EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. FR-003-18

(DUTY OF FAIR REPRESENTATION)

BRADLEY R. WARKENTIN, Complainant, v. BEND LA PINE SCHOOL DISTRICT, and OREGON SCHOOL EMPLOYEES ASSOCIATION, Respondents.	)	RECOMMENDED RULINGS, FINDINGS OF FACT CONCLUSIONS OF LAW, AND PROPOSED ORDER

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on September 27, 2018, in Salem, Oregon. The record closed on November 20, 2018, upon receipt of the parties' post-hearing briefs.

Anthony Albertazzi, Attorney at Law, Albertazzi Law Firm, Bend, Oregon, represented the Complainant, Bradley R. Warkentin.

Gregory P. Colvin, Attorney at Law, High Desert Education Service District, Redmond, Oregon, represented the first Respondent, the Bend La Pine School District.

Sarah K. Drescher, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented the second Respondent, the Oregon School Employees Association.

On March 13, 2018, the Complainant, Bradley R. Warkentin, filed an unfair labor practice complaint with the Employment Relations Board (Board) against the Respondents, the Bend La Pine School District (District) and the Oregon School Employees Association (OSEA). That

complaint was later amended on April 20, 2018 and September 18, 2018. As defined by the ALJ, the issues of this case are: (1) whether OSEA violated ORS 243.672(2)(a) by signing a memorandum of understanding without authority and without ratification by OSEA's membership; (2) if so, whether the District violated ORS 243.672(1)(a), (b), and (f) by its conduct during a meeting between the OSEA and the District held on September 14, 2017; and (3) whether OSEA is entitled to a civil penalty against Warkentin. As set forth below, we conclude: (1) that OSEA did not violate ORS 243.672(2)(a) as alleged; (2) that accordingly the District did not violate ORS 243.672(1)(a), (b), and (f) as alleged; and (3) that Warkentin must pay a civil penalty to OSEA.

RULINGS

1. Here, as is the standard practice for "duty of fair representation" cases like this one, the ALJ correctly bifurcated the hearing and ruled that Warkentin must first prevail against his labor organization, OSEA, before proceeding against his employer, the District. *See Ralphs v. Oregon Public Employees Union, Local 503, SEIU, AFL-CIO and State of Oregon, Executive Department*, Case Nos. UP-68/69-91, 14 PECBR 409 (1993); *Mengucci v. Fairview Training Center and Teamsters Local 223*, Case Nos. C-187/188-83, 8 PECBR 6722 (1984). Accordingly, the September 27, 2018 hearing merely addressed Warkentin's ORS 243.672(2)(a) claim against the OSEA. The parties' post-hearing briefs are also largely limited to that claim, as directed by the ALJ.

2. In a September 5, 2018 motion to dismiss, OSEA argues that Warkentin's ORS 243.672(2)(a) charge should be dismissed because, according to OSEA, Warkentin's complaint initially listed Robin Raiter, the local union president, as a respondent but failed to specifically allege that Raiter acted "outside the scope of her authority" as required by the Board's precedent. *See Chan v. Leach and Stubblefield, Clackamas Community College; McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-15 at 2-3, 21 PECBR 563, 564-65 (2006); *Witherell, et al. v. Marion County Law Enforcement Association*, Case No. UP-42-94 at 3-4, 15 PECBR 729, 731-32 (1995). Relatedly, OSEA also argues that a September 12, 2018 motion to amend the complaint should not have been granted because, according to OSEA, Warkentin did not show "good cause" to substitute OSEA as a party for Raiter as required by OAR 115-035-0010(2). Upon review, we conclude that the ALJ ruled correctly on this matter.

We break no new ground with this conclusion. In our view, this is not actually a case in which a complainant was allowed to add "new" or "substitute parties" to its case. Instead, the ALJ's rulings on this matter merely communicated for the record what the Board has always viewed as the respondents throughout the life of this case. In other words, OSEA was not added as a party. To the extent that Raiter was indeed once named in the complaint as "Respondent 2," she has otherwise always plainly been, as the ALJ put it, a mere "agent or representative" of the respondent union. The same is true for Shay Mikalson, the District's superintendent, who was similarly named in Warkentin's initial complaint. Thus, technically, Warkentin need not have filed his September 12, 2018 motion to amend (which simply seeks to "clarify" who the parties are "[i]n order to avoid confusion") at all. *See Oregon School Employees Association v. South Coast Education Service District*, Case No. UP-027-16 at 4, 27 PECBR 48, 51 (2017) (amendment

allowed to clarify ambiguity in original complaint); *Wiese v. Multnomah County Corrections Deputy Association and Multnomah County*, Case No. UP-17-07 at 2, 22 PECBR 555, 556 n 1 (2008) (Board "construed" one portion of a complaint to include a different statutory charge); *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05 at 2-3, 22 PECBR 108, 109-10 (2007) (in which complainant amended its complaint to clarify who was the true party in interest, and in which cover page of complaint did not match the narrative portion of the complaint).

As we read the original filings, it is ultimately sufficiently clear that Warkentin always intended to and did formally charge OSEA with an unfair labor practice, rather than Raiter in particular. Notably, on the first page of the initial March 13, 2018 complaint, Warkentin *also named OSEA the entity* and provided what is plainly OSEA's business address in Salem (rather than an address in or near Bend or La Pine) immediately underneath that. It also specifically listed Raiter as "Chapter #6 President," further suggesting she was named in her official capacity only. Moreover, as OSEA accurately states in its post-hearing brief (with emphasis in original), "the complaint failed to allege *any* claim against Ms. Raiter." Accordingly, in every single communication thus far (including the ALJ's March 30, 2018 order to show cause and the ALJ's May 2, 2018 statement of the issues, for example), the Board and the ALJ have always only listed OSEA as a respondent, and never Raiter. In addition, we note that even OSEA formally identified itself (not Raiter) as the respondent in its initial March 27, 2018 informal response and motion to dismiss (which it shared with the other parties). Significantly, that position did not change until OSEA's September 5, 2018 motion (which we must presume caused Warkentin to file his September 12, 2018 motion to amend, and to do so as close to the September 27, 2018 hearing as he did).

3. During the hearing, the ALJ correctly declined to admit Exh. C-2 and Exh. C-7 in full, as both exhibits were voluminous and much of the two was not meaningfully developed by Warkentin, who sought their complete admission. Exh. C-7 in particular is 200 pages in length and is relatively unorganized. In the end, the ALJ only admitted pages 1-3 of Exh. C-2, and pages 29, 30, 32, 33, 39-41, 76-79, 92, 93, 111, 128, 129, 136, 137, and 194 of Exh. C-7. That ruling was correct as well.

