

STATE OF OREGON, EMPLOYMENT RELATIONS BOARD

UNFAIR LABOR PRACTICE COMPLAINT

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528 Cottage St. NE, Suite 400
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Fax (503-373-0021)*
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Case No. UP-0218

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RELATIONS BOARD

COMPLAINANT

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Complainant alleges that Respondent has committed an unfair labor practice under ORS 243.672(1) (a) and (1)(i) of the Public Employee Collective Bargaining Act. The following is a clear and concise statement of the facts involved in each alleged violation, followed by a specific reference to the section and subsection of the law allegedly violated. (For each claim, provide specific dates, names, places, and actions. Attach copies of main supporting documents referred to in the statement of claims.)

The Parties and Relevant Individuals

1. The United Academics of Oregon State University, AAUP/AFT, AFL-CIO ("the Union") is a labor organization as defined in ORS 243.650(13). On June 27, 2018, the Union was certified as the exclusive representative for a large group of faculty members employed at Oregon State University. Ex. 1.
2. Oregon State University is a public employer as defined in ORS 243.650(20).
3. The following individuals are supervisory or confidential employees employed by Oregon State University and were involved in the situation that gave rise to this unfair labor practice complaint:

Ed Feser, Provost and Executive Vice President.
Susan Capalbo, Senior Vice Provost for Faculty Affairs.
Donna Chastain, Interim Chief Human Resources Officer.
Sara Daly, Executive Assistant to Ed Feser.
Michelle Klotz, Faculty Affairs Associate.¹
Rebecca Gose, OSU General Counsel
Kegan Sims, Digital Communications Manager

4. Brian Caufield is the Director of Labor Relations for the University Shared Services Enterprise (“USSE”). Mr. Caufield has advised Oregon State University on labor relations issues throughout the events at issue in this complaint. Mr. Caufield, the individuals described above, and other involved Oregon State University supervisors that may have been involved in the conduct described below will be collectively referred to below as “the Administration.”

Organizing

5. For the past few years, faculty members at Oregon State University have been working together towards a common goal—to improve Oregon State University by forming a union to allow faculty members to collectively bargain with the employer and provide faculty a stronger voice in dealing with the Administration. Faculty members began working with the Union to reach out to other faculty members across the state to discuss whether Oregon State University faculty wished to be represented by the Union. The result was a comprehensive organizing drive that spanned many months and involved extensive outreach to faculty members.

6. As the organizing drive gathered more and more support from faculty, the Administration began to distribute information to faculty members via its email system and through its website. One of the initial emails sent by the Administration was in July 2017, when Susan Capalbo used faculty list serves to distribute the following statement:

“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. This webpage can be found [HERE](#).

“As always, we welcome any questions or concerns that members of the school community may have related to these issues either through the interactive webpage or through the University’s supervisory staff.” Ex. 2. (Email with highlighting of link to webpage in original)

7. The initial information distributed by the Administration, while not necessarily accurate, primarily focused on procedural and legal issues and did not clearly violate ORS 243.670 by openly trying to deter employees from organizing. However, the Administration continued to create, publish, and

¹ Complainant believes this to be the appropriate spelling for Mrs. Klotz, but in Ex. 12, her name was spelled Klots.
Updated February 2017

distribute additional materials in 2018, as the organizing drive continued to gather widespread support on campus.

8. On March 22, 2018, the Administration distributed another email to faculty soliciting questions and providing faculty with links to its website where they could find “updated FAQs” relating to the organizing drive. Specifically, Ed Feser sent the following email to faculty:

“As you may be aware—and as we informed you last summer—some Oregon State University faculty are working to organize a collective bargaining unit at OSU.

“We continue to receive inquiries about this 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. You may find this information on the Provost’s web page in the section entitled ‘From the Provost,’ and on the Office of Human Resources web page under the section entitled ‘Faculty Union FAQs.’

