EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-014-17

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 503, OREGON PUBLIC EMPLOYEES UNION, Complainant, v. UNIVERSITY OF OREGON, Respondent.	)	ORDER ON REMAND

This matter is before the Board on remand from the Court of Appeals. *SEIU Local 503 v. Univ. of Or.*, 312 Or App 377, 494 P3d 993 (2021) (*SEIU Local 503*). The Service Employees International Union Local 503 (Union) claimed that the University of Oregon (University) violated the duty to bargain under ORS 243.672(1)(e) by declining to produce an unredacted version of a report without certain conditions. In an order issued December 4, 2018, this Board concluded that the University violated (1)(e), and the University appealed. The court concluded that the Board erred in its analysis and remanded the case for reconsideration. For the reasons explained below, after reconsidering this matter as directed by the court, we conclude that the University violated (1)(e).

Procedural and Factual Background

On April 28, 2017, the Union filed a complaint alleging that the University violated ORS 243.672(1)(e) by refusing to produce an unredacted version of a document titled "Resource Sharing Staff Interview Report" (Report). The findings of fact in our original order are undisputed, and we summarize them here only for ease of review. A Union steward received complaints by Union-represented employees about their treatment by a particular supervisor, and he discussed those concerns with a Human Resources (HR) manager. In response, the HR manager interviewed the Union-represented employees about their workplace, and he documented those interviews in the Report. The steward requested a copy of the Report. Eventually, the University produced a highly redacted version of the Report. The Union objected to the redactions. The University asserted a confidentiality interest, contending that the Report is a confidential "personal record" under the University's Faculty Records Policy. The University asked the supervisor whether he

would voluntarily consent to full disclosure of the Report to the Union, but the supervisor declined to consent without conditions, namely, a nondisclosure agreement (NDA) with a provision barring the Union steward from seeing the Report (but permitting substitution of a different steward). The parties attempted to negotiate an NDA, but the Union objected to provisions insisted on by the University, including the steward restriction and a liquidated damages provision, and the parties were unable to reach an agreement.

In response to the Union's unfair labor practice complaint, the University contended that it did not have a duty under the Public Employee Collective Bargaining Act (PECBA) to produce the Report because its content was not potentially or probably relevant to a contract administration matter. Further, the University contended that, even if the Report met the relevance standard, the University's response to the information request did not, under the totality of the circumstances, violate (1)(e). Because the University asserted that the redactions were justified by its confidentiality interest, the University bore the burden of establishing that its confidentiality interest was legitimate and substantial, and that it pursued a good-faith accommodation to reconcile the conflict.

The Board concluded that the Union met its burden to establish that the Report is potentially or probably relevant to a contract administration matter. *Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-014-17 at 15 (2018) (*Original Order*). The University did not dispute that conclusion on appeal. *SEIU Local 503*, 312 Or App at 382. Consequently, we will not revisit that issue on remand.

The Board also concluded that, under the totality of the circumstances, the University's response to the information request violated (1)(e). *Original Order*, UP-014-17 at 21. When assessing the totality of circumstances, the Board was "guided by the four factors identified in [*Oregon School Employees Association, Chapter 68 v. Colton School District 53*, Case No. C-124-81 at 5, 6 PECBR 5027, 5031 (1982)]: (1) the reason given for the request, (2) the ease or difficulty with which information could have been produced, (3) the type of information requested, and (4) the history of the parties' labor-management relations." *Original Order*, UP-014-17 at 15. When discussing the third *Colton* factor, the Board concluded that, because the University had a duty to produce the Report under PECBA, it fell within an exception under the Faculty Records Policy that permitted the University to disclose personal records when required to do so by law. Consequently, the Board concluded that the University had not established a legitimate and substantial confidentiality interest under the Faculty Records Policy, and that the University's conduct, under the totality of the circumstances, violated (1)(e). On appeal, the University contended that the Board's analysis of the University's confidentiality interest was erroneously circular, and the court agreed. *SEIU Local 503*, 312 Or App at 384-85. The court directed this Board, on remand, to "assess the third *Colton* factor in its own right—including determining whether [the University] established a legitimate and substantial confidentiality interest in the redacted information—without reference to [an] ultimate conclusion that the totality of the circumstances weighs in favor of disclosure under PECBA." *Id.* at 385.

