

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-023-20

(UNFAIR LABOR PRACTICE)

OREGON TECH AMERICAN ASSOCIATION)
 OF UNIVERSITY PROFESSORS,)
)
 Complainant,)
)
 v.)
)
 OREGON INSTITUTE OF TECHNOLOGY,)
)
 Respondent.)
 _____)

RULINGS,
 FINDINGS OF FACT,
 CONCLUSIONS OF LAW,
 AND ORDER

Elizabeth A. Joffe, Attorney at Law, McKanna Bishop Joffe, LLP, Portland, Oregon, represented the Complainant.

Jeffrey Chicoine and Taylor Richman, Attorneys at Law, Miller, Nash, Graham & Dunn, LLP, Portland, Oregon, represented the Respondent.

On August 10, 2020, Oregon Tech American Association of University Professors (Association) filed an unfair labor practice complaint against Oregon Institute of Technology (Oregon Tech). The complaint alleges that Oregon Tech violated ORS 243.672(1)(e) by making unilateral changes concerning faculty workload and compensation. The Association requested that this Board expedite the complaint under OAR 115-035-0060. Oregon Tech opposed that request. On August 20, 2020, the Board issued a letter ruling expediting the case.

On August 24, 2020, we issued a prehearing order, which set forth the parties' agreed on schedule. We also issued a notice of hearing for September 9 and 10, 2020. Oregon Tech filed a timely answer to the complaint on August 28, 2020. The parties filed prehearing briefs on September 4, 2020. On September 9, 2020, the first date of the scheduled hearing, Oregon Tech filed a motion for leave to amend its answer to reflect the fact that it rescinded the 2020-2021 Faculty Workload Guidelines, one of the alleged changes at issue. At hearing, the Association indicated that it did not oppose the motion for leave to amend the answer; it opposed only Oregon Tech's arguments regarding the effect of the rescission on the Association's claim. Based on the

parties' representations at hearing, we granted Oregon Tech leave to file the amended answer, and it did so on September 11, 2020.

This Board conducted a hearing on September 9, 10, and 21, 2020, by video conference. The parties made oral closing arguments on September 21, at which point the record closed.

As stated by the Board at hearing, the issues presented in this case are: Did Respondent violate ORS 243.672(1)(e) by unilaterally changing the status quo with respect to (1) faculty workload and compensation and (2) program director release time and stipends?

For the following reasons, we conclude that Oregon Tech violated ORS 243.672(1)(e) when it unilaterally changed the 2018-2019 Faculty Workload Guidelines and when it unilaterally eliminated program director stipends and release time under the Academic Release Time and Stipend Model.

RULINGS

The Board reserved ruling on Oregon Tech's objections to the admission of the Association's exhibits C-35 (a document regarding cross-listing requests) and C-38 (an email dated August 7, 2020, from Debbie McCollam, a department chair) on the ground of relevance. We overrule the objections and admit both exhibits.

Oregon Tech also made a standing objection to all evidence (exhibits and testimony) regarding the Faculty Workload Guidelines, arguing that, because it rescinded the 2020-2021 Guidelines, the Association failed to state a claim and the claim should be dismissed.¹ When determining whether a party has stated a claim before conducting an evidentiary hearing, we assume all of the well-pleaded facts in the complaint are true, and under that standard, the Association's complaint stated a cognizable claim. Further, as we explain in our conclusions of law, the fact that Oregon Tech rescinded the 2020-2021 Guidelines does not necessarily mean that no unfair labor practice occurred. Accordingly, we decline to dismiss this claim, and we adhere to our ruling admitting all of the related evidence.

Neither party pursued any other objections to the Board's rulings.

FINDINGS OF FACT

The Parties

1. The Association is a labor organization within the meaning of ORS 243.650(13). On June 27, 2018, this Board certified the Association as the exclusive representative of the following bargaining unit:

“All full time faculty, instructors, and librarians working at .5 FTE or above at the Oregon Institute of Technology, but excluding employees in the following groups:

¹Although Oregon Tech did not make a motion to dismiss, we address this argument because Oregon Tech raised it in support of its evidentiary objection.

(1) faculty employed as a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position; (2) faculty employed in an administrative position without a reasonable expectation of teaching, research or other scholarly accomplishments; (3) classified staff; (4) confidential employees; and (5) faculty chairs.”

2. Oregon Tech is a public employer within the meaning of ORS 243.650(20). Oregon Tech is one of Oregon’s public universities.

3. Since July 1, 2015, Oregon Tech has been an independent public body governed by its Board of Trustees, who are appointed by the Governor and approved by the Senate. The Trustees approve Oregon Tech’s mission, programs, budgets, and strategies. Oregon Tech receives approximately 45% of its general fund from the State of Oregon, with the remainder (approximately 50%) generated from tuition.

4. Oregon Tech has four primary campuses: Oregon Tech Klamath Falls Campus; Oregon Tech Wilsonville Campus; Oregon Tech Online Campus; and the Oregon Tech Extension in Salem, Seattle, and La Grande.

5. Oregon Tech is divided into two colleges: the College of Health, Arts and Sciences (HAS), and the College of Engineering, Technology and Management (ETM). The colleges are university-wide and extend to all campuses and operations. Oregon Tech offers both undergraduate and graduate degree programs.

6. Oregon Tech is further divided into 15 academic departments, all of which operate within one of the two colleges. Each year, approximately 15 faculty members serve as department chairs; when they do so, they are represented by the Association in a separate bargaining unit.

7. The president of Oregon Tech is the executive and governing officer of the university, the president of the faculty, and, under the Board of Trustees’ supervision, has the authority to direct the affairs of Oregon Tech. The current president of Oregon Tech is Dr. Nagi Naganathan.

8. The provost is the chief academic officer of Oregon Tech. The provost supervises academic programs in the two colleges (HAS and ETM) in collaboration with the dean of each college and the Faculty Senate. The current provost is Dr. Joanna Mott, who holds the title of Provost and Vice President for Academic Affairs and Strategic Enrollment Management.

9. The vice provost is Dr. Abdeh Afjeh. The dean of the College of Health, Arts and Sciences is Dr. Dan Peterson. The dean of the College of Engineering, Technology and Management is Dr. Tom Keyser.

10. Oregon Tech employs approximately 300 faculty members, including administrators. The Association bargaining unit includes approximately 170 faculty members, who may be tenured, tenure track, or non-tenure track. Tenure track and tenured faculty are also referred to collectively as “professorial faculty.” Tenure track faculty typically start at the rank of assistant

professor, and they are eligible for promotion to associate professor, and then professor. Associate professors and professors are tenured. Non-tenure track faculty are also referred to as “professional faculty,” and generally hold the rank of instructor. Oregon Tech also employs adjunct faculty, who are unrepresented.

11. According to Oregon Tech’s faculty evaluation policy (OIT 21-040), it evaluates faculty on an annual basis. Oregon Tech considers faculty members’ evaluations when making decisions on reappointment, promotion, and tenure. It evaluates a faculty member’s work performance in three areas: (1) instruction, (2) professional development, and (3) institutional and professionally-related public service.

12. Under the category of instruction, the faculty evaluation policy notes that “the primary focus at Oregon Institute of Technology is teaching,” and that faculty are expected to “excel in instruction.” The policy indicates that, to excel in instruction, a faculty member must demonstrate knowledge of the subject matter; develop and revise curriculum to meet departmental and course objectives; organize and deliver course materials to stimulate interest and discussion; demonstrate growth in instruction; employ a variety of assessment tools for evaluation of both teaching effectiveness and student learning; and maintain student numerical evaluations at a departmentally established standard.

13. Under the category of professional development, the faculty evaluation policy provides, “Faculty will advance knowledge in education and/or areas consistent with institutional, departmental, and personal goals and objectives.” Examples of professional development include research and publishing, participation in academic conferences, participation in related professional organizations, professionally relevant employment or consulting, earning a higher degree, and continuing education.

14. Under the category of institutional service, the faculty evaluation policy provides, “Faculty will contribute to the advancement of the institution consistent with institutional, departmental, and personal goals and objectives.” Examples of institutional service include serving on institutional, departmental, and/or faculty senate committees, participating in student advising or activities, serving as a department coordinator (assessment, advising, curriculum, program, scheduling, etc.), contributing to student recruitment and retention, and serving as a department chair.

15. Most of the faculty in the bargaining unit represented by the Association are nine-month employees. Each faculty member receives an annual notice of appointment, running from mid-September to the following June (*e.g.*, approximately the academic year). The 2020-2021 notices of appointment were issued on July 1, 2020. The appointment period is September 16, 2020 to June 15, 2021. The notice of appointment states the faculty member’s annual base salary rate and the percentage of FTE that the salary rate is based on.

16. Oregon Tech has a Faculty Senate that is responsible for considering proposed changes in university policies, recommending policy changes to the president and the President’s Council, considering issues affecting the general welfare of the faculty, and establishing policies

regarding academic freedom. Senate elections are conducted annually. All full-time faculty members with the academic rank of instructor or above are eligible to be elected.

17. Dr. Mark Clark is a professor in the Humanities and Social Sciences Department. He served as the Association's first president from December 2018 to June 2020.

18. Dr. Sean St. Clair is a professor in the Civil Engineering Department. He succeeded Clark as the Association president. His term started at the end of June 2020, and he was president at the time of hearing.

First Contract Bargaining

19. Dr. Cristina Negoita is a professor in the Applied Mathematics Department. She is an Association vice president and its chief negotiator in first contract bargaining.

20. Brian Caufield is the Director of Labor Relations Services for University Shared Services Enterprise and the chief negotiator for Oregon Tech.

21. On July 12, 2019, the Association sent its first request for bargaining dates to Oregon Tech. The Association suggested that the parties meet to bargain on August 7 or 14, 2019.

22. Oregon Tech declined the initial dates proposed by the Association. The parties discussed ground rules from October 17, 2019 to November 20, 2019. The parties agreed to exchange first proposals on December 5, 2019, to begin the bargaining clock on December 5, 2019, and to extend the bargaining period to 300 days.

23. The parties have met for bargaining on the following dates: December 6, 2019, January 16, 17, 30, 31, February 27, 28, March 12, 13, April 6, 13, 20, 27, May 11, 18, June 1, 8, 23, 24, July 14, 15, 28, 29, and August 11 and 12, 2020. The parties scheduled additional bargaining dates for September 2020.

24. On June 1, 2020, the Association provided Oregon Tech a written proposal on workload and overload compensation. The Association also made a PowerPoint presentation regarding faculty workload, to provide context for its proposal. Oregon Tech requested, and the Association provided, a copy of the presentation and its supporting data.

25. On July 29, 2020, Oregon Tech provided the Association a written proposal on workload and overload.

26. At the time of hearing, the parties were still engaged in first contract bargaining.

The Faculty Workload Guidelines

27. Oregon Tech requires faculty members to perform both instructional work and non-instructional work. Instructional work is, primarily, teaching a course. Non-instructional work includes professional development and service.

28. Since at least 2009, Oregon Tech has issued a document titled, “Faculty Workload Guidelines” (Guidelines).

29. From 2009 to 2018, the provost’s office typically issued a revised version of the Guidelines each academic year. When the provost’s office issued new Guidelines for a given academic year, it typically did so in the preceding spring term (before the preceding June), so that faculty members’ fall schedules could be set in accord with the applicable Guidelines. Thus, for example, the 2018-2019 Workload Guidelines were issued in or about the spring term of 2018.

30. The provost’s office drafted 2019-2020 Guidelines, but it did not issue them. Thus, the 2018-2019 Guidelines remained in effect for the 2019-2020 academic year.

31. The first section of the 2018-2019 Guidelines is titled, “Instructional Workload Definitions.” It defines what constitutes a “full instructional load,” which Oregon Tech refers to as the “instructional load standard,” for faculty on tenure track (a.k.a. “professorial”) and non-tenure track (a.k.a. “professional”) appointments.

