. We do not find that the WCPOA adequately pleaded that the alleged violative conduct was in anyway connected to an *employee's* exercise of protected rights, as addressed under (1)(a). Furthermore, even assuming the WCPOA adequately alleged that the conduct was connected to Whitely's rights under (1)(a), the facts, as detailed above, establish that the Sheriff's Office adequately responded to WCPOA's information requests related to the Whitely investigation. Furthermore, there is no evidence of an unlawful motivation, improper animus, or a retaliatory action taken because of protected activity. There is certainly no causal link

[34]Exh. 50 was not admitted into evidence at the hearing.

between the responses to the information requests and Whitely's discipline. Therefore, we find no basis for WCPOA's claim that the Sheriff's Office conduct violated (1)(a).

ORDER

The amended complaint is dismissed.

DATED: November 9, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-009-22

(UNFAIR LABOR PRACTICE)

THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, CHILD CARE PROVIDERS TOGETHER, Complainant, v. STATE OF OREGON, DEPARTMENT OF ADMINISTRATIVE SERVICES, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On October 23, 2023, this Board heard oral argument on objections of The American Federation of State, County & Municipal Employees, Child Care Providers Together (the Union) to a June 15, 2023, recommended order issued by Administrative Law Judge (ALJ) Jennifer D. Kaufman, after a hearing was held on February 1 and 3, 2023, in Salem, Oregon, and on February 13, 2023, via videoconference. The record closed on March 21, 2023, following receipt of the parties' post-hearing briefs.

Jason Weyand and Luke Kuzava, Attorneys at Law, Tedesco Law Group, Portland, Oregon, represented the Complainant.

Brena Lopez, Senior Assistant Attorney General, and Vera Poe, Senior Assistant Attorney General, Oregon Department of Justice, Salem, Oregon, represented the Respondent.

On February 17, 2022, the Union filed an unfair labor practice complaint against Respondent State of Oregon, Department of Administrative Services (the State). On December 7, 2022, the Union filed an amended complaint. The State filed timely answers to the complaint and to the amended complaint.

The issues are:

1. Did the State violate ORS 243.672(1)(a) by interfering with, restraining, or coercing a bargaining unit member (AS) in or because of the exercise of protected union activities?

2. Did the State violate ORS 243.672(1)(c) by discriminating against AS because of her protected union activities?

3. Are the Union's claims that the State violated ORS 243.672(1)(a) and/or (1)(c) time-barred by ORS 243.672(6)?

4. Should the State be required to pay a civil penalty pursuant to ORS 243.676(4)?

As set forth below, we conclude that the complaint is time-barred under ORS 243.672(6) and must be dismissed.

RULINGS

The rulings of the ALJ were reviewed and are correct.[1]

FINDINGS OF FACT[2]

The Parties

1. The Union is a labor organization within the meaning of ORS 243.650(13). The Union is the exclusive representative of a bargaining unit of certified and registered child care providers.[3]

2. The State is a public employer within the meaning of ORS 243.650(20).[4]

3. The dispute underlying the complaint in this matter involves multiple state regulatory agencies. The Oregon Department of Education, through its Early Learning Division, oversees and regulates child care licensing through its Office of Childcare (OCC). The Oregon Department of Human Services (DHS), through its Self-Sufficiency Program, operates a subsidized child care program, the Employment Related Day Care program (ERDC). ERDC pays subsidies to licensed child care providers who enroll eligible children in their facilities. ERDC subsidy payments are processed by the Direct Pay Unit.

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[1]The ALJ admitted the Union's Exhibits 1-25 and the State's Exhibits 1-87 into the hearing record.

[2]The Union objected to the recommended order's Findings of Fact, asserting that the Findings of Fact should be more detailed, and contended that the Board should include information that would tend to support the Union's position on the merits of this case. As discussed in this order, the Board concludes that the complaint was untimely and declines to address the merits. Regardless, after a close review of the record, we conclude that the ALJ's findings, including the ALJ's inferences contained therein, are supported by the record. Except as reflected in this final order, we decline to modify the findings and reject the Union's arguments.

[3]*See* ORS 657A.430.

[4]*See* ORS 657A.430(2), (5).

AS's History of Union Activity

4. AS operates a licensed child care facility, A to Zen, from her home. AS has owned and operated A to Zen since 2019.

5. From 2016 to 2019, AS worked for the Union as a Council Representative. AS was the lead negotiator during contract negotiations in 2017. AS was also heavily involved in processing the Union's grievances.

6. In 2019, AS transitioned to the role of child care provider. AS became a steward for the Union in November 2019. Among her duties in her role as a steward, AS has filed about half of the Union's contract grievances and has represented the Union in mediations. AS was a co-lead negotiator in successor contract bargaining in 2021.

7. The Union maintains a Facebook page on which AS regularly posts content, including videos of herself criticizing the State's handling of matters impacting child care providers. AS is the most frequent poster on the Union's Facebook page.

8. In the fall of 2020, AS posted a series of videos to the Union's Facebook page in which she talked about the billing of child care services for children who attended remote school while they were present at a child care facility.

9. AS's postings on the Union's Facebook page were viewed and discussed by members of ERDC staff. On September 1, 2020, Direct Pay Unit Operations Manager JoAnn Lindorfer and ERDC Policy Analyst Jordan Pargeter exchanged messages about AS's Facebook post. Pargeter wrote, "[AS] in that video though * * * was soooo out of control." Lindorfer responded that she had to be "in the right frame of mind" to watch the video and sent Pargeter three "headbang" emojis. Pargeter wrote that AS had some good points "but it's how it's communicated * * * that's really not okay." Lindorfer responded, "I wish we could do something about it." Pargeter replied, "I agree" with a frowning face emoji.

10. On September 10, 2020, Operations Manager Lindorfer and Policy Analyst Pargeter exchanged another series of instant messages about a video that AS had posted on the Union's Facebook page. Lindorfer wrote, "OMG! [AS] just told everyone if they have a question or comment not to post it on [Facebook] but to call her. She said [Facebook] is being monitored by OCC and [DHS]." Lindorfer responded, "I am not listening anymore. My blood pressure is going up. I can't listen to her anymore!"

Suspension of AS's Eligibility for ERDC Subsidy Payments

11. On March 1, 2021, a toddler who was receiving child care at A to Zen was left unattended and walked out of AS's home unsupervised. About five minutes later, the child was discovered by a neighbor and was escorted to join a group of supervised children from A to Zen who were walking less than a block away.

12. AS immediately reported the incident involving the unsupervised child to OCC. An OCC licensing specialist, Kathie Ferrier, advised AS that the incident would be recorded as a self-

reported non-compliance. Ferrier also advised AS that because of the seriousness of the violation, a follow-up visit would be necessary.

13. On March 8, 2021, Travis Whitehead of the Office of Training, Investigations & Safety (OTIS) and Wendy Stott, an Investigative Specialist for OCC, began a joint investigation into the March 1, 2021, incident that had been reported by AS.

14. On March 9, 2021, OCC Licensing Specialist Ferrier issued a letter to AS notifying her that a "valid finding" had been made for noncompliance with the supervision requirements of OAR 414-350-0120(2). A valid finding results when OCC determines that there is evidence that a noncompliance occurred. The letter stated that AS must take immediate steps to come into compliance with the rule.

15. On April 6, 2021, OTIS issued an Abuse Investigation Report regarding the March 1, 2021, incident involving the unsupervised child. The report contained a "founded" disposition for alleged neglect. A founded disposition results when OTIS determines that there is reasonable cause to believe that abuse occurred.

16. On April 9, 2021, Lisa Buss, a policy analyst for ERDC, sent an email to Program Manager Kirstin Sands[5] stating that OTIS had issued a founded disposition against AS. Buss advised Sands that she planned to submit a worksheet to suspend A to Zen's subsidy eligibility. Sands, who was preparing to take vacation leave, directed Buss to handle the matter with Operations Manager Lindorfer and Lead Policy Analyst Jen Heras.

17. On April 15, 2021, Policy Analyst Buss sent her recommendation to suspend AS to Program Manager Sands, Operations Manager Lindorfer, Lead Policy Analyst Heras, and Policy Analyst Alma Amador. Buss noted that there might be a conflict of interest because AS was a board member for the Union and that upper management should make the determination regarding the suspension. In a follow-up email, Buss explained that the reason she thought there might be a conflict of interest was because the parties were involved in contract negotiations.

18. On April 15, 2021, OCC Investigator Stott issued a letter to A to Zen providing notice that valid findings had been made regarding complaints that were unrelated to the March 1, 2021, incident. AS was found to be in noncompliance with OAR 414-350-0190(9), OAR 414-350-0220(1), and OAR 414-350-0240(6). The letter stated that AS must take immediate steps to come into compliance with the rules that were violated.

19. On April 16, 2021, Lead Policy Analyst Heras met with Self Sufficiency Program Director Daniel Haun regarding the recommendation to suspend AS. Haun determined that AS should receive a "notice of awareness" rather than a suspension.

20. On April 20, 2021, OCC Investigator Stott issued a letter to A to Zen providing notice that valid findings had been made regarding complaints that were unrelated to the March 1,

[5]At the time of the relevant events underlying the dispute in this matter, Sands's last name was Holman.

2021, incident. AS was found to be in noncompliance with OAR 414-350-0240(6). The letter stated that AS must take immediate steps to come into compliance with the rules that were violated.

21. On April 21, 2021, Program Manager Sands spoke to Director Haun regarding AS's case. That same day Sands notified Policy Analyst Buss, in an email, that absent "new findings or information to take into account that wasn't made available prior," Haun's decision remained not to suspend.

22. On April 23, 2021, Program Manager Sands spoke with OCC Compliance Manager Katrina Gannon-Peterson about the additional findings that had been made against AS. That same day, Sands brought the information that she had received from OCC to the attention of Director Haun. That afternoon, Sands sent an email to Policy Analyst Buss and Policy Analyst Amador stating that "the decision was made, in light of new information in addition to the existing information, to suspend [AS]." Sands directed Buss that the suspension letter should focus on the founded disposition related to the unsupervised child. Sands instructed Buss not to include the other findings that had been made against AS "unless we get more information from OCC."

23. On April 26, 2021, DHS issued a letter to AS notifying her that she had been placed on suspended status as a DHS child care provider and that she was no longer eligible for subsidy payments, effective April 30, 2021. The letter stated that a provider with a suspended status may be eligible for payments after the six-month ineligibility period ends, if the provider has been approved following reapplication.

24. On April 26, 2021, a staff member in the Direct Pay Unit notified 211info, a nonprofit organization that maintains a database of licensed child care providers, that AS had been suspended with DHS. A 211info staff member designated AS as ineligible for referrals to the public.