On appeal, the University also contended that the Board improperly conflated the first *Colton* factor, "the reason given for the request," with the threshold test for relevance. Although the court agreed that *Colton* "requires" us to consider "the reason given for the request," the court clarified that this factor "includes but is not necessarily limited to the requesting party's explanation of the information's relevance." *Id.* at 385.

In our original order, we had also concluded that, "even if the University had established a legitimate and substantial confidentiality interest, the University's proposed accommodations do not represent the common-sense approach we have urged parties to use in resolving (1)(e) information request disputes." *Original Order*, UP-014-17 at 20 n 10. The court addressed this conclusion as an "alternative ruling," and directed us to reconsider it "with an accurate understanding of the University's confidentiality interest." *SEIU Local 503*, 312 Or App at 386.

While the University's appeal was pending, the University was obligated to comply with this Board's original order. To resolve the parties' remedy dispute, the University submitted an unredacted copy of the Report to an administrative law judge (ALJ) for *in camera* review. *See Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-014-17 (2019) (*Order on In Camera Review*).

Opinion on Remand

With the court's instructions in mind, we reconsider whether the University's response to the Union's information request, under the totality of the circumstances, violated (1)(e).

It is well-settled that a public employer's obligation to collectively bargain in good faith under ORS 243.672(1)(e) includes the duty to provide an exclusive representative with requested information that has "some probable or potential relevance to a grievance or other contractual matter." *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98 at 7, 18 PECBR 64, 70 (1999). When analyzing (1)(e) claims, we "begin with the premise of full disclosure." *Id.* It is the requesting party's burden to establish that the requested information meets the relevance standard. As noted above, this Board previously concluded that the Union established that the redacted information in the Report has some probable or potential relevance to a grievance or other contractual matter, and the University no longer disputes that conclusion.

We turn to the question of whether the University's conduct—*i.e.*, the way in which the University responded to its duty to provide the Report to the Union—violated (1)(e). Even when there is a request for information of probable or potential relevance, the "extent to which a party must supply the information requested and the length of time a party may take to do so are dependent upon the totality of circumstances present in the case; just as good or bad faith bargaining at the negotiations table must be determined by consideration of all circumstances." *Colton*, C-124-81 at 5, 6 PECBR at 5031. We assess the totality of circumstances, guided by the four factors identified in *Colton*: (1) the reason given for the request, (2) the ease or difficulty with which information could have been produced, (3) the type of information requested, and (4) the history of the parties' labor-management relations. *Id*.

Additionally, when a party withholds information on the basis of confidentiality or conflicting legal obligations, "the withholding party must prove both a legitimate and substantial confidentiality interest, and that it pursued a good-faith accommodation to reconcile the conflict." *Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon*, Case No. UP-009-15 at 8, 26 PECBR 724, 731 (2016), *aff'd*, 291 Or App 109, 419 P3d 779, *rev den*, 363 Or 599 (2018). The Board "'balances a labor organization's need for information against any legitimate and substantial confidentiality interest established by the employer.' The party asserting confidentiality has the burden of proof." *Ashland Police Association v. City of Ashland*, Case No. UP-50-05 at 9, 21 PECBR 512, 520 (2006) (quoting *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98 at 8, 18 PECBR 64, 71 (1999)).

In this case, the University provided a heavily redacted copy of the Report, and when the Union objected, the University declined to produce an unredacted version. We consider whether the scope of the redaction was justified under the totality of the circumstances, guided by the *Colton* factors. The second and fourth *Colton* factors are not in dispute: the University could easily produce an unredacted copy of the Report, and the history of the parties' labor-management relations did not indicate improper "fishing expeditions," a pattern of numerous requests, or other factors that would weigh against the University's obligation to provide a response to the Union's request. *See Colton*, C-124-81 at 6, 6 PECBR at 5032.