- For a full-time tenure track faculty member, the instructional load standard is defined as 12 workload units (WLU) per term, which equals 36 workload units per academic year.²
- For a non-tenure track faculty member, the instructional load standard is defined as 14 workload units per term, which equals 42 workload units per academic year.

32. The 2018-2019 Guidelines note that non-tenure track faculty are “also expected to carry the equivalent of 3 WLU for non-teaching duties per academic year as assigned by the Chair to meet their 1.0 FTE.” This means that Oregon Tech expects non-tenure track faculty to carry a combined total of 45 workload units per academic year (42 instructional workload units, plus three non-instructional workload units).

33. The 2018-2019 Guidelines do not expressly indicate how many non-instructional workload units tenure track faculty are expected to carry. However, other evidence in the record indicates that Oregon Tech also expects tenure track faculty to carry a combined total of 45 workload units per academic year to meet their 1.0 FTE (36 instructional workload units, plus nine non-instructional workload units).

34. The Faculty Workload Guidelines also include rules and formulas for calculating how many instructional workload units are credited for teaching various types of courses. For example, one “contact hour” is defined as “50 minutes of scheduled instruction.” One “lecture contact hour” equals one workload unit. Depending on the department, three “lab contact hours” equal either one or two workload units.

²The Guidelines use the terms “workload hour” and “workload unit,” and the abbreviation “WLU,” interchangeably. For ease of reference, we use the term workload unit.

35. Oregon Tech applies the Faculty Workload Guidelines to determine how many instructional workload units should be credited to a faculty member for the courses they teach. Oregon Tech also applies the Faculty Workload Guidelines to determine whether a faculty member has met the applicable instructional workload standard.³

36. Oregon Tech pays faculty additional compensation, referred to as “overload pay,” if they exceed the applicable instructional workload standard for the academic year. As stated in the 2018-2019 Guidelines, under the section titled “Overloads,” “[o]verload pay is triggered when faculty surpass their specified workload threshold.” Thus, for example, when a full-time, tenure track faculty member is credited with 40 instructional workload units in an academic year, Oregon Tech pays them overload compensation for the four workload units that exceed the 36-workload unit standard. Overload is compensated on “a per workload unit basis at each location’s specified rate.” Overload is “calculated at the end of spring term to be paid on June 30th.”

37. Oregon Tech applies the Faculty Workload Guidelines to determine whether a faculty member’s total instructional workload units for a given academic year exceeds the instructional workload standard, and to determine how much overload compensation to pay them.

38. Department chairs have the authority to assign bargaining unit faculty members instructional work (courses) and non-instructional work (such as program director duties). In at least some departments, the chairs and faculty discuss and reach consensus regarding course and non-instructional assignments.

39. Faculty members’ assignments for the fall term of the 2020-2021 academic year were determined in the spring of 2020. In some departments, the assignments for the winter and spring terms were also determined at that time. Faculty members’ assignments for the 2020-2021 academic year were based on the 2018-2019 Guidelines.

40. In past years, the changes that Oregon Tech made to the Guidelines generally were limited in number and substance. In some years, Oregon Tech increased the overload pay rate. For example, in the 2016-2017 Guidelines, Oregon Tech increased the rate from \$600 per workload unit above the 36-workload unit threshold to \$625 per workload unit.

41. In June 2020, Oregon Tech administrators circulated a new version of the Guidelines, titled “Faculty Workload Guidelines 2020-2021,” to department chairs and requested their feedback.

42. The 2020-2021 Guidelines differ from the 2018-2019 Guidelines in a number of respects. The substantive changes at issue are described below.

³The record indicates that, occasionally, deviations from the Guidelines have occurred (or exceptions have been permitted), but such deviations do not undermine the finding that, as a general matter, Oregon Tech administrators and faculty use the Guidelines to measure and quantify faculty workload.

Externships

43. In some programs, faculty teach externship courses, through which they supervise students who are completing externships with outside employers for academic credit.

44. For example, the Medical Imaging Technology Department (MIT Department) offers bachelor degrees in five professional programs: Radiologic Science, Vascular Technology, Nuclear Medicine and Imaging Technology, Echocardiography, and Diagnostic Medical Sonography. To graduate from one of those programs, a student must complete a year-long clinical externship that meets accreditation standards. Approximately 45-50 students are enrolled in the Radiologic Science program's externship course each year. All four of the other programs typically have 18-23 students enrolled in their respective externship courses each year.

45. The faculty member who teaches the externship course is responsible for regularly communicating with and mentoring the students; coordinating with clinical instructors to ensure each student is receiving the necessary experience and training; evaluating each student's progress; addressing incidents or unprofessional conduct; writing, administering, and grading exams; testing competencies; addressing accreditation issues; and completing required documentation.

46. Under the 2018-2019 Guidelines, Oregon Tech calculated the instructional workload units for teaching an externship course based on student enrollment, according to the following formulas:

- Fewer than 18 students enrolled: 6-12 workload units per term.
- 18-22 students enrolled: 12 workload units per term.
- 22-48 students enrolled: 12-24 workload units per term.

47. In the 2020-2021 Guidelines, Oregon Tech changed the workload unit formulas for externship courses so that the number of workload units is based on a combination of student enrollment and course credit hours. As stated in the 2020-2021 Guidelines posted on the provost's website, the new formulas are:

- Fewer than 3 students enrolled per year, WLU "= 0 WLU"
- 3-5 students enrolled per year, "WLU = $1/3$ x Number of course credit hours"
- 6-9 students enrolled per year, "WLU = $2/3$ x Number of course credit hours"
- More than nine students enrolled per year, WLU "= 3 WLU"

48. Richard Hoylman is a professor of Nuclear Medicine and Medical Imaging in the MIT Department. He has served as the externship coordinator, *i.e.*, taught the externship course,

for Nuclear Medicine since the spring term of the 2001-2002 academic year. Since then, including under the 2018-2019 Guidelines, he has received a total of 36 workload units per year for teaching the externship course (unless he split the responsibilities with another faculty member, in which case, each received 18 workload units per year). Hoylman testified that he and the other faculty in his department understood that, under the 2020-2021 Guidelines, they would receive only a total of three workload units per year for teaching their department's externship courses, because all of those courses have more than nine students enrolled per year.⁴

Graduate Courses

49. Under the 2018-2019 Guidelines, Oregon Tech calculated the instructional workload units for teaching a graduate course based on the following formulas:

- 1-5 students enrolled: workload units equal “ $\frac{2}{3}$ x number of credits” (e.g., “3 credit course = 2 WLU”).
- 6-11 students enrolled: workload units equal “1 x number of credits” (e.g., “3 credit course = 3 WLU”).
- 12 or more students enrolled: workload units equal “ $\frac{4}{3}$ x number of credits” (e.g., “3 credit course = 4 WLU”).

50. In the 2020-2021 Guidelines, Oregon Tech eliminated the third tier, which increased the number of workload units credited for teaching a graduate course with 12 or more students enrolled. Under the 2020-2021 Guidelines, the workload unit formulas for graduate courses are:

- 1-5 students enrolled: workload units equal “ $\frac{2}{3}$ x number of credits” (e.g., “3 credit course = 2 WLU”).
- 6 or more students enrolled: workload units equal “1 x number of credits” (e.g., “3 credit course = 3 WLU”).

⁴Because the 2020-2021 Guidelines state that an externship with more than nine students equals three workload units (“>9 students per year = 3 WLU”), faculty in the MIT Department, including the chair, understood that they would receive only three workload units per year for teaching their programs' externship courses in the 2020-2021 academic year. However, at hearing, Afjeh testified that “3 WLU” was a typo, and that the Guidelines were supposed to indicate that the workload units would equal the total number of course credit hours (e.g., the faculty member would receive 12 workload units for a 12-credit externship course with more than nine students enrolled). Although Oregon Tech was aware that the MIT Department chair and bargaining unit faculty were very concerned about the apparently large reduction of workload unit credit for externship courses under the 2020-2021 Guidelines, Oregon Tech did not inform them that there was a typo in the externship section before the hearing in this case. We do not need to resolve whether Oregon Tech made a typo or speculate as to whether or when Oregon Tech would have corrected it. Even assuming that Oregon Tech intended to state that the workload units for an externship course with more than nine students enrolled would “equal the course credit hours,” that would still represent a change. And, Oregon Tech also made many other changes to the 2018-2019 Guidelines.

51. There are a total of six faculty in the Civil Engineering Department, including the chair, and all six teach in the graduate program. The Civil Engineering Department regularly has a number of graduate courses with more than 12 students enrolled. A typical engineering course is four academic credits.

52. Under the 2018-2019 Guidelines, a faculty member teaching a four-credit graduate course with more than 12 students enrolled would receive 5.33 workload units. Under the 2020-2021 Guidelines, they would receive 4 workload units.

Graduate Projects or Theses

53. In a graduate project or thesis course, the graduate student completes independent work under the supervision of the faculty member (commonly referred to as the faculty or graduate “advisor”). The graduate advisor’s duties typically include working with the student to select the project area; working with outside contacts to identify relevant projects; identifying literature to review; reviewing drafts and data analysis; training the student to use equipment or software; supervising conduct of the project; providing feedback; and assessing the project for final approval.

54. Under the 2018-2019 Guidelines, the workload unit formula for supervising graduate projects or theses is: “ $1/2 \times \text{number of credits} \times \text{number of students}$.”

55. Under the 2020-2021 Guidelines, the workload unit formula for supervising graduate projects or theses is: “0.5 credits per student per 3 credit hour course.”

56. Under the 2018-2019 Guidelines, a faculty member would receive 4.5 workload units for advising one graduate student’s project for a “3 term, 3 credit per term sequence.” Under the 2020-2021 Guidelines, a faculty member would receive 1.5 workload units for the same project.

57. Dr. Roger Lindgren is a professor in the Civil Engineering Department. At the time of hearing, he was serving as the department chair. His testimony established the following. Civil Engineering faculty sometimes teach multiple graduate courses with more than 12 students enrolled in one academic year. In a typical academic term, the Civil Engineering Department faculty members collectively advise 10-12 graduate theses or projects. Additionally, faculty members sometimes teach a graduate level course with more than 12 students enrolled and advise one or more graduate projects, in the same term. As a result, it is reasonably likely that the changes made in the 2020-2021 Guidelines will have a significant impact on some faculty members’ workloads. For example, under the 2020-2021 Guidelines, it is reasonably likely that some faculty members will need to teach one or two additional courses per term to meet Oregon Tech’s standard for a full instructional workload.

Independent Studies

58. According to the Guidelines, “[t]here may be times when it is necessary to accommodate students with special interests, needs, or when course schedules do not permit

students to take a required course. Independent Studies/Reading and Conference Courses are designed to fill this need.”

59. Under the 2018-2019 Guidelines, Oregon Tech calculated the instructional workload units for teaching an independent study based on the following formulas:

- “< 3 students per year = 0 WLU
- “3-5 students per year = 1 WLU
- “6-9 students per year = 2 WLU
- “> 9 students per year = 3 WLU”

54. Under the 2020-2021 Guidelines, faculty members will not receive any workload units for teaching independent study courses, regardless of the number of students. Specifically, the 2020-2021 Guidelines state: “No workload units are assigned for independent studies. Independent studies courses are not included in faculty workload calculations.”

Online Education Courses

60. The 2018-2019 Guidelines generally do not address online education courses. They state only that the development of “fully online courses * * * are not included in faculty workload calculations unless in accordance with the Online Workload Guidelines.”

61. Oregon Tech has issued two documents that address workload and compensation for online courses. One is titled “Online Compensation and Workload Guidelines” and is dated September 2018. Another is titled “Faculty Compensation Guidelines,” and indicates that it was last revised “Winter 2012.”