25. On May 13, 2021, the Union filed a Step 1 grievance over AS's suspension. The grievance stated that the Union "has documented evidence of state agencies reaching out to our union in an attempt to manipulate content and comments [AS] made on our Facebook page directly breaching our right to union activity," including "repeated attempts to contact [Union] staff * * * to get the Council to censor, subdue or silence [AS] on [the Union's] Facebook page for more than a year" and that "[h]er communications were protected union activity." The grievance further stated that "there does appear to be an overzealous and inconsistent response (with other responses to other providers who are not union leaders) to the complaints against [AS] * * * and with regards to the 6 month [s]uspension being applied at the time and manner in which it was, that seems to connected to [the State's] desire to subvert union activity by leaders of our union." The grievance also stated that the Union has "collected written evidence that the OCC has manipulated their investigation irregularly in an attempt to harm [AS's] child care program and therefore prevent her participation in union activities." The grievance was signed by Aimee Olin, a staff representative for the Union.

26. The parties' collective bargaining agreement (at Article 8, Section 3) specifies that "[g]rievances shall be filed within thirty (30) calendar days of the date the grievant or the Union

knows or by reasonable diligence should have known of the alleged grievance. Once filed, the Union shall not expand upon the original elements and substance of the written grievance."[6]

27. On May 21, 2021, Peter Druckenmiller, an attorney representing AS, sent a letter to DHS stating, among other things, that AS "believes that the rash actions and determination to suspend her continued eligibility to receive subsidy payments are linked to her role as a vocal advocate of Oregon's childcare providers, as well as an outspoken member of her union."

28. On May 25, 2021, AS requested a hearing to contest DHS's decision to suspend her ERDC subsidy payments. A hearing took place before Administrative Law Judge (ALJ) Andrew Holmes-Swanson, with the Office of Administrative Hearings, on July 19 and 29, 2021. AS testified before the ALJ that her union membership might have played a role in the suspension.[7]

29. On June 4, 2021, AS learned that she was not listed in the 211info database. On June 6, 2021, AS sent an email to Union representative Olin stating, "I would argue [unfair labor practice] instead of grievance on suspended status and 211 referrals."

30. On June 7, 2021, AS made a public records request to DHS seeking copies of communications between DHS staff and Early Learning Division staff related to the investigation of A to Zen.

31. On August 26, 2021, ALJ Holmes-Swanson issued a corrected final order upholding the suspension of AS's ERDC subsidy payments. The order stated that AS had argued, among other things, that DHS's "decision to implement a suspension was influenced by her active union participation."

32. On August 31, 2021, the State furnished AS with documents in response to her public records request, including internal emails among ERDC staff discussing the suspension of AS. In turn, AS provided the documents to the Union.

33. On October 27, 2021, AS applied to reinstate A to Zen's ERDC subsidy eligibility.

34. On November 16, 2021, DPU returned AS's application and asked her to complete a background check.

35. On November 19, 2021, AS was approved as eligible, retroactive to October 27, 2021.

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[6]We note this contract language for context, and neither party argues that interpretation or application of this language is necessary to resolve this dispute.

[7]During the hearing in this matter, AS testified that Policy Analyst Buss's testimony before ALJ Holmes-Swanson led AS to testify before ALJ Holmes-Swanson that her union membership might have played a role in the suspension. AS further testified that her testimony before ALJ Holmes-Swanson was speculation and that she did not have evidence in support of the allegation that the suspension was connected to her union activity.

36. On February 17, 2022, the Union filed the unfair labor practice complaint in this case, alleging that the State's decision to suspend AS was based on her Union activity, and therefore violated ORS 243.671(1)(a) and (1)(c).

CONCLUSIONS OF LAW

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

2. The complaint is untimely because it was not filed within 180 days of the alleged unfair labor practice as required by ORS 243.672(6).

We begin with the dispositive question of whether the complaint's claims are time-barred. Under ORS 243.672(6), an unfair labor practice complaint must be filed within 180 days "following the occurrence of an unfair labor practice." Claims brought under the Public Employee Collective Bargaining Act (PECBA) are subject to the discovery rule; the statutory timeline for union claims begins to run when the union, exercising reasonable or due diligence as the exclusive representative of the bargaining unit, 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). "[T]he determination of whether and when an injured party reasonably should have known of an unfair labor practice presents a factual question that requires case-specific analysis." *Id*. at 190.

Here, if the Union knew or, through the exercise of reasonable diligence, reasonably should have known of its claims before August 21, 2021 (180 days before the filing of the initial February 17, 2022, complaint), then those claims are time-barred. The State suspended AS's subsidy payment eligibility in April 2021, approximately 10 months before the Union filed its initial complaint and well outside of the 180-day period. The Union argues, however, that the State "withheld and concealed material information that, had it been promptly disclosed, would have allowed the Union to discover the State's unfair labor practice." Because of that alleged delayed disclosure, the Union asserts that it "did not learn of the key facts until it received a response to a public records request on or about August 30, 2021." Conversely, the State argues that there is no question that the Union knew of its claims for more than 180 days before it filed its initial complaint because the Union filed a grievance on May 13, 2021, alleging that the State had discriminated against AS because of her union activity. For the reasons set forth below, we find that the complaint is untimely.

The record evidence establishes that by May 13, 2021, the Union knew or reasonably should have known of the basis for the unfair labor practice claims that it advances in this case. On that date, the Union filed a detailed, 15-page grievance that stated, in relevant part, that the State's suspension of AS appeared to be "an overzealous and inconsistent response" compared to providers who were not leaders of the Union, and that the suspension of AS, "applied at the time and manner in which it was," appeared connected to a "desire to subvert union activity by leaders of our union."[8]

[8]Additionally, on May 21, 2021, AS made similar arguments through counsel, in her administrative appeal, that the State's suspension of her subsidy eligibility appeared to be linked to her union activity, an argument that AS also articulated during her July 2021 hearing.

Despite its prior contentions, the Union argues that it only received evidence of a violation of PECBA on or about August 30, 2021. On that date, the State provided a response to AS's public records request, which contained emails showing that members of the State's bargaining team (Heras and Sands) were, according to the Union, "materially involved in the decision to suspend AS." The Union argues that because it asserts its claims under a "cat's paw theory of liability" and that theory "requires a showing that an ostensibly neutral and independent decisionmaker (here Director Haun) made an adverse decision that was materially influenced by a biased actor" that this Board should apply "a particularly nuanced application of the discovery rule [in this case]."

We find this argument unavailing. The Union asserted in the May 13, 2021, grievance that AS's suspension was because she was a Union leader, and that AS was adversely treated compared to other child care providers on that basis. At that time, the Union expressly asserted that AS's suspension was *not* the product of a neutral decision-making process but was instead the product of a decision-making process that improperly penalized AS for her role in the Union. Even if it was not privy to the specific emails that it now cites in support of its "cat's paw" theory of recovery, its contentions in the grievance allege facts sufficient to also articulate a *prima facie* case for a PECBA violation. Indeed, it is an unfair labor practice for an employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise [of protected union activity]" under ORS 243.672(1)(a). Likewise, ORS 243.672(1)(c) makes it an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization." The evidence in this case establishes that the Union "knew or should have known" that the conduct and evidence alleged would provide the basis for a potential violation of PECBA no later than May 13, 2021. Therefore, the complaint in this case is untimely.

In arguing for a different result, the Union contends that it is the State's burden to prove that the Union knew or reasonably should have known that an unfair labor practice occurred, and that the record evidence is insufficient to establish that affirmative defense. The Union further asserts that the record evidence only supports that the Union had a "hunch" that there was a connection between AS's suspension and her union activity. The Union argues that the standard for filing grievances errs on the side of prompt filing, whereas unfair labor practices require well-pleaded facts in order to survive a possible motion to dismiss. Therefore, the Union avers that "the fact that an allegation was made in a grievance does not imply that the Union had, at that time, actual or constructive knowledge of specific and articulable facts that would tend to support the grievance allegation," and the State did not submit additional evidence (*e.g.*, testimony as to why the Union did not submit a PECBA information request, or the underlying documents referenced in the grievance) that would establish such constructive knowledge.

We disagree that the grievance merely implies that the Union had a "hunch" or suspicion of a potential unfair labor practice. The grievance states that the Union had "collected written evidence that the OCC has manipulated their investigation irregularly in attempt to harm [AS's] child care program and therefore prevent her participation in union activities." Additionally, and as the Union acknowledges in its memorandum in aid of oral argument, a party is on notice not only of facts actually known to it but *also* facts that with "reasonable diligence" it necessarily would have discovered. *See Rogue River School*, 244 Or App at 192. Therefore, once the Union believed the State committed an unfair labor practice, the Union was to exercise reasonable diligence to determine whether a violation occurred. The record does not establish that the Union

made a PECBA information request or took other steps of reasonable diligence within the 180-day statute of limitations to determine whether the alleged unfair labor practice occurred. It is not necessary, as the Union's argument implies, that an employer submit direct evidence that reasonable diligence was not exercised in a particular case. Rather, it is sufficient to submit evidence—including, but not limited to, circumstantial evidence—that establishes that the Union knew or reasonably should have known that a violation occurred. As explained in this order, we find the particular evidence of the Union's grievance (including the date thereof) sufficient to establish the State's affirmative defense in this case.[9]

For the reasons stated above, we conclude that the complaint is time-barred under ORS 243.672(6), and must be dismissed.

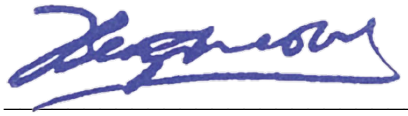
ORDER

The complaint is dismissed.

DATED: November 15, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

[9]The Union also argues that, at the very least, the State's delay of AS's ERDC reinstatement in November 2021, is timely. That allegation was first included in the Union's first amended complaint filed on December 7, 2022, and was not included in the initial complaint filed on February 17, 2022. The Union argues the claim is nevertheless timely because it "relates back" to the allegations in the initial complaint. However, a claim may only relate back to the original date of filing where the original complaint is found to have been timely filed. *Oregon Public Employees Union v. State of Oregon, Department of Administrative Services,* UP-112-93 at 3, 15 PECBR 567, 569 (1995) ("assuming the original complaint was filed within the statutory 180-day requirement, the amended complaint 'relates back' to the date that the original complaint was filed and is also considered timely."). Here, as discussed in this order, the original complaint was not timely. Accordingly, we find that the claim regarding AS's reinstatement is also untimely.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-016-23

(UNIT CLARIFICATION)

GRANTS PASS PROFESSIONAL FIREFIGHTERS, IAFF 3564, Petitioner, v. CITY OF GRANTS PASS, Respondent.	)	ORDER ADDING UNREPRESENTED EMPLOYEES TO EXISTING UNIT

On October 9, 2023, and as amended on October 19, 2023, the Grants Pass Professional Firefighters, IAFF 3564 (GPPF), filed a unit clarification petition under ORS 243.682(2)(a) and OAR 115-025-0050(4) to add the unrepresented classifications of Battalion Chief and Fire Marshall at the City of Grants Pass (City) to GPPF's current bargaining unit of Firefighters, Fire Engineers, Fire Lieutenants, and Fire Inspectors.