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

FINDINGS OF FACT

1. Complainant Bradley R. Warkentin works for the District as a "Custodian 3." In practice, that position may also be called a "C-3 Custodian" or simply a "C-3." The C-3 position is also a lead position and a separate classification than the entry-level "C-1" position.

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

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

4. OSEA is divided into approximately 140 distinct chapters across the state. Each of those chapters has its own local constitution and an elected executive board. Each executive board

has nearly exclusive authority to make decisions on behalf of its chapter. The chapter that represents District employees, including Warkentin, is Chapter 6. In total, Chapter 6's bargaining unit includes approximately 870 employees. The latest iteration of Chapter 6's local constitution was adopted on February 8, 2017 and became effective on July 1, 2017. In practice, the term "executive board" is used interchangeably with the term "executive committee" and other, related terms.[1]

5. OSEA Chapter 6's executive board consists of four elected officers, all of whom are also District employees. Recently, those officers have been Robin Raiter as president, Mary Hofer as vice president, Warkentin as treasurer, and Debbie Christian as secretary. However, as indicated below, Warkentin resigned from his position as treasurer in protest on October 12, 2017. Before he resigned, Warkentin had been treasurer since 2006 or 2007. Raiter started her tenure as president in May 2017. All decisions made by Chapter 6's executive board are determined by a majority vote.

6. In April or May of 2017, the District and OSEA started negotiating a successor collective bargaining agreement (CBA). OSEA Chapter 6's bargaining team included the executive board (*i.e.*, Christian, Hofer, Raiter, and Warkentin) along with eight or nine other members representing each of the major classifications included in Chapter 6's bargaining unit. During the negotiations, the District shared that it wanted to make some changes to Article 16.6.2 of the existing CBA in order to address a staffing issue. After it became clear that they could not reach an agreement on that particular issue during the negotiations for the successor CBA, the District and OSEA agreed that they would address that issue outside of the regular contract negotiations, during future "labor-management meetings," which have occurred monthly for years. Later, in August 2017, the two reached a tentative agreement (T.A.) that resolved all of their issues except those involving Article 16.6.2, which remained unchanged. That T.A. was ratified by Chapter 6's membership later the same month, resulting in the current CBA, which is effective from July 1, 2017 through June 30, 2021.[2]

7. At all times material, Article 16.6.2 of the CBA has stated:

> "Non-contract days for twelve (12) month employees shall be scheduled with approval of the employee's immediate supervisor. Whenever possible, twelve month employees shall remit to their supervisor their proposed request to use non-contract leave at least thirty (30) calendar days in advance of anticipated leave use. Shorter notice requests for non-contract leave shall be given all consideration

[1]OSEA Chapter 6's local constitution ostensibly treats the "Executive Board" and the "Executive Committee" of Chapter 6 as different groups. (Exh. R-2 at 8.) However, that distinction does not reflect the testimony provided during the hearing, which frequently conflates the two, and ultimately is not crucial to our analysis. The parties' briefs also use the terms interchangeably.

[2]Article 16.6.2 was also discussed during prior bargaining cycles. In each of those cycles, OSEA Chapter 6 always reached an agreement with the District to keep the current contract language or modify it. For his part, it appears that Warkentin voted "Yes" in favor of the above-referenced T.A. (Exh. R-7 at 2.)

by the immediate supervisor dependent upon work load and substitute availability." (Exh. R-1 at 31.)

The phrase "Non-contract days" used in Article 16.6.2 essentially refers to scheduled non-work days.

8. On August 1, 2017 at 5:37 p.m., Raiter (again, the local president) sent an email to everyone on OSEA Chapter 6's bargaining committee. That email states, in relevant part:

> "Attached you will find the summary of our Tentative Agreement reached with the district. Please review and give your input by August 8th. If you could please pay attention to 16.6.2. This has to do with the scheduling of non contract days. We agreed to address this matter in our labor management meetings. While there is no change, since we have agreed to discussions that MAY lead to a ratification vote down the road, I believe that we need to put it into the summary. It now places the burden on our member to look it up and question it. I don't want to discuss it at a later date such as at a chapter meeting and have people feel like it came out of nowhere. Give your thoughts please.
>
> "Your executive board has agreed that we will hold the discussion and vote on August 29 immediately after the back to school event at Les Schwab." (Exh. R-4 at 1-2.)

Debbie Christian responded to Raiter's email at 6:25 p.m. the same day, writing:

> "The summary is suppose[d] to summarize the changes to the existing contract that members are being asked to vote on.
>
> "There is no change to current language in 16.6.2, so it doesn't belong on the tentative agreement.
>
> "Additionally, members don't vote on what we talk about at labor management, so it's completely weird and out of the ordinary to have it on a contract tentative agreement summary.
>
> "We want a yes vote for this contract and this addition could cause a problem. We have other avenues to communicate the districts and chapters desire to work on this issue with our members. The tentative agreement summary is not the place." (Exh. R-4 at 1.)

Subsequently, at 7:06 p.m. on August 1, 2017, Hofer wrote back: "I have to say, I totally agree with Debbie." (Exh. R-4 at 1.)

9. On September 8, 2017, Christian sent an email to the rest of the executive board and Bob Bradetich, an OSEA field representative who has been assigned to Chapter 6 for around 12 years and was formerly an officer on Chapter's 6's executive board. The email states:

> "I think what will be important to remember, at least for me, is that we already have a contract with specific language on this topic. Any offerings for changes would need to go to a vote. Anne (and I'm not sure about Walt) is a classified employee, so I would have to think she won't suggest anything that she would not be willing to adhere to." (Exh. C-7 at 128-129).

Where this email says "on this topic," it is referring to Article 16.6.2 of the CBA. Further, when Christian wrote this particular email, she did not know what the District was going to propose or that the matter would ultimately be addressed via a memorandum of understanding (MOU), as discussed below.

10. On September 14, 2017, a labor-management meeting occurred. During that meeting, the District made a formal proposal regarding its C-1s. After the District shared its proposal, Warkentin (again, a C-3, not a C-1) asked the District if seniority would play a role in time off if the proposal was accepted. The District responded that, if the proposal was not accepted, the District would have to implement a "reduction in force."[3] Ultimately, an agreement on this topic was not reached during the September 14, 2017 meeting.