The first *Colton* factor—the reason given for the information request—includes, but is not limited to, the Union's explanation of the Report's relevance. In this case, the Union steward first requested the Report in a meeting with the HR manager who wrote the Report, and the reason for the request was evident from the context of the request itself. Before that meeting, the steward had informed the HR manager that several employees alleged mistreatment and poor management by a specific supervisor. To assess those complaints and the workplace environment, the HR manager interviewed multiple employees and summarized their responses in the Report.[1] When the HR manager and steward met again, the HR manager described the Report, and noted that it identified problems with the supervisor's managerial style. In response, the steward asked the HR manager for a copy of the Report. The HR manager did not ask the steward why he was requesting a copy. The reason for the request was self-evident from its context: the Report is directly related to the steward's investigation of the employee complaints that prompted the Report. Moreover, when the University later asked the Union to explain why it requested the Report, the Union explained that it was investigating a possible violation of Article 19 of the parties' collective bargaining agreement, which relates to unlawful discrimination.

[1]When the HR manager notified employees that he would be speaking with them, he sent them each an email that stated, in part, "I would like to meet with you to formally discuss the climate in Resource Sharing [RS]. I would like to hear from you, personally, about your perception of RS (challenges, stresses, opportunities, etc.). The information provided to me in this meeting will be aggregated with the feedback I receive from your peers and shared with Adriene and Mark. You will not be singled out or asked for a follow-up meeting with management based on feedback given to me in this meeting. This is a concerted effort by Library Administration to address growing concerns in Resource Sharing over issues of communication and interaction (whether by yourself or others) with management. I hope you will take me up on this offer because I see it as the first, important step towards improving the overall climate in RS." *Original Order*, UP-014-17 at 4.

The third *Colton* factor concerns the "type of information requested." In the Report, the HR manager formally summarized bargaining unit employees' responses to questions regarding "the climate" in their department and "growing concerns * * * over issues of communication and interaction" with their supervisor. The HR manager also made some recommendations about how to address what he learned from the interviews. The University gave a copy of the Report to the Union that redacted all bargaining unit employees' statements regarding the supervisor, but left unredacted their statements regarding bargaining unit employees. When the Union asked the University to describe the redacted information, the University represented that it is purely subjective, evaluative material about the supervisor, or recommendations for his professional development. However, the University admitted, for the first time at oral argument before this Board, that a portion of the redacted material is actually objective, factual information. Further, the record establishes that the majority of redacted material consists of summaries of bargaining unit employees' statements regarding their workplace complaints.[2]

The University contends that the redacted information is a confidential "personal record" under its Faculty Records Policy. The policy defines "personal record" as "all" "records containing information concerning an academic staff member," with only three exceptions: directory information, records of academic achievement, and salary information. The policy further provides that "personal records may not be released to any other person or agency without the faculty member's consent, unless upon receipt of a valid subpoena or other court order or process or as required by state or federal laws, rules, regulations, or orders."[3]

Because the Faculty Record Policy's definition of "personal record" is so broad—including *all* records that contain "information concerning an academic staff member," with only three, narrow exceptions—we agree that the Report qualifies as a confidential "personal record" under that policy, such that the University's confidentiality interest is legitimate with respect to that policy. However, the breadth of the definition of "personal record" means that the University's policy treats nearly *all* information concerning an academic staff member as "confidential,"

[2]As the Board noted in the original order, it was difficult to determine the nature of the redacted information because the University did not submit an unredacted copy of the Report for *in camera* review during the evidentiary hearing. Although the University repeatedly asserted that the redacted information is purely subjective, evaluative information, testimony regarding the content of the Report and the Report's unredacted portions indicated that much of the redacted material consists of bargaining unit employees' statements about the supervisor. Additionally, as noted above, the University admitted at oral argument that a portion of the redacted material consists of objective, factual information. We also note that, when the University submitted the Report for *in camera* review during the remedy phase, the ALJ determined that most of the redacted material consists of "bargaining unit employees' statements expressing workplace complaints," and only a small portion consists of "confidential evaluative information made by the University or recommendations for the [supervisor's] professional development." *Order on In Camera Review*, UP-014-17 at 2.

[3]The University promulgated the Faculty Records Policy pursuant to ORS 352.226, which authorizes the University to adopt standards governing access to "personnel records," and provides that such standards "shall require that personnel records be subjected to restrictions on access unless upon a finding by the president of the public university that the public interest in maintaining individual rights to privacy in an adequate educational environment would not suffer by disclosure of such records."

regardless of how sensitive or private the information actually is.[4] Because the policy's definition of "personal record" is so broad, the fact that the Report qualifies as a "personal record" does not necessarily establish that the University's confidentiality interest in the Report is *substantial*.

