EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-011-18

(UNFAIR LABOR PRACTICE)

CROOK COUNTY FIREFIGHTERS ASSOCIATION, IAFF LOCAL 5115,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
CROOK COUNTY FIRE AND RESCUE,	)	
Respondent.	)	

On July 12, 2019, this Board heard oral argument on Respondent's objections and Complainant's cross-objections to a recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading on March 15, 2019, after a hearing held on October 15, 16, and 17, 2018, in Prineville, Oregon. The record closed on November 21, 2018, following receipt of the parties' post-hearing briefs.

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

Steven Schuback, Attorney at Law, Peck Rubanoff Hatfield, Lake Oswego, Oregon, represented Respondent.

On April 23, 2018, Crook County Firefighters Association, International Association of Firefighters (IAFF), Local 5115 (Association), filed a Complaint alleging that Crook County Fire and Rescue (District or CCFR) violated ORS 243.672(1)(a) and (1)(c) by engaging in a series of actions that interfered with, restrained, or coerced Association officers and members in and because of their exercise of protected rights. The District's alleged unlawful actions included: (1) conducting more formal, third-party investigations of allegations against Association bargaining unit employees, (2) initiating use of supervisory notes to document employee conduct and counseling, (3) treating Association officers and supporters differently when investigating allegations of misconduct and issuing supervisory notes, (4) discriminating against Association

officers and supporters in promotions, and (5) making statements indicating that the District was taking such actions because of employees' exercise of protected rights. The Association also requested that the Board consider imposing a civil penalty. The District filed a timely answer.

On October 9, 2018, the Association moved to amend the Complaint to withdraw the allegations regarding discrimination in promotions. The ALJ granted the motion, and the Association filed an Amended Complaint on that date.

The issues, as articulated before the hearing, were as follows:

1. Did the District engage in a series of actions that interfered with, restrained, or coerced employees in and/or because of the exercise of protected activities, thereby violating ORS 243.672(1)(a)?

2. Did the District engage in a series of actions that discriminated against employees in their terms and conditions of employment in an effort to discourage membership in the Association, thereby violating ORS 243.672(1)(c)?

We conclude that the District's actions interfered with employees in the exercise of protected rights, in violation of ORS 243.672(1)(a). Because any additional violations would not alter our remedy in this case, we choose not to address the remaining claims.

RULINGS

On March 15, 2019, the ALJ issued a recommended order. On March 23, 2019, the ALJ disclosed to the parties that she had accepted (on March 16, 2019) an employment offer made by the firm representing the Association. The District filed timely objections to the recommended order, along with a motion to set aside that order, based on the ALJ's disclosure. The Association timely filed cross-objections to the recommended order. With respect to the motion to set aside the recommended order, the Association disputed the basis for and propriety of the motion, but nevertheless "join[ed] [the District's] request that the Board closely examine the entire record and all aspects of the Recommended Order in issuing its final order."

By letter dated April 29, 2019, this Board granted the District's motion to set aside the March 15, 2019, recommended order. In doing so, we explained that we understood both parties to be effectively requesting that this Board conduct a *de novo* review of the existing record,[1] and we ruled that we would conduct a *de novo* review of the record and make findings of fact and conclusions of law without reference to the recommended order. We also instructed the parties that they could, in their memoranda and oral argument before this Board, put forth their positions on the merits of the case as if no recommended order had issued (*i.e.*, they would not be limited to their specific objections and cross-objections).

Subsequently, in the District's memorandum in aid of oral argument and at oral argument, the District asked this Board to go beyond *de novo* review and dismiss the case without addressing the merits of the Association's claims. We decline the District's request to dismiss the case without

[1]The District did not petition for rehearing or move to reopen or supplement the record.

addressing the merits. The District has not established that *de novo* review by the full Board is insufficient to eliminate any possible bias on the part of the ALJ. Consequently, we conclude that outright dismissal is not warranted and we issue a final order as mandated by ORS 243.676.[2]

All prehearing and hearing-related rulings of the ALJ were reviewed and are correct.[3]

FINDINGS OF FACT

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

2. The District is a public employer within the meaning of ORS 243.650(20). The District provides emergency medical and fire services to the people of Crook County, Oregon. The District protects a 450 square mile "fire district" that includes the City of Prineville, and its Ambulance Service Area (ASA) covers the majority of the 3,000 square mile Crook County.

3. The District is governed by an elected, five-member board (Fire Board).

4. The District operates three stations, which are designated by number: 1201 is the main station in Prineville, 1202 is located in Powell Butte, and 1203 is located in Juniper Canyon. Only stations 1201 and 1202 are regularly staffed.

5. The District's positions are organized in a paramilitary rank structure. The Association's bargaining unit includes all full-time employees in the classifications of Firefighter/Paramedic, Lieutenant/Paramedic, and Captain/Paramedic (generally referred to as "firefighters" or "medics"). At the time of hearing, the bargaining unit included 12 firefighters, three lieutenants, and three captains. Employees in those bargaining unit positions are also referred to as "line staff." The line staff work 24-hour shifts on a "three-four" schedule ("one on, one off; one on, one off; one on, one off; four off").

6. In addition to the line staff, the District employs a Fire Chief, a Deputy Chief, a part-time Assistant Chief, and three Battalion Chiefs (collectively, "chiefs"). At the time of hearing, one of the battalion chiefs also served as the District's Fire Marshal. The Fire Board appoints the Fire Chief to carry out its directives. Matt Smith has served as the Fire Chief since 2012. Chiefs are not "on shift," meaning that they typically work a regular day shift on a 40 hours per week schedule, instead of 24-hour shifts on a three-four schedule like the line staff. Chiefs may be on call to respond to emergencies.

7. Non-bargaining unit part-time firefighters, students, and volunteers also work with full-time firefighters to provide services in the District.

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[2]At oral argument, we informed the parties that because we would effectively issue a final order without a recommended order, we would apply OAR 115-010-0100(3)(b) and grant any timely submitted request for reconsideration, along with further oral argument.

[3]Neither party objected to or otherwise sought review of any rulings made by the ALJ.

8. There are three levels of medical certifications in the field of paramedicine. The lowest level is emergency medical technician basic (EMT basic), and the highest level is paramedic. All full-time line staff must be paramedics. Other employees, such as part-timers, may have lower-level medical certifications, including EMT basic.

9. Dr. Douglas Gruzd is the District's supervising physician (also referred to as the physician advisor). The District employees practice medicine under Dr. Gruzd's license. He provides training and reviews medical calls when necessary. Dr. Gruzd always reviews certain types of cases (such as "trauma activations"), and he reviews other cases if a potential quality assurance issue is identified. Dr. Gruzd is an independent contractor, and is not employed by the District.

10. The District has Civil Service Commission Rules, which were in effect before the Association bargaining unit was certified. The civil service rules apply to classified employees; certain positions, such as Battalion Chiefs, are exempt from the classified service. The rules set forth detailed hiring and promotion processes for classified employee positions. Rule 8 authorizes the District to take various disciplinary actions against classified employees "for any just cause."

Formation of the Association

11. Some District firefighters, including Lieutenant Chad Grogan, first became interested in forming a labor organization in or about early 2013.[4] Grogan researched the potential benefits of labor representation and collective bargaining, including by speaking with employees in the Redmond Fire District, where firefighters are unionized. The Redmond firefighters' union informed Grogan that they had a good, productive relationship with management. Grogan also learned that the Redmond firefighters' collective bargaining agreement provided for some benefits, such as long term disability insurance, that the Crook County firefighters did not have. Grogan became one of the leaders in the employees' efforts to organize.

12. Grogan had multiple conversations with Chief Smith about the firefighters potentially forming a union. According to Grogan, Chief Smith generally tried to persuade him that the firefighters should pursue their concerns as an informal employee group instead of a union.

13. Over the years, Chief Smith has made statements along the lines of, "the threat of a union is better than a union." Chief Smith testified that he believes he made such comments in the context of budget seasons, *i.e.*, when the District board was setting the budget for wages and benefits. In that setting, Chief Smith was essentially negotiating with the Board to set the level of employee wages and benefits.

[4]The parties dispute the admissibility of evidence regarding the formation of the Association, the initial contract bargaining, the creation of the Battalion Chief positions, and various promotions that have occurred since the line staff organized. The District objected to that evidence because it pertains either to acts that occurred outside the statute of limitations, or to claims that were settled or withdrawn. The evidence at issue is admissible to provide context, establish the totality of the circumstances, or to show state of mind. *See, e.g.*, *Oregon School Employees Association v. Port Orford-Langlois School District 2J*, Case No. UP-54-92 at 2, 13 PECBR 822, 823 (1992) (receiving evidence regarding acts that occurred outside the statute of limitations).

14. On multiple occasions, including during staff meetings, smaller group settings, and one-on-one conversations with Grogan, Chief Smith made statements to the effect of, "If there is a union, then polices and rules will have to be enforced more strictly," or "You will have to follow the rules," or "We will need to tighten things up." In some cases, the context indicated that Chief Smith was referring to disciplinary rules. Regarding these comments, Chief Smith testified that his "view was, if we had a collective bargaining agreement, we would have to follow it. It would formalize the relationship. And that would have been the context in most of the collective bargaining agreements. It comes with just cause, which is, again, a little bit more formalization and making sure we had the just cause and due process."

15. On September 5, 2013, then-Lieutenant James Shannon sent a lengthy email to all "career" firefighters, explaining in detail his reasons for not supporting unionization at that time.

16. On September 10, 2013, in response to a question from an employee about the result of having a union, Chief Smith found a form letter, and then handed a copy to Grogan and emailed a copy to Shannon and then-Captains Dan Freauff and Jerimiah Kenfield. The form letter stated:

> "It is extremely important that you read this letter carefully. It has come to our attention that the IAFF may be attempting to organize our employees. In the near future, you may be asked to sign a card provided by the union authorizing them to represent you. Please do not sign this card without thoroughly knowing the facts. The matter of union representation is one which must be decided by each employee involved without interference, intimidation or coercion from any source. However, it is important that you know the significance of these cards and some of the reasons for not signing one of them.
>
> **"WHAT IS A UNION AUTHORIZATION CARD?**
>
> "A signed statement from an employee stating that he or she wants the union to be the collective bargaining agent.
>
> **"DOES SIGNING A CARD OBLIGATE YOU?**
>
> "Yes. It is a *legal* statement that you want to union [*sic*] to represent you.
>
> **"WHAT DOES THE UNION DO WITH THE CARDS IT COLLECTS?**
>
> "If the union gets cards signed by 51% of our employees, the union can legally demand full recognition and representation without a secret ballot election.
>
> "There are many things you should know about unions before you sign anything. First, unions cost employees money in monthly dues. Second, unions take freedom away from employees as you will no longer be able to approach your supervisors directly regarding labor relations matters.

> "In the event you are approached by a fellow firefighter of union organizer to sign a card, please give us an opportunity to answer your questions and explain the consequences of signing union authorization cards." (Emphases in original.)

17. At some point during this period, some employees approached Chief Smith and asked to be able to hold an employee meeting using the District's facilities to discuss unionization. Chief Smith agreed, and ran calls while the employees were meeting, so that they could meet without interruption.

18. In January 2014, the firefighters met to discuss unionization, and they conducted their own secret ballot vote to determine whether to unionize. They voted by a margin of one against unionization.

19. After that vote, a number of firefighters decided to try to address their employment concerns by coming together informally, instead of by unionizing. Many firefighters were interested in an alternative to the "three-four" schedule, referred to as a "48/96 schedule," under which firefighters would work 48 hours on and 96 hours off. Some neighboring fire districts in central Oregon use a 48/96 schedule. Some firefighters circulated information from studies that had been done on the 48/96 schedule, and they started a petition asking Chief Smith to adopt a 48/96 schedule for a trial period to assess whether it could work for the District. Grogan did not start the petition, but he was supportive of it. When Chief Smith found out about the petition, he confronted Grogan, expressed concerns about the petition, and asked who started it. Grogan declined to identify the employees who started the petition.

