BEFORE THE EMPLOYMENT RELATIONS BOARD

OF THE STATE OF OREGON

KLAMATH FALLS ASSOCIATION OF CLASSIFED EMPLOYEES (KFACE), Complainant, vs. KLAMATH FALLS CITY SCHOOLS, Respondent.	Case No. UP-039-21 **COMPLAINANT'S BRIEF IN AID OF ORAL ARGUMENT**

1. INTRODUCTION

In this case, Klamath Fall Association of Classified Employees ("KFACE" or the "Association") alleges that the Klamath Falls City Schools ("District") has engaged in knowing and intentional discrimination against Association leaders and activists in violation of ORS 243.671(1)(a), (b) and (c). Fundamentally, the District has sought to stifle core protected activity– communication about union business – through disciplinary actions and unlawful directives ("you cannot share concerns with the union directly" and "you cannot send union communications containing "political" messages). Because the District's conduct is egregious and strikes at a core principle of the PECBA, the Association seeks a civil penalty, in addition to electronic posting.

In his Recommended Order, the Administrative Law Judge (ALJ) concluded that the District violated the PECBA by threatening to discipline a member (Tanya

Thornton) if she shared information with the Association about potential contract violations. However, he rejected the remainder of the Association's allegations, ignoring evidence of unlawful motive and impact on the Association of the District's unlawful conduct. He also rejected the Association's request for a civil penalty or even an electronic posting. This is error. The Board should find that the District violated ORS 243.672(1)(a), (b) and (c) as a result of its conduct towards Thornton.

On the question of whether the Association has the right to communicate with members about its political endorsements using work email pursuant to ORS 243.804(5), the ALJ erred in concluding that political activity, such as endorsing school board members, is not "union business." He also erred in relying on the parties' collective bargaining agreement to conclude that the Association has effectively waived rights protected by ORS 243.804(5), when the contract provision conflict with the statute and when the District did not raise waiver as an affirmative defense.

This Brief in Aid of Oral Argument is offered to supplement the objections and original post-hearing brief it filed.

2. OBJECTIONS TO FACTS[1]

As set forth in Complainants' objections, most of the basic facts in the case are

[1] The hearing in this matter was recorded both on Zoom and through "For The Record." The parties obtained a rough transcript of the proceedings based on the Zoom recording, a copy of which was separately filed with ERB. Time references on that document related to the Zoom time stamp and are used in this brief. The Association recognizes that this rough transcript is not an "official transcript;" it is offered as an inexpensive alternative to assist the ALJ at this time. In addition, it has included a reference to the FTR time stamp.

undisputed. Nonetheless, the Association objects to certain omissions and inferences drawn by the ALJ regarding the facts. Those objections will not be addressed separately but rather discussed below in the context of the Association's arguments challenging the Conclusions of Law set forth in the Recommended Order.

3. OBJECTIONS TO CONCLUSIONS OF LAW

A. Clark's search of Thornton's Emails Violated ORS 243.672(1)(a) and (c) [2]

In the Recommended Order, the ALJ concludes that HR Director's search of Thornton's emails was unrelated to protected activity and that doing so would not cause a "reasonable person to be chilled from exercising PECBA rights by the employer's conduct." In reaching this conclusion, the ALJ notes that (1) the search was for "blind carbon copies" and not "union" emails; and (2) an employer has the right to search emails. Recommended Order, p. 18. Similarly, the ALJ finds that the search of Thornton's emails did not violate ORS 243.672(1)(c) because "the search was primarily because Thornton had "bcc'd" someone, and not because she was communicating with the Union.

These conclusions do not flow from the facts. To review:

[2] The ALJ correctly found that that Clark unlawfully threatened Thornton with discipline if she communicated with the union about anything other than personal contract violations. Recommended Order, p. 19. The District did not object to those findings so that issue will not be discussed here, except as context and as it relates to remedies.