11. In essence, the District's September 14, 2017 proposal sought to allow any existing C-1 to voluntarily choose (1) to switch to a new kind of schedule, working 224 days a year as an 11-month employee, or (2) to continue to work under the existing framework provided by Article 16.6.2, working 236 days a year as a 12-month employee. Moreover, any C-1 who chose the new arrangement would receive an increased hourly wage and be able to trade days, but would work fewer days a year and would no longer be able to schedule non-contract days. C-1s hired in the future, however, would not have the option that was given to the existing C-1s, and would instead simply be classified as 224-day employees. The proposal did not seek to amend the language of Article 16.6.2.[4]

12. After the September 14, 2017 labor-management meeting, the executive board debated the District's proposal and determined that it would share a modified version of the same with the C-1s in a meeting on September 18, 2017 and discuss the proposal with them. On September 17, 2017 at 12:55 p.m., Hofer sent an email to Christian and Raiter that stated the following: "[S]hould Brad [Warkentin] be at the meeting if it is just for C-1's even if he is on the Exec Board? I just worry that they made the meeting for C-1's only so they could talk freely and by having an engineer there it might stifle conversations. Is this just my paranoia coming out?" (Exh. R-9 at 1.) Afterward, at 1:30 p.m. on September 17, 2017, Raiter sent Warkentin an email

[3]The District disputes Warkentin's characterization of what occurred during this September 14, 2017 meeting. On that issue, we recognize that the September 27, 2018 hearing nearly exclusively concerned Warkentin's ORS 243.672(2)(a) charge against OSEA, and that accordingly the District did not call its own witnesses to describe this exchange. In the end, resolving this particular factual dispute is not critical to the ultimate outcome of this case, as we will explain below.

[4]We summarize the District's September 14, 2017 proposal here for efficiency only. The precise terms of the original proposal can be found in Exh. R-8. The handwritten portions of that exhibit were added by Bradetich. The October 12, 2017 MOU that was ultimately agreed to can be found at Exh. R-21.

stating: "Brad, [I] think it would be best if you didn't come to the meeting since you are in that department. I am going to represent the chapter and Bob [Bradetich] will be there. I just want to make sure all of the C1's feel comfortable speaking freely. Sound ok?" (Exh. C-7 at 137.) On September 18, 2017 at 11:31 a.m., Warkentin responded to Raiter's email, writing in part: "This situation puts a lot coming at you and if you would feel more comfortable with me not there then I will pass on this one though I thought being an Eboard member makes me apart [*sic*] of that." (Exh. C-7 at 136.) Raiter responded to Warkentin at 12:35 p.m. the same day, writing: "Brad, not trying to exclude an eboard member, just want the C1s to be comfortable. I will report back to the board." (Exh. C-7 at 136.)

13. The September 18, 2017 meeting with the C-1 custodians occurred as scheduled, and without Warkentin. During the meeting, every C-1 in attendance was given materials that included an individualized note that showed the pay step and dollar amount that he or she would be placed at under the new option proposed by the District. The materials also included a form that, if signed by a C-1, allowed him or her to opt into the new system. The C-1s who opted not to switch would continue to work under Article Section 16.6.2 of the CBA, as indicated. Any C-1s who did not make it to the September 18, 2017 meeting were subsequently given the same materials at their worksites. In the end, 31 out of the 36 C-1s opted for the new arrangement.

14. After the September 18, 2017 meeting with the C-1s, Bradetich drafted an MOU for the District's proposal. On September 19, 2017, Bradetich emailed a copy of that MOU to the executive board, which subsequently scheduled an executive board meeting for the following day, September 20, 2017, to discuss the matter.

15. On September 20, 2017, an executive board meeting was held as scheduled at Bend Senior High School at 4:05 p.m. During that meeting, the executive board and Bradetich discussed the draft MOU. Subsequently, a vote was taken and all four executive board officers—including Warkentin—verbally approved the MOU and voted in favor of Raiter signing it in lieu of sending it to OSEA Chapter 6's "full membership" for a ratification vote. (Exh. R-14 at 1.) Chapter 6's local constitution was not specifically discussed at the time. Since this September 20, 2017 meeting, the executive board has taken no action to overturn or rescind this authorization vote, and nobody has asked to have another executive board vote.

16. On September 21, 2017, Bradetich sent an email to Debbie Watkins, the District's Human Resources Director, to notify her of the executive board's unanimous vote on the C-1 MOU. The email states, in part: "Please find attached the proposed MOU in relation to the proposed and discussed C1 custodial move from 236 day to 224 day work year. The Chapter E-Board is in agreement with the document and if the District agrees we can move forward with signatures. If you have any question please contact Robin [Raiter] or myself." (Exh. C-7 at 33.)[5]

17. On September 22, 2017 at 8:55 a.m., Warkentin sent an email to Raiter. It states: "Has the MOA/MOU already been signed and do you know when? This is happening so fast and

[5]After sending this email, Bradetich went on a vacation. Upon his return, Bradetich made a number of minor modifications to the draft MOU on October 3 and 4, 2017. Each of those modifications was shared with Watkins and the executive board and are included in the record.

not giving time for Members to understand what is happening. If not signed yet, I suggest if it could wait till after our Oct 11 Chapter Meeting."[6] (Exh. R-16 at 2.) Raiter wrote back at 10:41 a.m. the same day, stating: "It is in the process of being finalized. It is not being pushed through. Each employee has the option. If you are receiving questions, please direct them to either Bob [Bradetich], Debbie [Watkins], or myself." (Exh. R-16 at 1.) Then, 10:56 a.m., Warkentin responded: "I met with Debbie Watkins this morning and discussed the C-1 New Hire lack of protection on number of days worked that I had in question. I understand the rest and can answer questions. I agree to this 224 MOU. I wish we could have let it go past one Chapter meeting but it is not likely to change the outcome." (Exh. R-16 at 1.)

18. Susan Miller is OSEA's Director of Field Operations and Bradetich's immediate supervisor. On September 26, 2017, Miller sent an email to the executive board and Bradetich. It states, in part:

> "As a recap, MOUs should always go to vote of the membership. This is part of the democratic foundation of unions and certainly our 'member run union.' MOUs are a modification of the existing Collective Bargaining Agreement and should be ratified. Since your bargaining was over and your contract was already ratified we did not need to bargain this. As I understand, there was a conversation in bargaining where both parties agreed to continue to discuss the issue of these positions and the need to be able to retain & hire. But there was no obligation to do so. That said, once 'meet and confer' type discussion have begun, the Board has ruled that counts as 'bargaining' whether we call it that or not. At this point I do not know the depth of the conversations with Bob [Bradetich] and Debbie [Watkins] but I would say that if an MOU was drafted, it is reasonable to say that we are now in bargaining over this and we would then have an obligation to continue 90-day mid-term bargaining." (Exh. C-7 at 29-30.)

