

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-021-18

(UNFAIR LABOR PRACTICE)

UNITED ACADEMICS OF OREGON	)	
STATE UNIVERSITY,	)	
	)	
Complainant,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW,
	)	AND ORDER
OREGON STATE UNIVERSITY,	)	
	)	
Respondent.	)	
_____	)	

On February 27, 2020, this Board heard oral argument on Respondent’s objections and Complainant’s cross-objections to a recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe on November 27, 2019, after submission of a stipulated record. The record closed on August 19, 2019, upon receipt of the parties’ rebuttal/reply briefs.

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

Jeffrey P. Chicoine, Attorney at Law, Miller Nash Graham & Dunn LLP, Portland, Oregon, represented the Respondent.

On August 13, 2018, United Academics of Oregon State University (Union), filed an unfair labor practice complaint alleging that Oregon State University (OSU) violated ORS 243.672(1)(a) and (1)(i), by conduct related to the publication and dissemination of a webpage regarding faculty unionization. The Union amended its complaint on December 26, 2018, and again on January 21, 2019. The parties agreed to submit the matter on stipulated facts, joint exhibits, and declarations in lieu of testimony, which the parties filed on June 6, 2019.

The issues are:

1. Did OSU use public funds in an attempt to influence the decision of employees regarding whether to support or oppose the Union, in violation of ORS 243.672(1)(i), when it solicited questions from faculty and subsequently created, maintained, and distributed a “Frequently Asked Questions” (FAQs) webpage in March through June 2018?
2. Did OSU interfere with, restrain, or coerce employees “in the exercise” of rights protected by the Public Employee Collective Bargaining Act (PECBA), in violation of ORS 243.672(1)(a), when it solicited questions from faculty and subsequently created, distributed, and maintained the FAQ webpage in March through June 2018?

As set forth below, we conclude that OSU violated ORS 243.672(1)(i). Because any additional violation would not alter our remedy in this case, we decline to reach the remaining claim.

### RULINGS

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

### FINDINGS OF FACT

#### The Parties and Relevant Individuals

1. OSU is a public employer within the meaning of ORS 243.650(20).
2. OSU is a state-supported institution of higher education with its main campus in Corvallis, Oregon, engaged primarily in research and teaching. OSU has more than 32,000 students enrolled on two physical campuses and in a virtual “e-campus.” Undergraduate students account for 83 percent of students, with the remainder in graduate or professional programs. OSU has approximately 4,700 full- and part-time faculty of all ranks, including tenure, tenure-track, instructor, and other ranked classifications.
3. The Union is a labor organization within the meaning of ORS 243.650(13).
4. On June 5, 2018, the Union filed a petition (Case No. RC-006-18) under ORS 243.682(2)(a) to certify a new bargaining unit of faculty employees at OSU through the card check process. On June 27, 2018, the Board certified the Union as the exclusive representative for a bargaining unit consisting of various faculty members employed at OSU. Specifically, the Union’s bargaining unit includes:

“All faculty employed by Oregon State University with rank (including those on Academic Wage Appointments), as well as PostDoctoral Scholars and PostDoctoral Fellows, but excluding: (1) confidential employees; (2) faculty employed as a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position; (3) faculty employed in an administrative position without a reasonable expectation of teaching, research

or other scholarly accomplishments; (4) unclassified employees with No Rank; (5) faculty who are not considered supervisory under ORS 243.650(23)(c)(C), but supervise other faculty with rank (including those on Academic Wage Appointments), PostDoctoral Scholars, and/or PostDoctoral Fellows.”

5. The following individuals are supervisory or confidential employees employed by OSU and were involved in the situation that gave rise to this unfair labor practice complaint:

Susan Capalbo, Senior Vice Provost for Faculty Affairs  
Donna Chastain, Interim Chief Human Resources Officer  
Steve Clark, Vice President of University Relations and Marketing  
Sara Daly, Executive Assistant to Edward Feser  
Edward Feser, Provost and Executive Vice President  
Michelle Klotz, Faculty Affairs Associate  
Edward Ray, President of OSU  
Kegan Sims, Digital Communications Manager

6. OSU maintains an email system that it routinely uses to communicate with employees.

#### Union Organizing Campaign and OSU Distribution of FAQs

7. The certification of the Union was the result of an organizing drive that began informally in 2014, with the public phase beginning in 2017.

8. In response to the organizing drive, OSU administrators began to distribute information to faculty members via its email system and through its website. On July 18, 2017, Senior Vice Provost for Faculty Affairs Susan Capalbo used OSU faculty email distribution lists to distribute a link to an OSU website with a list of questions described as “frequently asked questions.” OSU leadership had started hearing questions from faculty members in informal meeting or event contexts; however, OSU did not track those questions. OSU drafted both the questions and answers for the initial set of 27 FAQs. Those FAQs did not respond to specific questions received by OSU from faculty members. (For ease of reference and consistent with the parties’ briefs, the various questions and responses are referred to collectively as the “FAQs,” even where the question was drafted by OSU.)

9. In her July 18, 2017, email to faculty distribution lists, Capalbo explained the FAQ webpage as follows:

“Earlier this year, we became aware of an effort by United Academics to unionize the academic faculty at the Corvallis campus. Recognizing that unionization is often a complicated process, and in an effort to best serve the school community, we have created an interactive webpage containing factual information related to unionization under Oregon law. This webpage was developed to provide the OSU community with answers to frequently asked questions about the unionization process, common issues that may arise during a bargaining campaign, and what the

success of a unionization effort might mean at OSU. The webpage also provides members of the community the opportunity to anonymously submit additional questions of interest for us to respond to.”

Capalbo’s email provided a link where employees could submit their own questions to OSU relating to the organizing drive. The initial FAQ entries that were posted caused some alarm among the staff and leadership of the organizing campaign.

10. Capalbo’s email was distributed through OSU email distribution lists established for employees and faculty as Inform-C07 (Professional Faculty), Inform-C08 (Instructors, Research Associates/Assistants), and Inform-C09 (Professors, Associate/Assistant Professors); and copied to Inform-C11 (Office Managers, Executive Assistants, Administrative Assistants). Professional faculty are employees working in an academic, student, or other administrative support position with professional titles, and without an assigned rank.

11. The FAQs were posted on the OSU intranet and accessible only to OSU employees with a university-issued login. To access the FAQs, the employee had to be logged in to the OSU intranet. The FAQs could be accessed by clicking on a link in the email sent by Capalbo, an OSU administrator. The link took the employee to an entry page. The webpage was then designed in what OSU described as an “accordion” format, with pages sequentially accessed, as follows:

- a. At the entry page, the employee had to click on a button stating that the employee was an “OSU employee with questions about the unionizing process.” That click took the employee to a page with a list of questions.
- b. At the next level, there was a page with a published list of questions, without answers. The employee could click on any question to see OSU’s response.
- c. A click on the question page took the employee to the third level. At the third level, the user would be at a webpage displaying only the particular question or questions that the user clicked on, and OSU’s corresponding answer.
- d. An employee who wanted to ask a question not posted could click on the button that stated: “I have a question that is not answered on this website, how can I find an answer?” From there, the employee would be taken to a portal where the employee could submit a question, anonymously if preferred.

12. Any OSU employee was able to submit questions for consideration and posting as a FAQ, including supervisory or managerial employees.