- Prior to this dispute arising, the District had provided Thornton with a "letter of expectations" regarding Thornton's communications about a decision made by Clark to take back "bonus days" because staff are "angry with our human resources department and a grievance has been filed." Finding of Fact 18; C-2. Thornton felt targeted by Clark. Finding of Fact 8. While the letter may have been written by the Superintendent, it was clear that Clark understood and supported the action. Ex. C-4. Finding of Fact 22.
- When the Association (through UniServ Consultant, Ryan Olds) objected to the letter of expectations, expressly stating that it seemed retaliatory and a violation of the PECBA, Clark responded by asserting that "it was not a union issue." Nonetheless, Clark understood at the time that the Association was extremely concerned about anti-union retaliation. Finding of Fact 24; C-3.
- In March 2021, Thornton blind carbon copied the Association President (Heather Wisener) with an email identifying a potential contract violation relating to whether an employee was properly identified as a "temporary" employee. Thornton did so because she wanted to make sure the issue was addressed. She did not show the copy because of fear of retaliation for alerting the Association about the issue. Finding of Fact 31.
- When Wisener raised the issue with Clark, Clark was "perplexed" about how Wisener would know about the issue because the only people who should

have known were Thornton, Clark and the secretary. Clark Test., 6:20:05 (Tr, p. 120). (FTR 3:19:15 p.m.).

- Clark asked her IT department to track down the email to Wisener and, when she learned that it was blind carbon copied, initiated the investigation with Thornton. Clark did not ask Thornton who she had copied or whether she had previously copied the Union before undertaking the search. Finding of Fact 36. Clark also did not raise concerns about Thornton sharing confidential student or employee information.
- Clark's concern expressly flowed from her view that the Union had been improperly notified of the issue because she believed that interacting with the Union was "her job." Clark Test., 6:22:02-12 (Tr, p. 121). (FTR 3:21:14 p.m.). She explained:
    - **Question (Hungerford**): And what concern did it have for you that you were not aware that a message that came to you was also being blind carbon to somebody else?
    - **Answer (Clark):** Uh, well, one just the fact of not knowing who, who, who I'm, who's my who's getting my responses and who's being included in this work through, I work very hard to make contact, um, to both Heather and Lisa. Um, and when Don was here at the time. So, um, three presidents now to, to keep them in the informed of issues as they arise. Um, my concern was as much at times as I do talk with Tanya, is that happening on a regular basis? Like, I, you know, we have confidentiality in our positions, even a parapro has confidentiality with a, a student information. So with though an employee might not be labeled confidential in a, in their group. We all have confidentiality within our jobs. *And so that's one of those pieces of*

like, you know, that's my job to reach out to the union and, and make that work with them. So just, just, oh, just some red flags mm-hmm.

- When Thornton asked what the investigatory meeting was about and whether she needed to bring representation, Thornton was told that it was about the email she had blind carbon copied to the union. Finding of Fact 33, Thornton Test., 2:16:05. (Tr, p. 52) (FTR 11:15:14 a.m.). There was no mention of divulging truly confidential information.
- At the investigatory meeting, Clark explained that she believed all information Thornton learned in her job as payroll clerk was "confidential." Clark told Thornton that she could not provide the union with any information about potential problems unless it had to do with her directly, under threat of discipline. Finding of Fact 34. Thornton Test., 2:19:02. (Tr, p. 54). (FTR 11:18:11 a.m.). Thornton Test., 2:44:01 (Tr, p. 65). (FTR 11:43:11 a.m.).
- Thornton believed her job would be in jeopardy if she shared information with the Union. Finding of Fact 36.
- Thornton was asked by long-time Association leader, Dawn English, to run to be an officer of the Union. Thornton thought about it and declined, because she "didn't want to have to take the chance on her blaming me for information that got back to the union because of my position." Finding of Fact 37. Thornton Test., 2:19:51. (Tr, p. 54). (FTR 11:19:00 a.m.).