To determine whether the University's confidentiality interest is substantial, we must consider the nature of the redacted information. The record indicates that the redacted material may be divided into two categories: 1) the HR manager's purely subjective, evaluative opinions and recommendations based on what he heard from employees, and 2) the summaries of the bargaining unit employees' statements about the workplace issues under investigation, and any other objective, factual information.

Generally, a party either has no duty to produce purely subjective, evaluative information, or is ultimately excused from producing it. *See, e.g.*, *Colton*, C-124-81 at 6-7, 6 PECBR at 5032-33. That is so for two reasons. Typically, a party's purely subjective, evaluative information has no potential or probable relevance to a contractual or bargaining matter, and there is no duty to produce information that does not meet that threshold. And, even when such information is relevant, we recognize that each party has a substantial and legitimate confidentiality interest in their own subjective "reasoning." *Id.* (recognizing there is a confidentiality interest in "an explanation of a party's reasoning," "versus a description of the action the party took and the reason expressed for the action"). Typically, a party's confidentiality interest in such internal, subjective information outweighs the other party's interest in disclosure. Such internal, subjective information includes an employer's purely subjective, evaluative statements about its own supervisor (and the union equivalent, such as a union's subjective, evaluative statements about a union steward). Accordingly, we agree that the University has a legitimate and substantial confidentiality interest in the HR manager's purely subjective, evaluative statements about the supervisor (including his recommendations for professional development).

However, we question whether the University has established that it has a substantial confidentiality interest in the summaries of the bargaining unit employees' statements about the workplace issues under investigation, or other objective, factual information. Generally, there is a duty to produce objective, factual information that meets the threshold relevance standard. *Id.* The University admitted that at least some of the redacted information consists of objective, factual information. And, the Report primarily summarizes bargaining unit employees' responses to an HR manager's questions during interviews conducted to assess workplace issues and employee concerns that were brought to the University's attention *by the Union*. Even if the employees expressed subjective opinions about their workplace during these interviews, the Report's summary of their statements is objective or factual information about what they expressed. Further, the employer's confidentiality interest in subjective statements made by bargaining unit employees is not akin to the employer's confidentiality interest in subjective, evaluative statements made by *the employer.*

The University contends that its confidentiality interest is substantial because it adopted the Faculty Records Policy pursuant to ORS 352.226, which directs public universities to adopt standards governing access to personnel records. The University asserts that ORS 352.226

[4]Further, the University imposes the same restriction on disclosure, regardless of how sensitive the information is.

implicitly establishes a faculty privacy right, and that the University has a substantial interest in protecting that right and "upholding the integrity" of the Faculty Records Policy. Although we recognize that the University has an interest in protecting faculty privacy and upholding the Faculty Records Policy, the University has defined as "confidential" nearly all information about a faculty member, without regard to whether the information is actually private or sensitive. Further, the University provides the same, high level of protection to all information about faculty, regardless of how private or sensitive the information actually is.[5]

The University contends that the extensive redactions of the Report were justified because the supervisor felt that some of the employees' statements about him are unflattering and lack proper context. Although we sympathize with the supervisor's desire to avoid disclosure of subordinates' negative or critical statements about his conduct in the workplace, a supervisor's conduct in the workplace is not a private matter. Rather, a supervisor's conduct in the workplace could violate a contract or other legal obligation, and therefore, is subject to examination. That is true under the circumstances of this case, where the supervisor conduct at issue is treatment of subordinate employees, and the party seeking to examine the supervisor's conduct is the employees' exclusive representative.

Nonetheless, for the purposes of this analysis, we assume that the University has met its burden to establish that its confidentiality interest is both legitimate and substantial. That, however, does not end our analysis. As the court noted, even if the University's confidentiality interest is legitimate and substantial, we must still consider "the totality of circumstances to determine whether the union's need for particular information outweighs the employer's confidentiality interest in the information, such that the employer must disclose, notwithstanding its confidentiality interest." *SEIU Local 503*, 312 Or App at 384.

We begin with the purely subjective, evaluative statements.[6] Because disclosure of the HR manager's purely subjective, evaluative statements would not serve the purpose of the Union's request (to investigate potential contract violations), on balance, we find that the University's legitimate and substantial confidentiality interest outweighs the Union's interest in disclosure.