A majority of eligible employees specified in the amended petition signed valid authorization cards designating GPPF as the exclusive bargaining representative. On October 23, 2023, the Board's Election Coordinator caused a notice of the petition to be posted. Pursuant to the terms of the amended 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 November 8, 2023).

On November 7, 2023, the City filed objections to the petition and the matter was transferred to the hearings division. On November 15, 2023, before a hearing was held, the City withdrew its objections.

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ORDER

Accordingly, it is certified that the classifications of Battalion Chief and Fire Marshall at the City of Grants Pass are added to the existing bargaining unit represented by Grants Pass Professional Firefighters, IAFF 3564.

DATED: November 21, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

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.	)	STIPULATED ORDER FOR REPRESENTATION COSTS

On November 14, 2022, this Board issued an order ruling in favor of United Food and Commercial Workers, Local 555 (the Union), and imposing a civil penalty against Bay Area Hospital (the Hospital). On December 2, 2022, the Union petitioned the Board for an award of representation costs against the Hospital.

On March 3, 2023, the Hospital petitioned the court of appeals for review of the Board's November 14, 2022, order in CA Case No. A180467. As a result, the Union's representation cost petition was effectively stayed pursuant to OAR 115-035-0055(2)(a), which prohibits the Board from issuing an order on representation costs if an appeal is filed, until it receives the appellate judgment. The Hospital's appeal was transferred to the court's appellate settlement program, and the appeal was placed into abatement. Through the settlement program, the parties reached a settlement agreement settling the appeal. Pursuant to that settlement agreement, the Hospital filed a dismissal of its appeal of the Board order in this matter. Also pursuant to the settlement agreement, the parties jointly stipulated that when the Board received the appellate judgment dismissing the Hospital's appeal, that the parties would request that the Board enter a jointly stipulated order on representation costs. On October 30, 2023, the parties jointly submitted a stipulated order on representation costs and requested that this Board issue an order on representation costs as follows: The Hospital will pay the Union $29,235.45 in representation costs pursuant to ORS 243.676(3)(b), OAR 115-035-0055(1)(a), and OAR 115-035-0055(1)(b)(E).

Having received the order of dismissal and appellate judgment, this Board now issues this order for representation costs. OAR 115-035-0055(2)(a). Having reviewed the jointly stipulated order on representation costs, the Board grants the joint request and issues this order effectuating the stipulated order.

STIPULATED ORDER

The Hospital will pay the Union $29,235.45 in representation costs pursuant to ORS 243.676(3)(b), OAR 115-035-0055(1)(a), and OAR 115-035-0055(1)(b)(E).

DATED: November 27, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

*Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

*Member O'Glasser did not participate in the deliberations of this case.

EMPLOYMENT RELATIONS BOARD
OF THE

STATE OF OREGON

Case Nos. UP-045-20 and UP-004-21

(UNFAIR LABOR PRACTICE)

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 555, Complainant, v. BAY AREA HOSPITAL, Respondent And BAY AREA HOSPITAL, Complainant, v. UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 555, Respondent.	)	STIPULATED ORDER FOR REPRESENTATION COSTS

On July 10, 2023, this Board issued an order ruling in favor of United Food and Commercial Workers, Local 555 (the Union), and imposing civil penalties against Bay Area Hospital (the Hospital). On July 31, 2023, the Union petitioned the Board for an award of representation costs against the Hospital.

On August 25, 2023, and August 28, 2023, the Hospital petitioned the court of appeals for review of the Board's July 10, 2023, order in CA Case Nos. A182153 and A182157. As a result, the Union's representation cost petition was effectively stayed pursuant to OAR 115-035-0055(2)(a), which prohibits the Board from issuing an order on representation costs if an appeal is filed, until it receives the appellate judgment. The Hospital's appeals were transferred to the court's appellate settlement program, and the appeals were placed into abatement. Through the settlement

program, the parties reached a settlement agreement settling the appeals. Pursuant to that settlement agreement, the Hospital filed dismissals of its appeals of the Board order in this matter. Also pursuant to the settlement agreement, the parties jointly stipulated that when the Board received the appellate judgment dismissing the Hospital's appeals, that the parties would request that the Board enter a jointly stipulated order on representation costs. On October 30, 2023, the parties jointly submitted a stipulated order on representation costs and requested that this Board issue an order on representation costs as follows: The Hospital will pay the Union $63,580 in representation costs pursuant to ORS 243.676(2)(d), OAR 115-035-0055(1)(a), and OAR 115-035-0055(1)(b)(E).

Having received the orders of dismissal and appellate judgment, this Board now issues this order for representation costs. OAR 115-035-0055(2)(a). Having reviewed the jointly stipulated order on representation costs, the Board grants the joint request and issues this order effectuating the stipulated order.

STIPULATED ORDER

The Hospital will pay the Union $63,580 in representation costs pursuant to ORS 243.676(2)(d), OAR 115-035-0055(1)(a), and OAR 115-035-0055(1)(b)(E).

DATED: November 27, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

*Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

*Member O'Glasser did not participate in the deliberations of this case.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-006-23

(UNIT CLARIFICATION)

PORT OF PORTLAND POLICE EMPLOYEES' ASSOCIATION, Petitioner, v. PORT OF PORTLAND, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Mark Makler, Attorney at Law, Public Safety Labor Group, Portland, Oregon represented Petitioner.

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

On October 27, 2023, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4).

ORDER

The petition is dismissed.

DATED: November 28, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-006-23

(UNIT CLARIFICATION – CONFIDENTIAL EMPLOYEE)

PORT OF PORTLAND POLICE EMPLOYEES' ASSOCIATION, Petitioner, v. PORT OF PORTLAND, Respondent.	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on June 21, 2023, in Portland, Oregon. The record closed on July 21, 2023, following submission of the parties' post-hearing briefs.

Mark Makler, Attorney at Law, Public Safety Labor Group, Portland, Oregon represented Petitioner.

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

On April 17, 2023, Petitioner Port of Portland Police Employees' Association (POPPEA or Association), filed a petition seeking clarification of its Port of Portland Airport (PDX) Police Department bargaining unit to include a General Business Analyst II position. On May 8, 2023, PDX filed objections to the petition, asserting that the petitioned-for employee is a confidential employee within the meaning of ORS 243.650(6).

The issue at hearing was whether the petitioned-for General Business Analyst II is a confidential employee within the meaning of ORS 243.650(6) of the Public Employees Collective Bargaining Act (PECBA). As discussed below, this Board concludes that the position at issue is confidential under ORS 243.650(6) and therefore properly excluded from the Association bargaining unit.

RULINGS

The rulings of the ALJ have been reviewed and are correct.[1] [2]

FINDINGS OF FACT

The Parties

1. The Port of Portland is a public employer as defined by ORS 243.650(20). The facility of the Port at issue here is the Portland Airport, designated as "PDX." PDX has its own police force, with two major divisions, Operations and Patrol. The PDX police share law enforcement duties with various other local, state, and federal law enforcement entities at PDX.

2. The Association is a labor organization as defined by ORS 243.650(13). It represents various PDX employees employed in the PDX police department. During the relevant time period, Pete Brenner was the Association president.

3. The chief of the PDX police is Jason Wallis, who has worked at PDX for 26 years. Wallis worked as a police officer, sergeant, lieutenant, and captain before being promoted to chief in 2015.

4. Chief Wallis is the highest-ranking employee in the police department and a member of the Port's bargaining team. The parties do not dispute that Wallis formulates, determines, and effectuates management policies regarding collective bargaining with the Association. He does so in part through working with PDX Command Staff and PDX human resources officials.

PDX Police Department

5. At the time of hearing, the PDX police department employed approximately 60 employees. Approximately 50 of those employees (police officers, sergeants, and police clerks), are in the Association bargaining unit. The police department job classifications not in the bargaining unit are the chief, assistant chief, three captains, three lieutenants, general business analyst II (analyst) (the position at issue in this hearing), and police administrative coordinator III (ADCO III or ADCO) (vacant at the time of hearing). Three of these positions report directly to Chief Wallis – the assistant chief, analyst, and ADCO.

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[1]The following Exhibits were received into evidence at the hearing: Joint Exhibits Jt-1 through Jt-5; Petitioner's Exhibits A-1 through A-13; and Respondent's Exhibits R-1 through R-17.

[2]The Board recording of the hearing was subject to technical malfunctions, and therefore the recording of the hearing made and distributed by the Respondent is adopted as the official recording of the hearing.

6. Three job classifications in the PDX Communications Center are also included in the bargaining unit – call takers, communications dispatchers, and communications center operation coordinators. Chief Wallis does not oversee these positions.

7. At the time of hearing, Suzette Pump held the general business analyst II position at issue in this Petition. Pump worked for PDX as the ADCO from March 2017 until her promotion to analyst on February 10, 2022.

ADCO III classification duties

8. The PDX ADCO III position functions as the executive assistant to the PDX Police Chief.

9. The ADCO III position description[3] is dated June 13, 2022. The first sentence under "Job Purpose" states, "Provide confidential administrative support for the activities of the Police Department's Chief and Command staff." (Exh. Jt-4 at 1.)

10. The position description lists the "principal accountabilities/essential functions" "in order of importance." (Exh. Jt-4 at 1.) The list states:

> "(60%) *1. Complete or direct completion of office administrative functions such as payroll, requisitions, purchasing, travel arrangements, reimbursement, petty cash audit and credit card reconciliation.
>
> "(10%) *2. Perform complex administrative tasks, including support on capital project and budget; grant funding tracking; organizing and updating the police policy and procedures manual; maintain restricted files, such as supervisor's Inquiries and Internal Investigations.
>
> "(15%) *3. Perform confidential support for the Chief, Command Staff, and Business Analyst which includes (but is not limited to) generate correspondence; prepare official documents and maintaining schedules; process a wide range of confidential and sensitive material, including security directives, police reports, criminal history info, disciplinary documents, citizen complaints and airport security regulations.
>
> "(10%) *4. Take notes and document meetings, including collective bargaining negotiations; assist with research and documentation for arbitrations, litigation and public record requests.
>
> "5. Process, track and file personnel documents, including worker's compensation and FMLA."
>
> (Exh. Jt-4 at 1).

[3]The parties do not dispute the accuracy of this position description.

Creation of General Business Analyst II Classification

11. During 2021, Chief Wallis determined that he would benefit from a higher-level assistant, and that Pump would benefit from additional job responsibilities and increased salary (Pump was then at salary level 74). Wallis spoke with PDX human resources officials and Pump about creating such a position, ultimately called general business analyst II. Wallis and Pump worked together to create a draft position description and a recommended salary level (78) for the new position.

12. In early 2022, the draft position description was sent to the PDX Human Resources Department, which accepted the job description but reduced the salary level from 78 to 76, reasoning that many of the analyst job duties were the same as the ADCO position at level 74. Pump accepted the analyst position effective February 10, 2022.