13. The original set of FAQs remained unchanged until March 22, 2018.

14. In the original set of 27 FAQs drafted by OSU, OSU referred to strikes in three of the answers. For example, OSU included the following questions and responses:

“Could the union call a strike if an agreement is not reached on a contract?”

“Yes. If the parties have declared impasse, as noted above, UA can call for a strike vote after the required 30-day cooling-off period. Oregon law requires a 10-day notice of intent to strike, but based on the outcome of the membership strike vote, UA may ultimately call a strike or work stoppage.

“Would faculty continue to receive their salary if they participate in a strike?”

“When employees are on strike, they are not working and therefore are not entitled to receive the compensation or benefits traditionally provided by the employer in return for the work they perform.”

15. Some of the original FAQs drafted by OSU also included questions regarding “what the success of a unionization effort might mean at OSU.” For example, the initial set of FAQs included the following responses regarding the potential results of collective bargaining:

“Would all members of a bargaining unit be required to join the union and pay dues?”

“Although individuals do not have a choice as to whether they are part of a bargaining unit, membership in a union is voluntary. Unions, however, typically seek to secure a provision in a collective bargaining agreement that requires bargaining unit members who do not join the union to pay what is known as a ‘fair share’ fee. A ‘fair share’ fee reflects a share of the cost to the union to provide basic services and benefits to everyone in the bargaining unit. Full union members will pay a full dues amount determined by the union. Depending on how the union determines the full dues amount, the difference between a full dues fee and a ‘fair share’ fee can be minimal or nothing at all.<sup>1</sup>

“Would OSU faculty retain all of the benefits they currently enjoy if there is a new collective bargaining agreement?”

“The terms and conditions of faculty’s employment would be subject to the bargaining process and the positions taken by the UA and OSU at the bargaining table. It is important to understand that while some terms and conditions may continue unaffected, some of the benefits currently in place may change or be discontinued as the requirements of the new collective bargaining agreement are implemented.”

16. OSU administrators and employees continued to create, publish, and distribute additional FAQs on issues related to unionization as the organizing drive continued. As the new FAQs were added, OSU kept the older FAQs and responses on its website, periodically adding new FAQs and responses to the initial postings.

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<sup>1</sup>OSU posted this FAQ before the U.S. Supreme Court’s decision in *Janus v. AFSCME, Council 31*, 138 S Ct 2448 (2018).

17. On March 22, March 30, May 23, May 31, and June 7, 2018, Provost and Executive Vice President Edward Feser sent emails to email distribution lists with links to updated FAQs. Each new email directing employees to the FAQs and responses would take employees to a site where all of the FAQs and responses could be viewed (following the “accordion” format described above), not just the most recently added FAQs.

18. Feser’s emails dated March 22, March 30, May 23, and May 31, 2018, were distributed through the following email distribution lists: Inform-C07 (Professional Faculty); Inform-C08 (Instructors, Research Associates/Assistants); and Inform-C09 (Professors, Associate/Assistant Professors).

19. Feser’s email dated June 7, 2018, was distributed through the following email distribution lists: Inform-C07 (Professional Faculty); Inform-C08 (Instructors, Research Associates/Assistants); Inform-C09 (Professors, Associate/Assistant Professors); and Inform-C12 (Academic Wage & Other Misc.).

20. Feser’s emails conveyed the impression that OSU was maintaining the FAQ webpage for the purpose of responding to actual questions submitted by faculty. For example, Feser’s March 22 email stated, in part:

“We continue to receive inquiries about this [union organizing] effort. Oregon law allows public employers to respond to questions they receive from employees during a union organizing drive. Last summer, the university created a web page to provide responses to such questions.

“Recently we updated the page and included responses to additional questions we have received since the fall.”

The email also included two options for faculty to submit additional questions. Similarly, Feser’s March 30 email informed employees that the FAQ webpage had been updated after OSU “received a number of additional questions about faculty unionization.” Later, Feser’s May 31 email described the changes to the FAQ webpage as updates that were made “as new questions are submitted by faculty members.”

21. None of Feser’s emails informed faculty that the questions published on the FAQ webpage had been edited or changed from the questions actually submitted by employees.

22. OSU updated its FAQs on the same days that Feser sent his emails, and on June 13 and 15, 2018.

23. In some instances, OSU edited the questions before publishing them on the FAQ webpage. Some of the textual changes were minor grammatical or stylistic changes. Some questions were edited to omit the opinions expressed by the employee. For example, on June 7, 2018, an anonymous employee submitted the following question via the web form on the FAQ webpage:

“Unionized peer institutions have higher wages (e.g., University of Oregon) and some higher benefits. OSU has failed to keep pace with either of these two essential things often used to retain valued employees. Will unionization make OSU a more attractive employer, and will unionization allow the bargaining unit to reduce the bloated size of the OSU administration?”

When OSU published the question, it edited out the first two sentences, and the reference to the “bloated” size of the OSU administration, and published the question as, “Will unionization make OSU a more attractive employer, and will unionization allow the bargaining unit to reduce the size of the OSU administration?”

24. In another example, on May 24, 2018, an employee submitted the following question by email sent to Capalbo:

“A fellow faculty member informed me that the union representative misrepresented the purpose of the cards when visiting his office. The card was presented as a request for additional information, and it wasn’t until my colleague told the union representative that he knew the actual purpose of the card was a vote for unionization that the union representative confirmed its actual purpose.

“While researching the UAOSU, I noticed that universities that do not have unionized tenure-track and tenured research faculty are listed as ‘comparable universities with faculty unions.’ For example, Temple University has a graduate student union and an involuntary adjust [*sic*] faculty union but the tenure-track and tenured faculty are not unionized. The proposed union would require all faculty to pay dues, which is not comparable, as UAOSU is presenting it.

“How can this card process be considered legitimate and binding when the parties collecting cards are lying to faculty and presenting false information?”

OSU edited the question, omitting the details about the conversation between the colleague and the union organizer, as well as the phrase describing organizers as “lying to faculty and presenting false information,” and printed only the following text:

“A fellow faculty member informed me that the union representative misrepresented the purpose of the cards when visiting his office. While researching the UAOSU, I noticed that universities that do not have unionized tenure-track and tenured research faculty are listed as “comparable universities with faculty unions.” For example, Temple University has a graduate student union and a voluntary adjunct faculty union, but the tenure-track and tenured faculty are not unionized. How can this card process be considered legitimate and binding?”

OSU responded to the question as follows:

“Unions and their representatives are given a very wide latitude under the law because the right a union obtains from successfully unionizing a group of employees is only the right to negotiate. An employer is not obligated to accept any union proposal but only to meet and confer in good faith negotiations with the union over employment conditions such as wages, hours and other working conditions. OSU created this website to provide factual and truthful answers in response to the many questions that are often raised during the union organizing effort, and we encourage faculty to ask questions of UA also.”

25. In another example, on April 9, 2018, an anonymous employee submitted a question via the FAQ webpage about a union organizer coming to her home at 7:00 p.m., and asked:

“How do I know whether this is right or it is violating my privacy? Personally, I don’t understand why these two persons need to come to my private address to talk about this process, it didn’t feel right. Please let me know.”

OSU edited this employee’s description of her feelings, and published the question as, “Is it legal or appropriate that two persons from the union come to my home at 7:00 pm to speak about this process? How do I know whether this violates my privacy?”