19. On October 2, 2017 at 9:44 a.m., Warkentin sent an email to Miller. In his email, Warkentin expresses some concerns he had with the language of the MOU that Bradetich had sent him on September 21, 2017 and indicates that he hoped that OSEA's membership would vote on the MOU. At 10:33 a.m. that day, Miller replied to Warkentin's email, writing: "Bob [Bradetich] and I had a good discussion and yes, I believe it will be going to the membership for ratification. Don't hesitate to point out the language clarification when you all discuss." (Exh. C-7 at 32.)

20. On October 3, 2017, Bradetich sent an email to Debbie Watkins and others in which he wrote, in part: "If the district agrees the MOU has captured the tentative agreement the Chapter Leadership will move forward and conduct a ratification vote of the membership." (Exh. C-7 at 41.)

21. On October 6, 2017, Bradetich, Raiter, Watkins, and District Superintendent Shay Mikalson had a meeting at Raiter's worksite to discuss the MOU. During this meeting, Watkins shared copies of OSEA Chapter 6's numerous prior MOUs, all of which had been signed by Chapter 6's president without a prior ratification vote by the unit's members. Bradetich and Raiter

[6]The term "MOA" used in this case presumably refers to a memorandum of agreement, which is essentially the same thing as an MOU.

also went over the clause in the local constitution that they believed gave her the signature authority to do that—Article 5, Section 5. By the end of the meeting, Raiter had determined that she would go ahead and sign the C-1 MOU without a ratification vote.

22. On October 8, 2017 at 2:21 p.m., Raiter sent an email to the executive board and Bradetich that states:

> "After much review and many conversations, I have decided to use the clause in our constitution that allows me to sign the Memorandum of Understanding with prior approval of the Executive Committee, which I have from our meeting on September 20th at Bend High. This wording is found in Article 5, Section 5. Bob [Bradetich] and I met with Debbie Watkins and Shay [Mikalson] on Friday. Debbie presented MOU's that have been signed over the years without ratification of the full membership. This MOU only affects 35 employees. As of today, 29 of the C1's have chosen to switch.
>
> "I know that there are strong opinions regarding this issue. I mean no disrespect to any of my fellow eboard members. However, I believe presenting this to the full membership will be confusing. In addition, future negotiations with the district could be hampered and full membership could be voting on numerous issues outside of the contract. Please know that I am a firm believer in transparency. I just do not think this is an appropriate issue for the group as a whole." (Exh. R-18 at 2-3.)

23. Article 5, Section 5 of Chapter 6's constitution addresses the duties and authority of the Chapter's president. In relevant part, it specifically states, "The President does not have the authority to sign Memorandums of Understanding not subject to membership ratification, unless he/she has prior approval from the Executive Committee." (Exh. R-2 at 10.) This particular provision has been included in Chapter 6's local constitution since 1996. Moreover, this authority has been exercised by a president at least a dozen times in the past. In one instance in the late 1980s, a president signed an MOU without checking with the executive board at all. Historically, the "approval" referred to in this part of the local constitution has always been given by a majority vote from the executive board. Further, whenever an MOU is signed, it is attached to the back of the current CBA and, unless there is an expiration date, it is generally included in future ratification votes by the membership.

24. Miller (again, OSEA's Director of Field Operations) personally prefers that all MOUs be given a ratification vote by the membership. However, the statewide OSEA officially finds having MOUs signed by local presidents without a ratification vote to be an acceptable practice, and in practice it is "very common" (according to Miller) for other OSEA chapters to have that arrangement. Moreover, the statewide OSEA does not have the authority to direct a chapter to take an MOU to a ratification vote. That is left up to a chapter's board or president.

25. Christian (again, Chapter 6's secretary) responded to Raiter's October 8, 2017 email at 4:31 p.m. the same day, writing: "I am in support of your actions. Thank you for sharing with us." (Exh. R-19.)

26. On October 9, 2017 at 8:22 a.m., Hofer (Chapter 6's vice president) emailed her own response to Raiter's October 8, 2017 email, writing:

> "[T]hanks for the heads up. [T]his is definitely a unique situation, but I do think that just because MOU's have been signed in the past without full membership ratification, there is a new president so that is no longer a valid argument; it should be chapter leadership who makes that decision (which we did so that is totally fine), not HR.
>
> "We do need to schedule a leadership training with Bob [Bradetich]. I think it[']s supposed to be done each year. [O]ne big section of that training has to do with transparency and the concept that even tho technically a president can sign an MOU without chapter approval, should they…" (R-18 at 2.)

27. Raiter forwarded a copy of her October 8, 2017 email to Miller on October 9, 2017 at 11:23 a.m. Later, at 12:40 p.m. that day, Miller replied: "Why is the District pressuring you to not take this to the membership for a vote? Bringing decisions to the membership when you alter their contract, even though they may be confusing and take some added explanation, is always the right thing to do." (Exh. R-20 at 1.) Raiter wrote back at 1:00 p.m., explaining: "I felt NO pressure from the district when making this decision. This is a decision I came to after speaking with Bob [Bradetich] and reviewing the history." (Exh. R-20 at 1.) At 1:09 p.m., Miller responded:

> "That is good to hear that the district wasn't pressuring you. I can only make recommendations on my end, and I've done that. I would say however that just because past leaders bypassed membership ratification vote, doesn't make it the right way to do union work. As I stated over the phone, I believe unions are the thing to a true democracy you can get, or at least they should be. The final decision is of course yours to make." (Exh. R-20 at 1.)

28. On October 10, 2017, Raiter sent out another email to the executive board and Bradetich. It included a copy of the MOU and indicated that the MOU would be presented for signature at a labor-management meeting that would take place on October 12, 2017. On October 11, 2017, Warkentin respond to Raiter's email, writing: "Please Do NOT sign this MOU as I am NOT in agreement with it as written, now that I understand it, and it should go to a Membership Vote." (Exh. C-7 at 194.) Subsequently, however, Raiter signed the MOU on October 12, 2017 on behalf of OSEA. Superintendent Mikalson signed the MOU the same day on behalf of the District.

29. The signed MOU does not specifically reference Article 16.6.2 of the CBA or affect Warkentin's C-3 position in any way. Moreover, as noted above, any C-1 who was affected was given the option to reject the arrangement presented in the MOU and continue to operate according to Article 16.6.2. Nevertheless, Warkentin resigned from his treasurer position in protest the same day the MOU was signed. He did so because he believed, as he still does, that the MOU should have been presented to the membership for a vote.