13. Pump's general business analyst II position is sometimes referred to as "Police ADCO/business analyst" in PDX documents and among PDX staff. (Exh. R-1.)

Duties and Responsibilities of General Business Analyst II Classification

14. The general business analyst II position description[4] is dated January 31, 2022. The first sentence under "Job Purpose" states, "Provide confidential administrative support for the activities of the Police Department's Chief and Command staff."[5] (Exh. Jt-3 at 1.)

15. The position description lists the "principal accountabilities/essential functions" "in order of importance." (Exh. Jt-3 at 1.) Function number one, representing "40%" of the duties, states:

> "Complete or direct completion of complex office administrative functions such as payroll, requisitions, purchasing, travel arrangements, reimbursement, petty cash audit and credit card reconciliation; organize and update the police policy and procedures manual; maintain restricted files, such as Supervisor's Inquiries and Internal Investigations; perform confidential support for the Chief and Command Staff, which includes (but is not limited to) generating correspondence; prepare official documents and maintain schedules; process a wide range of confidential and sensitive material, including security directives, police reports, criminal history info, disciplinary documents, citizen complaints and airport security regulations. Take notes and document meetings, including collective bargaining negotiations; assist Chief and Captain with research and documentation for arbitrations, litigation

[4]The parties do not dispute the accuracy of this position description.

[5]PDX police Command Staff meetings generally include Chief Wallis, the assistant chief, the three captains, and Pump. From January 2023 to May 2023, when Pump's prior ADCO position was filled by employee WM, WM attended the Command Staff meetings and took the minutes. Pump also attended some of those meetings to coach WM and took the minutes when WM could not attend the meetings.

and public records requests. Process, track and file personnel documents, including worker's compensation and FMLA."

(Exh. Jt-3 at 1.)

16. Pump's analyst duties include creating personnel documents, preparing and maintaining disciplinary/investigation records and files, and preparing for arbitration cases and lawsuits. She also collected, reviewed, and summarized data to monitor and report on PDX law enforcement related subjects. Pump was granted permission to attend trainings in that field.

17. From February through December, 2022, notwithstanding Pump's promotion, Pump remained the only support staff to the chief.

18. A new ADCO, WM, was not hired until January 3, 2023. Beginning in January 2023, Pump was responsible for training WM in ADCO duties, and then acting as a backup for meeting assistance when WM was absent.

Pump Command Staff Participation as Analyst from February 2022 through January 2023

19. On March 29, 2022, at a Command Staff meeting, the participants discussed a grievance. Pump was present at this meeting.

20. On April 5, 2022, at a Command Staff meeting, the participants discussed a pending pay grievance involving a police officer and whether to resolve it. Wallis said he planned to meet with the Association president to discuss the grievance, along with Blaise Lamphier (PDX Employee & Labor Relations Manager) and a PDX attorney. Wallis also discussed the upcoming Association labor negotiations and stated that Pump would be part of the PDX caucus team. Wallis also discussed pending personnel issues as well as a petition the Association had filed to represent PDX police lieutenants. Pump was present at this meeting.

On May 4, 2022, at a Command Staff meeting, Wallis discussed personnel issues and an Association grievance. Wallis also provided a bargaining update which included PDX's plan to seek a two-year extension of the existing collective bargaining agreement. Wallis also discussed the Association's desire to represent the maintenance operation center dispatchers who recently had been moved to the same location as the emergency dispatchers. Wallis and the other meeting participants, including Pump, discussed whether PDX should voluntarily agree to add the dispatchers to the bargaining unit.

21. On October 10, 2022, at a Command Staff meeting, the participants discussed a contract administration issue involving a police officer who had recently resigned. The issue was whether the officer qualified for the signing bonus in the one-year extension agreement between PDX and the Association. Pump was present at this meeting.

22. On November 7, 2022, at a Command Staff meeting, Wallis discussed the Police Department's current budget, including the fact that the department was over budget in overtime costs. Wallis also discussed the department's current staffing and stated that he had decided not to

increase minimum staffing. Wallis considered this information to be restricted and not something to be shared with the Association at that time. Pump was present at this meeting.

23. Also at the November 7 meeting, the participants discussed the body worn camera training policy and that Association president Brenner had asked Association attorney Mark Makler to review that policy.

24. On November 14, 2022, at a Command Staff meeting, Pump was present when a captain raised a contract administration issue related to shift and vacation bidding. After discussing the issue, the participants decided that the Association would need to propose new contract language if they wanted a change.

25. On December 9, 2022, the PDX Employee & Labor Relations Manager, Blaise Lamphier, sent an email to various PDX executive staff, including Pump, stating:

> "We are beginning the process of preparing for the 2023 POPPEA Bargaining and will be kicking off with an initial strategy session sometime before the end of the year… You are included on this email because you will be a part of the internal strategy team (the "caucus team") to discuss edits to the contract and bargaining strategy."

(Exh. R-2.)

26. The email next listed the members of the Port's labor negotiations caucus team, which included Pump, Wallis, PDX Labor Relations Director Blaise Lamphier, EOC Senior Manager Marc Huls, then ADCO WM, and outside Legal Counsel Adam Collier.

27. The email also stated:

> "Before our first strategy session, please take some time to review the CBA to identify and make comments/redlines to sections that need substantive revisions (first priority) and any sections that may need some language cleanup (second priority). We have created a Sharepoint site[6] for you all to make edits and comments in so that we can keep all of our comments in one place – keep your eye out for a link to that document from Juliet in the next few days."

(Exh. R-2, emphasis omitted.)

28. On January 5, 2023, Pump attended the PDX police caucus team initial bargaining strategy meeting.

[6]Sharepoint is a web-based collaborative document management and storage system.

29. Legal Counsel Collier is the chief spokesperson for PDX during these negotiations. Wallis and PDX Senior Manager Huls work with Labor Relations Director Lamphier on a regular basis regarding personnel issues. Lamphier also works directly with the Association to obtain necessary PECBA-related information and materials.

30. On January 24, 2023, Pump attended a Command Staff meeting. At that meeting, Wallis disclosed what he understood to be attorney-client privileged information from a total compensation market analysis that had been prepared by PDX outside labor counsel in preparation for the labor negotiations. Wallis also stated that negotiations with the Association had begun and provided the ground rules with those attending the meeting (including Pump). Wallis also reported that the Association president had stated that the Association planned to propose moving to ten-hour shifts. The Command Staff discussed the viability of ten-hour shifts.

31. Pump also attends Command Staff meetings in which other matters are discussed such as issues related to bargaining, grievances, contract administration, and discipline. In Command Staff meetings generally, Wallis discloses everything he knows about bargaining proposals and potential proposals, the pros and cons of proposals, his confidential thoughts about them, and the likely consequences if a proposal were accepted or rejected.

32. Command Staff meetings when Pump is present routinely include issues related to Association bargaining unit member grievances, discipline, and issues of contract administration.

33. Discussions of grievances at Command Staff meetings where Pump is present include labor and management's positions, the merits of the grievance, whether to settle the grievance, and the consequences of settling or not settling the grievance. Wallis seeks input about grievances during these meetings, including when the grievance involves a payroll issue. Pump is the Command Staff member most knowledgeable about payroll issues.

34. Wallis relies on Pump to assist him and provide input when addressing confidential matters in the area of collective bargaining and relies on her input. He also relies on her to assist him in drafting confidential communications. No other employee provides these services to Wallis.

35. The PDX labor attorney (outside counsel) sends bargaining updates to the rest of the caucus team members, including Pump. At some point during her analyst work, it became Pump's practice to delete those updates without reading them. She did not, however, disclose this to the labor attorney or the rest of the caucus team.

36. Pump has access to restricted information pertaining to collective bargaining through her participation in Command Staff meetings and the work she performs for Wallis. The PDX Sharepoint site includes all PDX draft and actual bargaining proposals. Members of the PDX caucus team, including Pump, have access to the Sharepoint site and can make comments on either party's proposals, and the PDX draft proposals. By the time of hearing, however, Pump rarely accessed the Port's Sharepoint site.

Pump's Command Staff Participation while in Analyst position from February 2023 until April 2023

37. From February 2023 through April 2023, Pump continued to attend Command Staff meetings either in the capacity of training her ADCO replacement, WM, or performing those ADCO duties because WM was unavailable. Pump also continued doing analyst work and attending trainings in that field.

38. Once WM was trained, she was the note taker and administrative assistant to the management team in negotiations with the Association, and attended management strategy meetings and management caucuses about that bargaining. WM was asked to gather bargaining-related information for the management negotiation team. WM took bargaining notes for management and offered and provided support as to logistical bargaining functions, such as printing documents for the Port management team during bargaining with the Association.

39. On February 7, 2023, Pump was present at the Command Staff meeting. There, Wallis discussed confidential budget issues including staffing needs and a PDX directive to reduce the police budget by $2.5 million. Wallis also discussed the Association's demand to bargain over the body worn camera policy and stated that PDX's outside labor counsel would respond to the demand to bargain.

40. On February 14, 2023, at a Command Staff meeting, Wallis again discussed issues related to the current labor negotiations, including the Association's proposal to move to ten-hour shifts. Wallis told a captain who was not part of the PDX caucus team, to avoid discussing issues related to ten-hour shifts with Association unit employees. During the same meeting, Wallis discussed an overpayment issue involving some bargaining unit employees. Pump was present at this meeting.

41. On March 7, 2023, Pump uploaded a document to the Port caucus team's Sharepoint site that included her recommended proposals for collective bargaining agreement Articles 21 (Overtime) and 45 (Uniforms). Regarding Article 21, Pump recommended that PDX either (1) eliminate the language pertaining to the overtime compensatory bank, or (2) add language requiring employees serving overtime to choose to either be paid for overtime only or take it as compensatory time only. Pump's proposal would end a bargaining unit employee practice of splitting compensation for specific overtime worked into both a partial overtime payment and a partial compensatory time credit.

42. Regarding Article 45, Pump recommended three options for changing the uniform allowance language in order of preference. Pump's first choice was that PDX would make monthly payments of employee's uniform allowance instead of through one annual payment. This change would avoid situations in which an employee received the entire uniform allowance at the start of the fiscal year and but left their employment with PDX or moved to a PDX position that did not require uniforms.

43. Also on March 7, 2023, Pump's recommendations for Articles 21 and 45 were discussed in a Command Staff meeting which Pump attended. PDX followed Pump's recommendations. Regarding Article 21, PDX followed Pump's option two and proposed contract

language that would prohibit employees from splitting worked overtime into both wages and compensatory time. Regarding Article 45, PDX proposed contract language to pay the uniform allowance monthly instead of an annual lump sum.

44. Pump also recommended to Command Staff that the PDX police department transfer payroll process duties from the bargaining unit police clerks to Pump. At the time of hearing, PDX had not followed that recommendation.