26. In another example, on March 30, 2018, an anonymous employee submitted the following question via the FAQ webpage:

“Is there any way to reverse this if the 50%+1 is achieved? Will this be a binding union forever? (I know there are very few cases of unions being dissolved once established, this is more of a suggestion to include on the page, because it is an important thing to consider).”

OSU edited this employee’s question before posting it, including by deleting the parenthetical explaining that the employee perceived that there “are very few cases” of decertification, and that the employee submitted the question as a “suggestion” for OSU to post so that other employees would consider the issue. OSU published the question as:

“Will this be a binding union forever? Is there any way to reverse this if the union prevails in either a card check certification or an election?”

27. In some FAQs, OSU did not edit out extraneous opinion statements or allegations from the question. For example, OSU published the following question:

“It feels like the process to unionize is actually a bit out of the hands of faculty generally and the university administration completely. It's unclear, then, how to have a fair process with open dialogue about the pros and cons related to



unionization. Is the faculty senate expected to maintain neutrality on this issue as well? Where are the debates and public forums?”<sup>2</sup>

28. For another example, OSU published the following question and response on the FAQ webpage, without deleting the questioner’s assertions that OSU’s existing shared governance system is “great” and would “disappear” if the faculty unionize. OSU’s response also included advisory information that went beyond the scope of the actual question asked by the employee.

“Where is our faculty senate in this effort? We should be discussing this topic at every senate meeting. OSU has great shared governance already and it will disappear if we unionize. Why is our senate not leading an opposition?”

“OSU encourages discussion over this and other relevant issues among colleagues and within the faculty community. How unionization may impact OSU’s shared governance is not known at this time, *but it is important to discuss the quality of the current shared governance model and its many benefits.* This debate discussion may be introduced by participants in Faculty Senate as well as other forums throughout campus. Because of Oregon law, however, OSU cannot introduce opposition to the union through its Faculty Senate.” (Emphasis added.)

29. For another example of OSU providing advisory information, in response to a question about whether an employee could request the return of a signed authorization card after the Union filed the petition, OSU answered that it “may be possible,” and noted that there “is no formal process” for revoking an authorization card. OSU also included the following suggested course of action:

“It may be possible. OSU now have [*sic*] seven days with which to gather and provide the Employment Relations Board (ERB) with a list of employees so the ERB can check the list against the authorization cards filed by UA in support of its petition. Provided that you request your card back before that check, the ERB may honor your request to disregard your authorization card as a part of its showing of interest check. Under Oregon law there is no formal process for revoking an authorization card. However, the method most likely to achieve a revocation is through a written and dated communication (such as an email) to the union’s leadership and ERB at this address: [emprel.board@oregon.gov](mailto:emprel.board@oregon.gov).”

30. In another example, in response to a question about how union organizers obtained employees’ home addresses, OSU included in its answer, “Whether you choose to engage the union representatives, however, is entirely your choice.” In response to another question, OSU included in its answer its view that “OSU encourages faculty who may be affected by unionization to actively engage their colleagues and to communicate their opinions freely and openly—whether that be individually or as a collective. Similar to methods employed by the unionization effort, *opposition can be achieved through campus activism.*” (Emphasis added.)

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<sup>2</sup>The record does not identify the original source or text for this question.

31. In one answer, OSU included its subjective opinion about the process of decertification, as follows:

“Will this be a binding union forever? Is there any way to reverse this if the union prevails in either a card check certification or an election?”

“Yes, *but it is a difficult process*. The process is known as decertifying a union and it is accomplished through the filing of a decertification petition with the Oregon Employment Relations Board (‘ERB’). If a contract is in place between OSU and the union, a decertification petition could only be filed within a narrow 30-day period before the expiration of the contract. The decertification petition must be supported by signatures of at least 30% of the members of the bargaining unit. If ERB determines the signatures are valid, it will schedule an election for the entire bargaining unit. 50%+1 of those voting would need to vote in support of decertifying in order for the union to be decertified. As an aside, it is not permissible for OSU to provide any assistance (financial or otherwise) to a decertification effort and it is also impermissible to decertify a portion of the faculty from the bargaining unit (i.e., College of Business).” (Emphasis added.)

32. In response to an employee’s question about whether unionization would result in union dues and a pay cut, OSU published the following response:

“If this unionization effort is successful, will there be union dues (how much?) and can I expect a pay cut?”

“While we do not know exactly how United Academics will implement a dues structure, it is typical for faculty unions to assess dues as a percentage of salary, though some unions choose to implement a flat fee. Most faculty unions have rates in the range of 1 %-2% of a faculty member’s total salary. Regarding your question about a pay cut, when a union represents employees, the employer is required to meet and confer with the union about wages. Thus, we cannot say whether you can expect a pay cut as such is determined through the collective bargaining process with the union.”

33. On April 16, 2018, an anonymous employee submitted the following question via the FAQ webpage: “How is my ability to conduct research (e.g., field-based research that is time sensitive), participate in workshops/conferences, and meet deadlines set by funding agencies affected if the union decides to strike?” In its answer, OSU did not edit the employee’s inaccurate assumption that the union (rather than the represented employees) decides whether to strike. OSU also surmised what actions it would take in response to a strike, as follows:

“The answer depends on whether the employee participates in the strike by choosing not to work. If an employee chooses to participate in a strike and not come to work, they are not considered an employee for the time period during which they choose not to come to work. To this end, the individual’s ability will be impacted because he/she will receive no access to OSU’s computer systems (email, ONID

access, etc.), will not receive compensation or benefits, nor be able to participate in workshops or conference in their OSU capacity or using OSU resources. During this time period, these individuals generally would be unable to participate as an OSU principal investigator in OSU grant funded research. If an employee chooses not to participate in the strike and, instead, decides to work, the employee will continue as an OSU employee and the strike will not impact his/her ability to conduct research, participate in workshops and conferences, and meet deadlines.”<sup>3</sup>

34. An anonymous employee also submitted the following question on April 16, 2018:

“How does the unionization process, and potentially a strike, impact faculty who are in the U.S. on a work visa?

“The unionization process does not impact faculty who are in the U.S. on a work visa. A strike impacts only faculty being sponsored for employment in the U.S. on an H-1B work visa who have not yet begun their employment. A new H-1B petition filed for a faculty member who is not yet employed at the University will be denied if the sponsored position is one currently impacted by a certified strike. In contrast, faculty members already working in the United States in H-1B status do not have any negative impact to their U.S. immigration status as a result of participation in a strike. According to regulations, faculty members who have already begun employment in the United States under an approved H-1B petition do not violate the terms of their nonimmigrant status by virtue of past, present, or future participation in the strike. However, faculty members remain subject to all other applicable terms of the Immigration and Nationality Act in the same manner as other H nonimmigrants. For example, a faculty member engaging in unauthorized employment with a different employer while participating in a strike would violate other applicable terms of the Immigration and Nationality Act just as if the faculty member engaged in unauthorized employment in the absence of a strike. Finally, the faculty member’s status and authorized period of stay is not modified or extended in any way by virtue of participating in the strike. Time spent in H-1B status participating in a strike is treated no differently from time working in H-1B status and will continue to count against the faculty member’s maximum six year stay in H-1B status.”<sup>4</sup>

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<sup>3</sup>The questions of whether, and the extent to which, an employer may lawfully terminate striking employees’ access to publicly owned computer resources while those employees are not working are subject to dispute. See, e.g., *Portland State University Chapter, American Association of University Professors v. Portland State University*, Case No. UP-013-14 at 14, 26 PECBR 438, 451 (2015) (telling employees two days before strike authorization vote that they would lose their computer systems access violated ORS 243.672(1)(a) because it had the “quality of a reprisal,” even “assuming that the University’s announcement might, in different circumstances, have been lawful”).