CONCLUSIONS OF LAW

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

2. OSEA did not violate ORS 243.672(2)(a) by signing the MOU without ratification by OSEA's membership.

Standards of Decision

The complaint alleges that OSEA violated ORS 243.672(2)(a), which provides that "[i]t is an unfair labor practice for a public employee or for a labor organization or its designated representative" to "[i]nterfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed in ORS 243.650 to 243.782." That range of statutes covers the entirety of Oregon's Public Employee Collective Bargaining Act (PECBA). In relevant part, ORS 243.672(2)(a) requires that the exclusive representative of a group of employees represent all employees in the bargaining unit fairly, without hostility, and without discrimination. That is commonly known as the "duty of fair representation." *Griffin v. Service Employees International Union Local 503, Oregon Public Employees Union and State of Oregon, Employment Department*, Case No. FR-02-09 at 24, 24 PECBR 1, 24 (2010); *Mengucci*, C-187/188-83 at 10-13, 8 PECBR at 6731-34. As in any unfair labor practice case, the basic burden of proof here is on the complainant to prove its claims by a preponderance of the evidence. ORS 183.450(2); OAR 115-010-0070(5)(b).

When reviewing other ORS 243.672(2)(a) duty of fair representation claims, this Board has held that a labor organization's actions and decisions as the exclusive representative of employees must be afforded broad discretion. *See Caddy and Van Hooser v. Multnomah County Deputy Sheriff's Association*, Case No. C-62-84 at 10-11, 7 PECBR 6545, 6554-55 (1984) (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 73 S. Ct. 681 (1953)); *Conger v. Jackson County and Oregon Public Employees Union*, Case No. UP-22-98 at 10, 18 PECBR 79, 88 (1999). That discretion is not unlimited, however. In short, we will find a violation of subsection (2)(a) only where a labor organization's actions are arbitrary, discriminatory, or taken in bad faith. A labor organization's action is "arbitrary" if it lacks a rational basis. Its conduct is "discriminatory" if there is substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. In this context, discrimination refers to treatment different from that afforded to others who are similarly situated. A labor organization's conduct is in "bad faith" if it intentionally acts against a member's interest and does so for an improper reason. *Chan*, UP-13-05 at 12-13, 21 PECBR at 574-75 (2006) (citing *Stein v. Oregon State Police Officers' Association and Oregon State Department of State Police*, Case No. UP-41-92 at 8, 14 PECBR 73, 80 (1992); *Strickland v. Oregon Public Employees Union Local 503, SEIU, AFL-CIO, CLC*, Case No. UP-134-90 at 12, 13 PECBR 113, 124 n 6 (1991)); *Howard v. Western Oregon State College Federation of Teachers, Local 2278, OFT and Western Oregon State College*, Case Nos. UP-80/93-90 at 27, 13 PECBR 328, 354 (1991). In this case, Warkentin exclusively asserts that OSEA acted arbitrarily.

In relevant part, ORS 243.782(3) provides that only an "injured party" may file an unfair labor practice complaint with the Board. In particular, the complainant must show that he or

she has suffered or will suffer a "substantial injury" as a consequence of the alleged unfair labor practice. *See Jefferson County v. OPEU*, 174 Or App 12, 23 P3d 401 (2001); *Ahern v. OPEU*, 329 Or 428, 434, 988 P2d 364, 367 (1999); *Oregon City Fed. Of Teachers v. OCEA*, 36 Or App 27, 32, 584 P2d 303, 307 (1978). Here, in order to meet that standard, Warkentin (as the only named complainant) must either establish (1) that he is entitled to assert rights on behalf of those who are or will be harmed, or else (2) that he personally suffered an injury to his own interest as a result of OSEA's actions. *See Service Employees International Union Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No. UP-6-04 at 3-4, 20 PECBR 677, 679-80 (2004); *Clatsop County Oregon v. AFSCME Local 2746, Council 75, and Brunick*, Case No. C-139-81 at 5, 6 PECBR 4987, 4991 (1981).

Discussion

Standing

On the preliminary subject of standing, we note that the substance of the MOU at the center of this dispute exclusively involves C-1s. Warkentin, however, has at all times material been employed as a C-3, and thus was not directly affected by the MOU. Indeed, Warkentin unambiguously conceded as much during the hearing. The fact that the MOU affected some custodians does not automatically mean that all custodians have an interest. And at this point in the case, there is also no evidence showing that Warkentin has any interest in ever becoming a C-1, and Article 16.6.2, which he works under, was not changed. Moreover, if an existing C-1 did not want to change anything, he or she could opt to maintain the *status quo*. To the extent that a C-1 might have wanted to participate in a ratification vote, Warkentin has not shown that he can act on that C-1's behalf, and the C-1s will eventually be able to so vote during the next bargaining cycle in any event.

Warkentin otherwise contends that, going forward, "new hires" will be negatively affected by the decisions that OSEA has made in this case, but that position is speculative and too far removed from his own interests. Further, a labor organization's duty of fair representation is limited to "*employees* for whom it is the exclusive representative," not future employees. *Houchin v. Service Employees International Union, Local 49 and Centennial School District*, Case No. UP-37-92 at 11, 14 PECBR 395, 405 (1993) (emphasis added). Importantly, an essential element in these cases is the existence of a duty on the part of the labor organization to the allegedly injured individuals. *Hadley, Hadley, Cordes, Burton, and McMenamy v. Multnomah County Deputy Sheriff's Association and Multnomah County*, Case No. FR-1-08 at 4, 22 PECBR 416, 419 (2008).

Warkentin's noted concerns about *his own position* being similarly affected in the future are also speculative, and as explained below, are largely baseless within the record presented. Further, as the evidence revealed during the hearing clarifies, procedurally, the actions at issue here are consistent with a longstanding past practice. *See Witherell*, UP-42-94 at 15-16, 15 PECBR at 743-44 (wherein union's actions were essentially consistent with how the bargaining unit had been operated for many years without complaint). Warkentin does identify a possible personal interest in this matter when he contends that he has arbitrarily lost his "right" (as he puts it) to vote on the MOU during a ratification vote that included all OSEA members, as he is *currently* a member and ORS 243.662 generally guarantees employees the right to "participate in"

the activities of their labor organizations.[7] However, ultimately, Warkentin has not shown that such a right was actually violated here and he did not focus on this issue in his brief. Relatedly, Warkentin's complaint alleges that he was improperly "steered and coerced" away from attending the September 18, 2017 meeting with the C-1s, but the evidence we have now simply shows that Warkentin *agreed* to not attend after a polite email about it was sent to him, and that that meeting did not concern his classification. *See District Council of Trade Unions, et. al. v. City of Portland*, Case No. UP-023-14 at 2, 26 PECBR 525, 526 (2015) (in which standing under the PECBA was an issue for hearing); *Witherell*, UP-42-94 at 13-14, 15 PECBR at 741-42 (involving an alleged right to participate in union activities that was not demonstrated).