62. Some faculty members who normally teach on-campus courses also teach online courses. Oregon Tech generally requires faculty members to meet the instructional workload standard (36 WLU for tenure track faculty) by teaching only on-campus courses, and then permits them to teach online courses under a separate Oregon Tech contract for additional pay. (As stated in the Faculty Compensation Guidelines, “faculty will teach online courses outside of their regular work load, and will receive additional pay.”) In other words, Oregon Tech does not count the online course when determining whether the faculty member has met the standard for a full instructional workload. Under such circumstances, the online course is referred to as “out-of-load” work.

63. Under certain circumstances (as specified in Oregon Tech’s Online Compensation and Workload Guidelines), Oregon Tech may approve a faculty member teaching an online course as part of their regular workload. In other words, Oregon Tech may permit the faculty member to meet the instructional workload standard by teaching a combination of on-campus and online courses. Under such circumstances, the online course is referred to as “in-load” work.

64. Sometimes, faculty members teach an on-campus course and an online course on the same subject, in the same term, but at different times and to different groups of students. For some years, including under the 2018-2019 Guidelines, Oregon Tech did not require the faculty

member to cross-list those on-campus and online courses. Additionally, Oregon Tech counted those online and on-campus courses separately when calculating the faculty member's instructional workload units. In other words, the faculty member received workload units for two courses.

65. The 2020-2021 Guidelines include a new provision that states: "Any online course section offered in the same term in which an equivalent on-campus course section is offered should be co-listed and workload will be assigned as a cross-listed course. Exceptions may be approved by the Dean." Also according to the Guidelines, "cross-listed courses receive workload hours for one of the courses only." This means that, under the 2020-2021 Guidelines, faculty members who simultaneously teach on-campus and online courses on the same subject will receive workload units for one course, instead of two.

66. Negoita, a professor in the Applied Mathematics Department, sometimes teaches an online course section in the same term as an equivalent on-campus course section. When she did so under the 2018-2019 Guidelines, the on-campus and online courses were not cross-listed, she taught the online course out-of-load (*i.e.*, in addition to her regular instructional workload), and she received additional out-of-load pay for the online course. Under the 2020-2021 Guidelines, she would be required to cross-list the on-campus and online courses, and as a result, she would receive workload units for only one course (instead of two), and she would not be able to teach the online course as an "out-of-load" course for additional pay.

Overloads and Release Time

67. Oregon Tech may give faculty members "release time" for performing various types of non-instructional work. Release time reduces the amount of instructional workload units a faculty member must earn to meet Oregon Tech's instructional workload standard. In effect, a faculty member who receives release time is given instructional workload unit credit for performing non-instructional work. Thus, for example, if a faculty member receives 0.25 release time for serving as a program director, they can satisfy the 36-workload unit standard for instructional work by teaching 27 workload units and serving as program director.

68. In the 2018-2019 Guidelines, Oregon Tech provides the following examples of appropriate release time for non-instructional assignments:

- "Faculty Senate President – 0.25 (3 WLU) per term.
- "CPC Chair – 0.25 (3 WLU) for one term.
- "Assessment Commission Chair – 0.25 (3 WLU) Fall Term.
- "Faculty Athletic Representative – 0.25 (3 WLU) per term + \$1500 stipend"

69. The 2018-2019 Guidelines include the following section under the heading, "Overload":

"The FTE for an instructor carrying a paid overload is adjusted to reflect additional pay. For 9 month contracts, overload will be compensated on a per workload unit basis at each location's specified rate. Overload pay is triggered when faculty

surpass their specified workload threshold [*i.e.*, 36 WLU per year for tenure track faculty] *through a combination of instruction, approved release through [non-instructional workload], the Stipend Release model, or grant buyout.* Overload will continue to be calculated at the end of spring term to be paid on June 30th.” (Emphasis added.)

70. In the 2020-2021 Guidelines, Oregon Tech changed the Overload section and added a new section titled, “Release Time.” The new Overload section states:

“Instructional workload schedules in excess of 12 workload hours must be pre-arranged with the department Chair, Dean and provost, using a request for approval form prior to the start of the term. Overload is limited to one course per term except by special permission of the Dean and Provost. All efforts should be made to minimize overload for a faculty member, by utilizing an adjunct and reviewing the program schedule for efficiencies. Overload will be compensated on a per workload unit basis at each location’s specified rate. Overload pay is triggered when in-load workload hours exceed the load standards as indicated above. Overload will be calculated at the end of spring term and paid by June 30th.”

The new Release Time section states:

“The purpose of release time is to provide a faculty member the time for non-instructional activities such as grant funded research, administrative assignments etc. *Faculty given release time may not then teach overload or out of load courses.*” (Emphasis added.)

71. Before Oregon Tech issued the 2020-2021 Guidelines, including under the 2018-2019 Guidelines, Oregon Tech permitted, and in some cases required, faculty who receive release time to teach overload or out-of-load courses for additional pay.

72. For example, Lindgren has served as the Civil Engineering department chair since the middle of the 2018-2019 academic year, for which he has received a combination of stipend and 0.5 release time. With the 0.5 release time, he is expected to teach courses equaling 18 workload units per year. However, he is the only faculty member who is qualified to teach transportation engineering, and a certain number of transportation engineering courses must be taught each year. As a result, since he started as department chair, he has needed to teach overload courses, and he has received additional overload pay for doing so.⁵

73. For another example, Negoita has served as the program director for the Applied Math program since the 2017-2018 academic year. In the 2017-2018 and 2018-2019 academic years, she received 0.25 release time. In years that she has received release time, she has also taught overload or out-of-load courses for additional pay.

⁵Although department chairs are in a separate bargaining unit, the experience of faculty who receive release time as department chairs is relevant evidence of the status quo regarding release time and overload, because the relevant policies and practices apply to both chairs and bargaining unit faculty.

74. Under the 2020-2021 Guidelines, faculty who receive release time are no longer permitted to teach overload or out-of-load courses.

Senior Projects

75. Some faculty members supervise or advise undergraduate students who are completing senior projects.

76. The 2018-2019 Guidelines provide that faculty members “receive full workload units for [senior project] sections with enrollment of three students or more.” Senior project sections “with enrollment of one or two students will be treated as independent study,” *i.e.*, faculty members receive zero workload units for supervising senior projects if only one or two students are enrolled.

77. Under the 2020-2021 Guidelines, workload units for teaching senior project courses are credited as follows:

“Senior project courses will receive 0.3 WLU per student per 3 credit course. For example: an instructor for 12 students in a 3 credit hour senior project course will receive 3.6 WLU. No laboratory workload credits will be awarded to senior project classes.”

78. Under the 2018-2019 Guidelines, a faculty member teaching three students enrolled in a three-credit senior project course would receive three workload units. Under the 2020-2021 Guidelines, the faculty member would receive 0.9 workload units (0.3 WLU multiplied by three students). If 10 students enrolled in the course, the faculty member would receive the same number of workload units under the 2018-2019 and the 2020-2021 Guidelines. If less than three or more than 10 students enrolled, the faculty member would receive more workload units under the 2020-2021 Guidelines.

Communications regarding the 2020-2021 Guidelines

79. On July 1, 2020, St. Clair, on behalf of the Association, emailed Mott regarding changes to the Faculty Workload Guidelines and the Academic Release Time and Stipend Model. Regarding the Faculty Workload Guidelines, St. Clair wrote,

“It has come to our attention that you are planning to make significant changes to the Workload Guidelines * * *. These are changes in working conditions for the members of our bargaining unit. Since workload is a mandatory subject of bargaining the changes you are proposing may only be made through the bargaining process. We therefore insist that, should you wish to make this change to faculty workload and working conditions, you do so through the normal bargaining process, and that you immediately cease the unilateral implementation of changes [to the Workload Guidelines].”

Additionally, he requested “that anyone to whom these policies have been sent be informed that they are merely proposals and have not been adopted but will be addressed at the bargaining table.” St. Clair also wrote that if Oregon Tech “persist[ed] in implementing these changes,” the Association would file an unfair labor practice complaint.

80. On July 9, 2020, Mott replied by email to St. Clair. Regarding the Faculty Workload Guidelines, Mott wrote, “The workload guidelines are just that—guidelines, not policy. They are updated each year (hence the date on them) and this year is no different. A draft of this year’s update, which includes proposed assignments to the faculty that are still within the current credit hour confines, was sent to chairs and a meeting held to consult with them. We are currently receiving comments and concerns regarding proposed changes.”

81. On July 21, 2020, the department chair for Applied Mathematics, Tiernan Fogarty, emailed the department faculty, copying Peterson (dean of the College of HAS). Fogarty wrote:

“As per the new workload guidelines, anyone who has release time, including chairs, should no longer be teaching any online, out-of-load, or overload courses. Also there is another guideline that no full time faculty should teach more than one on-line course per term (excluding summer). During the fall term, Dan [Peterson] would like to meet with those of us who are involved in online to talk about how to develop a pool of adjuncts to teach our online courses so that we can comply with the workload guidelines and not cancel many of our online courses.”

82. On August 1, 2020, Oregon Tech posted the 2020-2021 Guidelines on the provost’s website. The posted version had a “draft” watermark. Oregon Tech did not request comments on the 2020-2021 Guidelines at that time. The posted version also stated that the 2020-2021 Guidelines would be “[e]ffective September 14, 2020.” Oregon Tech intended to implement the 2020-2021 Guidelines on September 14, 2020.

83. On August 7, 2020, the department chair for MIT, Debbie McCollam, emailed the department faculty. In her email, McCollam explained that the department chairs had met with Mott, and she described what they discussed at the meeting regarding the plan for re-opening campus in the fall and the Workload Guidelines. Regarding the Guidelines, she wrote:

“This is where I have EXTREME frustration. While working on the summer workload spreadsheet today * * *, I found that the supposed ‘draft’ of the workload guidelines is now ‘final’ and posted on the Provost website, stating ‘Effective September 14, 2020.’ NONE of our comments or concerns were addressed prior to this. We (chairs) have repeatedly asked to discuss the Workload Guidelines during various meetings (Fall re-opening, Academic Council, Chairs meeting) but there is never time allotted for that discussion. The response is ‘another meeting will be scheduled,’ but none thus far. My email to Dan [Peterson] and all chairs today certainly expressed my deep concern. Of course, Dan is furloughed so I won’t receive a response until next week. I sent Dan the Word document of the Workload Guidelines with our comments/concerns a while back and the Allied Health Chairs * * * submitted our proposal for externship workload early this week. We will be

meeting with Dan next week about the externship component, but no word regarding our other MAJOR concerns.”

84. Hoylman and other MIT Department faculty were very concerned because it was their understanding that, under the 2020-2021 Guidelines, they would receive significantly fewer workload units for teaching externship courses. They were also concerned that if they were unable to teach more courses to make up for the loss of instructional workload units, and, as a result, failed to meet the full-time instructional workload standard, their salary and benefits would be reduced accordingly. They tried to meet with Mott and Peterson regarding their concerns, but were unable to do so.

85. Peterson was aware that some faculty members, including the MIT Department faculty and chair, were very concerned about the impact of the changes made in the 2020-2021 Guidelines. He did not inform them that the Guidelines were a draft or otherwise inform them that their understanding of how they would be impacted by the Guidelines was incorrect.⁶

86. On August 10, 2020, the Association filed the unfair labor practice complaint in this case.

87. On September 8, 2020, Caufield stated in an email to Negoita, “Oregon Tech has decided to not implement the draft 2020-2021 Workload Guidelines and, instead, load bargaining unit members according to the 2018-2019 Workload Guidelines until such time as the parties reach agreement on changes through the ongoing negotiations.”

88. On September 11, 2020, an email was sent on behalf of Mott to the faculty. Mott stated, “Please note that due to continuing comments and concerns about the draft 20-21 workload guidelines we will not be implementing them this year. We have replaced them on the website with the current (18-19) guidelines.”