<sup>4</sup>Pursuant to 8 CFR § 214.2, a strike will cause H-1B petitions to be denied only “[i]f the Secretary of Labor certifies to the [immigration] Commissioner that a strike or other labor dispute involving a work

(Continued . . . )

OSU has numerous faculty from other countries who are generally able to work in the United States only if they hold a valid H-1B work visa.

35. OSU routinely uses a FAQ format for transmitting information to faculty and staff. At least 56 webpages on the OSU intranet for faculty or staff utilize a format loosely resembling that of the FAQs at issue here.

36. The Union submitted the declaration of attorney Michael Tedesco, who also serves as an adjunct labor law professor at the University of Oregon. Based on his experience representing unions in both the private and public sectors, Tedesco testified that the FAQ format is also commonly used in the context of anti-union materials, and that anti-union materials typically highlight topics such as union dues and strikes. He further testified that anti-union materials typically suggest that unionization is unnecessary, futile, or even harmful, for example, by suggesting that unionization can result in the loss of existing wages and benefits, flexibility, autonomy, or the ability to communicate directly with employer representatives, or that employees will have to go on strike to resolve labor disputes, even though strikes are rare in most all workplaces.<sup>5</sup>

37. Throughout the time the FAQs at issue here were posted, OSU restricted access to OSU employees, used the “accordion” approach in formatting the website, and required employees to take multiple steps to access the FAQ website.<sup>6</sup>

38. On June 16, 2018, legal counsel for the Union contacted Brian Caufield with concerns about OSU’s FAQs and requested more information about the process and source of the

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(Continued . . . )

stoppage of workers is in progress in the occupation and at the place where the beneficiary is to be employed or trained, and that the employment or training of the beneficiary would adversely affect the wages and working conditions of U.S. citizens and lawful resident workers.” 8 CFR § 214.2(h)(17)(i). “If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (h)(17)(i), the Commissioner shall not deny [an H-1B] petition or suspend an approved petition.” 8 CFR § 214.2(h)(17)(ii). *See also* 20 CFR § 655.733(a)(2) (“Upon receiving from an employer a notice described in paragraph (a)(1) of this section, ETA shall examine the documentation, and may consult with the union at the employer’s place of business or other appropriate entities. If ETA determines that the strike or lockout is covered under DHS’s ‘Effect of strike’ regulation for ‘H’ visa holders, ETA shall certify to DHS, in the manner set forth in that regulation, that a strike or other labor dispute involving a work stoppage of workers in the same occupational classification as the H-1B nonimmigrant is in progress at the place of employment.”).

<sup>5</sup>OSU referred to strikes in a total of six FAQ responses, three of which were in the initial set of FAQs drafted by OSU. In its FAQ responses, OSU did not provide factual information regarding the frequency of strikes in general, or of Oregon public sector strikes in particular.

<sup>6</sup>For the convenience of the Board, the parties submitted as a joint exhibit a printed version of the content of all 77 of the questions and answers posted on the website. A user would not be able to access the FAQs in that format.

questions.<sup>7</sup> On June 18, 2018, Caufield responded by email, and later provided additional information to the Union, including who worked on the FAQs and a spreadsheet listing the dates and manner in which some of the questions were received.

39. Caufield's spreadsheet showed how OSU responded to some of the questions that were submitted by email or through the website, specifically, by indicating whether OSU posted the question on its FAQ webpage or instead responded only directly to the employee. The spreadsheet also identified the sources of some of the questions that OSU posted on the FAQ webpage. Specifically, OSU indicated that 37 were derived from anonymous questions submitted via the online form on the FAQ webpage, one was submitted via the online form with the employee's name listed, 17 were submitted by email from faculty members, and four were listed as received by "other" means. OSU did not verify that the people submitting anonymous questions were limited to faculty who would have been included in the likely bargaining unit or that questions were not submitted by supervisors or administrators.

40. The FAQs labeled by OSU as "other" and dated May 21, 2018, were prompted by a *Corvallis Times-Gazette* news article entitled, "Getting Organized: OSU Faculty Members Take Steps to Form a Union." The article included a passage regarding conversations that United Academics organizers were having with OSU faculty, which stated, in relevant part:

"One issue that comes up frequently, organizers say, is the question of shared governance.

"While the Faculty Senate gets a say in matters such as academic regulations and curriculum, it has no decision-making powers when it comes to things such as university budgets, faculty assessment mandates and the structure of academic units.

"\* \* \* \* \*

"As faculty, we should have a stronger voice in the running of the institution and in our working conditions,' [a faculty member] said. \* \* \*

"Some critics of the United Academics organizing campaign counter that OSU functions pretty well already and that forming a union would only create an adversarial relationship between faculty and university administrators."

OSU posted three questions on the FAQ webpage to correct what it considered incorrect information in the article. The three questions and answers that OSU posted to respond to the article are:

"If a union is elected as the exclusive representative of the faculty, will the union have decision-making authority over OSU's budget process?"

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<sup>7</sup>Brian Caufield is the Director of Labor Relations Services for the University Shared Services Enterprise (USSE). Caufield advised OSU on the FAQs.

“No. The University budget process is considered a management prerogative. That said, OSU believes it already has a strong collaborative budgeting process that includes a diverse University Budget Committee and numerous University-wide budget forums and presentations. In fact, the University Budget Committee includes Faculty Senate representation.

“If a union is elected as the exclusive representative of the faculty, is OSU required to negotiate with a union over faculty assessment mandates?”

“If by faculty assessment mandates you mean faculty performance evaluations, the answer is no. The basis for an evaluation, including the criteria or standards by which performance is to be evaluated, areas to be evaluated, the content of the evaluation form, the number and timing of evaluations, and the use of evaluations are considered permissive subjects of bargaining. Neither party is required to negotiate over subjects which are considered permissive.

“If a union is elected as the exclusive representative of the faculty, will the union have decision-making authority over OSU’s academic units?”

“No. Staffing levels, assignment of duties, and workload when the effect on duties is insubstantial, are considered permissive subjects of bargaining. Neither party is required to negotiate over subjects which are considered permissive. Moreover, OSU already has a robust Faculty Senate that addresses issues related to academic units. Unless there is an agreement by Faculty Senate to cede this to a union, OSU will continue to address permissive subjects of academic issues through the Faculty Senate.”