20. Because many firefighters were interested in the 48/96 schedule, Chief Smith looked into it, including by reviewing the research studies and talking to other fire chiefs who had that schedule. He ultimately declined to adopt that schedule or conduct a trial period because of safety concerns. Chief Smith explained his reasons for that decision in a letter to the firefighters.

21. Some firefighters, including Grogan, also tried to address their staffing and safety concerns through informal advocacy. In or about 2016, they concluded that informal advocacy was insufficient, and they began discussing unionization again.

22. Union supporters scheduled additional meetings or discussions with unionized firefighters from other Central Oregon fire districts, and they distributed union authorization cards to every District firefighter who would be a member of the potential bargaining unit. When a majority of the full-time line staff (firefighters, lieutenants, and captains) supported unionizing and signed authorization cards, District firefighter Matt Hummel emailed all of the potential bargaining unit members to explain that they would go through the process to be certified as a union. The Association filed a petition for certification with this Board on August 29, 2016 (Case No. CC-005-16).

23. Some firefighters, including then-Lieutenant Bryan Shannon and Captain James Shannon, attempted to collect signatures on a petition for an election to be conducted (as authorized by ORS 243.682(3); OAR 115-025-0075). Because Bryan and James Shannon were scheduled to be on leave, they asked then-Captain Kenfield to help collect signatures. Kenfield agreed to help,

but he did not sign the petition himself. When Kenfield asked District firefighter Seth Tooley if he would like to sign the petition, Tooley declined, and he explained that he had voted for the union and would stick with his vote. After Kenfield realized that other firefighters were not interested in signing the petition, he left it in James Shannon's mailbox. This Board certified the Association as the labor representative for the full-time line staff on September 26, 2016.

24. The Association elected the following officers: Grogan, President; Hummel, Vice President; Sam Scheideman, Secretary; and Todd Olheiser, Treasurer.

25. Collective bargaining for the Association's first contract started in January 2017. This was the first experience any of the participants, including Grogan and Chief Smith, had with collective bargaining. Although the parties' bargaining process was contentious at times, they successfully negotiated their first collective bargaining agreement (Agreement), which the parties signed on August 27, 2017.

26. The Agreement provides that disciplinary action "shall be for just cause."[5]

Promotions and Reorganization following Association Certification

27. In February 2017, while the parties were still bargaining their first contract, the District promoted Russ DeBoodt to Fire Marshal. Before joining the District, DeBoodt worked as the Prineville Crook County Economic Development Manager. He initially worked for the District as a volunteer firefighter; later, he was hired into a front office administrative position, and his duties included assisting the deputy fire marshal with fire prevention work and working as a liaison to the business community in Prineville. The fire marshal primarily performs fire prevention work, such as public education and inspections. According to Grogan, he agreed that DeBoodt would make a good fire marshal, but the Association objected to the promotion because the District had not announced the fire marshal position opening or conducted a competitive selection process, and thereby denied bargaining unit employees the opportunity to compete for the position. Later, when the District began granting the fire marshal position chief-level authority over other firefighter/paramedics and deploying DeBoodt to command emergency scenes, the Association also questioned DeBoodt's qualifications for that expanded role, because DeBoodt had only EMT basic certification and limited experience commanding emergency scenes. The Association contended that putting DeBoodt in charge of emergency scenes raised safety issues. Chief Smith believed that the Association's safety concerns were unfounded and that the Association officers had a personal gripe with DeBoodt.

28. In April 2017, the District created two positions in a new classification, Battalion Chief (BC), which is supervisory and outside of the bargaining unit. Chief Smith promoted two bargaining unit captains, Kenfield and Freauff, to those positions. The Association objected to those promotions because the District had not conducted an open and competitive selection process. Additionally, the Association was concerned that the creation of the Battalion Chief classification was part of a broader reorganization that involved elimination of a bargaining unit captain position and other impacts on the bargaining unit.

[5]The parties dispute whether verbal counseling is disciplinary action under the terms of the Agreement. Because the issue is not material to our decision, we do not resolve it.

29. The Association filed an unfair labor practice complaint with this Board, Case No. UP-016-17, alleging that the District violated its duty to bargain in the course of creating the battalion chief positions and by using a non-competitive promotion process for the battalion chief and fire marshal positions. The parties resolved that complaint through a settlement agreement.

30. In the fall of 2017, the District conducted an open and competitive selection process for two captain positions. The applicants included two District lieutenants, Grogan and Bryan Shannon, and an outside applicant, Marty Theurer. The application process and examination included five components: EMS scenario, fire scenario, physical agility, panel interview, and the Chief's interview. In order for an applicant to proceed to the Chief's interview, they needed an average score of 70 or more from the panel interview. The interview panel included four members: District Battalion Chief Kenfield; District Fire Board member Dennis Merrill; Ranchview Fire District Deputy Chief of Operations Dave Phillips; and Redmond Deputy Fire Chief Dave Pickhardt. Grogan's panel interview occurred on September 25, 2017. The panelists scored Grogan as follows: Kenfield – 67; Pickhardt – 68; Merrill – 71; and Phillips – 72. The scores were tallied and cross-checked by Mary Puddy, a civil service examiner (who is not employed by the District). Because Grogan's average score was 69.5, he did not proceed to the Chief's interview. Chief Smith ultimately selected Shannon and Theurer.

31. In October 2017, Dillon Russell, a District firefighter, asked Kenfield why Grogan had failed the interview portion of the examination. Kenfield and Russell had socialized outside of work, and Kenfield had also mentored Russell. In response to Russell's question, Kenfield stated, "Well there is not much I can say about the process, but when you test for an organization that you have spoke negative about in the past, that's the way it goes." Russell testified that he understood Kenfield to be saying that "when you talk bad about an organization, whether it's the truth or not, you're going to get treated poorly."

Investigations and Employee Evaluations before Certification of the Association

32. Before the Association was certified, the District's established practice was to give firefighters monthly and annual performance evaluations. The evaluations provided firefighters with feedback on their overall performance, identifying both what they were doing well and what they needed to improve or train on. However, the evaluations could be time-consuming to complete, and those responsible for completing the evaluations sometimes found it difficult to do so on a monthly basis. They also sometimes found it difficult to recall the details of things that needed to be noted in the evaluation. On many occasions, the evaluations were delayed or skipped.

33. Minor issues and customer complaints about a particular firefighter were generally addressed through an informal, one on one discussion between the firefighter and their captain. Typically, if the complaint allegations were not sustained or if the issue was minor, the incident was not discussed in the firefighter's evaluation or otherwise documented. However, if a particular issue or incident was significant enough, it most likely was noted in the firefighter's evaluation and considered in the context of the firefighter's overall performance.

34. The District generally has not retained a private, third-party investigator to investigate firefighters in response to complaints from members of the public or concerns about

call responses. In approximately 2003, the District relied on a law enforcement officer (not a private entity) to investigate alleged criminal conduct by a District employee. Chief Smith also recalled that some kind of third-party investigation occurred before 2003, but he could not recall any details.

35. The District did not contract with an outside third party to investigate issues with the medical care provided by the firefighters. The District relied on its own quality assurance review (generally conducted by a chief-level employee) and, if necessary, a case review conducted by Dr. Gruzd, the District's physician advisor.

36. Dr. Gruzd described how he conducts case reviews as follows: In cases where there is a potential issue with the medical care that a District employee provided, Dr. Gruzd's practice is to address the issue through a relatively informal process. He will speak with the medics involved, and try to find out why the medic acted as they did, because a medic may deviate from protocol if they have a good reason to do so. Dr. Gruzd will also go over what the proper actions should be in similar situations in the future, and try to identify and address any systems or training issues that may have been an underlying cause of the issue. Dr. Gruzd's overarching goal is to prevent the issue from reoccurring. If Dr. Gruzd determines that the medic understands and accepts any feedback that Dr. Gruzd provides, Dr. Gruzd will continue allowing them to practice under his license. Chief Smith, not Dr. Gruzd, has the authority to determine whether there will be any employment consequences.

Investigations and Supervisory Notes after Certification of the Association

37. In January 2017, Chief Smith investigated a citizen complaint alleging that a District ambulance had been driven unsafely. One person had filed a complaint with dispatch, and another had complained in person at the station and spoken with then-Lieutenant Bryan Shannon. Smith investigated the complaint. He spoke with the involved employees, Pablo Quesada (the driver) and Bryan Shannon (the passenger), as well as three employees who were at the station that day (Hummel, Grogan, and Alysha Gilpatrick), and the complainant who had called dispatch. Smith's report addressed three issues. The first issue was whether the ambulance had been driven unsafely: Smith concluded that "the ambulance passed multiple cars" and "left the impression" that the ambulance had been driven unsafely. The second issue was whether Shannon had unduly pressured the driver to speed: According to Grogan, Quesada said that Shannon had pressured him, but Quesada denied that when questioned by Smith directly. In conclusion, Smith wrote, "Unclear," and noted that Grogan has an "open dislike and mistrust" of Shannon. The third question was whether Shannon, when speaking to the complainant who came to the station, "gave an excuse of driving fast to return for staffing (which was not true)": Smith concluded that it was "[l]ikely," but he could not "say with certainty." (Smith did not interview the complainant.) Smith decided that Shannon and Quesada should be counseled, but not disciplined.

38. On or around May 8, 2017, Chief Smith and BC Freauff met with a patient and their family member who had complaints about a medical call. The crewmembers were Olheiser (who served as the lead paramedic), Scheideman, and a student. Freauff conducted an initial investigation by speaking with the hospital emergency department staff, who reported that the patient also complained to them about the ambulance crew. As a result, Freauff recommended

investigating further, and noted that the investigation might lead to discipline. Smith retained an outside third party, Joe Henner with Pacific Consulting and Investigations, Inc. (PCI), to investigate the complaint. Henner submitted a report dated May 20, 2017, which indicates the following:

- All three crewmembers were "Named Employees" in the investigation report.
- The complaint had two parts: (1) allegedly inadequate patient care, and (2) allegedly disrespectful or unprofessional conduct. Chief Smith directed PCI to investigate only the professionalism issue, because CCFR would conduct "a standard review of the complaints regarding patient care with their physician advisor."
- Henner interviewed the complainants. He did not interview any of the crewmembers.
- After meeting with the complainants, Henner concluded that the allegations were "not sustained," which meant that he "did not have sufficient evidence to prove or disprove the allegation[s]."
- Considering only the information provided by the complainants, Henner identified three alleged statements "that <u>may</u> be construed as unprofessional." (Emphasis in original.) He noted that none of those alleged statements involved the use of curse words or any form of inappropriate language, and that the complainants were not able to identify which medic made each alleged statement. Later in the report, he identified some material discrepancies in the complainants' accounts of what occurred.
- After Henner discussed his findings with Chief Smith, they agreed that the investigation should be discontinued: "[We] agreed that the most appropriate course of action would be for CCFR staff to meet with the medics * * * to share the comments * * * and to discuss perceptions. What SMITH and I agreed on was that at this point, even if some of the statements made by medics were determined to be true, the end result would involve some type of verbal counseling regarding using caution in the presence of patients and the public. Neither of us believed continuing the investigation offered any value or benefit to the agency." Henner also noted that continuing the investigation would involve "significant (real and staff time) costs," and described the "steps mandated when conducting an investigation involving public employees," including providing "formal notices to the involved employees" and conducting "a formal audio recorded administrative interview" with "the opportunity to bring a Union representative, attorney, or other observer." Henner then stated, "It is absolutely critical to follow those steps when allegations are believed to be serious in nature. In this case, the final outcome of the investigation regarding inappropriate comments or language would likely result in a counseling session with the involved employees, no different than what might occur by concluding the investigation now."