45. Also at the March 7, 2023, Command Staff meeting, Wallis discussed several bargaining issues including the proposals Pump had recommended for Article 21 and 45, Article 10 issues related to ten-hour shifts, and numerous Association proposals. The participants strategized regarding how to respond to the Association's proposals, including possible counterproposals.

46. On March 28, 2023, at a Command Staff meeting, the participants again discussed Association bargaining proposals including a new proposal related to name, image, and likeness. Wallis also shared updated market data that the Port's outside labor counsel sent to him. Pump was present at this meeting.

47. On April 11, 2023, at a Command Staff meeting, a captain discussed a pending Association grievance related to court time/travel time. Wallis discussed a bargaining proposal the Association had made regarding court time. Pump was present at this meeting.

48. On April 18, 2023, the Association filed this unit clarification petition. Shortly thereafter, Wallis stopped holding Command Staff meetings, fearing that Pump could be in a position to share restricted information discussed during the meetings with the Association, and be faced with a conflict of interest. Wallis did not wish to hold those meetings without Pump's participation. PDX has not, however, changed Pump's position description or eliminated the ADCO position after it became vacant on May 31, 2023, when new ADCO MW left employment with PDX.

49. At the time of hearing, PDX and the Association were continuing to negotiate over a successor collective bargaining agreement.

CONCLUSIONS OF LAW

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

2. The General Business Analyst II is a confidential employee and is properly excluded from the Association bargaining unit.

The Public Employee Collective Bargaining Act (PECBA) defines a confidential employee under the statute as "one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." ORS 243.650(6). The PECBA excludes confidential employees from the definition of public employee, and thus excludes them from membership in a bargaining unit. Under the statutory definition,

"[c]onfidential employee status is a narrow technical concept, determined by an employee's direct and specific involvement in collective bargaining matters, rather than work in conformance with the broad, generally-held concept of 'confidential' secretarial duties." *AFSCME Local 1724, Council 75, AFL-CIO v. City of Eugene*, Case No. UC-10-85 at 9, 9 PECBR 8591, 8599 (1986). Further, "[t]his Board seeks to avoid the proliferation of confidential employees." *Service Employees International Union Local 503, Oregon Public Employees Union v. Oregon Cascades West Council of Governments*, Case No. UC-16-04 at 8, 20 PECBR 786, 793 (2004). In particular, this Board seeks to avoid the proliferation of confidential employees that "has no justification other than the convenience of management." *Oregon AFSCME, Council 75 v. Benton County*, Case No. C-210-82 at 18, 7 PECBR 5973, 5990 (1983). *See* also *Oregon AFSCME Council 75, Local 88 v. Multnomah County*, Case No. UC-004-19__ PECBR __ (Aug 28, 2020).

In representation-related cases, no party bears the burden of proof. OAR 115-010-0070(5)(a). However, where, as here, the issue is whether an employee falls within a statutory exclusion from the definition of "public employee," there must be sufficient evidence to establish that the exclusion applies. Without detailed, specific evidence establishing that a putative confidential employee meets the statutory definition, we will conclude that the employee is a public employee covered by the PECBA and therefore not excluded as a statutory confidential employee under the statute. *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 23, 25 PECBR 996, 1018 (2014).

To determine the PECBA confidential status of an employee, this Board asks three questions, all of which must be answered in the affirmative to establish confidential status:

> "(1) Does the allegedly confidential employee provide assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining?
>
> "(2) Does the assistance relate to collective bargaining negotiations and administration of a collective bargaining agreement?
>
> "(3) Is it reasonably necessary for the employee to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies?"
>
> *Oregon Cascades*, UC-16-04 at 8, 20 PECBR at 793 (internal quotation marks and citation omitted).

We will analyze each of these questions in turn.

Question One: Chief Wallis' contract bargaining and administration duties

The first question focuses on the manager whom the allegedly confidential employee assists, and requires a showing that the manager "formulates, determines, *and* effectuates employer policies in the area of collective bargaining." *Eugene*, UC-10-85 at 9, 9 PECBR at 8599 (emphasis

in original). The parties agree that Chief Wallis meets these criteria. Accordingly, we conclude that the answer to the first question is yes.

Question Two: Assistance in negotiating and administering a collective bargaining agreement

The second question focuses on the purportedly confidential employee, and requires a showing that the employee gives assistance, in a confidential capacity, that is directly related to collective bargaining. *Eugene,* UC-10-85 at 10, 9 PECBR at 8600. This Board's analysis focuses on whether the employee in question *acts* as a confidential employee, not whether the employee's job description is sufficient to establish confidential status. *Group of Unrepresented Battalion Chiefs Employed by the City of Medford v. City of Medford, and International Association of Fire Fighters, Local 1431 v. City of Medford and International Association of Fire Fighters, Local 1431 v. City of Medford*, Case Nos. CC-002-14 & CU-003-14 at 23 n 17, 26 PECBR 294, 316 n 17 (2014). Further, the employee at issue "must currently act in a confidential capacity." *Id.* at 23, 26 PECBR at 316 (emphasis in original). "[M]ere access to information regarding labor negotiations is not sufficient to establish assistance in a confidential capacity." *Eugene,* UC-10-85 at 10, 9 PECBR at 8600.

We turn to whether the assistance provided by the analyst involves collective-bargaining negotiations and administration of a collective bargaining agreement. Pump's involvement in those arenas include her presence at Command Staff meetings during bargaining discussions, her raising issues for negotiation, and membership on the PDX labor negotiation caucus team. Pump's work is in marked contrast to employees who furnish information that is readily available to the union, such as raw data concerning existing pay and benefits; or who calculate the cost of various bargaining proposals. *See Rogue Community College v. Oregon School Employees Association*, Case No. C-46-80 at 3, 5 PECBR 4127, 4129 (1980); *AFSCME Local Union 2746 v. Clatsop County*, Case No. UC-4-93 at 5-6, 14 PECBR 434, 438-439 (1993) (calculation of projected salaries and alternative wage scales was "not substantial enough" to establish confidential status); *Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC*, Case No. UC-54-86 at 8, 10 PECBR 25, 32 (collation of raw data concerning overtime, working out of class, and prior applications of leave accrual characterized as "minimal involvement" which did not qualify as confidential); *Pendleton School District 16R v. Oregon School Employees Association, Chapter 115*, Case Nos. C-208/218-83 at 5, 7 PECBR 6435, 6438 (1984) (assistance limited to costing bargaining proposals was characterized as "*de minimis*" and did not justify exclusion from the unit).

Pump's duties are comparable to those described by this Board in *Oregon AFSCME Council 75, Local 88 v. Multnomah County*, Case No. UC-004-19 (Aug 28, 2020):

> "Here, although Bothe [the purported confidential employee] provided assistance that included gathering public data and calculating projected cost scenarios, her assistance was not limited to those activities. Bothe also participated in bargaining strategy meetings, bargaining sessions, and management caucuses. Bothe was included in bargaining team emails in which negotiations priorities and strategies were discussed. She was privy to bargaining proposals that were being considered by the City before they were presented at the bargaining table, and [her manager]

solicited her feedback regarding pending proposals. Under these circumstances, we conclude that the payroll administrator has historically provided confidential assistance during collective-bargaining negotiations. *See, e.g., Oregon School Employees Association v. Canby Union High School District No. 1*, Case No. C-144-77 at 3-4, 3 PECBR 1843, 1845-46 (1978) (payroll clerk and secretary who worked on proposed salary schedules used in contract negotiations and were privy to confidential discussions of collective-bargaining matters were held to be confidential employees)."

We conclude that the answer to the second question is yes.

Question 3: Is it reasonably necessary for the employee to be designated confidential?

The third question in determining confidential employee status is whether it is reasonably necessary for the employee to be designated as confidential to protect against the premature disclosure of management's collective-bargaining policies, proposals, and strategies. In general, exclusion from the bargaining unit is not appropriate when the justification presented by the employer presents a matter of convenience, or where any assistance that might be sought by the employer could be easily obtained from currently excluded employees.[7] Were the analyst excluded from the bargaining unit, Wallis would have no qualified confidential administrative support to meet his needs during the bargaining process. *See City of Medf*ord, Case Nos. CC-002-14 & CU-003-14 at 25. On this record, we conclude that the exclusion of the general business analyst is not merely a matter of convenience for PDX. *See Oregon School Employees Association v. Petersburg School District 14-C*, Case No. UC-64-85 at 8-9, 8 PECBR 8320, 8327-28 (1985) (confidential status was reasonably necessary where a finding that the disputed employee was not confidential would have left the district with no confidential clerical help and the superintendent would have had to perform the clerical work needed for bargaining himself).

While some of the analyst's duties were suspended for confidentiality and conflict of interest reasons when this Petition was filed, they have not been removed from the position. The Association argues that this suspension of duties supports its position. However, we agree with PDX that the chief's suspension of Command Staff meetings illustrates the importance of Pump's confidential work and Command Staff attendance. Further, Pump's choice not to read bargaining summary updates from PDX Counsel does not affect our reasoning. There is no evidence that this choice was communicated to her employer and there is no evidence that PDX officials were aware of this. In any event, PDX also provided Pump with this bargaining information from counsel and at Command Staff meetings.

Consequently, we find that the answer to the third question is yes.

While Pump has pursued, with the employer's blessing, training opportunities to increase her skills and knowledge in other aspects of the analyst position, we conclude that confidential duties have been in the job description and duties for the analyst since its inception. We conclude

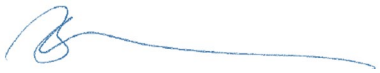
[7]Neither party suggests that the continued existence of the ADCO position after Pump's promotion, which was vacant most of that time, has had a determinative effect on Pump's confidential status.

that the general business analyst II position for the Port of Portland Police Department is confidential within the meaning of ORS 243.650(6), and that therefore the position cannot be included in the Association bargaining unit. We will dismiss the Petition.

PROPOSED ORDER

The Petition is dismissed.

SIGNED AND ISSUED 27 October 2023.



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. MA-009-23

(MANAGEMENT SERVICE REMOVAL AND DISMISSAL)

M. R., Appellant, v. STATE OF OREGON, OREGON HEALTH AUTHORITY, Respondent.	)	DISMISSAL ORDER

M. R., Appellant, Portland, Oregon, represented himself.

Margaret Wilson, Senior Assistant Attorney General, Labor & Employment Section, Salem, Oregon, represented the Respondent.

On August 23, 2021, Appellant began his state service with Respondent, State of Oregon, Oregon Health Authority (OHA). Appellant was hired as a Compliance Specialist 3, a position in the management service. On September 5, 2023, OHA issued Appellant a notice of removal from management service, and dismissal from state service, effective that day. The notice informed Appellant that he could file an appeal of his dismissal from state service with this Board, but that any such appeal needed to be received by this Board within 30 days.