In a May 15, 2018, email to Bennet Hall, the author of the story, Vice President of University Relations and Marketing Steve Clark declined an interview request, citing the neutrality requirement. Specifically, Clark wrote, “I confirmed that we believe Oregon law does not allow the university to offer comment on Oregon State University employees’ consideration of forming a collective bargaining unit. So we will respectfully decline your request to interview President Ray.” After that, Clark’s email directed Hall to a website that purportedly contained the “personal opinions of individual faculty members.” Later that same day, Hall responded, stating, “I’ve already interviewed some faculty members on both sides of the question, including a couple connected with that website.”<sup>8</sup>

41. The fourth FAQ labeled “other,” dated June 7, 2018, was prompted by an inquiry from Keith Leavitt, a professor in the College of Business, who was a vocal opponent of the organizing drive.<sup>9</sup> Specifically, Leavitt submitted a request to use an email distribution list to send

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<sup>8</sup>Although the record does not actually show where the link in Clark’s email to Hall went, we find based on the context that it directed viewers to Keith Leavitt’s OSU Excellence website (described below), a website that opposed the unionization efforts.

<sup>9</sup>The evidence suggests that this specific entry is titled, “Attempting to reach OSU employees for purposes of union discussions.”

information to faculty. Faculty are required to submit written requests to use a distribution list to the person controlling the list, who then approves or denies the message. OSU denied Leavitt the use of the distribution list because it was related to the union campaign. On June 7, 2018, Gigi Bruce, Special Assistant to Provost Feser, emailed Leavitt to deny his request to distribute his message through faculty email distribution lists. Bruce provided him with information about how to obtain email addresses through a public records request, and also advised him that his faculty message would generally comply with OSU's Acceptable Use of Computing Resources policy.

42. Based on Leavitt's inquiry, OSU published the following question, "How do I contact my fellow colleagues without using the faculty Listserv?" OSU published the following answer:

"You can make a Public Records Request seeking the public email addresses for all faculty. Email [Julie.Rondeau@oregonstate.edu](mailto:Julie.Rondeau@oregonstate.edu) your public records request. Once received, you can use that list to create your own email distribution list. Please keep in mind your obligations under the Acceptable Use of University Computing Resources Policy."

43. There is no evidence in the record that the question about how to contact faculty was a question that was frequently asked of OSU administration.

44. Leavitt helped create an opposition website called "OSU Excellence."

45. Leavitt also gathered names of individuals opposed to the organizing drive and solicited people to sign a petition for election in lieu of card check, as authorized by ORS 243.682(3)(a) and OAR 115-025-0075. Leavitt filed a petition for an election on June 25, 2018, but the petition was not supported by the 30-percent showing of interest required by ORS 243.682(3)(b) and OAR 115-025-0075(1).

46. On March 4, 2018, Faculty Senator Charles Murnieks from the College of Business sent an email to all faculty senators with links to OSU's FAQs, the OSU Excellence website, and the Union's website, and stated that he was doing so "to promote awareness of arguments that both support and oppose unionization."

47. Capalbo, Caufield, Chastain, Daly, Feser, Klotz, and Sims are employees of OSU or USSE, and OSU and USSE are funded by public funds. Public funds were used to pay for work on the website and for the computers, email system, website, software, and hardware used in such work. The parties stipulated that OSU spent one dollar of public funds in preparing, distributing, or posting the emails and FAQs at issue in this case.<sup>10</sup>

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<sup>10</sup>By stipulating that OSU used one dollar of public funds for the activities at issue, OSU did not agree that the expenditures were unlawful and the Union did not agree that additional funds were not spent beyond one dollar. At oral argument, OSU confirmed that that stipulation meant that the "use of public funds" element of an ORS 243.672(1)(i) violation had been proven. The parties intended for the amount of one dollar to be used solely for the purpose of determining the amount of the civil penalty mandated by ORS 243.676(4)(b), if this Board concluded that OSU violated ORS 243.672(1)(i).

48. OSU faculty rely on various electronic systems, accessible through OSU's ONID system, to perform their duties. Through ONID, faculty can access OSU's email system, Canvas (for online course and course components), OSU library resources, laboratory management and grant management database systems, procurement resources, employee information resources (such as pay stubs and timesheets), and other work-related electronic resources. Some faculty members use ONID resources for mixed personal and professional obligations. Some also use the systems, including email, for union organizing. Many faculty members are nine-month employees and arrange summer employment through their OSU email address.

49. Without ONID access, faculty would be unable to administer their grants, send and receive emails to colleagues and external contacts, engage with colleagues for their required services work within OSU, or access the library resources for research and writing purposes. The loss of this access could have innumerable professional and personal consequences because it could limit any faculty member's ability to pursue a wide variety of personal, professional, and mixed personal-professional activities.

50. When faculty are not teaching for a short period of time – for example, they are on sabbatical leave or medical leave – they retain their ONID access. Faculty who retire with emeritus status also retain their access.

51. Employee use of the OSU computer system is governed by OSU's "Acceptable Use of Computing Resources" policy. Access to OSU computing resources is controlled through a single sign-on or login. OSU views accessing its computer resources, even when done remotely, as the virtual equivalent of physically showing up at work.

#### CONCLUSIONS OF LAW

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

2. OSU violated ORS 243.672(1)(i) when it solicited questions from faculty and subsequently created, maintained, and distributed a FAQ webpage in March through June 2018.

The Union alleges that OSU violated ORS 243.672(1)(i) when it solicited questions from employees about union organizing and created, maintained, and distributed information through its FAQ webpage, while OSU faculty were in the process of deciding whether to unionize. ORS 243.672(1)(i) makes it an unfair labor practice to "[v]iolate ORS 243.670(2)." ORS 243.670(2)(a) provides, in relevant part, that a public employer may not "[u]se public funds to support actions to assist, promote or deter union organizing[.]" ORS 243.670 and ORS 243.672(1)(i) were added to PECBA in 2013, when the legislature enacted the Public Employer Accountability Act through House Bill 3342 (HB 3342). *See* 2013 Or Laws, Ch 663, § 4.

OSU stipulated that it used public funds to support the actions at issue, which, for brevity, we refer to collectively as publication of the FAQ. The parties dispute only whether those were "actions to assist, promote or deter union organizing," which the statute defines as follows:



“(a) Assist, promote or deter union organizing” means any attempt by a public employer to influence the decision of any or all of its employees or the employees of its subcontractors regarding:

“(A) Whether to support or oppose a labor organization that represents or seeks to represent those employees; or

“(B) Whether to become a member of any labor organization.”

ORS 243.670(1)(a). We have previously construed this statutory definition as “expressly limit[ing] the scope of subsection (2)(a), such that it prohibits only *attempts to influence* employees’ decisions regarding union organizing and membership.” *Amalgamated Transit Union, Division 757 v. Tri-County Transportation District of Oregon*, Case No. UP-003-16 at 55, 27 PECBR 375, 429 (2018) (emphasis in original). Thus, to determine whether OSU violated ORS 243.670(2)(a) (and thereby violated ORS 243.672(1)(i)), we must determine whether OSU’s conduct in preparing and publishing the FAQs was an “attempt to influence” the decision of OSU employees regarding whether to support or oppose representation by United Academics, within the meaning of ORS 243.670(1)(a).