The Academic Release Time and Stipend Model

89. At Oregon Tech, each department may have one or more programs. A program essentially is a major that a student can pursue a degree in. Most programs have a director. Typically, the program director is a bargaining unit faculty member. In small departments, such as a department with only one program, the department chair may simultaneously perform the work of a program director.

90. Depending on the program’s discipline and location, program directors are responsible for some or all of the following activities: program design and curriculum coordination, program assessment, program marketing and recruiting, program outreach (such as

⁶Peterson testified that the administration expects faculty members whose workload units are reduced under the 2020-2021 Guidelines to teach more courses in order to meet the full-time instructional workload standard for the 2020-2021 academic year. However, he also testified that Oregon Tech had determined that it could not reduce a faculty member’s compensation if they failed to do so, because Oregon Tech had already issued the faculty members’ their notices of appointment for the 2020-2021 academic year.

professional meetings and industry contacts), program course scheduling, student advising coordination, program graduation petitions, recruitment and management of adjunct faculty for the program, admission selection to the professional program, and development and management of internships, externships, and/or partnerships. Program directors also oversee program faculty meetings, conduct workshops for strategic planning, and serve as the point of contact for the program (*e.g.*, respond to requests for information about the program).

91. Some of Oregon Tech’s programs are accredited, and must meet specified standards to remain accredited. In such cases, the program director also is responsible for ensuring that the program maintains accreditation.

92. Oregon Tech has issued a two-page document titled, “Academic Release Time & Stipend Model” (Model). The document was prepared in May 2013 and has been used by department chairs and the provost since 2013. The Model has not changed noticeably since 2013.

93. The Model’s background section identifies various “[d]ifferences among academic departments and programs affecting Program Directors,” and states, “These differences among degree programs and departments make creating a single uniform Program Director stipend/release model that is equitable and fair challenging.”

94. The Model then explains that it is structured to permit department chairs to make “dynamic” decisions regarding the award of release time:

“Given the aforementioned differences among departments and programs, the Program Director/Academic release time model needs to be flexible enough to accommodate such idiosyncrasies affecting the workload. Department Chairs are in a unique position to ascertain the particular workload involved for a program, option, or any other academic enterprise in their department and award the appropriate release time subject to general guidelines. This enables the department to make dynamic decisions regarding the release time awarded while taking into consideration the stage of the program (*e.g.*, new launch versus established), accreditation requirements (*e.g.*, a new accreditation or reaccreditation self-study is forthcoming, etc.), and other considerations.”

95. Under the Model, Oregon Tech allocates a certain amount of stipends and release time to each department, based on various formulas specified in the Model. The release time and funds allocated under the Model may be distributed among faculty who serve as department chair, program director, or similar roles, such as coordinator roles.

96. The Model also provides: “Departments have the option of ‘cashing in’ their release time at adjunct rates to be used as PD [*i.e.*, program director] stipends or professional development (no other uses are allowed).” “Cashing in” release time refers to converting release time into a dollar value that is credited to a department-level budget account.

97. Generally, the Model provides that a department will receive a stated amount of release time and stipend funding calculated based on student enrollment (referred to as “head count”). For example, non-general education departments receive a “floor” of 0.5 FTE in release time and \$5,000 in stipend funds, and general education departments receive 0.75 FTE in release time and \$5,000 in stipend funds. General education departments with a program or programs with 50 or more students receive 0.5 FTE plus \$5,000 in stipend funds (plus 0.25 FTE release time and \$3,000 in stipend funds for B.S. programs) for each multiple of 50 students in the major. The Model also provides formulas based on the degree offered, whether a department is undergoing accreditation, and whether the department offers programs in three or more physical locations.

98. The Model provides that, for the first three years of a “startup” or new program, a department chair negotiates release time and stipend funding directly with the dean or associate provost. After the first three years of a startup or new program, the formulas in the Model apply.

99. The Model provides that for online programs, contract programs (such as a program offered at Boeing), and for “pre-years,” the head count stated in the Model does not apply. Instead, “[g]iven the significant differences among contract courses and distanced education programs, the release time and stipend negotiations for these initiatives must be negotiated by the Department Chair with the Provost based on the idiosyncrasies associated with each case.” In addition, any other educational initiative or external service not described in the Model is negotiated “on a case-by-case basis by the Department Chair and the Provost.”

100. The Model directs department chairs to distribute stipends and release time based on an assessment of eligible faculty members’ relative workloads. Eligible faculty members include those serving as department chairs or program directors (or comparable roles, such as advising coordinator).⁷ Under the Model, an eligible faculty member may receive a stipend, release time, a combination of the two, or nothing.

101. Department chairs may choose to decide how to distribute their departments’ allocation of stipend and release time, and some choose to consult with the other faculty members. For example, Hallie Neupert, who has served as the department chair of the Management Department since 2013, testified that her department has a retreat each spring, and they decide as a group, based on consensus, how to divide the release time and stipends for the following academic year.

102. Department chairs request release time and stipends using a form called “Stipend/Release Time Allocation.” Using that form, the department chairs propose the release time and stipend funds that should be awarded to their department, according to the formulas specified in the Model. The department chairs also report in the form how they propose to distribute the release time and stipends among faculty in their department.

103. For some years, Oregon Tech’s online program has allocated additional stipends and release time to departments, referred to here as the “Online Model.” There are no known written guidelines for the allocation or use of funds under the Online Model. However, Oregon Tech Online has generally allocated each department a certain amount of stipend and release time

⁷For ease of reference, we use the term “program director” to refer to all comparable roles.

based on the number of students enrolled in the department's online courses. Under the practice since at least the 2017-2018 academic year, Oregon Tech has directed department chairs to request stipends and release time under the Online Model at the same time, and through the same form, that they request stipend and release time under the "on-ground" Model.

104. Unlike the release time and stipends allocated under the Model, any portion of the Online Model allocation may be "cashed out," deposited in a department account, and used for purposes other than stipends, release time, or professional development. The Natural Sciences Department, for example, has "cashed out" Online Model release time and stipends to a department account to purchase lab equipment. The MIT Department "cashed out" Online Model funds for faculty computers, equipment, and retreats.

105. The record includes the Stipend/Release Time Allocation forms for the 2017-2018 and 2018-2019 academic years, which show the amounts of stipend and release time requested and distributed under the on-ground Model and the Online Model. The record also includes charts showing how much stipend or release time department chairs allocated to faculty members for the 2017-2018 and 2018-2019 academic years, and for part of the 2019-2020 academic year.

106. Department chairs requested and received allocations of stipend and release time according to the formulas set forth in the Model. Departments generally distributed their allocations of stipend and release time in accord with the Model's provisions.⁸ Specifically, departments generally distributed the stipend and release time to faculty serving in roles such as chair or program director. In a relatively small number of instances, a department cashed out a portion of the funds allocated under the Model for professional development.

107. In the 2017-2018 academic year, approximately 50 bargaining unit faculty received a stipend, release time, or combination thereof, for serving as a program director.

108. In the 2018-2019 academic year, approximately 51 bargaining unit faculty received a stipend, release time, or combination thereof, for serving as a program director.

109. In the 2019-2020 academic year, approximately 53 bargaining unit faculty received a stipend, release time, or combination thereof, for serving as a program director.

110. Program director stipends are paid over the course of the academic year in faculty members' regular paychecks.

111. When faculty members receive a stipend or release time for serving as a department chair, program director, or similar role, they typically receive the stipend or release time in addition to (not instead of) service credit in their performance evaluations.

112. The provost, Mott, convened an ad hoc group of about five department chairs in late 2019 to assess the Model and make recommendations to her. The group met several times in

⁸The record suggests that, occasionally, stipend amounts and release time awarded or allocated did not conform precisely to the Model, but such deviations do not undermine the finding that, as a general matter, Oregon Tech used the Model to apportion stipend amounts and release time to departments.

late 2019 and early 2020, primarily over the winter break. At least some members of the group were concerned that, because the Association and Oregon Tech were engaged in bargaining, it was not an appropriate time to make changes to the Model. At a meeting with Mott, the chairs presented some of their ideas, but also raised their concern about faculty bargaining. In response, Mott agreed to suspend the discussion, and the ad hoc group ceased meeting.

113. In March 2020, Governor Kate Brown declared a state of emergency related to the developing COVID-19 global health crisis. Subsequently, Governor Brown asked each state agency, including public universities, to prepare for and report on the impact of an 8.5% decrease in biennial funding for 2019-2021. Because all of that shortfall would occur in the second year of the 2019-2021 budget period (beginning July 1, 2020), the state estimated a 17% decrease in state funding for the July 1, 2020 to June 30, 2021 period.

114. Oregon Tech has a policy titled “Program Reduction and Elimination, OIT-20-050” (PREC Policy). The current PREC Policy was adopted in April 2011.

115. On April 14, 2020, the Faculty Senate passed a resolution asking the Oregon Tech president, Naganathan, to “immediately follow the procedures outlined” in the PREC Policy.

116. The PREC Policy requires the Oregon Tech president to take prescribed steps when there are budgetary reductions imposed on the institution (as opposed to internal reallocations) that would impose a significant net reduction in budget, such that an entire program is at risk for elimination or academic or non-academic program quality may be compromised.

117. Under the PREC Policy, the president is first required to notify the Oregon Tech community at large, and specifically the Faculty Senate, of the financial condition that exists or is forecast which, in the judgment of the president, may require program reduction or elimination. The president then convenes an ad hoc Committee on Program Reduction and Elimination (PREC Committee) and charges it with “making recommendations to meet the financial parameters imposed on the institution.” The PREC Committee must consist of nine members, at least six of whom must be faculty members, no two of which may be from the same department. It also must include one representative from the Administrative Council. The Oregon Tech president appoints five of the members (three of whom must not be serving on the President’s Council) and the Faculty Senate President appoints four faculty members. The committee members are to be broadly representative of the institution as a whole, and generally recognized for their knowledge of the institution. PREC Committee members are expressly selected and charged to not represent specific constituencies.

118. The PREC Committee gathers information and deliberates regarding possible recommendations to the president. In performing its work, the PREC Committee applies the criteria in the policy. The policy lists both criteria supporting reduction or elimination of academic and non-academic programs, and criteria contra-indicating reduction or elimination of those programs. The PREC Committee performs its work in secrecy and its recommendations are not treated as public.

119. The president may accept the PREC Committee’s recommendations or modify them. If the president modifies the recommendations, they are returned to the PREC Committee with a rationale for those modifications. The PREC Committee may submit comments on the modifications.

120. The PREC Policy requires the Oregon Tech president to submit the proposal for reduction or elimination to the campus and community for review and comment. Under the policy as written, the president considers any comments received, makes a final decision, and forwards the plan to the Chancellor and the State Board of Higher Education.⁹ If the recommendations are rejected, the plan is returned to the PREC Committee for further consideration, application of the criteria, and the remainder of the process as outlined in the PREC Policy.

121. On May 1, 2020, Naganathan convened a PREC Committee charged with identifying and recommending a set of possible savings, reductions, and eliminations totaling \$4.5 million balanced across academic and non-academic operations for the fiscal year beginning July 1, 2020. The committee’s recommendations were due by June 5, 2020.

122. Naganathan subsequently lowered the PREC Committee’s target for reductions to \$3.5 million based on informal feedback he received from the state.

123. On June 4, 2020, the PREC Committee provided its recommendations to Naganathan. Naganathan informed the Committee that he generally agreed with its recommendations, except with regard to deferring hiring in vacant positions.

124. On June 12, 2020, Naganathan emailed a memorandum to the Oregon Tech campus and community with his proposed reductions, totaling \$3,665,654, for “campus review and comment.” In relevant part, the memorandum indicated that there would be \$300,000 in “cost-savings” from the “Provost Division” under the heading, “Restructure stipend releases.” The memorandum did not explain what restructuring of stipend releases would entail.