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[5]We note that the University introduced no evidence at the evidentiary hearing in this matter to prove that the Report's redacted content is actually sensitive or private in nature, even though the University bore the burden of proving that its confidentiality interest was both legitimate and substantial. The University could have, for example, submitted an unredacted copy of the Report in the record for *in camera* review, in order to prove the factual basis for its defense, but it chose not to. The University did not submit an unredacted copy of the Report for *in camera* review until doing so was necessary to comply with this Board's order during the remedy phase. As noted above, that *in camera* review resulted in a finding contrary to the University's assertion—namely, the ALJ determined that most of the redacted material consists of "bargaining unit employees' statements expressing workplace complaints," and only a small portion consists of "confidential evaluative information made by the University or recommendations for the [supervisor's] professional development." *Order on In Camera Review*, UP-014-17 at 2.

[6]Because a party's purely subjective, evaluative statements typically do not meet the threshold relevance standard, we typically do not reach the question of whether the requesting party's interest in disclosure of such statements outweighs the withholding party's confidentiality interest. In this case, however, the Union established that the Report has probable or potential relevance to a contract administration matter, and the Report happens to include both subjective, evaluative statements and objective or factual information. Consequently, we must balance the parties' interests.

Although the other circumstances weigh in favor of disclosure, we conclude that the University's redaction of the purely subjective, evaluative statements was consistent with the duty to bargain in good faith.

However, the Union's interest in the summaries of the bargaining unit employees' statements, and any other objective, factual information in the Report, is much stronger. This Board has repeatedly held that witness statements and investigation reports must be disclosed when potentially relevant to a contractual matter, notwithstanding the employer's confidentiality interest. *See, e.g.*, *Portland State University Chapter of the American Association of University Professors v. Portland State University*, Case No. UP-36-05 at 18-19, 22 PECBR 302, 319-21 (2008) (report on investigation of bargaining unit employee's affirmative action complaint); *Beaverton Police Association v. City of Beaverton*, Case No. UP-60-03, 20 PECBR 924 (2005) (internal affairs investigation). Here, the disclosure of the bargaining unit employees' statements and the other factual information would serve the purpose of the Union's request—to investigate a potential grievance. A union files a grievance to enforce its contractual rights. Additionally, a union has a statutory duty of fair representation, which includes a duty to investigate potential grievances. *See, e.g.*, *Williams v. Amalgamated Transit Union, Division 757 and Tri-County Metropolitan Transportation District of Oregon*, Case No. FR-001-20 at 14 (2021).

The University contends that the Union's interest in the redacted information is weak because the redacted information is not *actually* related to age discrimination (which is only one of the potential grievances that the Union was investigating). The question of whether the redacted information actually relates to the Union's investigation is irrelevant to our analysis. When assessing the strength of the requesting party's interest in information, we must consider the information's *potential* relevance to a grievance or contract administration matter, *not* its *actual* relevance, because that is what a requesting party must do when deciding whether to pursue an information request. For example, in this case, based on the information that was available to the Union (*i.e.*, the complaints that prompted the HR manager to interview the employees and the HR manager's description of the Report), the Union reasonably concluded that the Report's content is potentially relevant to its investigation of a potential grievance. But, the Union could not assess whether the Report's content is *actually* relevant to its investigation unless and until the University provided the Union with an unredacted copy of the Report. Although the University asserts that the redacted information is irrelevant to the Union's investigation, under PECBA, the Union is entitled to review the information and make its own assessment. *Portland State University*, UP-36-05 at 18, 22 PECBR at 319; *Laborers' Local 483 v. City of Portland*, Case No. UP-15-05 at 14, 21 PECBR 891, 904 (2007).

Further, even assuming that the redacted information is not actually relevant to any potential grievance, that would not mean that the Union's interest in the redacted information is weak. A union is entitled to potentially relevant information whether that information would tend to show that a potential grievance has merit, or the opposite. Indeed, a union has a strong interest in timely receiving information that shows there has *not* been a contractual violation, so that the union does not waste resources investigating or pursuing meritless claims. It is common for a union to decide, based on information provided by the employer, that it should not pursue a potential grievance—and both public employers and unions benefit from the efficient resolution of potential disputes. In this case, if the Report showed that the employees, when asked to provide information about their workplace complaints, provided no information that is relevant to a potential grievance

(as the University asserts), then the Report could provide the Union with an objective basis for deciding that it need not investigate the grievance further. However, we reiterate that, under PECBA, the Union is entitled under to make its own assessment of the Report's content.