When construing a statute, our goal is to determine and give effect to the legislature’s intent. ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) (“Our goal in interpreting a statute is to determine what meaning the legislature intended in drafting the statute.”). In doing so, we apply the analysis in *PGE*, 317 Or 606, as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). The words chosen by the legislature are the best evidence of its intent; accordingly, we first review the text and context of the statute in question. *Gaines*, 346 Or at 171-72. We then review any relevant legislative history. *Id.* If we are still unable to determine the legislature’s intent, we then apply maxims of statutory construction. *Id.*

Starting with the statutory text, ORS 243.670(1)(a) provides, in relevant part, that “[a]ssist, promote or deter union organizing’ means any attempt by a public employer to influence the decision of any or all of its employees \* \* \* regarding: [w]hether to support or oppose a labor organization that \* \* \* seeks to represent those employees.” Where, as here, the legislature uses words of common usage, we give them their “plain, natural, and ordinary meaning,” *PGE*, 317 Or at 611, using a dictionary of common usage. *Pete’s Mt. Homeowners Assn. v. Or. Water Res. Dept.*, 236 Or App 507, 516-17, 238 P3d 395 (2010). The definition of “attempt” includes “to make an effort to do, accomplish, solve or effect,” and used as a noun means “the act of attempting.”<sup>11</sup> The term “influence” is defined as “to affect or alter the conduct, thought, or character of by indirect or intangible means.”<sup>12</sup> Thus, the text prohibits any act or instance of a public employer making an effort to affect or alter the decision of any or all of its employees regarding whether to support or oppose a labor organization that seeks to represent those employees.

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<sup>11</sup>*Webster’s Third New Int’l Dictionary* 140 (unabridged ed 2002).

<sup>12</sup>*Webster’s Third New Int’l Dictionary* 1160 (unabridged ed 2002).

That textual understanding is consistent with the statutory context and legislative history. The statute expressly provides that the legislative “purpose of ORS 243.670 is to maintain the neutrality of public bodies in labor organizing by forbidding the use of public funds for unintended purposes and to conserve public resources by ensuring that public funds are used as intended.” ORS 243.668(2). HB 3342’s sponsors explained that the bill prohibits public employers from trying to influence employees’ decisions. *See* Transcript of Audio, House Committee on Business and Labor, HB 3342, March 27, 2013 at p. 2:21-24 (Rep. Michael Dembrow explaining that when “an employer *tries to disrupt* a union-organizing drive, this has a negative effect on the workplace, including decreased productivity and a hostile work environment.”) (emphasis added); *id.* at p. 5:22-25 (Rep. Jeff Barker referred to past events as an illustration of “why it’s bad for the employer, public employer, *to try to stop* union activity”) (emphasis added). Similarly, Rep. Dembrow’s floor letter described HB 3342 as “a simple solution” that would “*ensure that public employers are not weighing in*, using our public resources to promote their personal opinions at the expense of the services they should be providing.” Rep. Michael Dembrow floor letter, April 23, 2013 (emphasis added). “Weighing in” is a colloquial expression that means entering a debate or conversation as a participant, contributor, or mediator.<sup>13</sup> *See also* Transcript of Audio, Senate Committee on General Government, Consumer, and Small Business Protection, HB 3342, May 15, 2013 at p. 3:11-14 (Testimony of Rep. Dembrow: “This bill requires public employers to remain neutral in organizing campaigns just as they are required to remain neutral in elections and other political activities. It’s up to the employees to decide whether or not they want to form a union[.]”); *id.* at pp. 8:23-9:1 (Testimony of Tom Chamberlain, President of Oregon AFL-CIO: “Right now, public employers can spend money weighing in to support their opinion on whether or not workers should form a union when, frankly, that’s a worker’s decision.”).

Accordingly, we interpret ORS 243.670(1)(a) and ORS 243.672(1)(i) as prohibiting any act or instance of a public employer making an effort to affect or alter (including by indirect or intangible means) the decision of any or all of its employees regarding whether to support or oppose a labor organization that seeks to represent those employees. Applying that framework here, we find, as a factual matter (and as described in detail below) that OSU used its FAQ webpage to subtly influence the campus debate on whether its employees should support or oppose the Union and, in some instances, OSU actively participated in that debate. That is sufficient to conclude that OSU tried to influence the decision of its employees regarding whether those employees should support or oppose the Union. Consequently, OSU violated ORS 243.672(1)(i).

To begin, OSU repeatedly told employees that it would publish *actual* employee questions on its FAQ webpage and answer them, but ultimately, in multiple instances, it did not do that. Specifically, while the organizing drive was underway, OSU sent emails to employee distribution lists and informed employees that they could submit questions to OSU, and that OSU would answer those questions. For example, Provost Feser sent an email on March 22, 2018, to an employee distribution list, and informed employees that, despite the neutrality required by PECBA, OSU was permitted “to respond to questions they receive from employees during a union organizing drive” and that OSU created a webpage “to provide responses *to such questions.*” (Emphasis added.) The email informed employees that it had updated its website to include “additional questions we have received since the fall,” and invited employees to “submit additional

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<sup>13</sup>*See Webster’s Third New Int’l Dictionary* 2593 (unabridged ed 2002) (defining “weigh in” as “to enter as a participant, contributor, or mediator”).

questions.” Later, in a May 31, 2018, email, Feser informed employees that OSU was continuing “to update our Frequently Asked Questions website as new questions are submitted by faculty members.”<sup>14</sup> OSU’s emails conveyed the impression that it was doing nothing more than collecting employees’ questions and answering them—acting essentially as an aggregator of questions.

Despite those assurances, OSU edited some questions before publishing them, substituting its own voice for the voice of the employees, but without telling employees that it was doing so. For example, one employee submitted a question that contained preliminary comments supportive of the union, but OSU edited out those comments. The employee actually asked:

“Unionized peer institutions have higher wages (e.g., University of Oregon) and some higher benefits. OSU has failed to keep pace with either of these two essential things often used to retain valued employees. Will unionization make OSU a more attractive employer, and will unionization allow the bargaining unit to reduce the bloated size of the OSU administration?”

OSU omitted the union-supportive preliminary sentences, as well as the employee’s characterization of the OSU administration as “bloated.” The published question on the FAQ website reads only, “Will unionization make OSU a more attractive employer, and will unionization allow the bargaining unit to reduce the size of the OSU administration?”

At the same time, OSU did *not* edit out some extraneous comments that expressed opposition to unionization. For example, OSU posted the following question in its entirety:

“Where is our faculty senate in this effort? We should be discussing this topic at every senate meeting. OSU has great shared governance already and it will disappear if we unionize. Why is our senate not leading an opposition?”

In its published response, OSU stated:

“OSU encourages discussion over this and other relevant issues among colleagues \* \* \*. How unionization may impact OSU’s shared governance is not known at this time, *but it is important to discuss the quality of the current shared governance model and its many benefits.*” (Emphasis added.)

OSU’s response was not strictly factual, but also communicated an opinion that the existing model (without a faculty union) has many benefits (as opposed to downsides or limitations). The record establishes that the faculty were debating the relative merits of the existing shared governance system in the context of discussions about whether to unionize. OSU weighed into that debate, including by advising faculty to discuss “the benefits” of shared governance.

These editorial changes to employees’ questions went beyond editing to improve readability or to make minor grammatical or spelling corrections. Rather, in multiple instances,

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<sup>14</sup>Similarly, in an email to an opponent of the organizing drive, Dr. Keith Leavitt, Senior Vice Provost Capalbo told Leavitt that OSU’s FAQ website was not intended to influence the debate, “but to answer direct questions with direct, factual answers.”

OSU's edits changed the tone of the questions. Changes to employees' opinions are suggestive of an attempt to frame or influence the campus debate. Further, OSU's contribution of its own suggestions in its answers—such as by encouraging discussion about the benefits of shared governance—is also evidence that the FAQs were an attempt to influence employees' decisions about whether to support or oppose the Union.