These facts make clear that the District violated both the "in the exercise of" and "because of" prong of ORS 243.6721)(a) when it searched Thornton's email because of her protected activity. Simply put, the evidence establishes that Clark had previously sought to limit Thornton's engagement with the Union and that Clark reacted strongly when she believed that the Union was being informed of matters that Clark believed was her exclusive responsibility. While it is possible that Thornton would have "blind carbon copied" someone else, Clark's own description of her concern makes clear that search was both triggered by and intended to discover if Thornton had blind carbon copied other emails to the Union. Why else reference the other union presidents? And, again, Thornton did not show the "cc" exactly because she feared retaliation – a fear borne out by the search of her emails and subsequent directive to not disclose any information to the union, unless it involved her personally. A reasonable employee in her shoes would be discouraged from alerting the union to issues, as a result of having her emails searched. [3]

B. The District Violated ORS 243.672(1)(b)

In the Recommended Order, the ALJ concludes that the Association failed to establish a violation of ORS 243.672(1)(b). This conclusion is not supported by the facts. As the ALJ correctly found, the District violated ORS 243.672(1)(a) when Clark

[3] The fact that the District has the right to search emails is irrelevant absent evidence that it routinely (or ever) has done so, or that that the "bcc" was discovered during a routine search. Of course, that was not the case.

threatened Thornton with disciplinary action for communicating with the Union about any matters she learned in her position, other than those directly affecting her. The ALJ also correctly found that Thornton declined to run for Association office because of that threat and fear that she would get in trouble for information getting to the union. Finding of Fact 37. Nonetheless, he concluded that there was no ORS 243.671(1)(b) violation, reasoning that "there is an insufficiently direct or substantial link between Clark's directive and Thornton's subsequent decision not run for office. We also find it significant that the directive was given to just one employee." The ALJ continued by noting the lack of evidence of actual intent by Clark to interfere with the Association or its elections when she searched the emails. Finally, he minimized the impact of the District's actions because they were only directed at one employee and because, he asserted, Clark had no prior knowledge that Thornton was engaged with or supported the Union. Recommended Order, p. 21.

There are a number of problems with this analysis.[4] Most fundamentally, "motive" or "intent" is not an element of a (1)(b) claim. Rather, the focus of the analysis

[4] The Association disputes the ALJ's conclusion that Clark had no knowledge of Thornton's union engagement prior to March. The Association had previously been required to intervene after Thornton was issued a letter of expectations because she had described an HR decision in a way that invited a grievance. Nor is the fact that Clark only targeted Thornton a reason to find no violation. To make out a claim, there is no need for the Association to prove that Clark announced to others in the bargaining unit that they would be disciplined for sharing information with the Association. Here, English solicited Thornton to be an Association leader exactly because Thornton was a straight shooter and was diligent about protecting and enforcing the contract. Thornton declined because she did not want to get in trouble with Clark. That is enough.

is on whether the employer's actions "actually, directly and adversely affected the labor organization." *Clackamas County Employees' Association v. Clackamas County, Case No.* UP-030-20 (June 6, 2022), 2022 WL 2077928 * 8 (OR ERB) (reiterating standard). Here, the evidence was unrebutted that as a result of the District's unlawful threats, Thornton did not run for an Association office. That is exactly the kind of direct and substantial evidence of *actual* interference necessary to find a (1)(b) violation.

C. The District Violated ORS 243.672(1)(a), (b) and (c) when it Disciplined Lisa Danskin for Union Communications that Contained Political Advocacy.

The Association alleges that the District violated ORS 243.672(1)(a), (b) and (c) when it disciplined Lisa Danskin for sending an Association email to KFACE members during the work day using work email because it contained the Association's endorsements for school board. According to the Association, pursuant to ORS 243.804(5), the Association has the right to communicate with members about "union business" – which includes its political positions -- using employer work email. That communication is a union communication and thus not prohibited by ORS 260.432, Oregon's "Little Hatch Act" which generally prohibits public employees from engaging in political activity while on the job during work hours.

The ALJ rejected the Association's claim for the following reasons. First, as argued by the District, he interpreted ORS 260.432, to be an absolute ban on the use of work emails for any political advocacy at any time. Second, he concluded that the right to use employer email for "union business" does not include political advocacy. Third,

even if ORS 243.804(5) were to give the Association the right, the email shared by Danskin was prepared by a UniServ Council committee and therefore not a communication by the exclusive bargaining representative. Fourth, even if the Secretary of State allows unions to engage in some political advocacy, the scope of that activity is controlled by the collective bargaining agreement. In this case, the parties' collective bargaining agreement includes a provision stating that the Association's use of email "shall be limited to Association business and shall not be to espouse a political candidate, cause, measure or any religious point of view." Fifth, the District has a policy that "strictly prohibits" transmission of political materials, which it had the right to enforce. Finally, the ALJ concludes that the District was "actually motivated by a desire to comply with ORS 260.432 and its policies, rather than a desire [to] restrain or interfere with protected rights." Recommended Order, pp. 22-24.