“To submit additional questions, please e-mail Susan Capalbo, senior vice provost for faculty affairs, at Susan.Capalbo@oregonstate.edu or Donna Chastain, interim chief human resources officer, at Donna.Chastain@oregonstate.edu.” Ex. 3.

9. This updated “FAQ” that faculty were directed to took on a decidedly different tone than the initial publications distributed by the Administration. See Ex. 4. This pattern continued in the subsequent months when the Administration repeatedly distributed updated “FAQs.” The FAQs were updated on the following dates: March 30, 2018; April 11, 2018 (See Ex. 5); May 23, 2018 (Exs. 6 and 7); May 31, 2018 (Ex. 8); June 6, 2018 (Exs. 9 and 10); and June 13, 2018 (Ex. 11).

10. The FAQs distributed by the Administration in these emails and posted on its website contained a number of “questions” and “answers” that were intended to discourage employees from exercising their rights to form or join a union of their choosing. Some of these responses included answers meant to convince employees that joining or forming the Union would provide no benefit to them or that the cost would be substantial to employees and the employer if they exercised their right to form a union. Some examples of this particular type of “FAQ” response include the following:

“Q. Is there any published evidence that a Faculty Union at OSU would increase state support or state funding for the University?

“A. No.

“Q. Would unionization affect the operating and administrative costs of the University?

“A. It is likely that unionization would affect the operating and administrative costs of the University. For instance, at Portland State University there is a full-time labor relations professional dedicated to academic labor relations, and at Rutgers University there is an office of eight labor relations professionals dedicated to academic labor relations. Should a union become the exclusive bargaining representative of the faculty, or a portion of the faculty, OSU may look to follow suit and employ one or more labor relations professionals in the academic setting.

“Q. Is there any evidence that unionization improves the quality of a Research I institution?

“A. To our knowledge, no, there is no independent evidence that unionization improves the quality of a Research I institution.” Ex. 10.

11. Even more troubling was the Administration’s creation and distribution of several “FAQs” that provided guidance to faculty members who opposed the Union’s organizing drive on how they could most effectively oppose the unionization drive. A few of the most obvious and clear examples include the following:

“Q. After listening to the Faculty Forum, I no longer support the union. Even though the petition for certification of UAOSU has been filed, is it too late to request my card back?

“A. It may be possible. OSU now have 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

“This said, ERB does permit employees to request an election as opposed to a card check. Oregon law provides that, within fourteen (14) days of posting of a Notice relating the petition, an employee or group of employees may request an election by sending a petition to ERB that is supported by at least 30% of the employees in the bargaining unit designated by the petition. (OSU has not yet been given the Notices or deadline to post the Notices, but that will start the timeline for the election request. We will update this site as to the dates when we know them.)

“Q. 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?

“A. 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.

“Q. How do faculty who are not supportive of the unionization effort “vote” against it? Is there no active way to oppose?

“A. Faculty who do not support the union may eventually gain the opportunity to vote in opposition to the union if the matter is put to a vote. However, as described above, a union may be certified by the Employment Relations Board without conducting an election

if the union presents signed Authorization Cards from a majority of the proposed bargaining unit. 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.

“Q. 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?

“A. The officers of the faculty senate (and the senate as a body itself) are considered an extension of OSU and, therefore, are expected to remain neutral in their faculty senate capacity. Individual senators, however, acting pursuant to the rules of the Senate may bring forward discussion forums. In fact, Senators did just that and a faculty senate forum regarding the unionization efforts is set to occur Tuesday, June 5 from 4:00pm to 6:00pm in room 228 of the Learning Innovation Center.” *Id.*

12. Unsurprisingly, around the same time that these FAQs were distributed, a few faculty members followed the advice given by the Administration and began pushing for an election in lieu of card check, while some also requested to rescind their previously signed cards. Tellingly, the faculty opposing the organizing drive parroted many of the same “answers” given by the Administration in its FAQs to support their efforts.