39. On or about May 30, 2017, Freauff informed Olheiser that there had been a complaint and asked him to write a paragraph about what he remembered about the call. Freauff did not inform Olheiser that the District had retained PCI to investigate the complaint, or that Henner had already investigated and submitted his report recommending that the investigation be

discontinued because the complainants' reports were unsubstantiated. Freauff did not ask any of the other involved crewmembers to report what they recalled, and he did not counsel them regarding this call.

40. On June 6, 2017, Freauff and Kenfield met with Olheiser to coach him regarding this call. Olheiser was represented by Grogan. At this meeting, Olheiser and Grogan learned that the District had investigated the call involving Olheiser and used a third-party investigator to do so. In response to that new information, Grogan and Olheiser asked a number of questions about the investigator and the report. When they asked why the District had used a third-party investigator, Freauff responded something to the effect of, a third-party investigator "validates and keeps the investigation neutral" and protects the District from being sued.

41. Later that day, Grogan emailed Freauff and Kenfield, requesting information about the third-party investigator and asking whether the District had any policy regarding the use of third-party investigators. In response, Freauff provided information about the investigator, but neither of the battalion chiefs addressed Grogan's question regarding policy. Grogan followed up by emailing both BCs and Chief Smith; he again asked whether there was a policy, and he asked what criteria they used to determine whether to retain a third-party investigator. None of the chiefs responded to Grogan's questions, either by email or in other discussions.

42. At the hearing in this matter, Chief Smith testified about how and why he decided to use a third-party investigator to review the May 2017 patient complaint. He explained that he had been in the initial meeting with the complainants, and that they made serious allegations and threatened a lawsuit, but he had questions about their credibility. He sought advice from Henner, the PCI investigator, who was a former fire chief, regarding how to proceed. Based on that consultation, he decided to retain Henner to conduct a second interview of the complainants, which ultimately confirmed the Chief's intuition that the complainants lacked credibility. Chief Smith did not provide that explanation to the Association officers or other bargaining unit employees before the hearing in this matter.

43. On or about June 24, 2017, DeBoodt was working at the Crooked River Roundup in his capacity as a Roundup board member; he was not on duty as a District employee. A District ambulance was on standby. A rodeo participant was injured. DeBoodt happened to be nearby, and he went to render aid. When the standby ambulance crew arrived, DeBoodt returned to his rodeo duties. When the rodeo ended, DeBoodt found that the patient and ambulance crew were still at the rodeo. When it became clear that the patient needed to be transported to a hospital, DeBoodt attempted to get a second ambulance dispatched, because protocol dictated that the standby ambulance remain at the rodeo in case another incident occurred, even though the event had technically ended. When DeBoodt had trouble reaching dispatch, he decided that the circumstances justified a deviation from the standard protocol, and he directed the standby ambulance crew to transport the patient. DeBoodt recognized that his decision was a deviation from protocol, and he called Grogan by cell phone to alert him because Grogan was the Station 1201 officer on duty. DeBoodt also called BC Kenfield.

44. In Grogan's view, DeBoodt should not have intervened or directed the crew to deviate from protocol because he was not on duty, he was not part of the operations plan, and he

is not a paramedic. Based solely on the nature of the event (not any specific conduct by DeBoodt), some individuals also speculated that DeBoodt might have consumed alcohol before intervening in the call. Grogan reported that rumor to the Chief and contended that the rumor should be investigated. Chief Smith declined to investigate the rumor about alcohol consumption, because it was purely speculative. The chiefs, including Chief Smith and DeBoodt, reviewed the call together and concluded that the protocol deviation could have been avoided by calling for another ambulance to be dispatched earlier. DeBoodt was not verbally counseled.

45. In November 2017, the District received a complaint about a medical call involving Olheiser. BC Freauff investigated and concluded that the complaint was "not sustained." Freauff verbally counseled Olheiser.

46. In or about December 2017, the District discontinued monthly evaluations, and started using a new form, titled "Supervisory Note," to record work performance issues or incidents. The form states: "This is not discipline. This form will not be placed in a personnel file." The form includes fields with the following labels: "Reporting Party," "Associated Member(s)," "Location of Occurrence," "Date of Occurrence," "Summary of Event," "Signature [of reporting party]," "Date [of signing]," and "Witness Name (if any)." All District employees (including chiefs, line staff, and part-timers), students, and volunteers, are subject to supervisory notes.

47. Chief Smith did not give the Association notice that the District would start using supervisory notes or explain his reasons for doing so.

48. To roll out the new supervisory notes, the chiefs first met with the captains. The chiefs told the captains that the supervisory notes were replacing monthly evaluations, and were a tool that captains could use to document things with their crew.[6]

49. The chiefs left it to the captains to explain the supervisory notes to their respective crews. The captains did not deliver clear and consistent information to all of the other line staff regarding why and how the District would be using supervisory notes before the first notes were issued.

50. When Captain James Shannon met with his crew, he explained that any work performance problems or policy violations would be documented using the notes and brought to the chiefs. He did not mention that supervisory notes could be used to document positive things, such as a firefighter's commendable conduct or good work performance. Shannon did not explain why the District was adopting this new practice. Within a few weeks, Shannon realized that he had given his crew a very negative impression of the supervisory notes, so he met with his crew again and attempted to explain that the notes could also be used positively. Shannon also reported to his supervisors that he had left a negative impression.

51. When Captain Theurer met with his crew, he explained what the supervisory note form was, and said something to the effect of, "I hope to never fill one of these out for you guys,

[6]Captains are in the bargaining unit, but they have authority over other firefighters in the chain of command and are responsible for directing their crews. Captains do not have the authority to discipline other firefighters.

and if you guys get one, you will know you will be getting one, because I have already talked to you several times." Firefighter Seth Tooley asked why the supervisory notes were used only to document negative things. Captain Theurer did not have an explanation, or represent that the notes could be used to document good conduct.

52. At hearing, several chiefs (including Chief Smith, Battalion Chief DeBoodt, and Battalion Chief Kenfield) testified that management has the responsibility to counsel employees, and that the purpose of the supervisory notes is to document any conversation that management has with an employee, whether good, bad, or neutral.

53. On December 29, 2017, BC Kenfield issued the first supervisory note to Captain James Shannon. Chief Smith had directed BC Kenfield to review a call that had occurred on December 7, 2017, and involved Shannon and Grogan. On Shannon's note, Kenfield wrote, "From my interviews, there is obvious contention between Capt Shannon and Lt Grogan which causes questioning of judgment. This needs to be solved to promote a positive working environment." Kenfield also indicated that there were "attached * * * findings that need to be addressed after call review." In the attachment, Kenfield listed seven different issues under the heading "findings." Several of the findings contained instructions for call responses (*e.g.*, "Read CAD notes for updates"). Kenfield also noted some systemic problems. For example, he wrote: "This incident was near the auto aid boundary which created some confusion. In this case, dual Run Cards were issued." Run cards indicate how crews should respond to various types of calls, for example, by specifying what type of equipment they should bring. The officer in charge may deviate from the run card based on specific information or staffing. Generally, Kenfield did not identify which individuals were responsible for the various problems that he discussed, but he specified that one action taken by "the Captain" had created "confusion."

54. Kenfield met with Shannon to give him the note and discuss the findings. In a "follow up" email, Kenfield directed Shannon to review the findings attached to the supervisory note, and to "[m]ake corrections for yourself and supervisory notes as needed for your crew."

55. On January 4, 2018, Captain James Shannon issued three supervisory notes to Grogan. Two of the notes related to the same December 7, 2017, call for which Shannon had received a note from BC Kenfield. On one note, Shannon wrote, "Make sure triage is performed correctly," and, "Crewmembers should stay near the medic unit and await assignment." In the other note, Shannon instructed Grogan to "[m]ake sure that all patients identified have proper charting" and to complete the charting for "patient B." Shannon also noted, "It was found during call review we need to improve charting and documentation." Shannon issued the third note to Grogan for an "occurrence" dated December 28, 2017, and wrote, "Wear your Class B uniform per the leaders intent document and CCFR expectations."

56. On January 3 and 4, 2018, two employees (Jared Brown and Eric Burhart) were issued supervisory notes for late timesheets.

57. Also on January 4, 2018, Captain James Shannon self-reported a "near miss" medication error. In his report, he suggested a system change to prevent similar issues in the future. The chiefs did not believe any further investigation was necessary.

58. Shortly after 1:00 a.m. on New Year's Day, January 1, 2018, four firefighters—Grogan, Chris Bocchi, Joe Mills, and Theurer—were dispatched to a report of an injured person with multiple gunshot wounds at a local tavern. The nature of the call and the severity of the patient's injuries made this a highly unusual call for the District. Theurer was the highest ranking member of the crew that responded to that call, but Grogan served as the lead paramedic and prepared the post-call reports.

59. Sometime shortly after the gunshot wound call (GSW call), Dr. Gruzd reviewed the medical reports completed by Grogan and became concerned that the patient may have been handled in a manner inconsistent with their protocol for protecting a patient's cervical spine. In Dr. Gruzd's opinion, a departure from protocol is permissible if warranted by the particular circumstances, but it was necessary to determine whether there was a departure from protocol in this case, and if so, the reasons why that occurred. Dr. Gruzd communicated his concerns about the call to Chief Smith.

60. Also in early January 2018, the District was responding to a complaint made by a Redmond Fire Division Chief. The Redmond chief had emailed BC Kenfield on January 2, 2018, requesting a conversation about their districts' joint responses to medical calls in Powell Butte. The Redmond chief later forwarded an email from a Redmond firefighter/paramedic in which he described a joint call and stated, "It felt to me, and this is the second time in as many calls, that they just wanted to punt the [patient to the Redmond ambulance without] any regard of best care. It feels like we are their easy out. This is completely subjective but it has been the feeling I've got both times on call with them." The District determined that one of the joint calls at issue had occurred on December 1, 2017, and the crewmembers were Grogan, who served as the lead paramedic, and Mike Wheeler, a part-time Basic EMT. The other joint call had occurred on December 21, 2017, and the crewmembers were Scheideman, who served as the lead paramedic, and Dan Price, a part-time paramedic.

61. On January 5, 2018, Chief Smith talked with Joe Henner at PCI and asked him to conduct an investigation of the GSW call and the two joint calls with Redmond. Early on during Henner's investigation, Smith also told Henner that, after consulting with the District's legal counsel, the District wanted Henner to produce only fact-finding reports.

62. Dr. Gruzd also reviewed the GSW call per his usual practice, including by meeting individually with Grogan to discuss the case. The PCI investigation conducted by Henner for the District was separate from and in addition to Dr. Gruzd's own call review.

63. On or about January 8, 2018, Captain Theurer wrote supervisory notes for Grogan, Mills, and Bocchi, commending each firefighter for how well they had handled the GSW call. On Grogan's supervisory note, Theurer described Grogan's actions during the call and stated that he acted "swiftly and appropriately." In conclusion, Theurer wrote:

> "Lt. Grogan fully assessed the patient, obtained pertinent medical information, directed care, assisted in providing proper treatments, and provided an accurate HEAR report to the receiving facility as to the nature of the patient and his injuries.

> All of these tasks were completed, while directing the team, in a very high stress situation.
>
> "Lt. Grogan should be commended for the excellent service and skills he demonstrated in this very low frequency/high risk situation. The behavior and confidence that Lt. Grogan displayed on this scene was far beyond my expectations, given the nature of the event."

Theurer similarly stated that Mills and Bocchi exceeded his expectations.

64. On January 9, 2018, Hummel, Association Vice President, filed a grievance and request for information regarding the supervisory notes. The grievance indicated that the Association was aware of four notes (the January 3 note issued to Brown and three notes issued to Grogan on January 4). The grievance claimed that the notes were effectively disciplinary and that, by using the notes, the District was circumventing contractual protections and rights related to personnel files.