In addition, OSU posted some questions on its FAQ webpage that were not questions actually received from employees. Specifically, OSU used the ostensibly factual FAQ webpage to publish questions in response to what OSU considered to be incorrect information in a local newspaper article entitled, "Getting Organized: OSU Faculty Members Take Steps to Form a Union." The article reported the following when discussing why the faculty at OSU were organizing:

"One issue that comes up frequently, [Union] organizers say, is the question of shared governance.

"While the Faculty Senate gets a say in matters such as academic regulations and curriculum, it has no decision-making powers when it comes to things such as university budgets, faculty assessment mandates and the structure of academic units."

When the reporter sought comment from OSU, it declined to comment, citing PECBA's neutrality requirement. OSU nonetheless included the following three questions on the FAQ website: (a) "If a union is elected as the exclusive representative of the faculty, will the union have decision-making authority over OSU's budget process?" (b) "If a union is elected as the exclusive representative of the faculty, is OSU required to negotiate with a union over faculty assessment mandates?" and (c) "If the union is elected as the exclusive representative of the faculty, will the union have decision-making authority over OSU's academic units?" OSU stipulated that it posted those three questions to respond to statements in the article that it believed were "incorrect." OSU answered each question with a "no," and in two of the responses, expressed its opinions on issues relevant to the faculty unionization effort. For example, in responding to its own question about the budget process, OSU opined, "OSU believes it already has a strong collaborative budgeting process that includes a diverse University Budget Committee and numerous University-wide budget forums and presentations." Further, OSU published these questions on its FAQ webpage without disclosing to employees that the questions were in fact vehicles for OSU to respond to press coverage. These editorial choices also weigh in favor of finding an attempt by OSU to influence the decisions of its employees.

Other FAQ responses similarly presented OSU's opinions and legal positions or conclusions. Such statements are not facts, notwithstanding OSU's statements to its employees that its intent was "only to provide factual information." For example, in response to a question about whether it is possible to "reverse" a decision to unionize, instead of merely stating "yes, it is possible to decertify a union," OSU opined that "it is a difficult process." For another example, OSU answered a question (submitted anonymously via the web form) as follows (in part):

“How is my ability to conduct research (e.g., field-based research that is time sensitive), participate in workshops/conferences, and meet deadlines set by funding agencies affected if the union decides to strike?”

“The answer depends on whether the employee participates in the strike by choosing not to work. If an employee chooses to participate in a strike and not come to work, they are not considered an employee for the time period during which they choose not to come to work.”

Although OSU edited other employees’ questions, it published this question as it was actually submitted, choosing not to correct the misstatement in the question by clarifying that it is *employees*, not labor organizations, who have the right to strike and who decide whether to strike. By not clarifying that misstatement, OSU published the question with phrasing that can be read as overstating the authority that a union holds over bargaining unit members. Additionally, in its answer, OSU incorrectly stated that an employee who strikes is “not considered an employee” during the strike; “[w]orkers on strike remain employees of the struck employer.” *Wy’East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06 at 10 n 5, 24 PECBR 786, 795 n 5 (2012) (*Order on Remand*). These editorial choices by OSU are evidence of OSU using indirect means to essentially weigh in on whether its employees should support or oppose the Union.

Finally, in some instances, OSU also inserted into the debate among faculty members its own advice to employees by answering some questions with information that exceeded the scope of the questions actually asked. For example, in response to a question about whether an employee could request the return of a signed authorization card after the petition was filed, OSU answered that there “is no formal process for revoking an authorization card.” Instead of providing only that factual response, OSU also included what amounts to advice to the employee:

“[T]he ERB may honor your request to disregard your authorization card as a part of its showing of interest check. Under Oregon law there is no formal process for revoking an authorization card. *However, the method most likely to achieve a revocation is through a written and dated communication (such as an email) to the union’s leadership and ERB at this address: [emprel.board@oregon.gov](mailto:emprel.board@oregon.gov).*” (Emphasis added.)

Similarly, in response to a question inquiring about how union organizers obtained faculty members’ private information, such as home addresses, OSU answered that it had provided the Union only employee “names, but no personal home address information.” OSU then supplemented that factual response with advice: “As an aside, it is common for union representatives to actively engage potential members by unsolicited phone calls and in-person home visits. *Whether you choose to engage the union representatives, however, is entirely your choice.*” (Emphasis added.) In another example, OSU included a similar advisory comment in response to the following question: “How do faculty who are not supportive of the unionization effort ‘vote’ against it? Is there no active way to oppose?” In its answer, OSU wrote, in part, “OSU encourages faculty who may be affected by unionization to actively engage their colleagues and to communicate their opinions freely and openly—whether that be individually or as a collective.

Similar to methods employed by the unionization effort, *opposition can be achieved through campus activism.*” (Emphasis added.) These answers, which go beyond the scope of the questions, presuppose that employees wanted (or needed) OSU’s view—even though that view was not actually requested by the questions. These editorial choices, like those described above, suggest that OSU was making an effort to participate in the debate about whether faculty should support or oppose the Union.

OSU asserts that it intended to remain neutral, citing its multiple public statements that it was not actively taking a position or role in the campus debate. OSU also contends that its neutral intent should be inferred because it published questions from both supporters and opponents of unionization. For example, it points out that it published both of the following questions:

“After listening to the faculty forum, I no longer support the union. Even though the petition for certification was filed, is it too late to request my card back?”

“A number of my colleagues watched the faculty forum and now support the Union. Is it too late for them to sign a card?”

It is accurate, as a factual matter, that OSU printed questions that can be interpreted as supportive of the Union, and others that can be interpreted as critical of the Union. However, OSU’s statements of neutrality and publication of union-supportive questions are inadequate, in light of the totality of OSU’s conduct, to persuade us that OSU was not, in fact, making an effort to influence the decisions of its employees. Rather, all of OSU’s conduct taken together, as described above, indicates at least an act or instance of OSU attempting to influence its employees’ decisions about whether to support or oppose the Union.

To the extent that OSU contends that the publication of its opinion statements in the FAQs falls within the exception set forth in ORS 243.670(3), we disagree. That subsection provides:

“If an employee requests the opinion of the employee’s employer or supervisor about union organizing, nothing in this section prohibits the employer or supervisor from responding to the request of the employee.”