13. In addition to trying to discourage employees from joining or forming a union of their choosing as described above, the Administration’s “FAQs” also contained at least two unlawful threats towards employees should they choose to form a union and participate in protected activities. Specifically, two of the FAQ responses included threats about what the Administration might do to faculty who first chose to form and join the Union, and then chose to participate in a strike if one was ever called. Specifically, the Administration created and distributed the following threatening statements through its FAQs:

“Q. 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?

“A. 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 conferences 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.

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

“A. 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 participation 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.” Ex. 10.

14. The first threatening response is remarkably similar to a statement that the Employment Relations Board found to be unlawful in *Portland State University Chapter, American Association of University Professors v. Portland State University*, Case No. UP-013-14, 26 PECBR 438 (2015).

15. On June 16, 2018, legal counsel for the Union contacted Mr. Caufield with concerns about the legality of the Administration’s “FAQs” and requesting more information about the process and source of the questions. On June 18, 2018, Mr. Caufield responded by email. Mr. Caufield requested some additional clarification about the Union’s concerns but also disclosed how the Administration received questions for the FAQs, stating:

“Just so you are aware, OSU received three types of questions: 1) orally; 2) anonymously through the FAQ website email; and, 3) directly from faculty members’ emails. Regarding those submitted orally, there may be no record. Regarding the latter two, again, this could take some searching.”

16. Subsequently, Mr. Caufield provided additional information to the Union, including who worked on the FAQs and a list of the dates and manner in which some of the questions were received. This response included the following explanations:

“1. Anonymous questions from the website were sent to the faculty affairs email inbox monitored by Sara Daly, executive assistant to the senior vice provost for faculty affairs. Additionally, the following individuals may have received questions: Ed Feser, provost and executive vice president; Susan Capalbo, senior vice provost for faculty affairs; and, Donna Chastain, interim chief human resources officer.

“2. Questions received from the website (or directly) were forwarded to Rebecca Gose, general counsel, and me, as outside labor counsel. I drafted a response to the question and sent it to Mss. Gose and Daly, and Michelle Klots, faculty affairs associate, for review and/or additional information. In submitting my response, if a question had already been asked and answered, I would recommend that it either be posted or not. My

recommendation to post was based on the number of like questions received or whether the question posed was answered some time before, such that the question and answer may have been difficult to find. Once approved, I sent questions to Kegan Sims, digital communications manager, for posting to the Faculty Union FAQ website. We reviewed questions as they were posed.

“3. Regarding oral questions, these were discussed in meetings, but to our knowledge no record was kept.” Ex. 12 (Includes full email chain).

17. Based on the information provided by Mr. Caufield, 37 of the 58 “questions” received by the Administration were from anonymous online submissions. Four were received by “other” means, presumably oral questions. Consequently, it appears that it would be impossible for the Administration to determine whether the vast majority of the “questions” it received and responded to were actually from employees in the potential bargaining unit or if they were from supervisors or even outside parties. Ex. 13 (Spreadsheet attached to email in Ex. 12).

18. Mr. Caufield, Ms. Gose, Ms. Daly Mr. Feser, Ms. Capalbo, Ms. Chastain, Mrs. Klotz, and Mr. Sims are employees of Oregon State University or USSE. Each entity is financed in whole or in part by public funds, and the salary for each of these individuals is likewise paid in whole or in part through public funds. Thus, public funds were used to pay for some or all of the time spent for these Administration employees to solicit questions and responses to the emails and web postings described above, as well as the time spent collecting, answering, and distributing the emails and FAQs. Further, the computers, email system, website, and all related software and hardware used to solicit, create, and distribute the “FAQs” was paid for in whole or in part through public funds.

Count 1:

The Administration’s Creation and Distribution of its FAQs Violated ORS 243.672(1)(i) Because it Required the Use of Public Funds to Oppose the Union’s Organizing Efforts.