65. On January 12, 2018, Chief Smith responded to the grievance and request for information. Smith stated that there was no specific policy on supervisory notes. He also explained that the note "is intended as a record to document work related matters and notify employees inclusive of both commendable behavior or actions which need to be corrected by such directive. The supervisory note is specifically not a disciplinary document and is not placed in the personnel file."

66. On January 18, 2018, the parties met to discuss the grievance. On January 30, 2018, Chief Smith wrote Hummel a letter providing the District's "Step 2 Grievance Response." Smith thanked Hummel for meeting with him and explaining the Association's perspective. Based on that conversation, Chief Smith understood that "there was miscommunication about how the use of the notes was explained by the shift Captains," "that it was not clear" that employees could submit rebuttals to the notes, and that "there is a concern that the District was using the notes disparagingly." Smith reiterated that the notes could document both "commendable behavior and actions which need to be corrected * * * in a non-disciplinary fashion." Smith offered a draft addition to the District's personnel policy manual regarding supervisory notes "for review and comment" by the Association, and offered to speak to each shift personally to review the District's expectations of their use.[7] The draft policy stated, in part:

> "Supervisory Notes are a less formal means of resolving issues related to daily operations, interpersonal conflicts, and minor matters of improper conduct. The District specifically does not consider counseling documents to be a form of formal

[7]The District denied the grievance at each step, and the Association continued to advance the grievance. At the same time, the parties attempted to settle the grievance. On March 4, 2018, Hummel emailed Chief Smith (and copied the other Association officers), both to advance the grievance to Step Four (arbitration), and to continue settlement negotiations by attaching a draft memorandum of understanding. On March 9, 2018, Chief Smith replied to Hummel, expressing continued interest in settling the grievance and attaching an edited version of the MOU as a counterproposal. The Association did not respond to the counterproposal.

discipline. 'Supervisory Notes' are not placed in an employee's personnel file, however, they may be maintained in a supervisory note file for periodic review and may be mentioned in the next yearly evaluation."

67. The District issued formal notices of "administrative investigation for possible misconduct" to Scheideman, Grogan, Mills, and Bocchi on January 10 and 11, 2018. The District did not issue investigation notices to the two non-bargaining unit part-timers who had participated in the two December 2017 joint calls with Redmond, or to Captain Theurer, who had participated in the GSW call.

68. In or about January 2018, after learning that the District had retained PCI to investigate Grogan and Scheideman, Grogan asked Freauff to explain why the District was using a third-party investigator. Freauff replied in words to the effect that, as he understood it, it was because of the union.

69. On or about January 14, 2018, firefighter Russell asked BC Kenfield, "Why are union members being investigated for incidents that occurred in the past with no investigation until now?" Kenfield responded, "Well when a grievance is filed by the Association for supervisory notes, then the District will have to investigate the members with a third-party investigator."

70. In or around January or February 2018, Dr. Gruzd asked Chief Smith why CCFR was using a new process to investigate the medical care issue. Dr. Gruzd testified that he asked that question because the new method "seemed like a lot more aggravation than [he] was used to doing, and it was obviously distracting from the medicine." According to Dr. Gruzd, Chief Smith responded that the District decided to use PCI because it was the first major investigation under the collective bargaining agreement; the administration did not have any experience working with the union; and they believed using an independent investigator would depoliticize the process and make it seem more impartial. In Dr. Gruzd's opinion, the new process "unfortunately * * * probably did the opposite of that," "seemed more adversarial," and "[s]ince it had never been done, then it appeared to be more likely to put somebody on the defensive."

71. At hearing, Chief Smith testified that he chose to use a third-party investigator to investigate the Redmond complaint regarding joint calls and the GSW case because of the potential for litigation in the GSW case and the chiefs' workload at that time (which included training and preparing for a lieutenant's exam). Smith also testified that he did not explain those reasons to the firefighters or the Association before the hearing in this matter.

72. Henner submitted his reports regarding Grogan, Mills, and Bocchi, on January 28, 2018.[8] The report regarding Grogan addressed both the joint call and the GSW case, and indicates the following:

- The allegation regarding the joint call with Redmond was that the CCFR crew failed to timely provide pain medication to the patient. Grogan explained that he attempted to strike a balance between making the patient comfortable and

[8]The record includes the complete copy of Henner's report regarding Grogan, but only one-page excerpts from the Mills and Bocchi reports.

exercising caution in giving narcotics. He described the factors he considered when determining whether and when to give the patient narcotics, including cautions from Dr. Gruzd regarding narcotics, the patient's condition and medical history, and consultation with the patient and her family. For example, Grogan stated that he determined that the patient's pain was not new or acute, and then he "talked to the daughter about giving narcotics to older, elderly folks and said if they could get her in a position of comfort, he would really like to not have to give her narcotics because she's already taking them," and because the patient needed "more definitive care" than they could provide in the "15-minute transport" to the hospital. Henner did not interview Wheeler, the District part-timer who was also involved in the joint call at issue, or any other witnesses.

- For the GSW case, Henner interviewed Dr. Gruzd, Theurer, Mills, Bocchi, and Grogan. Chief Smith told Henner that Theurer was a witness but not a subject of the investigation because Theurer had significantly less patient contact than the other crewmembers.
- Henner described in detail the four crewmembers' accounts of what occurred during the GSW call. Their accounts were generally consistent. All four individuals had some difficulty recalling details and the exact chronology of events, and all four expressed some uncertainty about the accuracy of their recollections.
- The protocol issue flagged by Dr. Gruzd related to the use of c-spine protections during two actions: first, when moving the patient from the scene of the incident to the ambulance, and second, while treating the patient's wounds in the ambulance. According to all four crewmembers' accounts, all four of them (including Theurer) participated in both of the actions at issue.
- Regarding the first action, Mills recalled that someone made a suggestion regarding c-spine precaution before they moved the patient from the scene, but he could not recall who. Grogan recalled that he asked Mills for his opinion about whether they should take c-spine precaution before they moved the patient. Grogan said that he sought Mills's opinion because c-spine precaution "was in the front of [his] mind," but he also had to consider other priorities, including "airway, breathing, circulation ["the ABCs"]," and stopping the patient from hemorrhaging. Grogan explained that he ultimately decided not to use c-spine protection because it would block their access to the patient's back, and it would delay moving the patient from the scene to the ambulance. All of the crewmembers stated that the scene was too dark and chaotic to fully assess and treat the patient.
- Regarding the second action (in the ambulance), Theurer informed the other crewmembers that they needed to check for other wounds. Grogan told Henner that it was his decision to sit the patient up so they could check for wounds on the patient's back, and that he did not believe that "logrolling" the patient (instead of sitting him up) was an option for multiple reasons. All four crewmembers recalled working as a team to sit the patient up, and none raised any concerns about doing so, or suggested alternatives.
- When Henner asked Theurer whether "he felt overwhelmed by the incident," Theurer explained that, based on his extensive military experience and training, he believed that all of the crew members "operated on all cylinders" and "flawlessly."

73. On or about February 14, 2018, BC Freauff, BC Kenfield, and Captain Theurer conducted meetings with Mills and Bocchi to discuss the GSW case. They reviewed the allegations, as well as the District's findings and conclusions. BC Freauff prepared identical written summaries of those findings and conclusions for Mills and Bocchi. In the findings section, Freauff stated:

> "1. Scene safety was not clearly identified
> "2. Retain personal accountability on calls in which others are running
> "3. High risk call was not properly secured to maximize patient care
> "4. Suggestions were not clearly heard or communicated
> "5. Roles of team members limited the overall reality of patient care[.]"

In the conclusions section, Freauff stated that the allegations regarding inadequate patient care were "not sustained." Freauff also wrote that "a judgment call was made based on several factors," and specified five directives for future conduct, including:

> "1. Use personal accountability with scene safety. * * *
> "2. You must account for yourself and speak up if concerns arise * * *.
> "* * * * *
> "5. Recognize as a paramedic you are not exempt from being accountable to a poor patient outcome by working under the advisement of a lead paramedic."

Freauff also wrote, "This incident should be concluded with an explanation and conversation regarding the above mentioned." Freauff did not specifically recommend that Mills or Bocchi receive remedial training.

74. Although Mills and Bocchi were counseled, and Freauff had prepared written findings regarding their conduct during the GSW call, neither Mills nor Bocchi received supervisory notes for that call.

75. On February 20, 2018, BC Kenfield issued a supervisory note to Grogan regarding the GSW call, and BC Freauff issued a supervisory note to Grogan regarding the joint call with Redmond.

76. At the hearing in this matter, Chief Smith testified that only Grogan received a supervisory note regarding the GSW case because Grogan had served as the lead paramedic.

77. In the February 20 supervisory note issued to Grogan regarding the joint call, BC Freauff wrote:

> "Attached are the findings and conclusions from the investigation. Judgment calls were made and below are some topics to consider.
>
> "Work to understand policies and procedures such as run cards so they are better understood.

"Situations require independent judgments to be made based on variable scene factors and district expectations."

In the attachment to the supervisory note, Freauff summarized what he called the "allegation." In the "conclusions" section, Freauff wrote:

"Not sustained. A judgment call was made based on several factors relating to pain management and patient care. From the nature of the complaint and interview I do see a need to address the following findings."

Freauff then listed four findings. The first three findings did not address the joint call under investigation; instead, those findings addressed statements that Grogan made in response to Henner's background questions. For example, Freauff wrote: "Points to past practice being confusing and changing," and "Defines response plan as 'very gray' and 'situation dependent.'"[9] The fourth finding addressed Grogan's conduct during the joint call. Freauff wrote: "[Grogan s]tates giving narcotics to someone already on them is something we do not want to do. Narcotics can be given with caution to patients on opiates."[10]

78. In the February 20 note issued to Grogan regarding the GSW case, BC Kenfield wrote that a "judgment call was made, and then listed "some topics to consider when making judgments":

"Ensure scene safety and/or have communication with [Law Enforcement].

"Consider spinal immobilization when mechanism warrants or the patient has symptoms of possible injury.

[9]Freauff's findings appear to be based on comments Grogan made during his investigatory interview with Henner (the PCI investigator). While questioning Grogan about the joint call with Redmond, Henner asked him various background questions about how the District operates, and specifically, how the crew determines whether to respond with "an engine versus a medic unit." According to Henner's report, Grogan responded that it "depend[s] on the incident's run card"; cited a motor vehicle crash as an example of a situation that they would respond to with an engine; and added, "It's very gray. It's situation dependent." The PCI investigator continued to ask questions along these lines, and Grogan indicated that there are a number of exceptions to the general response protocols. Grogan then stated, "[I]t's getting to the point where just to know if we're doing what we're supposed to do, it is going to be easier for us to call the station officer at 1201 or 1202 and ask them what they would like us to take…even though the run card says this, it's not…we've been told to follow the run card. We've also been told the run card is just a guideline." Grogan added that, for the joint call being investigated, "there was no question that a medic unit was the appropriate response vehicle." At the hearing in this matter, Captain Bryan Shannon described the run cards similarly: "[O]ur run cards are dynamic. They constantly change. As the shift captain of B Shift, I reserve the right to alter the run card at any time, based on the dispatch information * * *."

[10]Freauff's supervisory note seems to indicate that Freauff concluded that Grogan believed that there is a hard rule against giving narcotics to someone already taking them. Grogan's statements and conduct (as described in Henner's report), however, indicate that he understood that he could give narcotics to the patient but should exercise "caution" before doing so.

"EMS scene management procedures allow for a systematic approach.

"Procedures and Guidelines allow CCFR members to use judgment."

Kenfield also attached a document to the supervisory note that identified what he called "the allegation," and summarized his conclusion and findings. In the conclusion section of the attachment, Kenfield wrote that the allegation was "not sustained," but recommended "a remedial training plan to review the basic scene management philosophies."