125. Effective July 1, 2020, Oregon Tech reduced the funding available to departments for stipends by approximately \$300,000. Subsequently, Mott reallocated \$75,000 to departments for department chair stipends (resulting in a net reduction of \$225,000 in funds for program director stipends during the 2020-2021 academic year). According to Mott, the reduction in funding cut the funding for stipends under both the on-ground Model and the Online Model.¹⁰

⁹Presumably, since 2015, the Board of Trustees performs the functions previously performed by the State Board of Higher Education. The record contains no evidence about the Board of Trustees’ specific actions with respect to the PREC Committee’s recommendations at issue in this case.

¹⁰In the 2019-2020 academic year, Oregon Tech estimated that faculty stipends (including stipends paid to department chairs) plus cash outs totaled approximately \$300,000. That figure does not include the indirect costs of release time. For example, when a faculty member receives release time, they may be assigned to teach fewer courses, and Oregon Tech may need to pay adjunct faculty to teach courses instead. Oregon Tech estimated that all faculty release time (including department chairs) in the 2019-2020 academic year indirectly cost Oregon Tech approximately \$1.5 million.

126. On June 12, 2020, Dr. Mark Neupert, the chair of the Department of Humanities and Social Sciences, emailed the department faculty. Neupert wrote,

“Dr. Mott informed department chairs that there will be no funding of stipends or releases for anyone other than department chairs next year. She believes that roles such as Program Director are a key form of ‘service’ to the department and would like to see that hold far more sway in promotion and tenure decisions than ever before. Thus, she will also be curtailing expectations and opportunities for university-level service. She did not address the impact of this late decision on teaching/workloads next year as Fall schedule is already set.

“She also recognizes that some departments are complex enough that chairs may need release beyond the typical .5 fte. This will need a ‘conversation’ with the Dean, who will then pass along requests to the Provost.”¹¹

127. On June 19, 2020, Clark, acting on behalf of the Association, emailed Mott. The subject line of the email was, “Information Request—Stipend Release Model.” Clark wrote that it had come to the Association’s attention “that you may be planning to end the current practice of providing release time or a stipend to faculty who serve as program directors and/or provide other academic functions as provided under the Academic Release Time & Stipend Model dated 5/10/2013.” Clark asked Mott a series of questions: “Would you please confirm if you are in fact making this change, if you have directed department chairs to make this change, and on what grounds are you making the change? If you are planning to make a change, what is the implementation date for this change?”

128. On June 25, 2020, Mott replied by email to Clark. She responded to his questions as follows: “As part of the budget reduction proposal following the PREC process, as announced recently, funds for the stipend release model were eliminated. I notified the chairs of the discontinuance of the model. It will be effective for this upcoming fiscal year.”

129. As noted above, St. Clair emailed Mott on July 1, 2020, on behalf of the Association, to ask about changes to the Guidelines and Model. Regarding the Model, St. Clair again explained that it had come to the Association’s attention that Oregon Tech was planning to end the current practice of providing release time or a stipend to program directors under the Model. The Association stated that this was a change in working conditions for bargaining unit faculty, and demanded that Oregon Tech make the change “through the normal bargaining process,” and that it “immediately cease the unilateral implementation of changes” to the Model. St. Clair also wrote that if Oregon Tech “persist[ed] in implementing the changes,” the Association would file an unfair labor practice complaint.

130. On July 9, 2020, Mott replied by email to St. Clair. With regard to the Model, she wrote, “As you are aware, the stipend and release model funding was cut in the President’s budget reductions proposal, based on PREC recommendations. Chairs will continue to receive a \$5,000 stipend, and can ask for increased release as needed to perform chair duties. This was a model, not a policy.”

¹¹Mott testified that Neupert accurately described the substance of her statements.

131. Departments set faculty assignments for all or part of the 2020-2021 academic year in the preceding spring term, before Oregon Tech informed faculty that program director stipend and release time would be eliminated. At that time, faculty assignments were made with the expectation that stipends and release time would be allocated and distributed according to the Model's terms.

132. Oregon Tech has not suspended or eliminated the need for program director duties for the 2020-2021 academic year. Oregon Tech has not communicated to the department chairs or to the faculty who serve as program directors that, because program director stipends and release time have been eliminated for 2020-2021, faculty will not be appointed or serve as program directors, or that they will not be assigned program director duties, or that they will not be expected to perform those duties. Multiple faculty members have been informed or concluded that they are expected to perform the program director duties for the 2020-2021 academic year, but without receiving either a stipend or release time.

133. Dr. Jherime Kellerman, an associate professor in the Natural Sciences Department, has served as the program director for environmental sciences since the 2017-2018 academic year. Kellerman has received a \$3,000 stipend for each academic year since 2017-2018 for performing program director duties.

134. Kellerman has also served as the advising coordinator for the program since at least the 2017-2018 academic year. In this role, he performs duties such as organizing advisory notes regarding the courses students should be steered to take, advising students who are considering transferring to the program, organizing events for new students, and ensuring that course listings are correct. He has consistently received release time equal to 1/12 FTE (three workload units) per academic year for performing advising coordinator duties.

135. Although Kellerman received release time, he continued to teach a full course load (*i.e.*, 36 workload units per year). As a result, he exceeded the instructional workload standard, and he was paid overload compensation, equaling approximately \$2,000 per academic year.

136. In or about June 2020, Kellerman was informed by his department chair that, for the 2020-2021 academic year, he would continue to perform his program director and advising coordinator duties, but he would not receive the program director stipend or advising coordinator release time that he had previously received, and expected to continue receiving, for performing those roles. As a result, Kellerman will receive approximately \$5,000 less than he expected for the 2020-2021 academic year (\$3,000 stipend and \$2,000 overload pay).

137. Negoita has served as the program director of the Applied Math program since the 2017-2018 academic year. Each year, she has received 0.25 FTE (nine workload units) release time for serving as program director. She agreed to serve as the program director for Applied Math for the 2020-2021 academic year before Oregon Tech notified faculty that it was eliminating program director stipend and release time. It is her understanding that she is expected to serve as program director even though she will not receive the release time. It is also her understanding that

Oregon Tech expects her to make up for the loss of release time by teaching more courses, in order to meet the instructional workload standard of 36 workload units per year.¹²

138. Hoylman is the program director for the Nuclear Medicine Program in the MIT Department. Since at least 2017-2018, he has received a \$3,000 stipend to serve as the program director.

139. Peterson testified that department chairs had “a variety of options” to ensure that the program director duties are performed. Peterson testified that the “program directors could do them. The chairs could do those responsibilities. The chair and the program director could work together. They could perhaps assign other faculty within their departments to work those items as well. The work could be spread out.”

140. Peterson testified that a dean could approve service credit for performance of program director duties. He also testified that a faculty member can fulfill their service requirements through a variety of activities, such as university committees, that are less onerous than serving as a program director.

141. Mott testified that, following the elimination of program director release time and stipends, department chairs could make varying choices about how to accomplish program director duties, depending on the size of the department. Mott told the department chairs that they could request additional release time if they were going to “take up” some of the program director duties. In Mott’s experience, at other institutions, many of the duties performed by program directors at Oregon Tech are done by committees or groups of faculty and distributed across a department. In Mott’s view, roles such as program director are a form of service to the department, and she would like to see such service hold more sway in promotion and tenure decisions.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. Oregon Tech violated ORS 243.672(1)(e) when it unilaterally changed the 2018-2019 Faculty Workload Guidelines.

ORS 243.672(1)(e) makes it an unfair labor practice for a public employer to “[r]efuse to bargain collectively in good faith with the exclusive representative.” An employer commits a *per se* violation of the duty to bargain in good faith by unilaterally changing the status quo concerning a mandatory subject of bargaining. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-33-06 at 7, 22 PECBR 159, 165 (2007) (*AOCE*). To determine whether an employer has made an unlawful unilateral change, we first identify the status quo and then determine if the employer changed it. *Id.* If the employer changed the status quo, we then decide whether the change concerns a mandatory subject of bargaining or has an

¹²According to Peterson, if a faculty member’s courses for the fall term of the 2020-2021 academic year were assigned with the assumption that they would receive program director release time, Oregon Tech expects that faculty member to make up for the loss of release time by teaching more courses in another term, in order to meet the instructional workload standard.

impact on a mandatory subject that is more than de minimis. *See id.* If the change concerns a mandatory subject, we determine if the employer completed its bargaining obligation before deciding to make the change. *Three Rivers Education Association, SOBC/OEA/NEA v. Three Rivers School District*, Case No. UP-16-08 at 5, 25 PECBR 712, 716 (2013). If the change concerns a permissive subject of bargaining but has a more than de minimis impact on a mandatory subject, we determine if the employer completed its bargaining obligation before implementing the change.¹³ *International Association of Fire Fighters, Local 1159, v. City of Lake Oswego*, Case No. UP-015-18 at 11-12 (2018).

The following is undisputed. For many years, Oregon Tech has promulgated faculty workload guidelines that, for example, define a full instructional workload for faculty members and determine how much workload credit a faculty member will receive for performing various types of instructional work. The version titled “2018-2019 Faculty Workload Guidelines” was in effect for the 2018-2019 and 2019-2020 academic years. On August 1, 2020, Oregon Tech posted a changed version titled “2020-2021 Faculty Workload Guidelines,” with a “draft” watermark and an effective date of “September 14, 2020,” which corresponds with the start of the 2020-2021 academic year. Oregon Tech did not bargain with the Association regarding the changed Guidelines.

The Association contends that, by issuing the 2020-2021 Guidelines without bargaining, Oregon Tech unilaterally changed the status quo concerning faculty workload, which is a mandatory subject of bargaining. Oregon Tech contends that the 2018-2019 Guidelines do not establish a status quo for faculty workload, and that the Guidelines concern only permissive subjects. Oregon Tech also argues that no unilateral change violation actually occurred because the 2020-2021 Guidelines were merely a draft, and it rescinded that version before its effective date.

We resolve those issues as follows: The 2018-2019 Guidelines and evidence of Oregon Tech’s practices under those Guidelines establish the relevant status quo. The 2020-2021 Guidelines changed the status quo concerning the mandatory subject of workload.¹⁴ The record establishes that Oregon Tech unilaterally decided to replace the 2018-2019 Guidelines with the 2020-2021 Guidelines, effective September 14, 2020, notwithstanding the draft watermark. When Oregon Tech unilaterally decided to make that change, a unilateral change violation occurred. Oregon Tech’s subsequent rescission of the 2020-2021 Guidelines affects the remedy, but it does not negate the Association’s unilateral change claim. We explain each of these conclusions in more detail below.

We begin by determining the status quo. A working condition can become the status quo in a number of ways, including through a contract, past practice, work rule, or policy. *AOCE*, UP-33-06 at 7, 22 PECBR at 165. In this case, the faculty unionized in 2018, and the parties have

¹³Generally, the final step is to consider any affirmative defenses raised by the employer. In this case, however, Oregon Tech withdrew all of its affirmative defenses.

¹⁴Although the issue statement also refers to the mandatory subject of compensation, in the Association’s prehearing brief, it argued only that the changes to the Guidelines concern workload. Because we agree with that contention, it is unnecessary to address whether the changes also concern compensation.

not yet completed first contract bargaining. In that situation, the terms and conditions of employment in place at the time of certification establish the status quo. Documents such as employer policies or manuals may be evidence of that status quo. *Teamsters Local Union No. 223, v. City of Shady Cove*, Case No. UP-3-94 at 11 and n 3, 15 PECBR 589, 599 and n 3 (1989) (referring to personnel manual to identify the status quo for recently certified bargaining unit and noting that evidence of employer practices under the manual would also be relevant).

Here, the Association's evidence of the status quo includes the 2018-2019 Faculty Workload Guidelines, as well as testimony regarding Oregon Tech's practices under those guidelines. Additionally, the record shows that the faculty unionized in June 2018, and the 2018-2019 Guidelines have been in effect for each academic year since then. Under these circumstances, those 2018-2019 Guidelines reflect the status quo.