We also find that the Union has an especially strong interest in the Report under the particular circumstances of this case. The University conducted the employee interviews summarized in the Report in response to employee complaints that were reported *by the Union*. Considering the Union's role in prompting the Report, the University's interest in withholding the Report *from the Union* is relatively weak.

The University bears the burden of proving that its confidentiality interest in the redacted information outweighs the Union's interests under the circumstances. The University did not meet that burden here with respect to the employee statement summaries and any other objective, factual information in the Report. Because the Union's interest in that redacted information outweighs the University's confidentiality interest, the University was required by PECBA to disclose those portions of the Report to the Union. Consequently, the University's overbroad redaction of the Report violated (1)(e).

We turn to the alternative basis for our conclusion that the University violated (1)(e). As noted above, when a party withholds information on the basis of confidentiality or conflicting legal obligations, the withholding party must prove both a legitimate and substantial confidentiality interest, and that it pursued a good-faith accommodation to reconcile the conflict. For the reasons discussed below, we find that the University did not pursue a good-faith accommodation to reconcile the conflict between the parties' interests.

First, the University misrepresented the nature of the redacted information when communicating with the Union. Specifically, when the Union asked the University to describe the redacted content, the University represented that it is "[e]valuative information related to [the supervisor's] communication style/skills, work habits and abilities, and actions as a supervisor" and "[r]ecommendations for [the supervisor's] professional development." And, when the Union questioned whether the redacted information also included a summary of interviews with Union-represented employees and "factual information," the University did not acknowledge that it redacted factual information, and instead maintained that it redacted only purely subjective, evaluative material regarding the supervisor. However, the University acknowledged for the first time at oral argument that it had redacted objective, factual information. Further, the ALJ confirmed, after conducting an *in camera* review of the Report, that the majority of redacted material consists of summaries of the interviews with Union-represented employees. Only a small portion of the redacted material consists of the HR manager's purely subjective, evaluative statements and professional development recommendations. The University does not dispute any of these facts, which establish that the University's description of the redactions—at best—lacked the accuracy and transparency that is necessary for parties to fulfill their PECBA bargaining obligations. That conduct was inconsistent with the University's duty to bargain in good faith, and is, in itself, a sufficient basis for finding that the University failed to pursue a good-faith accommodation.

Second, the University's proposed accommodations do not represent the common-sense approach we have urged parties to use in resolving (1)(e) information request disputes. For example, the University initially proposed a nondisclosure agreement that required the Union to pay $10,000 in liquidated damages upon a breach, plus attorney fees and costs. The University also initially proposed that only the Union's attorney be permitted to access the Report, and only by an in-person review at the University's offices in Eugene. The University offers no specific explanation as to how the Report's contents warranted such draconian conditions, even as a starting proposal. The University relies solely on its interest in maintaining the confidentiality of faculty records generally, which does not, under the circumstances presented, justify its treatment of the Report as if it involved private health information, private personal information, valuable research information, or other comparably sensitive information.

Although the University later reduced its proposed liquidated damages amount, it continued to insist that the Union either agree to a liquidated damages provision, or a provision stating that a breach of the NDA is an unfair labor practice and will cause the University "irreparable harm," and authorizing this Board to "fashion a remedy" and "award representation costs." The University's insistence on such conditions was not reasonable under the circumstances. In particular, the University's proposals failed to account for the fact that the Union is the exclusive representative of its employees, and that the University and Union have a longstanding contractual relationship that is regulated by PECBA.[7] Rather, the University made NDA proposals as if it were engaged in complex civil litigation against a party who has no ongoing relationship with the University.