19. The creation and distribution of the FAQs described above was an attempt by Oregon State University—a public employer—to influence the decision of its employees on whether they would be represented by the Union. The creation and distribution of the FAQs described above required the use of public funds to pay for the involved employees’ salary and benefits. Further, public funds paid for the software and hardware used to solicit, create, and distribute the FAQs.

20. As a result of the Administration’s actions, Oregon State University has violated ORS 243.670(2), and therefore committed an unfair labor practice under ORS 243.672(1)(i).

Count 2:

The Administration’s FAQs Violated ORS 243.672(1)(a) by interfering with, restraining, or coercing employees in the exercise of PECBA-protected rights.

21. By engaging in the conduct described above, the Administration has interfered with, restrained, or coerced employees in the exercise of protected activities. Most importantly, by including the questions and answers described in paragraph 13 above, the Administration published and distributed threats of adverse action against employees should they choose to form a union and subsequently choose to go on strike. Employees engage in protected activity when they choose whether to form a union and also engage in protected activity when and if they choose to go on strike. As a result, Oregon State University violated ORS 243.672(1)(a).

Civil Penalty

22. Under ORS 243.676(4)(b), the Board is required to order a civil penalty in an amount three times the amount of the public funds used by the public employer to promote, assist, or deter an organizing drive. Here, given the salaries of the high-ranking Administration officials involved in the violations described above, it is clear that substantial public funds were used to oppose the Union's organizing drive. Without extensive testimony and evidence, the exact amount of public funds used to pay for the Administration's efforts to oppose the efforts of faculty to form or join a union is difficult to pinpoint. However, because the Union is not interested in a decision that costs Oregon State University money that should be spent on educating students, the Union is only seeking an order finding that at least \$1.00 was spent to oppose the Union's organizing drive. As a result, the Union is only seeking a civil penalty of \$3.00.

23. The Union also believes that the actions described above are egregious and would justify a civil penalty even absent the provision of ORS 243.676(4)(b). The Union requests the same \$3.00 civil penalty under ORS 243.676(4)(a).

Posting of Notice

24. The Administration's actions were calculated and flagrant, continued over the course of several months, and involved a significant number of prominent and high-ranking personnel within the Administration. Further, the FAQs were distributed to the entire potential bargaining unit and were intended to deter employees from selecting the Union as their designated bargaining representative. The threats detailed above also related to what adverse actions the employer might take if employees ever went on strike. These actions occurred during a critical point in the organizing drive and could have significantly impacted the ability of employees to freely choose whether to be represented by the Union. For these reasons, the Board should require the employer to post a notice of the violations. Because Oregon State University maintains an email system that all bargaining unit members have access to, the employer should be required to distribute the posting of notice electronically as well as placing copies of the notice in work areas throughout its facilities where employees are likely to see them.

WHEREFORE, the Union requests an order:

- A. Finding that Oregon State University violated ORS 243.672(1)(a) and (1)(i);
- B. Requiring Oregon State University to cease and desist from committing the unfair labor practices described above and to remove the FAQs and any related postings from its website;
- C. Requiring Oregon State University to distribute notices of the violation by email to all faculty members through its email system and to post hard copies of the notice in workplaces throughout its facilities where bargaining unit employees are likely to see them;
- D. Requiring Oregon State University to pay a civil penalty of \$3.00 under ORS 243.676(4)(b) and because the violation was egregious and flagrant;
- E. Requiring Oregon State University to reimburse the Union's filing fee under OAR 115-035-0075(3);
- F. Awarding the Union its full representation costs and attorney fees under ORS 243.676(2)(d) and OAR 115-035-0055 because the case involves a civil penalty; and

G. Awarding any other relief deemed just and equitable by the Board.

I certify that the statements in this complaint are true to the best of my knowledge and information.

By: /s/ Jason M. Weyand
Signature of Complainant or Complainant's Representative

Attorney
Title

August 13, 2018
Date