Oregon Tech argues that the 2018-2019 Guidelines cannot establish the status quo because they are "just guidelines." The record establishes, however, that Oregon Tech expects department chairs and bargaining unit faculty to comply with the Guidelines, and that it applies the Guidelines when determining faculty workload, including the number and types of courses taught. For example, Oregon Tech generally expects faculty members to teach enough courses to constitute a "full" instructional workload as defined by the Guidelines. For another example, Oregon Tech applies the Guidelines to determine whether certain types of work, such as supervising students doing independent study, are credited toward a faculty member's instructional workload.

Oregon Tech also argues that an employer policy or practice must be "longstanding" to be the status quo, and that standard is not met in this case, because Oregon Tech has typically revised the Faculty Workload Guidelines every year. However, an employer policy or practice does not need to be "longstanding" to establish the status quo during initial contract bargaining. Oregon Tech cites the standard for a past practice discussed in *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987 (2005), but that is the standard we apply when an established union (*i.e.*, one with a collective bargaining agreement) argues that a particular practice must be maintained even if it is not addressed in the CBA. That standard is based in part on the premise that the practice "arose from [the parties'] joint understanding." *Id.* at 7, 20 PECBR at 993. That standard does not apply here, where the parties are still in first contract bargaining and have not yet had sufficient opportunity to establish mutually agreed upon practices. *See, e.g., NLRB v. Katz*, 369 US 736, 746-47, 82 S Ct 1107 (1962) (when an employer makes a discretionary change during first contract bargaining, "[t]here simply is no way * * * for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist" that the employer bargain over such changes).¹⁵ *Id.* at 7, 20 PECBR at 993.

Oregon Tech also essentially argues that it was permitted to change the Guidelines under the "dynamic status quo" doctrine. Under that doctrine, if an employer has regularly taken a

¹⁵Other cases on which Oregon Tech relies, such as *Oregon Public Employees Union v. State of Oregon, Department of Administrative Services*, Case No. UP-112-93, 15 PECBR 567 (1995), are inapposite for the same reason, *i.e.*, they determine the status quo after parties have a collective bargaining agreement (and have had the opportunity to mutually establish practices under that agreement), not the status quo during first contract bargaining.

particular action (e.g., granting an annual three percent wage increase), such that employees have a reasonable expectation that the employer will continue taking that particular action, then the employer must continue taking that action in order to maintain the status quo. Conversely, the employer does not unlawfully change the status quo by taking that regular and expected action. In this case, Oregon Tech has typically revised the Guidelines each academic year. However, the changes that Oregon Tech made this year were not in line with a regular and predictable pattern set by the past revisions. In the past, when Oregon Tech revised the Guidelines, the changes were generally limited in scope and minor. In contrast, the 2020-2021 Guidelines are a significant departure from the prior guidelines, and the scope and nature of the change is well beyond that of the past annual revisions. In other words, Oregon Tech was not required to make the changes that it made to the 2018-2019 Guidelines to maintain the status quo. Accordingly, the dynamic status quo doctrine does not justify that action.

Further, although Oregon Tech annually made discretionary changes to the Guidelines in the past, before the faculty unionized, it does not follow that it may continue to make discretionary changes now, after the faculty have unionized. To the contrary, in this context, the fact that the change at issue was discretionary means that Oregon Tech could *not* decide to make it without bargaining. *See Katz*, 369 US at 746-47 (finding that employer made an unlawful unilateral change during first contract bargaining by granting discretionary merit increases without bargaining over “the procedures and criteria for determining such increases,” even though employer did so semiannually before the employees unionized). *See also City of Shady Cove*, UP-3-94 at 11, 15 PECBR at 599 (personnel manual constituted status quo for new bargaining unit, even though it was not a contract and could be changed at any time). In sum, we conclude that Oregon Tech had a duty to maintain the 2018-2019 Guidelines concerning mandatory subjects while the parties engaged in first contract bargaining.

We turn next to the question of whether the subject of the change at issue concerns a mandatory subject of bargaining. The Association contends the change concerns workload, which generally is a mandatory subject. However, ORS 243.650(7)(g) provides that workload is a permissive subject “when the effect on duties is insubstantial.” Thus, if we determine that the subject of the change at issue is workload, we must also assess its effect on faculty members’ duties.

Our first task is to identify the subject of the change. For context, we note that, according to both the 2018-2019 and 2020-2021 Guidelines, the instructional workload standard for full-time tenure track faculty is 12 workload units per term, and the instructional workload standard for full-time non-tenure track faculty is 14 workload units per term. In other words, Oregon Tech expects a full-time tenure track faculty member to teach courses totaling at least 36 instructional workload units each three-term academic year. The Guidelines also set forth various rules or formulas that determine how many instructional workload units will be credited to a faculty member for performing particular types of work.¹⁶

¹⁶Oregon Tech requires bargaining unit faculty to perform both instructional and non-instructional work, and the Guidelines set standards for both. In this analysis, however, only the instructional workload provisions are relevant, so for brevity, we sometimes use the generic term “workload” or workload unit to refer to “instructional workload” or “instructional workload unit.”

Oregon Tech changed multiple provisions of the 2018-2019 Guidelines. When a change (or proposal) has multiple components, “we attempt to identify the ‘core feature’” of the change “that defines and ultimately shapes” its scope. *Jackson County v. Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. UP-002-20 at 6 (2020) (citing *In the Matter of the Declaratory Ruling Petition Filed by Portland Firefighters Association, IAFF Local 43 and City of Portland*, Case No. DR-001-19 at 3 (2019)). In this case, Oregon Tech primarily changed the rules or formulas that determine how many instructional workload units are credited for performing various types of work. For example, under the 2018-2019 Guidelines, faculty members received zero to three workload units for supervising students doing independent study, depending on the total number of students enrolled in the independent study course. Under the 2020-2021 Guidelines, faculty members receive zero workload units for supervising students doing independent study, regardless of the number of students enrolled. When a faculty member is credited with fewer workload units for performing the same work, they must perform more work that qualifies for workload units under the Guidelines in order to meet Oregon Tech’s 36-unit standard.¹⁷ Based on the foregoing, we conclude that the core feature of the change to the 2018-2019 Guidelines is faculty workload, and that the change had more than an insubstantial effect on faculty members’ duties.¹⁸

Oregon Tech argues that the Association cannot prove that the change to the Guidelines has a more than insubstantial effect on faculty members’ duties because the 2020-2021 Guidelines permit administrators to approve certain exceptions to determining workload credits, and those exceptions could mitigate the effect on faculty members’ duties. For example, the 2020-2021 Guidelines changed the rule that determines how much workload unit credit will be credited for supervising externships, but also provide that exceptions to that rule are permitted with the approval of the dean and the provost. However, the mere possibility that Oregon Tech will approve exceptions does not reduce the effect of the underlying rule changes. Under the Guidelines’ terms, the administrators decide unilaterally whether to approve exceptions, and those decisions are completely discretionary and not subject to review. Moreover, there is no evidence establishing the magnitude or frequency of such exceptions; thus, we can only speculate about whether such exceptions will be made and, if so, what effect they would have on the changed workload unit credits. In sum, nothing in the Guidelines or the record establishes that administrators will definitely grant exceptions, and that those exceptions, when granted, will mitigate the effects of the rule changes so that they have an insubstantial effect on employee duties.

Oregon Tech also argues that the elimination of workload unit credit for independent study supervision, in particular, has an insubstantial effect on duties. The elimination of workload unit

¹⁷Additionally, Oregon Tech does not pay faculty members overload compensation unless they are credited with a total number of workload units that exceeds the 36-unit standard. Thus, when a faculty member is credited with fewer workload units for the same work, they must perform more work that qualifies for workload units before they will be paid overload compensation.

¹⁸We discuss how changes that reduce the number of instructional workload units credited for particular work affect faculty workload to illustrate why we conclude the changes at issue concern the subject of workload. However, changes that increase the number of workload units credited for particular work also concern the mandatory subject of workload, and therefore, cannot be made unilaterally.

credit for independent study supervision is only one component of the change at issue, and under the circumstances of this case, we are not persuaded that we should consider the effect of each component separately.¹⁹

Next, we address Oregon Tech’s contention that no (1)(e) violation actually occurred, because the 2020-2021 Guidelines were merely a draft, and Oregon Tech took no steps to implement them. As explained below, we disagree with the factual premise of that contention, because the record shows that Oregon Tech decided to change the 2018-2019 Guidelines and took steps to implement that decision. Additionally, even if Oregon Tech had not implemented its decision, we would still conclude that Oregon Tech violated (1)(e), because the unilateral change violation occurred when Oregon Tech made the decision.

“An employer must bargain about its decision to change a mandatory subject for bargaining before making the decision.” *Three Rivers School District*, UP-16-08 at 5, 25 PECBR at 716 (emphasis in original, quotation marks and citation omitted). See also *AFSCME, Local 173, v. Polk County*, Case No. UP-100-88 at 7, 11 PECBR 536, 542 (1989) (“When the subject matter of a management decision concerns employment relations, * * * the employer must bargain about the decision before it can lawfully even make the decision or take any action on the matter.” (Quotation marks and citation omitted.)). Thus, an employer violates the duty to bargain when it unilaterally decides to change the status quo concerning a mandatory subject of bargaining.

We find that Oregon Tech decided to change the 2018-2019 Guidelines in or about July 2020, based on the following evidence. The Association first became aware that Oregon Tech was planning to change the 2018-2019 Guidelines in or about June 2020, when Oregon Tech circulated the 2020-2021 version to department chairs. On July 1, 2020, the Association asked Oregon Tech to confirm that it would cease unilaterally changing the Guidelines and demanded to bargain over those changes. On July 9, 2020, Oregon Tech responded by asserting that the workload guidelines are “not policy,” that they are updated each year “and this year is no different,” and that it was in the process of consulting with department chairs about its “draft of this year’s update, which includes proposed assignments to the faculty that are still within the current credit hour confines.”²⁰ Despite the Association’s request, Oregon Tech did not confirm that it would cease

¹⁹Further, even considering the independent study component separately, we conclude that eliminating workload unit credit for independent study courses involving three or more students has more than an insubstantial effect on duties. Oregon Tech argues that this particular change has an insubstantial effect on duties because very few faculty members supervise independent study courses with three or more students. Even assuming that assertion is true, it does not make the effect insubstantial. When determining whether the effect of a workload change is sufficient to give rise to the duty to bargain, we do not consider how many employees are affected by the change. Rather, we consider the effect on employee duties. One instructional workload unit equals one-twelfth of a full-time tenure track faculty member’s instructional workload in an academic term. The effect of receiving one less workload credit on a faculty member’s duties is more than insubstantial.

²⁰PECBA does not prohibit Oregon Tech from consulting with department chairs about potential changes to bargaining unit faculty members’ terms and conditions of employment. However, such consultation is not a lawful substitute for collectively bargaining with the faculty members’ chosen labor representative, the Association.

unilaterally changing the Guidelines, and it did not agree to bargain with the Association over the changes.

Read in context, Oregon Tech’s response to the Association shows that it had made a decision to change the Guidelines, and that it had taken the first step of implementing that decision—telling department chairs that there would be new Guidelines. Only the precise details of the change were subject to comment by department chairs. Then, on August 1, 2020, Oregon Tech posted the 2020-2021 Guidelines on the provost’s website, with a stated effective date of “September 14, 2020,” which corresponds with the start of the 2020-2021 academic year. Around that time, in late July and early August, at least some department chairs told bargaining unit faculty that the 2020-2021 Guidelines would be effective on September 14 and began discussing how the changes would be implemented. Further, Peterson, dean of the College of Health, Arts and Sciences, testified that Oregon Tech intended to implement the 2020-2021 Guidelines on September 14.