In the findings section, Kenfield wrote five paragraphs. The first three paragraphs address the paramedics' communication with law enforcement and the spinal precaution issue, and contain specific directives to Grogan regarding how to act in future situations with similar circumstances. In the fourth paragraph, Kenfield wrote:

> "High acuity scenes can be difficult to manage with a lot of distractors. These types of incidents require defaulting back to basic scene management training so they run effectively. In this case, the patient said several times he could not feel or move his legs but was not heard by the lead paramedic [Grogan.] This suggestions [*sic*] stressors overwhelmed the Paramedic which led to 'tunnel vision' and being 'stuck on the ABCs' along with feeling no other options were available to assess the posterior of the patient other than sit him up."[11]

In the fifth paragraph, Kenfield wrote:

> "Constructive feedback and call review is a necessity in this line of work. In this case, it was referenced a Paramedic would be criticized for using judgment on partial Spinal Immobilization and became defensive by contacting both CCFR Physician Advisor, ED Physician and referencing a Trauma article to defend his actions. A positive attitude to accept feedback and self-improvement is needed for patient and crew safety."[12]

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[11]Kenfield's finding (that Grogan did not hear the patient's statements and had "tunnel vision") appears to be based on Grogan's interview responses in which he stated that he could not recall hearing the patient use the exact words, "I can't feel my legs." However, according to Henner's report, Grogan did recall hearing another paramedic ask the patient whether he could feel or move his legs, and that the patient responded, "No." Additionally, Grogan's recollection of the patient's actual words is consistent with Bocchi's. We also note that, according to Henner's report, Grogan was already aware that the patient could not feel or move his legs by the time the patient was in the ambulance. The "tunnel vision" quotation may have been taken from the portion of Henner's report that states: "Grogan shared that he is aware of how easy it is to get tunnel vision on calls of this nature. He noted that while he was the lead paramedic, he wanted to bounce things off the others. When asked, Grogan said while in the back of the medic unit and in route to the hospital, he asked the others, about using a c-collar."

[12]According to Henner's report, Grogan told Henner that he had sought feedback from the emergency department physician on the night of the incident, while the crew was waiting to transport the patient to another facility. Henner wrote, "Grogan shared * * * that CCFR staff will frequently speak with

(Continued . . .)

79. Also on February 20, 2018, BC Freauff, BC Kenfield, and Dr. Gruzd met with Grogan to discuss Kenfield's findings and conclusions regarding the GSW call. Dr. Gruzd shared some recommendations regarding how to deal with similar situations in the future. Grogan asked why the District had used a third-party investigator. Dr. Gruzd responded that he would have preferred to proceed as they had in the past (referring to reviewing the case himself), and that they were doing the third-party investigation process because of the union.

80. Dr. Gruzd made written notes of the concerns Grogan raised at the February 20 meeting. After describing Grogan's concerns about the third-party investigation, Dr. Gruzd wrote, "These concerns were not demands, but seemed to somewhat distract from Mr. Grogan's dealing with the issues presented to him. He seemed to continue to try and defend himself rather than participate in the possible remediation of the concerns."

81. Kenfield also briefly summarized the February 20 meeting in writing. Regarding Grogan's response to the counseling, he wrote, "Grogan accepted feedback and discussed wanting active shooter training, bleeding control training and had concerns with how the district handles investigations and concerns with dispatch. Grogan was open to a training plan for improvement."

82. Grogan submitted rebuttals to both of the February 20 supervisory notes. Freauff and Kenfield asked to meet with Grogan again to discuss his rebuttals, but the meeting did not occur due to scheduling difficulties.

83. In connection with Grogan's February 20 supervisory notes, the District submitted an undated document titled "Implementation Plan," which discusses Grogan's "Training Plan," and then includes the following statements:

> "District and Association need to have mutual respect and understand the roles of each organization. This needs to be enforced so the operation can be effective and safe for staff and public.
>
> "The district and its officers should not allow undermining comments at any level of the organization. A strong presentation to officers and staff is needed.
>
> "Reorganize the shift tour meetings so they are effective. * * * This should be productive with appropriate Q/A and not just a time to bring up gripes with no solutions."

(Continued . . .)
the physician after an incident to see if they missed anything or should have done something differently. He said it helps them become better medics and provide better patient care." According to Grogan, the ED physician confirmed that Grogan had made an appropriate judgment call when he decided not to use c-spine precautions. Henner asked Grogan whether the physician had changed his opinion or expressed concerns since their initial conversation. Grogan responded that the physician had not changed his opinion, and that he had offered to talk to Henner directly. Henner did not interview the physician.

84. On January 22, 2018, Henner submitted his report regarding the second joint call with Redmond, involving Scheideman and Price. The allegation was that the CCFR crew had inappropriately delayed care by failing to treat a patient for nausea and attempting to transfer the patient to the Redmond unit. The investigator described in detail Scheideman's investigatory interview, but did not draw any final conclusions about the allegation. According to Scheideman's interview responses, he did not provide any nausea medication when the CCFR crew first arrived because the patient was not nauseated at that time. The patient did not become nauseated until after the Redmond crew arrived, as she was walking to the Redmond ambulance. At that point, the two leads discussed whether they should give the patient nausea medication. Only the higher-level CCFR crew could administer that medication, and if they did, the Redmond crew could not transport the patient. Scheideman stated that he told the Redmond medic he was fine with administering the medication and transporting the patient, but that "it was up to them [*i.e.*, the Redmond crew,] since [the call] was inside of [Redmond's] ASA [ambulance service area]." Scheideman then said that, "after discussing the topic for a few moments, they decided to transport the patient in the CCFR unit." The investigator did not interview the other CCFR crewmember, Price, or any other witnesses.

85. On February 22, 2018, BC Kenfield issued a supervisory note to Scheideman regarding the joint call with Redmond. On the note, Kenfield wrote:

"1. Review ASA boundary

"2. Clarify patient care responsibilities & expectations of CCF&R

"3. Promote patient advocates [*sic*]."

Kenfield also attached written findings to the supervisory note. He made three findings:

"1. Unfamiliar with ASA boundaries

"2. Patient care was directed by a BLS crew by stating 'it's up to you guys'

"3. ALS care was initially withheld due to an ASA boundary misunderstanding."

In the conclusion section, Kenfield wrote, "Not sustained. A judgment call was made based on an unfamiliarity of ALS responsibilities."

BC Freauff, BC Kenfield, and Scheideman's shift captain met with Scheideman to discuss the findings regarding the joint call. Scheideman was represented by Grogan. Scheideman submitted a written rebuttal to the supervisory note on February 24, 2018. Scheideman questioned why he had been issued a supervisory note and whether it was actually "a less formal means of resolving issues," pointing out that the investigation results meeting "was attended by two Battalion Chiefs, [his] shift Captain and [his] union representation, due to the possibility of the meeting resulting in discipline." Regarding the joint call at issue, Scheideman maintained that "[t]here was good, professional dialogue between two agencies and the decision was made for [his] crew to transport the patient." Scheideman also stated his opinion that the issues stemmed in

part from "a systems problem, not a personnel/conduct problem," and explained the basis for his opinion. In conclusion, he wrote, "I have always been, and always will be an advocate first for my patients, despite the supervisory note stating that I need to work on promoting patient advocacy." Freauff and Kenfield held another meeting with Scheideman to discuss his rebuttal.

86. BC Freauff issued supervisory notes to Hummel and Tooley (dated March 2 and March 8, 2018, respectively), regarding a February 21, 2018, text message exchange involving Hummel, Tooley, and James Shannon, which the parties refer to as "the screenshot incident." As background, both Tooley and Mills had applied for a promotion to lieutenant, and Mills was selected. Tooley had been confident that he would be promoted, and he was on shift when he learned that he was not. At the hearing in this matter, Tooley explained that he felt shocked, and that he needed to go home to process what had happened and regroup. Tooley informed his shift captain, James Shannon, that he needed to go home. Shannon told Tooley that he could take either vacation or sick leave, but that if he took sick leave, he would need to explain why he was leaving. Tooley told Shannon that he did not want to explain why he was leaving, so he would take vacation. Shannon granted the vacation request, and Tooley went home. Shannon texted Chief Smith using a work phone, stating something to the effect of, "Tooley is going to be using vacation and when he comes back he can better articulate what his 'problem' was."[13] Hummel saw Shannon's text on the work phone, took a screenshot of it, and sent the screenshot to Tooley. Tooley was confused by Shannon's message, and felt that it conflicted with their earlier conversation (when Shannon said that Tooley would not have to explain his reasons for leaving if he used vacation leave). Tooley forwarded the screenshot to Shannon, who was off-duty, seeking an explanation. Shannon explained the message and offered to sit down and talk further. Tooley responded, "No thank you, I'm good." Tooley did not make any threats, or use any threatening language or profanity, in his text exchange with Shannon.

87. Freauff conducted meetings with Hummel and Tooley before he issued the supervisory notes regarding the screenshot incident. According to Tooley, in his meeting, Freauff said that, by forwarding the screenshot to Shannon, Tooley had violated the District's policy regarding menacing behavior and violence in the workplace. Freauff reviewed the policy with Tooley, and emphasized that it was a "zero tolerance policy." Freauff told Tooley that his conduct was "not normal behavior." Tooley explained to Freauff that he had not intended to be menacing or threatening, but understood that his text (forwarding a screenshot of Shannon's message to Shannon) could be seen as inappropriate if viewed out of context. In Tooley's supervisory note, Freauff wrote, "In our conversation you admitted to sending the screen shot to Shannon. You accepted full responsibility, and said you understand why this was inappropriate behavior. I informed you this will not be tolerated in the future. As a reminder behavior which causes a tense and stressful workplace filled with interpersonal conflict is against policy."

88. In Hummel's note, Freauff wrote that Hummel admitted that he sent "the screen shot to Tooley with the intent to 'stir the pot,'" accepted full responsibility, and understood why his behavior was inappropriate.

[13]The screenshot and text messages at issue are not in the record. According to Shannon, in his text message to Chief Smith (which Hummel captured in the screenshot at issue), Shannon used the word "problem" to describe Tooley's unspecified reason for leaving, and placed that word in quotation marks. Shannon did not receive a supervisory note for his manner of communication in this exchange.

89. At some point, the District decided that the remedial training planned for Grogan should be provided to the line staff generally. Dr. Gruzd conducted that training on March 19, 2018. At the start of the session, Dr. Gruzd attempted to address the employees' concerns about the District's changes to the investigation process. He began by explaining that everyone makes medical mistakes. He then explained that the hospital he works at had changed how it handles physicians' mistakes and complaints. Formerly, such issues were reviewed by the physician's department or the next person up in the chain of command. Under the new system, everything was reviewed by a professional performance committee. Regarding that change, Dr. Gruzd stated, "And that really traditionally has been a big elevation of the severity of the potential punishment and/or recordkeeping, and this basically started when the physicians became employees of the hospital system. And that was not a way of handling things that I was used to for my entire career, because once it got to a committee level of your peers, then you've really screwed up." Dr. Gruzd went on to explain that, over the years, he began to understand that the hospital had changed the review process and increased documentation because the physicians' "employment status had changed," noting, "I don't like [that change], but I understand why it's there."

Next, Dr. Gruzd noted that over the years, CCFR had transitioned from a totally volunteer fire department/EMS response to a service with paid employees. He then stated, "[T]here's changes that occurred, and the latest change in that administrative burden, or at least the approach to it, is the coming of the union. And it's new territory."

Dr. Gruzd then returned to discussing his personal experiences with the hospital's review process and acknowledged that, for him, the more formal review "was not a very happy place for me," but also explained how he came to understand that "[i]t doesn't mean that I've made more mistakes; it just means it's handled differently."