Under ORS 240.570(4), ORS 240.560(1), and OAR 115-045-0005, an appeal of a management service dismissal must be filed by 30 days after the effective date of the dismissal. Here, a timely appeal was required to be filed by October 5, 2023. On October 10, 2023, Appellant filed this appeal. Although the appeal was filed after the statutory deadline, Appellant requests that this Board accept his appeal and set the matter for hearing. For the reasons set forth below, we are unable to grant Appellant's request.

The State Personnel Relations Law (SPRL) and binding, long-standing precedents require this Board to strictly enforce the statutory deadline for filing an appeal, even in cases where the

management service employee did not understand their deadline or missed it by only a short period.[1] *See Furqan v. State of Oregon, Department of Human Services*, Case No. MA-16-12 at 1-2 (August 2012) (on reconsideration) (citing *Nelson v. Department of Corrections*, Case No. MA-36-94 (January 1995) and *Lamb v. Cleveland*, 28 Or App 343, 345-46, 559 P2d 529 (1977)). There is no hardship exception to the 30-day limitations period and "a party's failure to meet the statutorily required deadlines deprives this Board of jurisdiction to hear the appeal." *Furqan* at 2 (internal citations omitted).

Appellant suggests that OHA's alleged failure to timely provide his last paycheck pursuant to ORS 652.140 requires that the effective date of his termination be tolled, thus extending the SPRL statute of limitations. Appellant offers no authority to support this theory, and we can find none. As Appellant acknowledges in his correspondence with this Board's agent, ORS 652.140 is a separate statute from ORS Chapter 240. This Board does not have jurisdiction to adjudicate disputes or to grant remedies under ORS 652.140. Furthermore, as explained above, this Board is required to strictly enforce the statutory deadline for filing an appeal. *See Lamb*, 28 Or App at 345-46. Accordingly, OHA's alleged failure to promptly provide a final paycheck does not extend the timeline for filing an appeal under ORS 240.570(4), ORS 240.560(1), and OAR 115-045-0005.[2]

We conclude that the appeal filed by Appellant on October 10, 2023, is untimely because it was not filed within the 30-day limitation period established by ORS 240.570(4), ORS 240.560(1), and OAR 115-045-0005. Therefore, this Board must dismiss the appeal.

ORDER

The appeal is dismissed as untimely.

DATED: November 29, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

[1]Appellant has not contended that he did not receive the notice on September 5, 2023, and in fact emailed OHA when he received it.

[2]Appellant also alleges that OHA violated his rights relating to protected leave and therefore violated ORS 657B.070 (Denying leave; discrimination and retaliation prohibited; remedies for violation). This Board has no jurisdiction over the enforcement of this law. As provided in the text of the statute, an employee who alleges a violation may bring a civil action or may file a complaint with the Commissioner of the Bureau of Labor and Industries. *See* ORS 657B.070(2).

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-014-17

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, Complainant, v. UNIVERSITY OF OREGON, Respondent.	)	FINDINGS AND ORDER FOR ATTORNEY FEES ON APPEAL

This case is before the Board for consideration of the parties' respective petitions for attorney fees on appeal. As explained in greater detail below, we grant the fee petition that was filed by the Service Employees International Union Local 503, Oregon Public Employees Union (Union), and deny the fee petition that was filed by the University of Oregon (University).

On April 28, 2017, the Union filed an unfair labor practice complaint against the University. On December 4, 2018, this Board issued an order holding that the University violated ORS 243.672(1)(e). We did not impose a civil penalty. The University appealed. On August 9, 2021, the Court of Appeals entered an appellate judgment concluding that the Board erred in its analysis and remanding the case for reconsideration. *Service Employees Int'l Union Local 503 v. U of O*, 312 Or App 377, 494 P3d 993 (2021). The court's appellate judgment designated the University as the prevailing party. The University petitioned for its attorney fees incurred in prosecuting the appeal and sought $5,000.00. The Union objected to the University's petition for attorney fees. The Union did not dispute the University's account of its fees incurred; rather, it contended that any award of attorney fees should follow the ultimate disposition of the case. This Board held the University's fee petition in abeyance pending the ultimate resolution of the case.

On November 23, 2021, on remand from the Court of Appeals, this Board issued a final order holding that the University violated ORS 243.672(1)(e). We did not impose a civil penalty. The University appealed. On July 19, 2023, the Court of Appeals affirmed the Board's order. *Service Employees Int'l Union Local 503 v. U of O*, 327 Or App 149, 534 P3d 736 (2023). The court's appellate judgment designated the Union as the prevailing party. The Union petitioned for its attorney fees incurred in prosecuting the appeal and seeks $5,000.00. The University objected to the Union's petition for attorney fees. The University does not dispute the Union's account of

its fees incurred; rather, it contends that any fees awarded to the Union should be offset by an award of fees arising out of its successful intermediate appeal.

The legislature has defined our authority to issue an award of attorney fees on appeal, which is contingent on whether this Board has found that a person named in the complaint has committed an unfair labor practice. When an unfair labor practice is found, we are directed to "[d]esignate the amount and award attorney fees, if any, to the prevailing party on appeal, including proceedings for Supreme Court review, of a board order." ORS 243.676(2). In contrast, when no unfair labor practice is found, the statute authorizes an award of representation costs, but does not authorize an award of attorney fees on appeal. ORS 243.676(3). Put another way, "the statute does not authorize an award of attorney fees when no unfair labor practice was committed." *Clackamas County Employees Association v. Clackamas County*, Case No. UP-4-08, 23 PECBR 797, 802 (2010) (Attorney Fees Order).[1]

In addition, our rules do not authorize an award of attorney fees arising out of intermediate appeals. We award attorney fees to the "prevailing party on an appeal" up to $5,000.00 for cases where no civil penalty is awarded. OAR 115-035-0057. "The prevailing party is the party designated as such in the appellate judgment issued by the Court of Appeals or the Supreme Court *following the ultimate appellate decision regarding a particular case*." OAR 115-035-0057(3) (emphasis added). Therefore, "before attorney fees * * * can be awarded to the prevailing party, there must be a final adjudication" on whether an unfair labor practice occurred. *Carlson v. AFSCME*, 77 Or App 49, 52, 711 P2d 199 (1985) (internal citations omitted). "Until that determination is finally made, there is no statutory basis for an award." *Id*.[2]

Therefore, 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 ultimate appellate judgment. OAR 115-035-0057(3).

2. The Union requests $5,000.00 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).

3. Although it filed other objections to the Union's fee petition, the University did not object to the hours or the billing rates as excessive. OAR 115-035-0057(2). Based on the Union's

[1]In *Clackamas County*, the Board explained that it had been inconsistent on the question of whether attorney fees were awardable when no unfair labor practice occurred. The Board went on to explain why it ultimately reached the conclusion that attorney fees were not awardable in that circumstance.

[2]Although not cited by either party, we recognize that we granted a party's petition for attorney fees following an appeal, during the pendency of Board proceedings on remand, in *Portland Firefighters' Association, IAFF Local 43 v. City of Portland*, Case No. UP-059-13 (2020) (Attorney Fees Order). In that case, no objections to the fee petition were filed. In any event, that award was not consistent with our precedent, and we disavow any suggestion that attorney fees on appeal are awardable (1) before the ultimate disposition of the case or (2) when no unfair labor practice was committed.

unrebutted fee statement, we find that the amount of hours and billing rates were reasonable and award $5,000.[3]

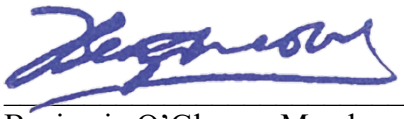
ORDER

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

DATED: December 14, 2023.

Adam L. Rhynard, Chair

*Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Khosravi did not participate in the deliberations of this case.

[3] On this same date, we issue a separate order for representation costs under ORS 243.676(2)(d) and OAR 115-035-0055.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-014-17

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, Complainant, v. UNIVERSITY OF OREGON, Respondent.	)	FINDINGS AND ORDER FOR REPRESENTATION COSTS

On December 4, 2018, this Board issued an order holding that the University of Oregon (University) violated ORS 243.672(1)(e), as alleged in the complaint filed by the Service Employees International Union Local 503, Oregon Public Employees Union (Union). The University appealed, and the Court of Appeals reversed and remanded the case for reconsideration consistent with its opinion. *Service Employees Int'l Union Local 503 v. U of O*, 312 Or App 377, 494 P3d 993 (2021). On November 23, 2021, this Board issued an order on remand adhering to our ultimate conclusion that the University violated ORS 243.672(1)(e). The University appealed, and the Court of Appeals affirmed our order. *Service Employees Int'l Union Local 503 v. U of O*, 327 Or App 149, 534 P3d 736 (2023). Having received the appellate judgment, this Board now issues its order for representation costs. OAR 115-035-0055(2)(a).[1]

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 required one day of hearing.

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

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). *See* OAR 115-035-0055(1)(b)(C).

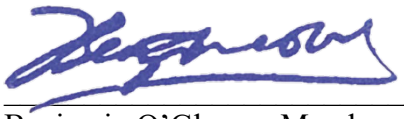
ORDER

The University shall remit $3,000 to the Union within 30 days of the date of this Order.

DATED: December 14, 2023.

Adam L. Rhynard, Chair

*Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Khosravi did not participate in the deliberations of this case.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-039-22

(UNFAIR LABOR PRACTICE)

OREGON NURSES ASSOCIATION, Complainant, v. OREGON HEALTH SCIENCES UNIVERSITY, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Thomas Doyle, General Counsel, Oregon Nurses Association, Tualatin, Oregon, represented Complainant.

Dan Rowan, Attorney at Law, CDR Labor Law, Portland, Oregon, represented Respondent.

On November 20, 2023, Administrative Law Judge Jennifer D. Kaufman issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4).

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

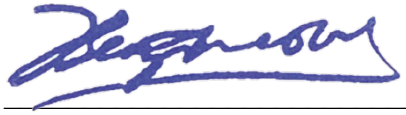
ORDER

OHSU shall cease and desist from violating ORS 243.672(1)(a).

DATED: December 15, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member



Benjamin O'Glasser, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-039-22

(UNFAIR LABOR PRACTICE)

OREGON NURSES ASSOCIATION, Complainant, v. OREGON HEALTH SCIENCES UNIVERSITY, Respondent.	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

A hearing was held before Administrative Law Judge (ALJ) Jennifer D. Kaufman on June 2, 2023, via videoconference. The record closed on August 14, 2023, following receipt of the parties' post-hearing briefs.

Thomas Doyle, General Counsel, Oregon Nurses Association, Tualatin, Oregon, represented Oregon Nurses Association.

Dan Rowan, Attorney at Law, CDR Labor Law, Portland, Oregon, represented Oregon Health Sciences University.

On October 27, 2022, the Complainant, Oregon Nurses Association (Association) filed an unfair labor practice complaint against the Respondent, Oregon Health Sciences University (OHSU), alleging that OHSU violated ORS 243.672(1)(a) of the Public Employee Collective Bargaining Act (PECBA). On December 28, 2022, OHSU filed a timely answer.