In sum, the circumstances presented here do not amount to a "substantial injury" for Warkentin or anyone else, and accordingly Warkentin does not have standing to pursue his ORS 243.672(2)(a) charge against OSEA. He also cannot pursue such a claim on another's behalf. As a result, that element of the complaint must be dismissed.

The Merits

Even were we to determine that Warkentin does have standing in this case, which we do not, for the reasons outlined below, Warkentin has also failed to carry his burden of proof and demonstrate by a preponderance of the evidence that OSEA's actions were arbitrary, discriminatory, or taken in bad faith as required. Accordingly, we dismiss the claim against OSEA for that reason as well. *See Brookings-Harbor Education Association/OEA/NEA v. Brookings-Harbor School District 17C*, Case No. UP-005/010-16 at 30-31, 27 PECBR 11, 40-41 (2017) (addressing standing and the merits in light of the evidence presented).

Warkentin attempts to distinguish the other 14 MOUs in the record—none of which were sent out for a ratification vote—from the C-1 MOU of this case. However, Warkentin fails to identify precisely why such distinctions should have any bearing on our ORS 243.672(2)(a) analysis. The local constitution that establishes the signature authority of the Chapter 6 president makes no such distinction. Moreover, in our view, these prior MOUs quite effectively establish a clear past practice (ranging from at least 2005 to 2017) of the local president signing MOUs without a prior ratification vote. Outside of that, Miller's testimony also indicates that, while it might not be her personal preference, it is "very common" for OSEA's other chapters to have the

[7]This particular contention is one part of why Warkentin's complaint survived the ALJ's order to show cause. Significantly, although we do grant unions substantial discretion in this area, to simply claim that internal union disputes cannot be violations of the PECBA as a matter of law goes too far. *Witherell*, UP-42-94 at 4-5, 15 PECBR at 732-33 (wherein, "although a close question," it was determined that a hearing was warranted and a motion to dismiss was properly denied by an ALJ where the complainant's allegations were sufficient to raise an inference of arbitrary or bad faith conduct beyond the naked question of the union's technical compliance with bylaws). We also note that OSEA's informal response/motion to dismiss concluded that Warkentin's complaint was "factually incorrect," reinforcing that there was an "issue of fact" to be addressed and resolved by a hearing. Moreover, in the pre-hearing phase of the case, the fact that Raiter had provided Warkentin one basis for her actions (*i.e.*, Raiter's October 8, 2017 email) did not necessarily mean that that explanation was actually true, especially in light of Warkentin's other factual allegations, which the ALJ *did* have to assume were true. *Schroeder v. State of Oregon, Department of Corrections, Oregon State Correctional Institute and Association of Oregon Correctional Employees*, Case Nos. UP-49/50-98 at 2, 17 PECBR 907, 908 (1999).

same arrangement as Chapter 6 does. Warkentin frames this case as being about the purportedly "dangerous precedent" the process used here sets going forward. But under these circumstances, one could reasonably argue that going *against* such a well-established practice (as well as the unanimous position of the rest of the executive board) would have actually been more arbitrary than the action Raiter ultimately took. *See Stein*, UP-41-92 at 9, 14 PECBR at 81 (no breach where the union followed its normal procedures in processing the grievance).

Upon review, we also conclude that the changes in this C-1 MOU were not of an entirely different nature than those of the past MOUs in evidence. Warkentin contends that the latest MOU uniquely created a "new class" of custodial employees (*i.e.*, 224-day employees) and "changed the bargaining terms of their employment." However, at a basic level, the C-1s are still classified as C-1s, no job duties have changed, and all of the parties appear to agree that this latest MOU did not change the existing terms of the CBA. Further, prior MOUs similarly addressed related topics such as "incorporating a new category of employee" and changing scheduling and wage schedules, for example. (Exh. R-3 at 1.) To the extent that this MOU does have any novel aspects, we reiterate that labor organizations are consistently afforded "broad discretion" in the exercise of their duty of fair representation, and note that the older MOUs also have their differences.

More fundamentally, though, the PECBA has no rule requiring every change to employees' terms of employment to be approved or ratified by a union's members. *See Block v. Amalgamated Transit Union, Division 757*, Case No. FR-001-15 at 4-5, 26 PECBR 486, 489-90 (2015) (unpopular agreement reached by union president without approval of membership in violation of union's CBA, bylaws, constitution, and past practice would not be a violation). There is also no rule or precedent that requires a local president to run everything by his or her members before taking an action. *See Putvinskas v. Southwestern Oregon Community College Classified Federation, Local 3972, AFT, AFL-CIO and Southwestern Oregon Community College*, Case No. UP-71-99 at 17, 18 PECBR 882, 898 (2000) (union does not need to offer an explanation of its decision not to pursue a grievance). As we stated generally in *St. John*, *v. Oregon School Employees Association, Local 119 and Moser*, Case No. UP-70-90 at 2, 12 PECBR 409, 410 (1990), "The PECBA does not prescribe specific rules for the conduct of a union's internal affairs." Moreover, if Warkentin felt that the rest of the unit should have known about something (*e.g.*, the original plan to disclose the substance of the MOU), he could have simply let them know about it on his own. Being a union officer does not require someone to lie or remain silent. *See Tancredi v. Jackson County Sheriff's Employee Association and Jackson County Sheriff's Office*, Case No. UP-31-04 at 10-11, 20 PECBR 967, 976-77 (2005).

As indicated, Warkentin stresses that new hires are being forced into this new arrangement without a say in the matter. But, significantly, even if the issue were sent to a ratification vote as Warkentin wanted, employees who have not been hired yet would never participate in such a vote, as they are not yet part of OSEA's unit (and therefore OSEA has no duty to fairly represent them). Plus, as Warkentin recognized in one email to the executive board, "[t]he outcome would probably be the same with a vote." (Exh. C-7 at 111.) Again, 31 of the 36 C-1s opted for the new schedule, and those who did not could keep working under the existing terms of the CBA. Beyond that, we have previously indicated that time spent in a bargaining unit position is a "rational criterion" for granting scheduling priority. *See Bjornsen, Sieg, and Burchfiel v. Jackson County Sheriffs' Officers Association, Affiliated With Teamsters Local 223, and Jackson*

County, Case Nos. C-130-/131/132/133/134/135-83 at 13, 8 PECBR 6783, 6795 (1984-1985). Warkentin is also concerned about his own position being affected in the future without a ratification vote. Yet, we can reasonably assume that any future MOUs will still have to be approved by either (1) ratification or (2) a majority of the executive board (which Warkentin left) as required by the local constitution, and that, if a similar agreement is ever reached for his position, he (like the C-1s) could opt to keep his existing schedule and wage rate and eventually vote on the MOU as part of the next CBA.