Oregon Tech’s assertion that the 2020-2021 Guidelines were merely a draft is not persuasive, for several reasons. The evidence establishes that Oregon Tech intended to implement the 2020-2021 Guidelines on the stated effective date, notwithstanding their draft watermark. The evidence also establishes that Oregon Tech communicated that intent to department chairs, who in turn relayed that information to bargaining unit faculty.²¹ Although Peterson was aware that department chairs and bargaining unit faculty believed that the posted version of the 2020-2021 Guidelines were final and would be effective on September 14, despite the draft watermark, he did not inform them that their understanding was incorrect. There is no evidence that Oregon Tech ever communicated to the Association or bargaining unit faculty that it considered the 2020-2021 Guidelines to be a draft, that it had not made a final decision to implement the 2020-2021 Guidelines, and that it would bargain with the Association before making a final decision.²²

Finally, we address Oregon Tech’s contention that no unilateral change violation occurred because Oregon Tech rescinded the 2020-2021 Guidelines before their effective date. As explained above, the unilateral change violation occurred when Oregon Tech decided to change the status quo concerning the mandatory subject of workload. A unilateral change is unlawful because it

²¹The record includes correspondence and testimony showing that department chairs told bargaining unit faculty members that Oregon Tech had decided to implement the 2020-2021 Guidelines that it had posted on the website, notwithstanding the draft watermark. Oregon Tech notes that this is hearsay evidence, and that the statements of department chairs cannot be attributed to Oregon Tech, because they are not supervisors under PECBA. See *Oregon Tech American Association of University Professors (Oregon Tech AAUP) v. Oregon Institute of Technology*, Case No. RC-007-18 (2019), *appeal pending*. Our rules, however, allow “[e]vidence of a type commonly relied on by reasonably prudent persons in conduct of their serious affairs,” even if the evidence is hearsay. OAR 115-010-0050(1). Here, the evidence offered meets our standard for admissibility, and this evidence was un rebutted.

²²Oregon Tech also points out that, after Oregon Tech posted the 2020-2021 Guidelines, administrators considered making additional revisions, and argues that this shows Oregon Tech never made a final decision to change the Guidelines. We disagree. There is substantial evidence that Oregon Tech had already decided to replace the 2018-2019 Guidelines with the 2020-2021 Guidelines. Under these circumstances, the possibility that Oregon Tech would further revise the 2020-2021 Guidelines does not negate the fact that it had already decided to change the status quo concerning faculty workload.

frustrates the bargaining process and conveys the message to employees that the employer can change their terms and conditions of employment without bargaining in good faith with their chosen representative. *See, e.g., Katz*, 369 US at 743-44 (like a “flat refusal to bargain,” an employer’s unilateral “action plainly frustrate[s] the statutory objective of establishing working conditions through bargaining”); *May Dep’t Stores Co. v. NLRB*, 326 US 376, 385, 66 S Ct 203 (1945) (“[U]nilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.”). That harm to the bargaining relationship was done once Oregon Tech unilaterally decided to change the Guidelines. Thus, the fact that Oregon Tech rescinded the 2020-2021 Guidelines before their effective date does not mean that the violation caused no harm, or that the Association is not entitled to relief. A party is entitled to a cease and desist order and any other necessary remedy whenever we determine that a party “*has engaged in* or is engaging in any unfair labor practice charged in the complaint.” ORS 243.676(2) (emphasis added).

3. Oregon Tech violated ORS 243.672(1)(e) when it unilaterally eliminated program director stipends and release time under the Academic Release Time and Stipend Model.

The Association contends that Oregon Tech made an unlawful unilateral change to the status quo when it eliminated the stipends and release time that it provided to program directors (and comparable roles) pursuant to the Academic Release Time and Stipend Model (Model). Oregon Tech contends that the allocation of stipends and release time to program directors was too discretionary and variable to constitute a status quo. Oregon Tech also contends that the elimination of funding for program director stipends and release time concerns only permissive subjects of bargaining, namely its budget, staffing levels, and assignment of duties. For the reasons discussed below, we conclude that Oregon Tech changed the status quo by eliminating program director stipends and release time under the Model, and that this change concerns the mandatory subject of compensation. Because Oregon Tech made the change unilaterally, it violated its duty to bargain in good faith under (1)(e).

We begin by identifying the status quo. At the time that the faculty unionized, and until the change at issue, Oregon Tech followed the Model. According to the Model’s background statement, it was intended to provide program directors with stipends or release time while accounting for differences in program directors’ workloads among departments and programs.²³ Under the Model, Oregon Tech allocated a certain amount of release time and stipends to each department, according to specified, objective criteria (such as the number of students enrolled in the department’s programs). Then, department chairs determined how to distribute the allocated release time and stipends among faculty members who serve as chairs or program directors.

Effective July 1, 2020, Oregon Tech changed the status quo by eliminating stipends and release time provided under the Model, at least for the 2020-2021 academic year. Oregon Tech did

²³Oregon Tech requires faculty members to perform both instructional and non-instructional work. The work of program directors is considered “non-instructional work.” Release time reduces the amount of instructional work a faculty member must perform to meet Oregon Tech’s instructional workload standard. In effect, a faculty member who receives release time is authorized to meet their instructional work load standard through a combination of non-instructional and instructional work. A program director who does not receive release time must still carry a full instructional workload.

so by deciding not to spend \$300,000 of funds budgeted for stipends. The provost subsequently restored \$75,000 of that cut to fund department chair stipends (but not program director stipends), and informed department chairs that they would continue to receive their expected stipends and release time for the 2020-2021 academic year. Oregon Tech did not inform the faculty who were expecting to serve as program directors for the 2020-2021 academic year that they would not serve as program directors, or that they would not be expected to perform that role's job duties. Rather, Oregon Tech informed bargaining unit faculty that they would receive only service credit for performing the work of program directors, instead of stipends or release time (in addition to service credit).

The change at issue—elimination of program director stipends and release time under the Model—concerns the mandatory subject of compensation. Stipends are a form of compensation. The parties dispute whether release time is also a form of compensation. We need not resolve that dispute because, under the Model, program directors receive stipends or release time, or a combination of the two. Under these circumstances, stipends and release time are interchangeable parts of a single policy. And, Oregon Tech made a single decision to eliminate (or at least suspend) the entire Model; that is, it made one decision to stop giving program directors stipends or release time (or a combination of both)—not two distinct decisions. Thus, the elimination of program director stipends and release time under the Model is one change.

To determine the subject of that change, we must identify the “core feature” of the Model, considering the terms of the Model and how Oregon Tech has applied it. *Jackson County*, UP-002-20 at 6. We find that the core feature of the Model, and therefore the subject of its elimination, is compensation. At Oregon Tech, a faculty member's salary is based on their FTE, and Oregon Tech has defined “1.0 FTE” for a tenure track faculty member as 36 instructional workload units. A faculty member receives a stipend in addition to base salary. A faculty member who receives release time is given instructional workload credit for performing non-instructional work, and that credit counts towards the 36-instructional workload unit threshold. Under the Model, stipends and release time are parts of an integrated method of compensating faculty who take on certain administrative duties. The example provided by Professor Jherime Kellerman illustrates this point. At the time of hearing, Kellerman was assigned to serve as both a program director and an advising coordinator for the 2020-2021 academic year; both of those roles were eligible for stipends and release time under the Model. Under the status quo, Kellerman received a \$3,000 stipend for the program director work, and release time (equal to three workload units) for the advising coordinator work. Kellerman also regularly teaches courses that equal 36 instructional workload units, and he expected to do so again in the 2020-2021 academic year. Under the status quo, when he received release time and taught 36 instructional workload units, he was credited with a total of 39 instructional workload units, and paid overload compensation for the workload units that exceeded the 36-workload unit standard, approximately \$2,000 (in addition to his regular salary). In June 2020, his department chair informed him that he would still need to do the program director and advising coordinator work, but that he would not receive either the program director stipend or the advising coordinator release time. As a result, even if he teaches the same course load and continues to serve as program director and advising coordinator, he will not receive either the \$3,000 stipend or the \$2,000 overload pay that he was expecting for the 2020-2021 academic year. Based on the terms of the Model and how Oregon Tech has applied it,

we conclude that the core feature of the Model (and therefore, the subject of the change at issue) is compensation.

Oregon Tech contends that there is no status quo with respect to program director stipends and release time because department chairs have discretion over how much stipend or release time to award a program director (if any), and sometimes, a department chair “cashes out” a portion of funds allocated under the Model for faculty professional development.²⁴ We disagree. Despite the department chairs’ discretion, the record establishes that Oregon Tech has, for many years, allocated stipend and release time to departments according to the Model’s criteria, and department chairs have distributed the allocated stipends and release time among the faculty in their departments. Further, the department chair’s discretion is generally guided by the Model’s terms and guidelines (and subject to an administrator’s approval), and program directors have received (or not received) stipend or release time in accord with those terms and guidelines. Under these circumstances, the award of program director stipends and releases according to the Model’s terms and guidelines is the status quo, notwithstanding the discretionary element.²⁵

Oregon Tech alternatively contends that that the elimination of funding for the Model concerns only the subjects of staffing levels and assignment of duties, which PECBA expressly designates as permissive subjects. ORS 243.650(7)(g). We first address Oregon Tech’s contention that this change concerns staffing because the “decision to appoint (or not to appoint) faculty members as program directors” is a staffing decision. We disagree, because the decision to eliminate (or provide) program director stipends and release time under the Model is distinct from the decision to appoint or not appoint a faculty member as a program director. The evidence does not indicate that Oregon Tech has changed the number of program directors, the conditions for the appointment of a faculty member to serve as program director, or any similar factor related to appointment. Oregon Tech delegates to department chairs the authority to appoint program

²⁴Professional development is a form of non-instructional work that Oregon Tech expects faculty to perform and is a requirement for promotion and tenure. Under the express terms of the Model, a department chair may choose to allocate a portion of the funds allocated to the department to pay for faculty members’ professional development, such as conference travel costs.

²⁵The NLRB has long held that where, as here, an employer has an established policy or practice that includes an element of discretion, the employer must maintain the status quo with respect to the non-discretionary aspects of the policy, and bargain with the union over the discretionary element. *See, e.g., Katz*, 369 US at 746-47 (discussing employer’s duty to bargain before granting semiannual merit increases); *Jensen Enter.*, 339 NLRB 877, 878 (2003) (“[T]he [NLRB] with court approval has consistently found that merit increase programs like the Respondent’s are a term and condition of employment notwithstanding the element of discretion retained by the employer in setting the amount of such raises. *Daily News of Los Angeles*, [315 NLRB 1236 (1994), *enfd* 73 F3d 406 (DC Cir 1996)]. As the [NLRB] stated in *Oneita Knitting Mills*, what is required in such circumstances ‘is a maintenance of preexisting practices, *i.e.*, the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted.’ 205 NLRB 500 fn. 1 (1973).”). Thus, when employees unionize, the employer may not unilaterally “discontinue” such a program, notwithstanding the discretionary element. *Oneita Knitting Mills*, 205 NLRB at 500 n 1.

directors and coordinators. Oregon Tech has not informed department chairs that they must discontinue appointing program directors for 2020-2021. Rather, Oregon Tech has communicated only that it is suspending stipends and release time for program directors. Thus, the discontinuation of program director stipends and release time under the Model did not reflect a staffing decision to eliminate program directors; rather, it reflected a decision to cease compensating faculty for serving as program directors.