The issue is: Did OHSU interfere with, restrain, or coerce employees in or because of the exercise of protected rights, in violation of ORS 243.672(1)(a), by meeting with Association representative MC as a result of her protected activity?

As set forth below, we conclude that OHSU violated ORS 243.672(1)(a) as alleged.

RULINGS

The rulings of the ALJ were reviewed and are correct.[1]

FINDINGS OF FACT

The Parties

1. OHSU is a "public employer" within the meaning of ORS 243.650(20). OHSU operates a public hospital and research institution in Portland, Oregon,

2. The Association is a "labor organization" within the meaning of ORS 243.650(13). The Association is the exclusive representative of a bargaining unit of registered nurses at OHSU.

3. At all times material to this case, the Association and OHSU were parties to a collective bargaining agreement effective by its terms from January 4, 2021, through June 30, 2023.

Background and Staffing Level Dispute

4. MC (a pseudonym) is a charge nurse in the Labor and Delivery Unit of OHSU. MC has worked for OHSU since 2014. She has worked in the Labor and Delivery Unit since 2016.

5. Charge nurses are included in the Association's bargaining unit. Since June 2021, MC has been a "unit representative," or steward, for the Association.

6. Charge nurses report to a nurse manager, who in turn report to the Director of Women's and Neonatal Services, Molly Blaser. Above Director Blaser is Chief Nursing Officer (CNO) Jane Russell. Gretchen McCullough is the Associate CNO.

7. Charge nurses are responsible for overseeing the day-to-day operations of their units, including managing patient flow and patient assignments, and scheduling staff nurses. Charge nurses determine staffing levels based on established staffing protocols and the standards set forth in the collective bargaining agreement. Nurse managers have oversight over the staffing decisions of charge nurses.

8. Article 4 of the collective bargaining agreement contains a "Management Rights" clause. Article 4 gives management the rights to:

"1. Direct employees
"2. Hire, promote, transfer, assign and retain employees.

[1]The ALJ admitted Complainant's Exhibits 1-8 and Respondent's Exhibits 1-2 into the hearing record.

"3. Suspend, discharge or take other proper disciplinary action against employees.
"4. Reassign employees.
"5. Relieve employees from duty because of lack of work or other proper reasons.
"6. Schedule Work.
"7. Determine methods, means and personnel by which operations are to be conducted."

(Exh. R-1 at 17.)

9. Article 6.17 of the collective bargaining agreement, "Nurse Staffing Law," states:

"The Employer and registered nurses will act in compliance with Oregon's hospital nurse staffing law, ORS 441.151 through 441.192 [(Nurse Staffing Law)]. At least twice per year the [Chief Nurse Executive (CNE)] or the CNE's designee shall, at the request of the Nurse Staffing Committee, meet with the Committee at one of its scheduled meetings.

"6.17.1 Staffing Plans.

"1. Establish a unit's staffing levels, including during meals and breaks.
"2. Include a mechanism to measure patient acuity and nursing work intensity.
"a. A patient acuity and workload intensity tool is to be agreed upon by [Unit Based Nursing Practice Committee (UBNPC)] consensus, and included with the staffing plan submission.
"3. The Employer will maintain appropriate staffing levels on each unit, supported by the acuity and intensity outlined in section 6.17.1(2), for the duration of the shift."

(Exh. R-1 at 26.)

10. Article 27.2 of the collective bargaining agreement covers the development of UBNPCs. Article 27.2.1, "Role of UBNPC," states that the UBNPC is the "foundation for shared governance at the unit level. Its structure provides for the involvement of the UBNPC in local decision making by creating an environment that enhances the flow of information to and feedback from every nurse." Article 27.2.2, "Recommendations, functions and authority," states that the "UBNPC is responsible for making recommendations and performing functions that advance the delivery of professional nursing at OHSU" including the "development, implementation, monitoring, evaluation and modification of the unit staffing plan." (Exh. R-1 at 86-87.)

11. MC has been a member of the Nurse Staffing Committee since June 2021. MC is a former member of a UBNPC.

12. Staffing levels are a persistent source of disagreement between the Association and OHSU. MC has been outspoken on the matter in her roles as a member of the Nurse Staffing Committee and as an Association representative. In March 2021, the Association filed a grievance against OHSU alleging a failure to adhere to contractual staffing standards. MC signed the grievance on behalf of the Association.

13. At times, the discussions between MC and Director Blaser about staffing issues have been tense. Because of this dynamic, Blaser requested that MC communicate with her in person as much as possible rather than through email or telephone calls.

14. On September 22, 2022, the UBNPC for the Labor and Delivery Unit held a virtual meeting with OHSU leadership to discuss their concerns regarding staffing levels. The meeting was attended by Chief Executive Officer and Vice President John Hunter, former CNO Dana Bjarnason, Director Blaser, CNO Russell, and Associate CNO McCollough. High level managers do not typically attend UBNPC meetings, but the September 22, 2022, meeting was attended by OHSU leadership because the parties were attempting to resolve the pending grievance over staffing issues. Association Representative Amber Cooper also attended the meeting.

15. In preparation for the September 22, 2022, meeting, Labor and Delivery Unit nurses compiled data about patient acuity and staffing levels and prepared a PowerPoint presentation regarding the data. Staff nurse JS (a pseudonym), who had the lead role in collecting the data, presented the information during the meeting, and the meeting participants engaged in a discussion over the interpretation of the data and whether staffing standards were being met. MC expressed frustration that nurses were continually asked to validate and update their data to substantiate their claims about staffing levels, which delayed the process of getting the additional nurses that were needed. MC also stated that she believed the staffing plan was not being followed and that OHSU's staffing practices were not in compliance with the Nurse Staffing Law. At one point when CNO Russell was speaking, MC interjected and stated that there were quite a few nurses who were trying to speak and that she wanted to make sure they all got a chance to speak.[2]

16. On September 28, 2022, Director Blaser filled in for a nurse manager. At approximately 8:30 a.m., Blaser telephoned MC to request information about patient numbers and nurse staffing levels. MC told Blaser that the unit had three patients and nine nurses. Blaser asked whether MC intended to send any nurses home. MC responded that she did not think it was safe to do so and that pursuant to "AWHONN" (Association of Women's Health, Obstetric and Neonatal Nurses) standards, she needed the nurses that she had to ensure that nurses were able to take their meal and break periods. Blaser responded that they would talk about it later.

17. At 8:52 a.m., MC sent Director Blaser a follow-up email. MC stated in her email, "I am very uncomfortable with the conversation we had this morning. It felt like you were trying to bully and threaten me with the statement 'we'll be talking about his later' in regards to having extra nurses without assignments. Our data and variances have proven over and over we need at a minimum of two extra nurses at all times, we often need a second flex or a second triage, and to maintain AWHONN we need meal and break nurses, and we almost always need an admit nurse

[2]Russell believed that MC's interruption was abrupt and rude, but not a basis for corrective action.

available." MC continued her email with further discussion of the staffing needs of the unit, and closed her email by stating, "As charge nurses we should be supported for doing what is best and safe for our patients and it is unacceptable to have to constantly advocate and justify having extra nurses on the unit that don't have assignments, especially being a high risk level one trauma OB hospital. I did not feel supported." (Exh. C-2 at 1-2.)

18. At 11:05 a.m., Director Blaser responded to MC's email. Blaser copied CNO Russell and Assistant CNO McCullough on her response, which stated:

> "I am sorry you were uncomfortable with my asking why you staffed [nine][3] nurses when you only had [three patients] on the floor and [one] in triage. From my perspective, you were significantly overstaffed and should not have needed that many nurses at that time. I believe that we are not on the same page on how many nurses we should staff with only [four patients]. We are needing to staff safely AND with a fiscal lens as well."

(Exh. C-3 at 1.) Blaser went on to explain why she thought that seven was the appropriate number of nurses under the circumstances. Blaser closed her email by stating:

> "I was not threatening you but wanted to let you know that I needed more conversation which would not happen on the phone or in an email (from our previous conversation).
>
> "We will need to come together to discuss AWHONN, staffing and how the acuity tool is filled out. I know we are not all on the same page and we need to find a way to get there. More to come and happy to continue the conversation in person! As always, I appreciate you reaching and sharing your thought process."

(Exh. C-3 at 2.)

19. At 5:45 p.m., MC responded to Director Blaser's email. In addition to copying CNO Russell and Assistant CNO McCollough, MC copied the UBNPC for the Labor and Delivery Unit and Nurse Staffing Committee member Erica Swartz. MC stated in her response:

> "We absolutely should not be staffing with a fiscal lens, that is in direct violation of the [Oregon Health Authority (OHA)] nurse staffing law. This is not a matter of a difference of opinion or not being on the same page, this is a matter of blatantly disregarding data, variances, OHA violations, and keeping our patients safe. Our staffing plan was approved by the staffing committee by both managers and RNs months ago. It is irrelevant whether one 'agrees.' Our staffing plan was approved based on OHA law and patient safety. AWHONN standards are not arguable, they are our professional practice standards that must be followed. I do not feel comfortable speaking with you in person without representation but feel free to let me know if you would like to set up a meeting with [Association Representative Cooper] and HR. I am including UBNPC as they are an integral part of this

[3] In the original email, Director Blaser typed the number nine in red font.

> conversation. I am also including Erica Swartz, the [co-chair] of the staffing committee to answer any questions you may have about our staffing plan."

(Exh. C-4.)

20. On September 29, 2022, CNO Russell responded to MC's email with an email titled "Professionalism and code of conduct." Russell copied Assistant CNO McCullough, Senior Human Resources Business Partner Todd Pfahler, and Executive Assistant Emily Duquette. Russell stated in the email, "I would like to schedule a time to meet with you regarding the tone of your communication both written and in meetings. Please include an ONA representative if you wish. This conversation will be about professionalism and code of conduct expectations as an employee of OHSU." Russell added that Pfahler and McCullough would be joining them during the meeting, and asked Duquette to schedule a 40-minute meeting on WebEx (a videoconferencing platform). (Exh. C-5 at 3.)