As set out below, each of these reasons for denying the Association's claims is flawed.

D. ORS 243.804(5) Guarantees the Exclusive Representative the right to use public employer email systems.

The starting point of the analysis is ORS 243.804(5). That provision, added as part of HB 2016 during the 2019 Legislative session, protects the right of the exclusive representative to use work emails to communicate with members. It provides:

> (5) An exclusive representative *shall have the right* to use the electronic mail systems or other similar communication systems of a public employer to communicate with the employees in the bargaining unit regarding:
>
> (a) Collective bargaining, including the administration of collective bargaining agreements;
>
> (b) The investigation of grievances or other disputes relating to employment relations; and
>
> (c) Matters involving the governance or business of the labor organization.

Emphasis added.

Notably, unlike other portions of HB 2016, the statute affirmatively establishes these rights – they are not simply identified as something to bargain. *Compare,* HB 2016, Section 4, codified at ORS 243.802 (authorizing negotiation over release time).[5] That is, pursuant to ORS 243.804(5), the union *shall have the right* to use the electronic mail system to communicate with members. Prior to passage, the union only had the ability to bargain over access, which is a mandatory subject of bargaining. *Association of*

[5] A review of legislative history reveals relatively little discussion of this provision, including the meaning of "union business." HB 2016, Section 5(5), now codified at ORS 243.804(5) was included in the original bill and not amended or otherwise the subject of discussion in written testimony, except to the extent that some public employer advocates argued that certain provisions should remain subject to bargaining. *See,* Written Testimony of Nancy Hungerford, March 11, 2019, noting that the bill would remove the subjects from bargaining. The issue that got more attention was an initial provision, ultimately deleted, that would have allowed public employers to deny access to the employer's email system by entities seeking to discourage union membership and activities. HB 2016 A-Engrossed, p. 12, lines 12-27, deleted in B-Engrossed. *See, e.g.* Written Testimony by Jeffrey Chicoine on behalf of the Oregon Public Employer Labor Relations Association, April 18, 2019, noting that bill would give "unfettered" email access to unions, while barring access to those opposing unions.

Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services, Case No. UP-043-11, 2013 WL 3465251, at *15. This means that, historically, the use of work email and other access issues were governed by the parties' collective bargaining agreement exclusively. ORS 243.804(5) changed that, establishing a floor of rights relating to access.

E. The Union's Political Activities, including School Board Endorsements, are "Union Business."

In his Recommended Order, the ALJ concluded that "union business" does not include the union's political agenda or advocacy, but does not offer an alternative definition. In reaching this conclusion, he notes that the reference to business is close to "governance." The Board should reject this conclusion. First, the statute refers to "governance" or "business," expressing an intent that they be different. "Governance" deals with union elections, meetings, budgets, etc. There is no reason to assume that "business" is similarly limited to "operations" which seems to be what the ALJ and the District argue. In the absence of any particular definition or legislative history, words are given their "plain, natural and ordinary meaning, " generally as reflected in the dictionary. " *PGE v. Bureau of Labor and Industries,* 317 Or 606, 611 (1993). The dictionary of choice is *Webster's Third New Int's Dictionary* (unabridged ed 2002), which defines "business as "a.(1) purpose activity; activity directed toward some end * * * (2)an activity engaged in as normal, logical , or inevitable and usu. extending over a considerable period of time * * * (3) an activity engaged in toward an immediate specific

end and usu. extending over a considerable period of time. *Websters, supra* at 303. Clearly, electing supportive board members is union business -- "an activity directed toward some end." As UniServ Consultant Ryan Olds testified, electing school board members who respected the Association, and its members was an essential component in organizing for bargaining. Olds Test. 4:20:18; ((p. 80) 4:54:09 (p. 92). [6]

In addition, the notion that political objectives and activities are somehow separate from "usual" union business is inconsistent with the U.S. Supreme Court's analysis in *Janus v. American Federation of State, County, and Mun. Employees, Council 31,* 138 S Ct. 2448, 2480 (2018) – the case which was the impetus for HB 2016 in the first place. In *Janus,* the Court overturned years of precedent based on its belief that virtually all public sector union activities are "inherently political."