Even if there was some conceivable harm here, the mere fact that a union's actions may have had a negative effect on some members of the bargaining unit is not enough to establish that those actions are arbitrary and in violation of ORS 243.672(2)(a). *Tancredi*, UP-31-04 at 8-9, 20 PECBR at 974-75. Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. *Caddy and Van Hooser*, C-62-84 at 10, 7 PECBR at 6554-55. A complainant must be able to show that the union's act or omission "seriously prejudiced" the rights of the injured employee. *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 19, 22 PECBR 975, 993 (2009) (citing *Ralphs*, UP-68/69-91 at 16, 14 PECBR at 424). Here, no such showing was made.

This is also not a situation in which the union has made a unilateral change as Warkentin suggests. Here, OSEA negotiated and reached an agreement with the District about the complained-of change. In addition, that agreement was reached after Chapter 6's member-elected leadership voted in favor of it, and did so in accordance with the Chapter's past practice and its member-ratified constitution. Moreover, again, in this chapter, nearly all signed MOUs are affixed to the current CBA, regardless of their subject matter, and subsequently voted on by the membership at the end of the next bargaining cycle. Thus, although the C-1 issue was not handled as part of regular successor contract bargaining, Warkentin is plainly incorrect when he claims that "the negotiation of the MOU was done outside of the collective bargaining process." This scenario is likewise easily distinguishable from a case in which a union has negligently failed to perform a ministerial act or pursue a grievance, as in the private sector case cited by Warkentin's post-hearing brief, *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983). Warkentin claims that OSEA's actions here are "irreversible," but nothing actually stops it from negotiating this issue further in the future.

Warkentin contends that OSEA "consciously" chose to circumvent membership ratification for the C-1 MOU. We agree that it did, and OSEA does not deny this. However, that element does not decide this issue. As outlined above, Raiter deliberately made the choice she did because, in her mind, presenting the matter to the full membership would be confusing for them and could hamper future negotiations with the District, and because the choice would be consistent with past practice. Such an allegedly "conscious" decision (again, as Warkentin puts it) is unlikely to also be arbitrary. *See Morgan-Tran v. AFSCME Local 88 and Multnomah County*, Case No. UP-67-03 at 13, 20 PECBR 948, 960 (2005) (union acted reasonably by entering into an MOA to avoid "upheaval" in the bargaining unit). Neither is Raiter following the advice of Bradetich, her chapter's far more experienced field representative, as Warkentin also suggests happened here. In October 2017, when Raiter decided to handle this issue in labor-management meetings and sign

this MOU without a ratification vote, she had only just recently been elected president in May 2017. Bradetich, in contrast, had served as a field representative for around 12 years and had previously been an OSEA executive board officer for approximately 18 to 20 years in total. Additionally, the District had recently threatened a reduction in force over this issue, thereby providing OSEA yet another "rational basis" and a "legitimate union objective" for opting to work with the employer on the matter. *See Caddy and Van Hooser*, C-62-84 at 12, 7 PECBR at 6556 (ensuring continued employment for the greatest number of members is a rational union objective).

Warkentin otherwise contends that Raiter simply did not address or consider the counter-arguments raised by Warkentin and others and thereby acted arbitrarily, but that position is unsupported by the evidence that was ultimately presented. We must also reiterate that Warkentin himself, as well as the rest of Chapter 6's executive board, voted in support of avoiding a ratification vote during the September 20, 2017 executive board meeting, which is the very act complained of here. Indeed, Warkentin even continued to openly support the executive board's unanimous decision after the fact, writing clearly on September 22, 2017, "I agree to this 224 MOU." (Exh. R-16 at 1.) The fact that Warkentin subsequently changed his view on this matter or is unsatisfied with the outcome is not compelling here. Even if Warkentin could have changed his original vote, the evidence suggests that the rest of the executive board's officers ultimately remained supportive of Raiter's choices, and executive board decisions are always made by a majority vote in Chapter 6. The fact that Miller (again, OSEA's Director of Field Operations) personally might have chosen a different approach here and had some reservations is also not compelling because Miller is not a member of the unit at issue and, as she put it, Miller can "only make recommendations" to chapters. (Exh. R-20 at 1.)

We recognize that OSEA's bargaining team originally planned to include the C-1 matter in a T.A. that would have gone to the membership. However, it is plain that OSEA moved on from that approach to conclude regular contract bargaining and to avoid confusing members who would not be affected by any of the changes being contemplated. On its own, that rationale does not demonstrate arbitrariness, discrimination, or bad faith. Plus, when the District and OSEA decided to move the C-1 issue to a labor-management meeting, they had zero guarantee that they would ever actually end up agreeing on that subject. Although the CBA was signed the same day that the executive board voted in favor of Raiter signing the MOU, the particulars of the MOU had not yet been agreed upon at that time.

Warkentin makes a fair point when he notes that the final version of the C-1 MOU was never actually voted on by the executive board. The draft MOU that existed as of the September 20, 2017 executive board meeting (which is found at Exh. R-13 at 1) during which the authorization vote took place is indeed different than the form the MOU took when it was signed on October 12, 2017 (which is found in Exhs. C-1 and R-21.). However, the differences that do exist are not so striking that they give us pause, and nothing in the record indicates that this approach is any different than how MOUs have been handled in the past. A prior OSEA president has even signed an MOU without checking with the executive board in advance. Likewise, nothing establishes that such differences would or should take away the president's authorized signature authority, or that the executive board ever has to agree to the exact wording of an agreement. The Board's precedent also does not address this issue. *See Block*, FR-001-15 at 4-5, 26 PECBR at 489-90. Moreover, the portion of the local constitution that gave Raiter her authority simply states

that if "she has prior approval from the Executive Committee" then she has the authority to sign an MOU. (Exh. R-2 at 10.) On September 20, 2017, such approval was given, and Chapter 6's executive board took no action afterward to overturn or rescind that.