We next address Oregon Tech's argument that the granting of release time is a proxy for the management decision whether to assign a faculty member program director duties. "Assignment of duties, as a permissive subject, concerns the actual direction of employees during the workday." *Oregon Public Employees Union, Local 503, SEIU, AFL-CIO, CLC v. State of Oregon, Executive Department*, Case No. UP-64-87 at 31, 10 PECBR 51, 81 (1987). The Model, however, does not address whether or how department chairs assign program director duties to faculty. Rather, it addresses how stipends and release time are allocated to departments and the circumstances under which it is "appropriate" for department chairs to award a portion of the allocated stipends and release time to faculty who are assigned program director duties.²⁶

Further, at hearing, Oregon Tech's administrators conveyed that Oregon Tech has not yet decided how program director duties will be assigned for 2020-2021, while acknowledging that those duties are necessary and will continue to be performed. For example, the provost testified that program director duties would be handled differently in different departments, but she did not state that bargaining unit members would not perform these duties. If, in fact, the core feature of Oregon Tech's unilateral change was the assignment of program director duties, Oregon Tech would have made decisions regarding who would perform those duties (if anyone), rather than only eliminating the stipends and release time for the performance of those duties. We conclude, on this record, that assignment of duties is not the subject of Oregon Tech's change to the Model.

Oregon Tech also contends that the change to the Model was merely a change to a "budget model," and therefore, it had no duty to bargain, because budget-setting is not a mandatory subject. Oregon Tech is correct that a public employer is not required to bargain about budget-setting itself. *Cascade Bargaining Council, OEA/NEA v. Jefferson County School District 509J*, Case No. C-194-82 at 9, 7 PECBR 6039, 6047 (1983) (employer did not violate ORS 243.672(1)(e) by declining to collect all property taxes approved by the voters, even though that caused the employer

²⁶The text of the Model expressly links release time to the effect that the assignment of program director duties has on faculty workload, not the assignment of duties itself:

"Given the aforementioned differences among departments and programs, the Program Director/Academic release time model needs to be flexible enough to accommodate such idiosyncrasies affecting the workload. *Department chairs are in a unique position to ascertain the particular workload involved for a program, option, or any other academic enterprise in their department and award the appropriate release time subject to general guidelines.*" (Emphasis added.)

to be unable to agree to the union’s proposed wage increase in subsequent bargaining).²⁷ However, the record establishes that the decision at issue—the elimination of program director stipends and release time—was not a budget decision. Rather, it was a management decision about how to spend budgeted funds. This point is illustrated by Oregon Tech’s decision to continue paying stipends to department chairs, despite the elimination of funding for the Model. Specifically, after the Oregon Tech president announced the elimination of \$300,000 in funding for the Model, the provost decided to reallocate \$75,000 to pay department chairs the stipends that they expected to receive under the Model for the 2020-2021 academic year. Put differently, after Oregon Tech decided to cut funds for the Model, the provost decided to “restore” some of those funds, but in doing so made stipends available only for some faculty (department chairs), but not others (bargaining unit faculty who serve program directors, coordinators, and the like).²⁸ That decision illustrates that the elimination of funding for program directors’ stipends under the Model was not a policy-level budget-setting decision outside the scope of PECBA’s bargaining obligations, but instead was a management decision regarding the *administration* of budgeted funds that concerns the mandatory subject of compensation.²⁹

²⁷*Jefferson County* involved the employer’s ability to pay for *proposed* compensation, not an existing obligation. The Board distinguished the situation in which an employer cuts its budget and then cites lack of funds as the basis for avoiding an existing obligation to pay. *Jefferson County*, C-194-82 at 11, 7 PECBR at 6049 (“This would be a different case if the employer had tentatively agreed to an economic settlement, intentionally reduced tax collections below that authorized, and then attempted to avoid the agreement due to an ‘inability’ to pay.”). Here, Oregon Tech’s obligation to continue providing program director stipends and release time under the Model arises under the statute, not a collective bargaining agreement, but it is an existing obligation.

²⁸For another example, the evidence shows that Oregon Tech projected that it would save \$300,000 by defunding the Model, which corresponds only to the cost of department chair and program director stipends; it does not include the indirect costs associated with release time. Thus, Oregon Tech could have saved \$300,000 by eliminating only stipends, while continuing release time. However, Oregon Tech made a management decision to discontinue *both* program director stipends and release time under the Model (while continuing department chair stipends and release time, and potentially even increasing the latter).

²⁹The record does not establish that Oregon Tech engaged in the budget-setting process that is governed by applicable budget law, not PECBA. However, even if Oregon Tech had adopted an amended budget that did not include funds for program director stipends and release time under the Model, Oregon Tech would remain obligated to bargain over the decision to eliminate program director stipends and release time. *Oregon Nurses Association v. Polk County*, Case No. C-118-82 at 6-7, 6 PECBR 5426, 5431-32 (1982) (explaining that employer’s failure “to provide in its approved budget funds to maintain wages” did not relieve the employer of liability under ORS 243.672(1)(e) for its unilateral change in wages). In bargaining, the Association would be entitled to propose alternatives, including an alternative under which Oregon Tech would not cut faculty compensation at all. And, under PECBA, Oregon Tech would be required to bargain in good faith regarding such alternatives. If the Association successfully bargained for an alternative to the budgeted-for elimination of program director stipends and release time, then Oregon Tech could make the bargained-for adjustment accordingly. *See id.* at 7, 6 PECBR at 5432. If the Association agreed, in bargaining, to eliminate program director stipend and release time, then Oregon Tech could implement that change. However, Oregon Tech could not decide to make that change if it neither obtained the Association’s agreement nor completed the bargaining process, as it did here.

We also understand Oregon Tech to argue that defunding the Model was not tantamount to actually eliminating program director stipends and release time. We agree that the former did not *necessarily* have to result in the latter. However, the record establishes that Oregon Tech, in fact, implemented the decision to defund the Model by actually eliminating program director stipends and release time. Specifically, the Association asked Oregon Tech whether it was “in fact” ending “the current practice of providing release time or a stipend to faculty who serve as program directors * * * as provided under the Academic Release Time & Stipend Model.” And, the provost responded, “As part of the budget reduction proposal following the PREC process, * * * funds for the stipend release model were eliminated. I notified the chairs of the discontinuance of the model. It will be effective for this upcoming fiscal year.” The Association then asked Oregon Tech to cease unilaterally implementing the change to the Model. In response, the provost reiterated that “the stipend and release model funding was cut.” Further, she explained that chairs “will continue to receive a \$5000 stipend, and can ask for increased release as needed to perform chair duties,” despite the defunding of the Model. However, the provost did not state that program directors also would continue to receive their stipends and release time, despite the defunding of the Model. Rather, Oregon Tech made clear to department chairs and bargaining unit faculty that program directors would not receive any stipends or release time.³⁰

We recognize that Oregon Tech has given department chairs some discretion over the distribution of stipend and release time under the Model, and that, as a result, there is variation in what program directors actually receive. However, this variation does not mean, as Oregon Tech contends, that the program director stipends and release time for the 2020-2021 academic year were not ended. They were ended. Nor does the discretion exercised by department chairs mean, as Oregon Tech contends, that the decision to end the program director stipends and release time was made by department chairs, not Oregon Tech. Oregon Tech’s communications and other evidence establishes that Oregon Tech made the decision to end program director stipends and release time. Therefore, Oregon Tech unilaterally changed program director stipend and release time.

Oregon Tech also notes that it decided to defund the Model pursuant to the PREC process, which includes consultation with a committee that includes bargaining unit faculty. The process by which Oregon Tech made that decision, however, makes no difference because Oregon Tech has parallel, independent obligations under PECBA. Under PECBA, Oregon Tech has a legal obligation to maintain the status quo for unionized faculty members’ terms and conditions of employment while it engages in the collective bargaining process. The PREC process does not eliminate Oregon Tech’s statutory obligation to continue providing program directors with stipends and release time. *See Polk County*, C-118-82 at 7, 6 PECBR at 5432 and (“The bargaining rights of public employees established by the PECBA would be severely diminished if a public employer could, in essence, terminate them in mid-negotiations simply by making a policy

³⁰Oregon Tech asserted, in its prehearing brief, that department chairs could fund program director stipends and release time from other budgeted funds (and argued, based on that factual assertion, that the defunding of the Model was not tantamount to eliminating program director stipends and release time). However, at hearing, Oregon Tech presented no evidence that any department chair plans to or can fund program director stipends and release time from other funds. Likewise, the record contains no evidence about those ostensible other funds, where they are found in Oregon Tech’s budget, their amount, or what portion of them could be used to fund stipends and release time.

decision concerning its budget.”); *see also id.* at 9-11 n 2, 6 PECBR at 5434-36 n 2 (describing how a public employer can fulfill the duty to bargain when facing a budget shortfall).

In sum, we find that Oregon Tech decided to change the Faculty Workload Guidelines, and it decided to end program director stipends and release time under the Academic Release Time and Stipend Model. Those decisions changed the status quo concerning mandatory subjects. Because Oregon Tech made those decisions unilaterally, it violated its duty to bargain in good faith with the Association.

Remedy

Having found that Oregon Tech violated ORS 243.672(1)(e), we will 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).

We generally order an employer to affirmatively remedy a unilateral change violation by restoring the status quo. Oregon Tech has already restored the status quo regarding the Faculty Workload Guidelines. We will order Oregon Tech to restore the status quo with respect to program director stipends and release time under the Academic Release Time and Stipend Model.

Because the record establishes that, under the status quo, faculty members would have started receiving a portion of their stipends at the start of the 2020-2021 academic year, a make-whole remedy is also necessary. Therefore, we will order Oregon Tech to pay the affected faculty members the portion of stipends that they would have received from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04 at 16, 21 PECBR 206, 221 (2005) (citing *Oregon School Employees Association, Chapter 84 v. Redmond School District 2J*, Case No. C-237-80 at 14, 6 PECBR 4726, 4739 (1981)).

The Association also requests that we order physical and electronic notice posting. 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. *Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College*, Case No. UP-032-14 at 8, 26 PECBR 254, 261 (2014). In this case, a notice posting is warranted because Oregon Tech’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. *Id.* at 9, 26 PECBR at 262. Here, the record establishes that email is the common method of communication between Oregon Tech and Association-represented employees. Accordingly, we will order Oregon Tech to post the notice and distribute it to bargaining unit employees by email.

ORDER

1. Oregon Tech shall cease and desist from violating ORS 243.672(1)(e).
2. Oregon Tech shall restore the status quo with respect to program director stipends and release time under the Academic Release Time and Stipend Model.
3. Oregon Tech shall make all bargaining unit employees whole by paying them the portion of stipends that they would have received under the Academic Release Time and Stipend Model from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum.
4. Oregon Tech shall post the attached notice for 30 days in prominent places where Association-represented employees are employed.
5. Oregon Tech shall distribute the attached notice by email to all Association-represented employees within 10 days of the date of this order.

DATED: October 28, 2020.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.



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-023-20, *Oregon Tech American Association of University Professors v. Oregon Institute of Technology*, 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 Institute of Technology (Oregon Tech) committed unfair labor practices in violation of ORS 243.672(1)(e), which prohibits a public employer from refusing to bargain in good faith with the exclusive collective bargaining representative of its employees.

The Board concluded that Oregon Tech violated the duty to bargain in good faith when it unilaterally changed the 2018-2019 Faculty Workload Guidelines. The Board also concluded that Oregon Tech violated the duty to bargain when it unilaterally eliminated stipends and release time for faculty who serve as program directors (and comparable roles) under the Academic Release Time and Stipend Model.

To remedy these violations, the Board ordered Oregon Tech to:

1. Cease and desist from violating ORS 243.672(1)(e).
2. Restore the status quo with respect to program director stipends and release time under the Academic Release Time and Stipend Model. (The Board did not need to order Oregon Tech to restore the status quo with respect to the Faculty Workload Guidelines, because Oregon Tech reinstated the 2018-2019 Guidelines on or about September 8, 2020.)
3. Make all bargaining unit employees whole by paying them the portion of stipends that they would have received under the Academic Release Time and Stipend Model from the date of the violation to the date it complies with this order, plus interest at the rate of nine percent per annum.
4. Post this notice for 30 days in prominent places where Association-represented employees are employed.
5. Distribute this notice by email to all Association-represented employees within 10 days of the date of this order.

EMPLOYER

Dated _____, 2020

By: _____

Title: _____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

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