It is also important to note that "political advocacy" includes more than just candidate-related matters. If "union business" excludes anything "political" (as that is defined in ORS 260.432), then the Union would be prohibited from sending an email to members expressing support for a bond measure, stating its position on a ballot measure, or simply announcing a rally or canvass to support an endorsed candidate or

[6] The fact that the endorsement decisions were made by a committee of the regional UniServ Council, of which KFACE is a member, does not mean that Danskin's communication about that endorsement was not a communication by the exclusive representative. The UniServ Council is a coordinating body, much like a regional meeting of superintendents. Olds Test., 4:19:05 (Tr, p. 80) (FTR 1:18:15 p.m.). But each Association is independent. As reflected on the email itself (Ex. C-14) and as testified to by Danskin, she sent the email in her capacity as Association Vice President.

measure. Surely, enacting a bond that will pay member salaries is a core function and activity of the union, as would communication about a measure to create school vouchers. *See, e.g.,* IP 6 (2024).

Relatedly, how would a public employer enforce such a prohibition? Review each union email or newsletter? Any effort to examine the content of union communications to determine whether they are "political" or "union business" would put the employer in the role of censor of union communications, and necessarily undermine PECBA rights. *See, e.g., AFSCME Local 189 v. City of Portland,* Case No. UP-7-07, 22 PECBR 752, 797 2008) (confidentiality of union communication "furthers the purposes and policies of PECBA by ensuring that employees have unfettered access to their union representatives"). Moreover, an interpretation of "union business" that excludes political communications may also violate Article 1, section 8 of the Oregon Constitution. *See, e.g. Oregon Natural Resources Council Fund v. Port of Portland,* 286 OrApp 447, 464, *rev den,* 362 Or 175 (2017) (Port's prohibition on all "political advertisement" violated Article 1, section 8 because it was content based – political versus non-political); *Outdoor Media Dimension, Inc. v. Department of Transp.* 340 Or 275 (2006) (allowing some non-content based regulation of signs on public highways).

In sum, the Board should find engaging with members about political matters is essential to the union's core functions of organizing, bargaining and representing members – it *is* the union's business.

F. ORS 260.432 Does Not Prohibit Political Communications by Public Employee Unions

As the Association acknowledges, resolution of this dispute requires the Board to harmonize ORS 243.804(5) and ORS 260.432. That statute provides that it is generally unlawful for public employees to engage in political activity "while on the job during working hours." However, contrary to the findings in the Recommended Order, the statute is not an absolute bar to any political activity by a public employees. It does not prevent public employees from expressing personal political views (during or outside of work hours), nor does it prevent the Union from expressing its views.

ORS 260.432(2) provides:

> "No public employee shall solicit any money, influence, service or other thing of value or otherwise promote or oppose any political committee or promote or oppose the nomination or election of a candidate, the gathering of signatures on an initiative, referendum or recall petition, the adoption of a measure or the recall of a public office holder *while on the job during working hours. However, this section does not restrict the right of a public employee to express personal political views."*

Emphasis added.

Thus, the limitation only applies to personal political expression *while on the job* and *during working hours.*

The Secretary of State is charged with interpreting this law. She does so through

a manual, which has the force of administrative rule. OAR 165-013-0030.[7] In that manual, the Secretary recognizes that political activity by a public employee union is different than public employee political activity. Thus, public employee unions may post information on a designated bulletin board, consistent with the terms of any collective bargaining agreement, and may also distribute materials to their members pursuant to their contract. In addition, the current manual provides that:

> Unions can email their members with political information so long as it does not require the employee to engage in political advocacy while on the job during working hours."

Manual, p. 8 and 10.

In ruling against the Association, the ALJ first suggests that ORS 260.432 prohibits all political activity by public employees, regardless of how much time is spent on the political activity or when it was done. Recommended Order, p. 23. He appears to base this conclusion on portions of the SOS manual discussing the challenges of determining when salaried employees are deemed "on the job" or acting in an "official capacity." Those concerns do not apply to hourly employees for time when they are on break or not being compensated. Manual, p. 5.