Warkentin argues that the process that OSEA used to adopt the C-1 MOU "clearly and unequivocally" violated the express terms of the local constitution. On that subject, it is clear that a union's violation of its constitution does not by itself constitute an unfair labor practice under the PECBA. Absent some persuasive evidence of arbitrary, discriminatory, or bad faith conduct by a union, the Board does not have the authority to police or enforce compliance with a union's constitution. *Witherell*, UP-42-94 at 14, 15 PECBR at 742 (citing *Powell v. Monmouth Police Officers Association*, Case No. C-95-76 at 5, 3 PECBR 2038, 2042 (1979), *rev'd on other grounds*, 33 Or App 93, 575 P2d 175 (1978)); *St. John*, UP-70-90 at 2, 12 PECR at 410.

According to Warkentin, the constitutional violations that have occurred here were so egregious that they rose to the level of being unfairly arbitrary. That presents a slightly different argument for us. *See Witherell*, UP-42-94 at 4-5, 15 PECBR at 732-33; *Ralphs*, UP-68/69-91 at 15-16, 14 PECBR at 423-24 (an act or omission that reflects a "reckless disregard" for the rights of employees may be actionably arbitrary). After careful review, however, we must conclude that Warkentin has at best presented *debatable* interpretations of the text at issue, which does not meet our standard. And critically, for the reasons stated above, the limited portion of the constitution that OSEA actually claims to have relied upon here—Article 5, Section 5—was certainly not "clearly" or "unequivocally" violated as alleged. Additionally, Warkentin's argument regarding the part of the constitution urging "unity of actions and mutual cooperation" (Exh. R-2 at 3) in particular conflicts with the very limited testimony provided on this subject, which indicates (at least according to Miller) that that language actually refers to dealing with "affiliates" or "different entities" rather than ratification votes or negotiations.

In the end, the overall record reveals that, "[a]fter much review and many conversations," Raiter made a deliberate and reasoned decision that was based on a clear past practice and sound bargaining strategy. (Exh. R-18 at 2.) It also appears that that decision was explained honestly. That is not an arbitrary action as alleged by the complaint. Accordingly, the necessary conclusion reached here is that no ORS 243.672(2)(a) violation was committed, and that charge against OSEA must therefore be dismissed.

3. OSEA is entitled to a civil penalty.

In relevant part, ORS 243.676(4)(B) provides that the Board may award a civil penalty if it deems that the dismissed complaint "was frivolously filed." A claim is frivolous only if every argument asserted in its support is one in 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) (quoting *AFSCME Council No. 75 v. City of Forest Grove*, Case Nos. UP-5/25-93 at 2, 14 PECBR 796, 797 (1993) (Rep. Costs Order)). Upon review, we conclude that Warkentin's ORS 243.672(2)(a) charge against OSEA was frivolously filed within the meaning of the statute.

This Board has extensive case law discussing and delineating the duty of fair representation that a labor organization owes to employees that it represents. *Horn v. Salem Police Employees' Union and City of Salem and Salem Police Department*, Case No. FR-002-13 at 1, 26 PECBR 348, 348 n 1 (2014) (Rep. Costs Order). Warkentin's underlying argument in this case—that OSEA's action violated its constitution—has previously been roundly rejected by prior Board cases such as *Block*, FR-001-15, 26 PECBR 486, which Warkentin (who did not appear *pro se*) was specifically made aware of well in advance of the hearing via the ALJ's March 30, 2018 order to show cause. Furthermore, the narrower version of that argument presented here—that this case's violation was so clear that it rose to the level of being unfairly arbitrary—was ultimately unsupported by the evidence and the arguments presented. Warkentin's secondary arguments, outlined above, similarly fall short. In addition, the full record crystallizes that Warkentin himself was frequently formally supportive of and even partially responsible for all of the complained-of actions, and that OSEA's actions did not differ in any material way from its normal practices. Finally, given the lack of any meaningful injury here, Warkentin has ultimately failed to even establish the minimum standing to be able file his charge against OSEA, as explained above. Taken together, those circumstances plainly differentiate this case from a standard duty of fair representation claim.

As a general matter, we give broad deference to a union's decision-making to permit it to be free to act in what it perceives to be the best interests of its members, without undue fear of lawsuits from individual members. *Ralphs*, UP-68/69-91 at 14, 14 PECBR at 422. Ordering a civil penalty in this case supports that principle. At the same time, however, in duty of fair representation complaints where a complainant relies on personal resources to litigate the claim, we order less than an average *representation costs* award under OAR 115-035-0055. Indeed, normally, we award approximately 10 percent of a party's actual costs in this type of case. *Gibson-Boles v. Oregon AFSCME Council 75 and State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-46-01 at 2, 20 PECBR 982, 983 (2005) (Rep. Costs Order) (citing *Houchin*, UP-37-92, 14 PECBR 521; *Randolph v. International Alliance of Theatrical Stage Employees, Local B-20 and Metropolitan Exposition Recreation Commission*, Case No. UP-15/16-92, 15 PECBR 337 (1994)). We would also limit the amount required by this case's civil penalty, which ORS 243.676(4) provides we *may* award "in the aggregate amount of up to $1,000 per case, without regard to attorney fees." There is no doubt that Warkentin, though he is mistaken, sincerely believes that he was treated unfairly, and we do not find that he filed this complaint with the intent to harass. Moreover, the hearing in this case only lasted one day. *See Randolph*, UP-15/16-92 at 23, 15 PECBR at 107. In light of the foregoing, a civil penalty of $100 is appropriate.

4. Warkentin cannot pursue his claim that the District violated ORS 243.672(1)(a), (b), and (f).

As a rule, where no violation is found against the labor organization in a duty of fair representation case, the complaint against the public employer will automatically be dismissed. *Hadley*, FR-1-08 at 6, 22 PECBR at 421 (citing *Tancredi*, UP-31-04 at 9, 20 PECBR at 975; *Mengucci*, C-187/188-83 at 13, 8 PECBR at 6734). Above, we have rejected Warkentin's underlying charge against OSEA. Therefore, we must dismiss his charges against the District as well, and we may do so without an additional hearing.

PROPOSED ORDER

1. The complaint is dismissed.

2. Warkentin must pay OSEA a civil penalty of $100.

SIGNED AND ISSUED on February 28, 2019.

Martin Kehoe
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file proof of such service with this Board. The objections must be mailed, emailed, faxed, or hand-delivered to this Board. To file by email, please attach the filing as a PDF and send it to ERB.filings@oregon.gov. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(10) and (11); 115-010-0090; 115-035-0040; and 115-070-0055.)