OSU argues that this section expressly permits “the employer”—*i.e.*, not just individual management employees—to provide its opinion. OSU, however, did more than merely share its opinion when an employee asked for it. OSU wrote some of its own questions, including three questions that it drafted so that it could respond to employees’ statements about why they supported union representation, as reported in a newspaper article. OSU did not disclose on the FAQ website that OSU, not employees, had posed those questions. OSU also *solicited* questions from its employees, rather than allowing the employees to “request the opinion of the employee’s employer” and then “responding to the request of the employee,” as the ORS 243.670(3) exception allows. OSU also changed some of the questions that were submitted through the website, and then “answered” those changed questions publically, via its FAQ webpage, without revealing that the

questions had been altered. In some cases, OSU’s response went beyond the scope of the question asked. Such conduct is outside the scope of the protection afforded by ORS 243.670(3).<sup>15</sup>

Relying on legislative history, OSU also argues that ORS 243.670 should be construed as generally permitting public employers to provide factual answers to questions posed by employees. OSU is correct that the legislative history includes statements by the bill’s advocates that HB 3342 would not preclude employers from answering employees’ questions under certain circumstances. *See* Transcript of Audio, House Committee on Business and Labor, HB 3342, March 27, 2013 at p. 24:10-14 (Statement of Elana Guiney that “I also want to clarify, again, that this is not stating that management can’t answer questions. Where there are factual questions asked by workers of their managers, they’re absolutely allowed to answer those questions.”); Transcript of Audio, Senate Committee on General Government, Consumer, and Small Business Protection, HB 3342, May 15, 2013, at p. 9:17-20 (Statement of Tom Chamberlain that this “bill doesn’t stop a manager or worker from having a conversation off the clock if a worker is interested in that conversation.”). However, OSU does not identify any statutory text that supports its interpretation that the statute permits the actions that it took, and the only relevant express statutory exception is the one provided for in ORS 243.670(3), discussed above. In any event, as set forth above, OSU’s conduct was not limited to merely providing factual responses to questions asked by its employees. OSU did not merely answer employees’ questions: it created some of its own questions; it changed some of the questions that were submitted through the website; and in some cases, it published answers that went beyond the scope of the questions asked. Additionally, OSU’s responses were not merely factual, but included various opinion statements, predictions about the future, and legal positions. OSU also advised employees how to take certain actions, such as retracting a signed authorization card or using campus activism to oppose the organizing drive. *That* conduct goes beyond answering employees’ questions with factual answers, and OSU’s defense that it was merely answering the questions it received does not assist it here.<sup>16</sup>

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<sup>15</sup>The Union contends that publishing questions and answers on a website (particularly when questions could be submitted anonymously by any employee, regardless of supervisory status) is outside the scope of the exception provided by ORS 243.670(3). OSU counters that the “accordion format” of its website meant that employees asked questions “virtually” by clicking sequentially on the layered pages in order to “ask” a question. Because we conclude that OSU’s conduct went beyond answering employees questions, it is not necessary to determine whether publishing questions in such an “accordion format” is tantamount to an employee requesting an opinion from the employee’s employer or supervisor.

<sup>16</sup>OSU argues that the National Labor Relations Board’s decision in *Bridgestone/Firestone, Inc. and Automotive Chauffeurs, Parts and Garage Employees, Teamsters Local Union 926*, 335 NLRB 941 (2001), is instructive. There, the NLRB concluded that it was not an unfair labor practice for the employer to give an employee a decertification petition, even though the employee asked only if there was a way that he “could get out of being in the union.” *Id.* at 941. The Board concluded that the decertification petition “was untainted by the [employer’s] ministerial involvement” in its drafting. *Id.* at 942. OSU argues that its conduct was similar—according to it, it merely provided factual answers to specific questions about Board process. The National Labor Relations Act does not contain the equivalent of ORS 243.670, and, in any case, OSU’s conduct was not limited to providing factual answers about Board process, and it was not merely ministerial.

In sum, we conclude that the totality of OSU's conduct, which included soliciting questions from employees and changing some of those questions, answering some questions with non-factual information including advice, using the FAQ webpage to respond to a newspaper article, and publishing such questions and answers from March to July 2018 on its FAQ webpage, is sufficient to demonstrate that OSU attempted to influence faculty members' decisions regarding whether to support union representation by United Academics. Accordingly, OSU used public funds to support actions to "assist, promote or deter union organizing" in violation of ORS 243.670(2)(a), and thus ORS 243.672(1)(i).

### Remedy

We turn to the appropriate remedy. Having concluded that OSU violated ORS 243.672(1)(i), we order it to cease and desist from the unfair labor practice conduct. ORS 243.676(2)(b). We must also order affirmative action necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c). Here, this Board granted the certification petition on June 27, 2018, designating the Union as the exclusive representative. Under these circumstances, the effects of OSU's conduct are better remedied by the posting of a notice.

We generally order notice posting if we determine that a party's violation of PECBA (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was committed by a significant number of the respondent's personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82 at 12, 6 PECBR 5590, 5601, *aff'd without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). In this case, a notice posting is warranted because OSU'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 OSU and Union-represented employees. Accordingly, we will order OSU to post the notice and distribute it to bargaining unit employees by email.

The Union requested a civil penalty pursuant to ORS 243.676(4)(b). As amended by HB 3342, PECBA provides that when the Board finds that a public employer violated ORS 243.670(2), the Board "shall impose a civil penalty equal to triple the amount of funds the public employer expended to assist, promote or deter union organizing." ORS 243.676(4)(b). The statute requires us to impose a civil penalty for violations of 243.670(2) without regard to the civil penalty standard set forth in ORS 243.676(4)(a), which is applicable to all other unfair labor practices. Here, the parties stipulated that "OSU spent one dollar of public funds in preparing,



distributing, or posting the e-mails and FAQs at issue in this case.” In accordance with this stipulation, and as required by ORS 243.676(4)(b), we award the Union a civil penalty of \$3.00.<sup>17</sup>

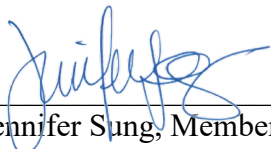
ORDER

1. OSU shall cease and desist from violating ORS 243.672(1)(i).
2. OSU shall post the attached notice for 30 days in prominent places where Union-represented employees are employed.
3. OSU shall distribute the attached notice by email to all Union-represented employees within 10 days of the date of this order.
4. OSU shall pay the Union a civil penalty of \$3.00 within 30 days of the date of this order.

DATED: May 4, 2020.

  
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Adam L. Rhynard, Chair

  
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Lisa M. Umscheid, Member

  
\_\_\_\_\_  
Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482

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<sup>17</sup>We also decline the Union’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(6). The Union did not address this request in its briefing, and we see no basis for finding that OSU’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 (Board) in Case No. UP-021-18, *United Academics of Oregon State University v. Oregon State University*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our employees that the Board found that Oregon State University committed an unfair labor practice in violation of ORS 243.672(1)(i), which prohibits a public employer or its designated representative from violating ORS 243.670. Specifically, ORS 243.670(2)(a) provides, in relevant part, that a public employer may not “[u]se public funds to support actions to assist, promote or deter union organizing[.]”

The Board concluded that the totality of OSU’s conduct, which included soliciting questions from employees and changing some of those questions, answering some questions with non-factual information including advice, using the FAQ webpage to respond to a newspaper article, and publishing such questions and answers from March to July 2018 on its FAQ webpage, was sufficient to demonstrate that OSU attempted to influence faculty members’ decisions regarding whether to support union representation by United Academics. Accordingly, OSU used public funds to support actions to “assist, promote or deter union organizing” in violation of ORS 243.670(2)(a), and thus ORS 243.672(1)(i).

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

1. Cease and desist from violating ORS 243.672(1)(i).
2. Post this notice for 30 days in prominent places where Union-represented employees are employed.
3. Distribute this notice by email to all Union-represented employees within 10 days of the date of the Board’s order.
4. Pay the Union a civil penalty of \$3.00 within 30 days of the date of the Board’s order.

EMPLOYER

Dated \_\_\_\_\_, 2020

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 employed. This notice must not be altered, defaced, or covered by any other materials. This notice must also be electronically distributed (such as by email) to all bargaining unit personnel. 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.*