21. The meeting between CNO Russell and MC was held on October 11, 2022, over Webex.[4] Also attending the meeting were Assistant CNO McCullough, HR Business Partner Pfahler, Association Representative Cooper, Association Representative Matt Calzia, and Nurse Staffing Committee member Swartz. Russell told MC that she had been observing her communications over Webex and email. She stated that she wanted to talk to MC about how she was coming across, which was hurting MC, and that MC's message was important but that it was getting lost because of the way she delivered it. Russell stated that the purpose of the meeting was to help MC become a more effective communicator. Russell stated that the first topic she wanted to cover was respect of others. She stated that MC seemed comfortable giving feedback but not receiving it. Russell also stated that being direct to the point of rudeness is not acceptable, and that several people feel that MC's communication is aggressive to the point of rudeness.[5] Russell stated that managers have a right to ask questions about how a shift was staffed. Russell then stated that they would discuss the OHSU Code of Conduct[6] and the Management Rights clause of the collective bargaining agreement. Russell quoted provisions of the Code of Conduct that address holding oneself and colleagues to high standards; giving and receiving feedback openly; and being courteous, honest, and respectful. Russell also read the Management Rights clause out loud to MC, including the provisions related to discipline. Russell stated that when putting those things together, MC's recent email communication with Director Blaser had been inappropriate. MC responded that the problem was not that Blaser had questioned MC about staffing, but that Blaser's comment that they would be talking later felt like bullying. Cooper stated that MC's advocacy is protected under PECBA, that it was appropriate for MC to be direct when she was acting in her

[4]This account of the October 11, 2022, meeting is based on notes that were taken by Calzia and Swartz during the meeting, admitted into the record as Exhs. C-6 and C-7. It is undisputed that although the notes did not capture every detail of the discussion and are not verbatim transcriptions of the meeting, they are a generally accurate reflection of the discussion that took place during the meeting.

[5]CNO Russell did not identify the individuals who had expressed concern over MC's aggressiveness.

[6]The OHSU Code of Conduct was not entered into the record.

capacity as a union steward, that MC's advocacy was related to a pending grievance, and that the meeting felt retaliatory. McCullough stated that the conversation was not intended to be investigatory or disciplinary. Cooper asked why, in that case, Russell had read the statements that she had, which felt like intimidation. Russell responded that she disagreed, and that she did not consider aligning communication with the Code of Conduct to be retaliatory. Cooper stated that she considered reading the Management Rights clause aloud to be retaliation and intimidation, and that the Association would consider filing an unfair labor practice complaint. The meeting ended shortly thereafter.

22. During the hearing, CNO Russell explained that she had called the October 11, 2022, meeting because MC's September 28, 2022, emails were concerning, and she wanted to talk to MC about how to communicate differently. She testified that the "words bully and threaten did not sit well" with her, that managers have the right to question staffing decisions, and that doing so is not bullying or threatening. Russell further explained that she told MC that she could bring an Association representative because MC had previously indicated that she would not speak to Director Blaser without an Association representative present.

23. Approximately 1200 nurses work under CNO Russell. Russell has met with nurses at OHSU more times than she can estimate. Russell has never read the Management Rights clause of the collective bargaining agreement or the OHSU Code of Conduct out loud during any meeting with a nurse other than the October 11, 2022, meeting with MC.

24. MC discussed the October 11, 2022, meeting with several of her colleagues. MC's meeting with CNO Russell was still a topic of discussion among unit nurses as of the date of the hearing in this matter.

25. MC did not receive any discipline in connection with the October 11, 2022, meeting.

26. MC continued to advocate regarding staffing issues after the October 11, 2022, meeting. On October 19, 2022, MC sent an email to Director Blaser and nursing staff about nurses floating to outside units, which MC contended was a violation of the staffing plan and the Nurse Staffing Law.

CONCLUSIONS OF LAW

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

2. OHSU violated ORS 243.672(1)(a) by summoning MC to a meeting and suggesting that she could be subject to corrective action in response to her protected activity.

Under the PECBA, it is an unfair labor practice for a public employer or its designated representative to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.672(1)(a). ORS 243.662 guarantees public employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public

employer on matters concerning employment relations." Subsection (1)(a) has two prongs, commonly referred to as the "because of" and "in" prongs. The Association contends that OHSU's actions violated both prongs of the statue.

To determine if an employer interfered with, restrained, or coerced employees "because of" the exercise of protected rights, we examine the employer's motives or reasons for the employer's action. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12 at 18, 25 PECBR 871, 888 (2013). If an employer acts "because of" employees' exercise of protected rights, the employer's actions are unlawful. It is not necessary for a complainant to prove that the employer acted with hostility or union animus, or prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. *Id.*

We determine the employer's reason for acting by examining the record as a whole. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 626, 16 P3d 1189, 1195 (2000). After we make that factual determination, we decide whether the reasons were lawful or unlawful. *Id.* at 639. If, after considering the evidence from both parties, the facts persuade us that the employer acted for lawful reasons, the "because of" claim must be dismissed. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03 at 9, 20 PECBR 733, 741 (2004). If the record persuades us that the employer acted for unlawful reasons, including that the employer's stated reasons were a pretext for unlawful conduct, we will find a "because of" violation of subsection (1)(a). If we find the employer acted for both lawful and unlawful reasons, we apply a mixed motive analysis. In that analysis, we determine whether the employer would have taken the same action in the absence of the protected activity. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-39-10 at 15-16, 25 PECBR 325, 339-40 (2012).

When we analyze whether an employer's actions restrained, interfered with, or coerced employees "in" the exercise of their protected rights, "the employer's motive is irrelevant." *Id*. at 15, 25 PECBR at 339. "We focus only on the effects of the employer's actions on the employees. If the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in PECBA-protected activity," the employer violates the "in" prong of subsection (1)(a). *Id*. A violation of the "in" prong of subsection (l)(a) may be either derivative or independent. An employer who commits a "because of" violation also generally commits a derivative "in" violation because an action taken in response to employees' exercise of protected rights has the natural and probable effect of chilling the exercise of those rights. *Id.* An independent violation is typically "based on an employer's threat or implied threat of interference with employees' exercise of protected rights." *Tigard Police Officers' Association v. City of Tigard*, Case No. UP-59-10 at 11, 24 PECBR 927, 937 (2012). For a reasonable employee to be chilled in the exercise of protected activity, that employee must see some relationship between the protected activity and the employer's actions or statements. *Id*. (citing *Teamsters Local 223 v. Tillamook County Emergency Communications District*, Case No. UP-46-95 at 8, 16 PECBR 397, 404 (1996)).

Here, MC engaged in PECBA-protected activity by serving as an Association representative and a member of the Nurse Staffing Committee. MC's advocacy regarding adherence to contractual staffing standards was a part of those roles. MC's advocacy was also protected because employees engage in PECBA-protected activity when they seek to enforce their rights under a collective bargaining agreement. *Central Education Association and Vilches v. Central School District, 13J*, Case No. UP-74-95 at 14, 17 PECBR 54, 67 (1996), *recons*, 17 PECBR 93 (1997), aff'd, 155 Or App 92, 95 n 1, 962 P2d 763 (1998). OHSU does not dispute that MC's advocacy related to staffing standards was protected.

As detailed above, MC was summoned to a meeting with CNO Russell to discuss the tone of her communication during the September 22, 2022, UBNPC meeting and in the September 28, 2022, email exchange between MC and Director Blaser. Those communications concerned contractual staffing standards and were therefore protected activity. Based on an examination of the record as a whole, we are not persuaded that the purpose of the meeting was to help MC become a more effective communicator, or that Russell would have taken the same action absent MC's protected advocacy. The record does not establish that CNO Russell has taken a similar interest in the communication style of other nurses, or that calling an employee into a meeting with the CNO and a HR Representative is a routine response to discourteous communication. We conclude that MC was summoned to the meeting because of, and in response to, her protected activity.

OHSU contends that its conduct did not violate the statute because it did not take any "adverse action" against MC. We disagree. In a recent decision, we found a "because of" violation based on an employer's coercive statements to an employee in response to their protected activity. *See Klamath Falls Association of Classified Employees v. Klamath Falls City Schools*, Case No. UP-039-21 at 18-19 (2023) (finding a "because of" violation where a manager effectively threatened an employee's job in response to her protected communication with a union representative about a contractual issue). Here, although MC was not disciplined, she was called into a formal meeting with high-level management and effectively put on notice that she was at risk for future discipline. Despite Assistant CNO McCullough's statement that the meeting was not investigatory, it is reasonable to perceive a meeting requested by the CNO, to discuss Code of Conduct "expectations," in the presence of a Human Resources representative, as an indicator that discipline is being contemplated. Furthermore, CNO Russell read the entire Management Rights clause out loud to MC, including OHSU's right to discipline and discharge employees. Given this context, a reasonable interpretation is not, as OHSU suggests, that the meeting was called to have a conversation about improving MC's communication skills, but rather, that it was a veiled threat that MC should tone down her advocacy or face future discipline. We find that conduct coercive. *See Hood River Education Association v. Hood River County School District*, Case No. UP-38-93 at 5, 14 PECBR 495, 499 (1993) (violations can occur in the absence of direct threats or coercion). Even if, despite the reasonable conclusions to be drawn from the circumstances of the meeting, CNO Russell's intent was not to deter MC's advocacy but merely to change MC's tone, the meeting was nonetheless coercive because it is not necessary to establish that an employer is subjectively motivated by an intent to restrain or interfere with protected rights to find a "because of" violation. *Klamath County Fire District*, Case No. UP-049-12 at 18, 25 PECBR at 888.

In arguing that OHSU's conduct did not constitute interference, restraint, or coercion, OHSU relies on *AFSCME Local 88 v. Multnomah County*, Case No. UP-44-98 at 8-9, 18 PECBR 430, 437-38 (2000). In that case, a manager sent a letter to a union council representative about the behavior of two employee shop stewards. The manager asked for the council representative's help to correct a continuing pattern of distrust and with the use of work time for conducting union business. In contrast to the present case, the employee shop stewards were not called into a meeting with management and told that their conduct had fallen short of work rules or standards, and they were not advised of the employer's right to discipline them. Indeed, the Board found it significant in that case that the letter was sent to the council representative, not the stewards, which minimized the potential for any chilling effect. Consequently, we find the case distinguishable.

We conclude that OHSU violated ORS 243.672(1)(a) by summoning MC to a meeting and effectively threatening her with discipline because of her protected activity. Having found that OHSU interfered with, restrained, or coerced MC "because of" her protected activity, we also find an "in" violation. As stated above, conduct taken in response to protected activity also has the natural tendency to chill employees in the exercise of protected rights. Furthermore, the record establishes that news of the October 11, 2022, meeting was disseminated among MC's coworkers. Employees hearing that MC was summoned to such a meeting in response to her advocacy during the September 22, 2022, UBNPC meeting and her September 28, 2022, email exchange with Director Blaser would reasonably be chilled from speaking out about adherence to contractual staffing requirements. Therefore, OHSU's conduct had "the natural and probable effect of deterring employees from engaging in PECBA-protected activity." *Tri-County,* Case No. UP-39-10 at 15, 25 PECBR at 339. Consequently, we find that OHSU's conduct violated both the "in" and "because" prongs of ORS 243.672(1)(a).

Remedy

Because we have found that OHSU violated ORS 243.672(1)(a), we order OHSU to cease and desist from engaging in that unlawful conduct. *See* ORS 243.676(2)(b).

PROPOSED ORDER

OHSU shall cease and desist from violating ORS 243.672(1)(a).

DATED: November 20, 2023.

Jennifer D. Kaufman
Administrative Law Judge

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