Finally, Dr. Gruzd explained that it is important to discuss mistakes to learn from them, stating, "So I want you all to remember that you all are going to make mistakes. We're going to review and look and see – and I want – and I found almost to a – every single complaint ends up being some form of [a systems] problem, that is, we didn't teach you – I didn't teach something correctly; we didn't have a policy that was clear and an action was taken. And that's still the way I'm going to be working in this department, even though we're using a slightly different system of evaluation and making it more official and having paper trails. And I always get scared when there's paper trails, personally, but again, the goal is to make sure that we still work together as an organization and that everyone gets to learn from everyone else's mistakes. The worst thing that could happen is, with a change in the administration of how we investigate things, that people will stop reporting problems because then for sure those problems will be repeated."

90. At the hearing in this matter, Dr. Gruzd testified that, from his perspective as the supervising physician, the former process for call reviews worked well, and he did not view the District's process changes (third-party investigations and what he referred to as "paper trails") as necessary or preferable. Dr. Gruzd also testified that the changes "would seem intimidating" to him personally, and he believed that the changes hurt morale. Dr. Gruzd explained that, when he spoke at the March 19 training about those changes, his intent was to allay the firefighters'

concerns about the process changes, and to ensure that the firefighters continued to feel comfortable reporting and learning from mistakes.

91. On March 23, 2018, the District issued a written reprimand to Mills for an incident that occurred on or about March 15. Mills was off duty that day, but he reported to work in the evening, in response to a request to return to work for a medical call. While on duty, Mills drove an engine and provided patient care. After learning that Mills was on duty, another firefighter's family member reported that she had seen Mills drink at least two beers at a local brewery earlier the same evening. OAR 333-265-0083(3) states: "Alcohol use within eight hours of going on duty or while on duty or in an on-call status" is "contrary to recognized standards of ethics of the medical profession."

92. BC Kenfield was assigned to do a "preliminary inquiry" into the allegation against Mills. Kenfield notified Mills and interviewed him. Mills admitted that he had consumed one beer with dinner while off duty, and then responded to the request to return to work within a couple hours of dinner. Captain James Shannon reported that Mills was not visibly impaired while on duty. Because Mills admitted to drinking one beer, Chief Smith decided that there was sufficient evidence that Mills had violated District policy and the OAR. Chief Smith did not believe it was necessary to determine whether Mills had drank more than one beer (as alleged by the witness).

93. In Mills's written reprimand, Chief Smith explained that the allegation against Mills had been "sustained." He then wrote, "The findings of the investigation also recognized that you were not visibly impaired in any way while providing medical treatment. At the time of the phone call with Captain Shannon you had likely forgotten that you had consumed a single beer with dinner 2 hours earlier." In conclusion, Smith stated, "Your conduct is a violation of policy and OAR, however, the circumstances presented here, including your admission and contrite demeanor, are viewed as mitigating factors."

94. On April 13, 2018, Captain Bryan Shannon issued a supervisory note to Olheiser, regarding his conduct toward Mills during a tour meeting on April 10. According to the note, Olheiser "appeared to be agitated and stated to Lieutenant Mills, 'Joe, if you say personal accountability one more time I'm going to get up and walk out of this room.'" Shannon stated that this was an "inappropriate way to handle personal conflict," and directed Olheiser "to show respect for his officers and department members," and "work on fostering a positive environment where mutual respect is shown." Shannon also directed Olheiser not to "make statements in an aggressive" or harassing manner. Olheiser did not submit a rebuttal to the April 13 note. At hearing, Olheiser testified that he was worried that submitting a rebuttal would be perceived as "not responding to training."

95. On April 23, 2018, the Association filed the unfair labor practice complaint in this matter. The April 23 unfair labor practice complaint identified "DR" as a witness to some of the allegations. DR refers to firefighter Dillon Russell.

96. For the purpose of this hearing, the District categorized all of the supervisory notes as either "instructed" or "commended."

97. Between December 2017 (when the District started issuing supervisory notes) and April 2018 (when the Association filed the complaint in this matter), a total of 15 instructive supervisory notes were issued.

- Four of the instructive notes were issued for late or missing timesheets, and the recipients were Brown, Burhart, Cody Buss, and Price (at least two of whom are part-time employees).
- Eleven of the instructive notes addressed workplace conduct or responses to calls. One of those notes was the December 29, 2017, note issued to James Shannon by BC Kenfield. The remaining ten notes were issued to a total of five individuals, all of whom were either Association officers or open Association supporters at the time: Grogan (Association President), Hummel (Association Vice President), Scheideman (Association Secretary), Olheiser (Association Treasurer), and Tooley (Association supporter). Five out of those ten notes were issued by BC Freauff or BC Kenfield; three were issued by Captain B. Shannon to Grogan; one was issued by Captain J. Shannon to Grogan; and one was issued by Captain B. Shannon to Olheiser.
- During the same period, 22 commendation supervisory notes were issued by the three captains (Theurer, B. Shannon, and J. Shannon). Recipients of those commendation supervisory notes included Association officers and supporters Grogan, Hummel, Olheiser, Scheideman, Tooley, and Russell (among others).[14] In many instances, the notes recorded positive feedback from customers.

98. After the Association filed the ULP complaint in this matter, chiefs and captains continued to issue supervisory notes. Between the filing of the ULP complaint and the end of August 2018, chiefs issued four supervisory notes regarding workplace interactions among employees, and the recipients were Grogan, Brown, Mills, and B. Shannon.

99. In that same period (April 28 to August 31, 2018), six instructive supervisory notes were issued relating to call reviews or customer complaints. Three out of those six instructive notes were issued to Russell (two by BC Kenfield, one by Captain J. Shannon); the other three notes were issued by chiefs to Buss, DeBoodt, and Mills.[15]

100. The May 21, 2018, supervisory notes issued to Russell and Buss addressed a nursing home's complaint about their response to a medical call. Buss served as the lead paramedic, and Russell was the secondary care provider. BC Kenfield investigated the complaint and issued the notes. The content of Buss's and Russell's supervisory notes is identical. In both notes, Kenfield wrote: "It was found during my inquiry no harm or gross negligence was done during the patient care and Adult Protective Services 'screened out' or closed the case without any further action other than CCFR and the [nursing home] should come to a conclusion. In the future,

[14]This figure includes eight commendations that were recorded on a form titled "Customer Service Feedback Form."

[15]Between the complaint filing date and the date the parties submitted hearing exhibits, the three captains also issued a total of 17 commendation supervisory notes. Additionally, Russell testified that Captain James Shannon issued him a commendation note shortly before the hearing in this matter.

be mindful of impressions that can be left and to use proper techniques and/or equipment while moving patients if indicated." Kenfield did not make any individualized findings regarding Russell's or Buss's conduct, or explain why Russell received a note even though he served as the secondary paramedic (not the lead).

101. The July 19, 2018, supervisory note issued to Russell addressed a customer complaint about a medical call. Kenfield investigated and issued the note. In the note, he identified four "areas to discuss," and described the family's complaints and concerns. Kenfield then wrote, "I do not believe any of the above mentioned complaints were intentionally left by our crew, but there still is a concern of an impression left which is unfavorable to the District." Although Kenfield noted that "each [crew] member thought the call was without incident," he did not identify the other crewmember or issue them a supervisory note. The record does not indicate which paramedic served as the lead.

102. Russell's August 8, 2018, supervisory note was issued by Captain James Shannon. In the note, Shannon stated that he spoke with Russell after an "incident," but he did not describe the incident itself. Shannon wrote that Russell "does want to make the improvements" but "blames" others in an effort "to excuse himself or justify his actions." Shannon also indicated that he would evaluate Russell's "acceptance to feedback" as "unacceptable."[16]

103. On September 28, 2018, the District issued a written reprimand to Brown. In a letter explaining the reasons for the reprimand, Chief Smith cited a supervisory note that Brown had received on May 14, 2018, as evidence that the District had given Brown notice that such conduct violated the District's expectations for professional and respectful conduct.

104. At some point after the Association filed the complaint in this matter, Chief Smith submitted a document titled "situational assessment" to the Fire Board, in which he wrote:

> "The ULP and the articles in the paper are a continuation of the intimidating behavior of the Union president and a few past and present employees. This behavior has been carried out inside the District for years and has been heightened when the Union was certified. After the Union was certified this behavior was no longer hidden and there is a blatant and organized effort to delegitimize management employees and union employees that are officers within the District that this group does not like. The attacks are personal in nature, slanderous and I believe done to intimidate and ultimately cause employees to leave this Fire District

[16]Russell testified that he is concerned that his instructive supervisory notes are related to his protected activity, because he has been working at the District since 2011 (starting as a student), and he did not receive such negative feedback or any instructive notes before he was identified as a witness in the Association's complaint. Additionally, in Russell's view, he has not made any changes in how he conducts himself or responds to calls that could explain the change in his work performance record. BC Kenfield testified that the two supervisory notes that he issued to Russell arose from outside complaints; that he had no control over the timing or nature of those complaints; that he was not aware that Russell was identified as a witness in the complaint before he issued the notes; and that he did not consider Russell's protected activity when issuing them. Captain James Shannon testified, but he was not questioned about the note he issued to Russell. We note that Captain Shannon is a bargaining unit employee.

or self-demote so that the attacks will cease. A Captain in 2016 self-demoted after he came under personal attack by 3 out of the 4 current Union e-board members. The method of attack is to spread gossip as fact throughout the District by consistently speaking negatively of members they do not approve of and by spreading these false accusations to other Fire Districts in Central Oregon in an attempt to ruin the targets' reputation.

"In short, the allegations are that, Matt Smith as Fire Chief, * * * has purposely manipulated the Fire Board, Civil Service Commission, Budget Committee and ultimately the District's budget to fulfill his quest for power and control of Crook County Fire and Rescue. During his tenure as Fire Chief he has illegitimately promoted employees that would do his bidding.

"* * * * *

"The Fire Board should strongly consider investigating these allegations and publicly sharing the results. I believe this will show the target employees have displayed outstanding performance and legitimize the fact that they were promoted to key positions in the District. This will also give the public confidence that the Fire Board is attentive to concerns that have been reported in the ULP and subsequently in the paper. It will also send a message that intimidation through slander and false representation will not be tolerated."

105. At the hearing in this matter, Chief Smith testified regarding his letter to the Fire Board, including his statements about the captain who self-demoted in 2016. Chief Smith explained that it was his "impression that this individual may have been targeted," but that he did not actually know that the captain had self-demoted for that reason. Chief Smith also confirmed that he had essentially given the individual two choices, to resign or self-demote.

CONCLUSIONS OF LAW

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

2. The District interfered with employees in the exercise of protected rights, in violation of ORS 243.672(1)(a).

In this case, the Association claims that the District interfered with employees in and because of the exercise of protected rights, and retaliated against Association officers and supporters, through a series of actions that include using a third party to investigate matters involving Association officers and supporters, and increasing formal documentation of employees' conduct issues, particularly in cases involving Association officers and supporters. The District acknowledges that it used a third party investigator in certain circumstances and sought to improve documentation of employee performance through the use of supervisory notes. However, the District maintains that it acted with lawful motives, and disputes that it treated Association officers and supporters differently or otherwise retaliated against them for protected activity. For the reasons discussed below, we conclude that the District's actions interfered with employees in the

exercise of protected rights, in violation of paragraph (1)(a). We decline to reach the Association's remaining claims, because finding additional violations would not, in this case, change the appropriate remedy.

The Public Employee Collective Bargaining Act (PECBA) guarantees public employees the "right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. In order to protect and enforce these rights, PECBA provides that a public employer may not "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.672(1)(a).