Additionally, the University insisted on prohibiting the Union steward—a University employee who represented the employees at issue and had requested the Report—from viewing the Report. Under PECBA, public employees have a statutory right to act as a steward, and a public employer may not interfere with an employee's exercise of protected rights. *Clackamas Cty. Employees' Ass'n v. Clackamas Cty.*, 243 Or App 34, 40, 259 P3d 932 (2011).[8]

The University asserts that its NDA proposals merely reflected the conditions that the supervisor required for his consent to the Report's disclosure and, as such, were reasonable. That argument fails, for several reasons. First, the University's belief that the supervisor could dictate the conditions placed on disclosure arose from the University's erroneous conclusion that the Faculty Records Policy conclusively prohibited disclosure of the Report without his consent. Because the University was required by PECBA to disclose most of the Report to the Union, the

[7]As the Union correctly noted, PECBA expressly provides that it is an unfair labor practice for a labor organization to "[v]iolate the provisions of any written contract with respect to employment relations." ORS 243.672(2)(d). PECBA also authorizes this Board to "[t]ake such affirmative action * * * as necessary to effectuate the purposes [of PECBA]," ORS 243.676(2)(c), and award representation costs to the prevailing party, ORS 243.676(2)(d).

[8]Additionally, unions have the sole prerogative to determine which employees will participate in bargaining or other representational activities. *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union. Division 757 and Amalgamated Transit Union. Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-035/036-20 at 62 n 32 (2021). And, as a general rule, an employer may not deny employees the union representative of their choice. *See, e.g.*, *Oregon Public Employees Union v. Jefferson County*, Case No. UP-20-99, 18 PECBR 310 (1999).

University was permitted to disclose most of the Report to the Union without the supervisor's consent pursuant to Section (E)(3) of the Faculty Records Policy. Second, even assuming the University needed the supervisor's consent, there is no evidence that the supervisor insisted that the NDA include provisions that would make the Union liable for liquidated damages and attorney fees. Third, even if the University needed the supervisor's consent and the supervisor had requested all of the conditions at issue, that would not make it lawful for the University to insist on conditions that would interfere with the steward's exercise of protected rights or be inconsistent with the University's statutory duty to bargain in good faith with the Union.

The University also argues that it was excused from providing the Report to the Union in response to its information request because the Union could have obtained the Report through a subpoena instead. This Board has previously rejected that argument. *Klamath Falls Education Association/OEA/NEA v. Klamath Falls City Schools*, Case No. UP-27-07 at 26, 23 PECBR 257, 282 (2009). As we explained in *Klamath Falls*,

> "The right of a labor organization or employer to enforce an information request before this Board is separate and distinct from the right of parties in a pending unfair labor practice proceeding to seek and enforce a discovery request. The duty of the parties to share information allows bargaining and contract administration to proceed in an efficient and timely manner. These goals would be undermined if a party had to file an unfair labor practice complaint and obtain a subpoena whenever it needed information."

Id. (citing *Oregon School Employees Association v. Salem-Keizer School District 24J*, Case No. UP-40-86 at 7-8, 11 PECBR 659, 665-66 (1989)).

In sum, considering the totality of the circumstances, the University violated (1)(e) by redacting, and thereby withholding from the Union, objective, factual information, including statements by bargaining unit employees concerning workplace complaints. Additionally, the University failed to establish that it pursued a good-faith accommodation to reconcile the conflict between the parties' interests. The University's communications with the Union regarding the nature of the redacted material were inconsistent with its duty to bargain in good faith. And, the University's proposals and approach when bargaining over the NDA were not aimed at a reasonable balance between the Union's need for the information and the University's interest in preserving the confidentiality of the Report, or faculty records generally. For each of these reasons, we conclude that the University's response to the Union's information request violated ORS 243.672(1)(e). Consequently, we order the University to cease and desist from that unlawful conduct. Because the University complied with our original order pending appeal, we see no other remedies that are required to effectuate the purposes of PECBA.

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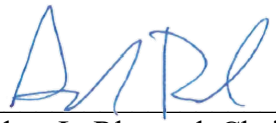
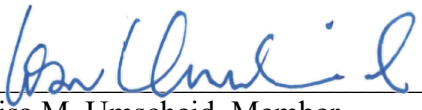
ORDER

The University shall cease and desist from violating ORS 243.672(1)(e) in responding to information requests from the Union.

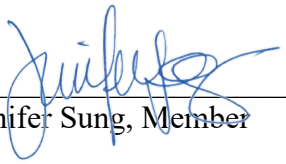
DATED: November 23, 2021.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.