ORS 243.672(1)(a) includes "two distinct prohibitions: (1) restraint, interference, or coercion 'because of' the exercise of protected rights; and (2) restraint, interference, or coercion 'in' the exercise of protected rights." *Portland Assn. Teachers v. Mult. Sch. Dist No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000); *see also International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12 at 7-8, 25 PECBR 871, 887-88 (2013). To determine if an employer violated the "because of" prong of paragraph (1)(a), we examine the employer's reasons for the disputed action. *Portland Assn. Teachers*, 171 Or App at 623; *Klamath County Fire District #1*, UP-049-12 at 8, 25 PECBR at 888. To prove a violation of the "because of" prong of paragraph (1)(a), a complainant need only show that the employer took the disputed action because an employee exercised a protected right. *Id*. It is not necessary for a complainant to demonstrate that an employer acted with hostility or anti-union animus, or prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. *Id.*

When deciding a claim under the "in" prong of paragraph (1)(a), we focus on the "natural and probable effect of the employer's actions" on the employees. *Dallas Police Employees Association v. City of Dallas*, Case No. UP-33-08 at 12, 23 PECBR 365, 376 (2009). "If the employer's conduct, when viewed objectively, would tend to deter employees from exercising their PECBA rights, the employer's actions violate [paragraph] (1)(a)." *Id.* Because this standard is objective, "neither [the employer's] motive nor the extent to which employees actually were coerced is controlling." *Portland Assn. Teachers*, 171 Or App at 624.

We turn to applying that objective standard to this case. At the outset, we recognize that it generally is lawful for an employer to use a third-party investigator and supervisory notes. However, an employer action "that might otherwise be lawful can nevertheless violate (1)(a)[,] depending on the timing and circumstances." *Portland State University Chapter American Association of University Professors v. Portland State University*, Case No. UP-013-14 at 13, 26 PECBR 438, 450 (2015) (hereinafter "*PSU-AAUP*") (citing *Klamath County Education Association v. Klamath County School District*, Case No. C-28-78 at 10, 5 PECBR 2991, 3000 (1980)); *see also Oregon Public Employees Union and Termine v. Malheur County, Commissioner Cox, Commissioner Hammack and Sheriff Mallea*, Case No. UP-47-87 at 8-9, 10 PECBR 514, 521-22 (1988) (hereinafter "*OPEU*").

Here, we do not reach the question of whether the District acted "because of" employees' protected activities, and therefore, we do not make any determinations regarding the District's

actual motives or reasons for taking the actions at issue. Nonetheless, we conclude that the District's actions and statements, when viewed objectively under the circumstances, would tend to deter employees from exercising their PECBA rights. Consequently, the District's actions and statements violate the "in" prong of paragraph (1)(a). *See Portland Assn. Teachers*, 171 Or App at 624. Below, we discuss in more detail each of the actions, statements, and circumstances that, when viewed together, lead us to this conclusion.

1. The District's Actions and Pertinent Circumstances

To begin, we consider the District's use of a third-party investigator. Previously, before the firefighters organized, the District typically investigated concerns and complaints regarding employee conduct internally. Significant medical calls were reviewed by the District's physician advisor, Dr. Gruzd. Both the District's internal investigations and Dr. Gruzd's call reviews were relatively informal. After the firefighters organized, however, the District opted to use a third-party investigator in three of the cases that arose during that period, and each of those cases happened to involve Association officers. We recognize that the District did not control when those cases arose or which employees were involved, and that the District, like all public employers, has a responsibility to investigate such cases. Further, the record does not show that the District selectively investigated cases involving Association supporters while declining to investigate other cases. Rather, the record shows only that the District, by contracting with a third-party investigator, used a different investigation *method* in certain cases. The District points out, and we agree, that using a third party can help to ensure that an investigation is neutral. Nonetheless, such an investigation also is typically more formal and costly than an internal investigation, and thus also can result in employees reasonably believing that the employer considers the allegations to be relatively serious and warranting heightened scrutiny. In this case, the District contracted with a private firm that specializes in workplace investigations. The third-party investigations were also substantially more formal than the District's internal investigations, involving recorded interviews and lengthy written reports.

Additionally, after the employees organized, the District started using "supervisory notes" to document employee issues. The supervisory notes replaced monthly evaluations, and those documentation practices have some significant differences. The District's monthly performance evaluation forms asked the evaluator to cover various aspects of an individual's work performance, while the supervisory notes were designed to address a particular event. Unlike a typical performance evaluation, some of the instructive supervisory notes document specific complaints or allegations against employees, and summarize investigatory "findings" and "conclusions." When the District used monthly performance evaluations, a verbal coaching or counseling would not necessarily be documented in the employee's evaluation, especially if the issue was relatively minor. When the District introduced supervisory notes, the chiefs explained that supervisory notes should be used to document all counseling of employees, creating the appearance that employee workplace performance and conduct would be subjected to heightened scrutiny.

The timing of those actions – the introduction of third-party investigations and supervisory notes – and the context of the parties' labor relations are also relevant circumstances. The Association was certified on September 26, 2016, and the District first used a third-party investigator to investigate a call that occurred on May 5, 2017, involving Todd Olheiser, the

Association Treasurer, Sam Scheideman, the Association Secretary, and a student. After somewhat contentious first-contract bargaining, the parties signed their first collective bargaining agreement in August 2017, and the District introduced supervisory notes in December 2017. Based on that timing and the potential employment impacts of the District's actions, it was objectively reasonable for employees to have questions about the District's reasons for taking those actions. When Association officers asked such questions, District chiefs made multiple statements that expressly drew a causal connection between the employees' protected activities and the District's actions. We discuss those and other relevant statements in more detail below.

2. The District's Statements

First, when the firefighters were deciding whether to unionize, Chief Matt Smith made statements to the effect of, "If there is a union, then policies and rules will have to be enforced more strictly," "You will have to follow the rules," or "We will need to tighten things up," likely referring to disciplinary rules. Chief Smith made such statements on multiple occasions to various employees. Given those prior statements, employees could reasonably believe that the District was using third-party investigations and supervisory notes to "tighten things up" and enforce rules "more strictly," and doing so because they had exercised their protected right to organize.

Second, in October 2017, less than a month after the Association was certified, Dillon Russell, a District firefighter, asked Battalion Chief Jerimiah Kenfield why the Association President, Lieutenant Chad Grogan, had failed the interview portion of his examination for promotion to captain. Kenfield responded, "Well there is not much I can say about the process, but when you test for an organization that you have spoke negative about in the past, that's the way it goes." The record does not establish that Kenfield was actually referring to statements made by Grogan in the exercise of protected rights. However, considering Grogan's prominent role in the Association and the fact that Grogan had, in the context of protected activity, frequently criticized the District's practices or actions (which could be characterized as "negative"), a reasonable employee could conclude that Kenfield was saying that Grogan failed his promotional interview because of his protected activity. There is no evidence that the context of Kenfield's statement or other circumstances made clear that he was *not* referring to Grogan's protected activity. Although Kenfield and Russell had socialized in the past and had a mentoring-type relationship, that fact does not detract from the message objectively conveyed by Kenfield's statement, or, assuming Kenfield did not intend to convey that message, his failure to explain more fully what he intended.

"We acknowledge that a public employer, especially a para-military organization such as [a police bureau or fire district], has a generally valid interest in stopping the flow of untrue rumors, requiring employees to follow a chain of command, and preventing employees from leveling unfair public criticism of supervisors." *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07 at 41, 22 PECBR 752, 792 (2008). However, there is a difference between unfair public criticism of individual supervisors and criticism of employer policies or actions that affect employees' working conditions. "The twin goals of workplace peace and labor stability can be 'attained only if employees and their representatives are free to present their workplace disputes to the employer.'" *Id.*, UP-7-07 at 39, 22 PECBR at 790 (quoting *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05 at 18, 22 PECBR 168, 185 (2007)). Thus, an employer "is not entitled to apply its anti-rumor rule, chain of command directive, or prohibition against criticizing

supervisors in a way that interferes with [employees'] PECBA rights." *Portland*, UP-7-07 at 41, 22 PECBR at 792; *see also IAFF Local 1395 v. City of Springfield*, UP-48-93 at 11-12, 15 PECBR 39, 49-50, *adh'd to on recons*, 15 PECBR 111 (1994) (employer violated (1)(a) by downgrading firefighter's evaluation score in "respect" category, based on firefighter's critical statements and negative demeanor when speaking as a union officer regarding union concerns).

Third, in or about January 2018, Grogan learned that the District had retained a third party to investigate a call involving a patient with nausea, which had been handled by Grogan and the Association Secretary, firefighter Sam Scheideman. Grogan asked Battalion Chief Dan Freauff to explain why the District was using a third-party investigator. Freauff replied that, as he understood it, it was because of the union.

Fourth, on or about January 14, 2018, firefighter Russell asked BC Kenfield, "Why are union members being investigated for incidents that occurred in the past with no investigation until now?" Kenfield responded, "Well when a grievance is filed by the Association for supervisory notes, then the District will have to investigate the members with a third-party investigator."[17]

Fifth, on February 20, 2018, when BC Freauff, BC Kenfield, and Dr. Gruzd met with Grogan to discuss the District's findings and conclusions regarding the GSW case, Grogan asked why the District had used a third-party investigator. Dr. Gruzd responded that he would have preferred to handle the matter as he and the District had in the past, but that there was a third-party investigation because of the union. Significantly, the battalion chiefs did not explain or elaborate on Dr. Gruzd's response attributing the decision to use a third-party investigator to "the union." Nor did the battalion chiefs explain why, in this particular case, the District had concluded that a call review conducted by Dr. Gruzd would not be sufficient. Then, at a training on March 19, 2018, attended by many bargaining unit employees, Dr. Gruzd again indicated that there was a causal connection between the District's decisions to change its investigative and documentation practices and the employees' decision to unionize. Specifically, after discussing how the hospital where he practiced had changed when the physicians had become employees, he stated (in part), "[T]here's changes that occurred, and the latest change in that administrative burden, or at least the approach to it, is the coming of the union. And it's new territory." None of the chiefs who were present, including Chief Smith, attempted to explain or elaborate on Dr. Gruzd's statements

[17]The Association filed a grievance on January 9, 2018, claiming that the use of supervisory notes violated the parties' contract. On January 10 and 11, the District issued formal notices of investigation to Association officers Grogan and Scheideman in response to complaints from another fire district regarding joint calls that had occurred in early December 2017, as well as notices of investigation to Grogan, Chris Bocchi, and Joe Mills, regarding a December 31, 2017, case referred to as the "GSW case." The record establishes that Chief Smith actually decided to retain a third party to investigate those matters *before* the Association filed the supervisory note grievance. However, there is no evidence that Chief Smith or another District representative explained that fact to the Association before the hearing in this matter. In the absence of that information, the timing of the District's action coupled with Kenfield's statement objectively created the impression that there was a connection between the Association grievance and the investigations.

linking unionization and the heightened formality of the District's handling and documentation of investigative matters.[18]

At the hearing in this matter, the District provided a more nuanced explanation of the various statements that connected the employees' union activity with the third-party investigations and supervisory notes: the District explained that it took those actions not because employees had unionized, but because the union had collectively bargained for changes, specifically, just cause protection and arbitration, that required more formal investigatory and documentation practices. Chief Smith also testified that he decided to retain a third-party investigator in each particular case for neutral reasons, such as the chiefs' workload, the nature of the allegations, or the potential for litigation. The Association disputes that the District actually acted for such lawful reasons, pointing out, for example, that the District's existing civil service rules already provided for just cause and a formal appeal process, and that Chief Smith acknowledged that the need for documentation was "not new."

We need not resolve that factual dispute, because the District's actual motives are not relevant to the question of whether the District violated the "in" prong of paragraph (1)(a). Rather, what matters is what the chiefs communicated to the employees and the natural and probable effect that those communications would have on employees. *See, e.g.*, *OPEU*, UP-47-87 at 8-10, 10 PECBR at 521-23 (although employer acted with lawful motives, employer committed "in" violation by "creat[ing] in [employee] the impression" that she must choose between her protected activity and her job). Here, Chief Smith acknowledged that he did not fully explain his reasons for taking the actions at issue to the Association or its members until the hearing in this matter. Instead, on at least several occasions, when employees expressed concerns about the District's actions and asked for explanations, battalion chiefs vaguely attributed those changes to "the union" (and the chiefs witnessed Dr. Gruzd make similar statements to employees, but made no attempt to clarify). Without the further explanation that the District provided at the hearing in this case, the chiefs' statements, viewed objectively under all the circumstances, conveyed a message to employees connecting the District's actions (which communicated a heightened scrutiny of employee performance and conduct) to protected activity (forming a union). *See id.*, UP-47-87 at 11, 10 PECBR at 524 (in concluding that supervisor's conduct violated "in" prong, notwithstanding supervisor's lawful motive, Board noted that supervisor "made no attempt to correct [employee's] misimpression").

3. The District's Implementation of Third-Party Investigations and Supervisory Notes

Additionally, the manner in which the District used a third-party investigator and issued supervisory notes, objectively viewed, created the impression that the chiefs were treating Association officers and known supporters differently from employees who were perceived as less supportive of the Association. For example, the District used a third-party investigator only in cases involving Association officers. At hearing, Chief Smith testified that he decided to do so for

[18]We also consider the fact that, in June 2017, when Grogan and Olheiser asked BC Freauff why the District had used a third party to investigate Olheiser, Freauff stated that using a third party would keep the investigation "neutral" and protect the District from being sued. Although that explanation, viewed objectively, would have a mitigating impact, that impact is outweighed by the effects of the other statements and circumstances discussed above.

lawful reasons, unrelated to the employees' protected activities. However, even assuming that the District's motives were lawful, motive is not a required element of a (1)(a) "in" case. *Portland Assn. Teachers*, 171 Or App at 624. Moreover, when Association officers asked the chiefs to explain the District's criteria for deciding when to use a third-party investigator, the chiefs declined to respond. Although an employer is not required to disclose the reasoning behind all of its management actions, in this particular case, by deciding not to provide the criteria, the chiefs left employees to draw their own conclusions based on what they could observe, which included the fact that all of the third-party investigations involved primarily Association officers. Moreover, the chiefs amplified (even if only inadvertently) employee concerns of retaliation by making statements that expressly linked the third-party investigations to "the union," as discussed above.

For another example, the District issued an instructive supervisory note to Grogan regarding the GSW case, but not to the other three crewmembers, Captain Marty Theurer, Lieutenant Mills, and firefighter Bocchi. The District asserts that only Grogan received an instructive supervisory note because he was the lead paramedic.[19] However, the District's witnesses also testified that the purpose of supervisory notes is to document *all* verbal counseling of employees (whether good, bad, or neutral), and the record establishes that BC Freauff and BC Kenfield counseled both Bocchi and Mills. Specifically, after the third-party investigator submitted his report regarding the GSW case, Freauff prepared separate written documents summarizing the allegations and his findings and conclusions regarding Mills's and Bocchi's conduct. Then, Freauff, Kenfield, and Theurer held meetings with Mills and Bocchi to review those findings and conclusions, which, among other things, emphasized that the secondary crewmembers remained accountable for the patient care even though they had not been serving as the lead paramedic.[20] Additionally, the District initially required only Grogan to receive remedial training, even though all of the crewmembers participated in, and were accountable for, the patient care actions that were reviewed. The District ended up providing the remedial training to all of the line staff, but only Grogan has a record in his file indicating that he was instructed and required to receive remedial training.[21]

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[19]When Captain Theurer issued commendation supervisory notes for the same GSW call, he issued them to all three crewmembers, Grogan, Mills, and Bocchi.

[20]We also note that, in May 2018, when an issue arose in another medical case, BC Kenfield issued instructive supervisory notes to both firefighter Cody Buss, who had served as the lead paramedic, and Russell, who had served as the secondary crewmember. The District did not identify a neutral reason for treating this situation differently.

[21]Regardless of whether a supervisory note (or any verbal counseling documented therein) is disciplinary action, the record establishes that supervisory notes can have some impact on promotional prospects and, in certain circumstances, can have disciplinary implications (as is typically the case in a public sector workplace). We also note, however, that this employer uses supervisory notes for multiple purposes, including documentation of coaching and counseling aimed at helping an employee to improve, and commendations for good performance. Additionally, in the District's Step 3 grievance response letter to the Association, it specifically noted that the use of supervisory notes to "form the basis of periodic performance reviews and other actions is common, consistent with best practices and in the best interest" of the District, and that the "consensus opinion of the [Fire] Board is that it expects the District's managers and supervisors to give direction, correction and evaluation in a way that promotes continued improvement without disciplinary action unless absolutely necessary."

The content of some of the instructive supervisory notes issued to Association officers and supporters likely reinforced the impression that Association officers and supporters were being subject to harsher scrutiny. For example, the District used a third party to investigate two calls in which Grogan participated (the GSW case and the joint call case), and, then, based on the investigator's report, District battalion chiefs made their own findings and conclusions and issued Grogan supervisory notes. In doing so, the battalion chiefs appeared, in at least some instances, to take various statements by Grogan (as quoted or summarized in the third-party report) out of context and disregard his explanations of his decisions or other mitigating information. For example, in the supervisory note regarding the joint call case, BC Freauff instructed Grogan to "work to understand * * * run cards so they are better understood," apparently responding to background comments Grogan had made describing run cards as "gray," "situation dependent," and subject to the discretion of the station officer. At hearing, Captain Bryan Shannon also described the run cards as "constantly changing" and subject to the shift captain's discretion. However, the supervisory note issued to Grogan implied that his description of the run cards was inaccurate, and that he simply needed to work harder to understand them.

For another example, in the supervisory note issued to Grogan regarding the GSW case, BC Kenfield instructed Grogan to "[c]onsider spinal immobilization," implying that Grogan did not do so. However, nothing in the note or the attached findings addressed the evidence (including statements by Grogan and Mills) indicating that Grogan in fact did consider taking that precaution. Kenfield also stressed the importance of "[c]onstructive feedback" and "self-improvement" "in this line of work," and characterized Grogan's conduct following the GSW call as "defensive," stating, Grogan "became defensive by contacting both CCFR Physician Advisor [and Emergency Department] Physician and referencing a Trauma article to defend his actions." However, Grogan's conduct (asking physicians for feedback and researching medical articles) could as easily be construed as seeking constructive feedback and self-improvement (instead of defensive). In fact, Grogan first sought feedback from the emergency department physician on the same night of the GSW call – that is, before there was any investigation that could cause him to feel defensive.

4. Objective Analysis of the District's Actions and Statements under the Circumstances

The above-described actions and statements—viewed together and objectively under the circumstances—naturally and probably would discourage bargaining unit employees from engaging in PECBA-protected activities. To briefly summarize: after the employees organized, the District started using a private, third-party investigator to investigate some, but not all, complaints or concerns about employee conduct, and started using supervisory notes to more comprehensively and formally document employee conduct, and coaching and counseling. When employees expressed concerns about the potentially negative employment implications of the District's actions, or perceived differences in how Association supporters were being treated, and asked for explanations, the chiefs, on multiple occasions, expressly attributed the employer's actions to "the union." Given the parties' history, including the fact that the employees had only recently organized, Association-represented employees could reasonably fear that exercising their PECBA-guaranteed rights would result in undesired changes (*i.e.*, increased formality and

documentation),[22] as well as heightened scrutiny and less favorable judgments from their supervisors. That is sufficient to establish that the District violated ORS 243.672(1)(a) by interfering with employees in the exercise of rights guaranteed in ORS 243.662.

We turn to the appropriate remedy. Having found that the District violated ORS 243.672(1)(a), we order the District 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). The District represented in its objections to the recommended order that it would "voluntarily expunge the [three] supervisory notes resulting from third party investigations imposed upon Grogan and Scheideman." Given the District's voluntary representation, in the event that the District has not already expunged those notes (including any attachments to those notes and any references to those notes in other personnel records), we order it to do so. We decline to order, as the Association requests, that the District expunge all instructive supervisory notes. Under the circumstances of this case, the effects of the District's conduct are better remedied by ordering the District to post a notice of its wrongdoing.

We generally order notice posting if we determine that a party's violation of PECBA (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was committed by a significant number of the respondent's personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82 at 12, 6 PECBR 5590, 5601, *aff'd without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536 (1984). In this case, a notice posting is warranted because the District's conduct affected a significant number of bargaining unit employees. In addition to the traditional physical posting of the notice, we require an employer to electronically notify employees of its wrongdoing when the record indicates that electronic communication is the customary and preferred method that the employer uses to communicate with employees. *Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College*, Case No. UP-032-14 at 9, 26 PECBR 254, 262 (2014). Here, the record establishes that email is the common method of communication between 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.

We decline to order a civil penalty, as requested by the Association. 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 practice was egregious." ORS 243.676(4). In order to prove that a violation was repetitive, we generally require a complainant to show "the existence of a prior Board order involving the same parties that establishes that prior, similar activity was unlawful." *Lincoln County Education Association v Lincoln County School District*, Case No. UP-56-04 at 16, 21 PECBR 206, 221 (2005) (quotation marks and citation omitted). Egregious means "conspicuously bad and flagrant." *Id*., UP-56-04 at

[22] At hearing, some Association officers and members explained their concerns about the third-party investigations and supervisory notes, but also testified that they could support those practices if there was improved communication and their concerns were addressed.

18, 21 PECBR at 223. The record does not establish that the District's violation meets either standard.[23]

ORDER

1. The District shall cease and desist from violating ORS 243.672(1)(a).

2. To the extent that it has not already done so, the District shall expunge the instructive supervisory notes issued to Chad Grogan and Sam Scheideman following the third-party investigations (including any attachments to those notes and any references to those notes in other personnel records).

3. The District shall post the attached notice for 30 days in prominent places where Association-represented employees are employed.

4. The District shall distribute the attached notice by email to all Association-represented employees within 10 days of the date of this order.

DATED: December 5, 2019.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

[23]We also decline the Association's request for reimbursement of its filing fee. PECBA authorizes us to order reimbursement to the prevailing party "in any case in which the complaint or answer is found to have been frivolous or filed in bad faith." ORS 243.672(3). The Association did not address this request in its briefing, and we see no basis for finding that the District's answer was either frivolous or filed in bad faith.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board in Case No. UP-011-18, Crook County Firefighters Association, IAFF Local 5115, v. Crook County Fire and Rescue, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that:

The Employment Relations Board has found that Crook County Fire and Rescue (CCFR) committed an unfair labor practice in violation of paragraph (1)(a) of PECBA, which prohibits a public employer or its designated representative from interfering with, restraining, or coercing employees in or because of the exercise of rights protected by PECBA. Under PECBA, ORS 243.662:

> **"Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."**

The Employment Relations Board found that CCFR interfered with employees in the exercise of PECBA-protected rights by making certain statements and using a third-party investigator and supervisory notes in a manner that created a reasonable belief that employees were subjected to heightened scrutiny after forming a union and engaging in other protected activities.

To remedy this violation, the Employment Relations Board ordered CCFR to:

1. Cease and desist from violating ORS 243.672(1)(a).

2. Expunge the instructive supervisory notes issued to Chad Grogan and Sam Scheideman following the third-party investigations (including any attachments to those notes and any references to those notes in other personnel records).

3. Post this notice for 30 days in prominent places where Association-represented employees are employed.

4. Distribute this notice by email to all Association-represented employees within 10 days of the date of the Board's order.

EMPLOYER

Dated_____, 2019 By: _____

Title:_____

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for 30 consecutive days from the date of posting in each employer facility in which bargaining unit personnel are likely to see it. This notice must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street N.E., Suite 400, Salem, Oregon, 97301-3807, phone 503-378-3807.