[7] When there are changes in the law or practice, the manual is updated. The most recent revision occurred in October, 2022, after the hearing in this matter. A copy of the revised manual can be found at here and is attached to this memorandum. This updated manual expressly addresses email, social media, and other common aspects of current political activity. The prior version (Ex. C-10) was prepared in January 2016, and before HB 2016 was enacted. It recognized the right of Unions to post materials on bulletin but did not include anything related to emails.

The ALJ then turns to the import of statements in the manual recognizing the Union's ability to post information on bulletin boards and distribute materials to members, consistent with the collective bargaining agreement.[8] Rather than view that as a recognition by the Secretary of State that union communications are different than personal political advocacy by public employees – and thus not absolutely prohibited by ORS 260.432 – he jumps to language in Article 4.G of the parties' collective bargaining agreement (prohibiting use of District email for political advocacy) to conclude that the District's discipline of Danskin was lawful. The Association will further discuss the relevance of the contract provision below. But it is essential that the Board recognize that ORS 260.432, as interpreted by the Secretary of State, has *always* permitted certain political activity by public employee unions. Prior to enactment of HB 2016 in (2019), permissible union activity was defined in reference to collective bargaining agreements, since there were no affirmative rights to access set out in the PECBA. After HB 2016, permissible activity as it relates to employer email is established by ORS 243.804(5). Accordingly, the SOS Manual (page 8 and 10) now includes the unequivocal statement, with no reference to a collective bargaining agreement, that:

[8] The Association recognizes that the ALJ did not have the benefit of the current manual when he prepared the Recommended Order. However, the statement regarding union use of email simply reflects rights established under ORS 243.804(5).

> "Unions can email their members with political information so long as it does not require the employee to engage in political advocacy while on the job during working hours."

This means that the Board can find that ORS 243.804(5) gives public employee unions the right to use employer email to communicate about political matters without violating ORS 260.432.

G. The Parties' Collective Bargaining Agreement Is Not a Defense

In his Recommended Order, the ALJ relied heavily on a provision in the parties' collective bargaining agreement that expressly states that the Association could not use District email to "espouse" political positions. Recommended Order p. 23-24. The Association acknowledges that the language – negotiated prior to enactment of HB 2016[9] -- is bad for the Association. But it cannot be relied upon to justify the District's discipline of Danskin for two reasons. First, because the language conflicts with ORS 243.804(5), it is an unenforceable prohibited subject of bargaining. This is true, even if the subject would otherwise be mandatory. *See, Eugene Education Assoc. v. Eugene School Dist. 4*J, 91 Or App 780, vacated on other grounds, 306 Or. 659 (1988) (proposal for two-tiered seniority system conflicted with statute and therefore was a prohibited subject of

[9] Because the District did not raise the contract as an affirmative defense, the Association did not put on any evidence regarding the history of the article. However, in its post-hearing brief, the District itself noted that the language predated enactment of HB 2016 and that the Association had not demanded that it be reopened. *See,* Respondent's Post-Hearing Brief, p. 33, n4. However, because ORS 243.804(5) is not one of the provisions that requires bargaining, the Association was not obligated to demand to reopen.

bargaining). That is, once ORS 243.804(5) was passed, the District could not propose or legally enforce a collective bargaining provision denying email access to the union for "union business." *Portland Association of Teachers/OEA/NEA v. Portland Public Schools,* UP-024-17, 2017 WL 4536052* 7 (2017). And, provisions in a collective bargaining agreement that involve prohibited subjects are unenforceable, even if agreed to by the parties. *See, Portland State University SSUP and Portland State University,* Case No. UP-36-05 at 16, 22 PECBR 302, 317, *recon.,* 22 PECBR 503 (2008), *aff'd,* 352 Or 697 (2012).

The Association anticipates that the District will argue that, even if it could not prohibit all email access under ORS 243.804(5), it could bargain with the union about how to implement the statute, including what constitutes "union business." The Association disagrees that what constitutes "union business" is subject to bargaining. That is a core term in the statute, and not a mere implementing detail. Therefore, the collective bargaining agreement's prohibition on union political communications is unenforceable. That ends the analysis.[10]

But, even if it were theoretically bargainable, the District did not preserve its waiver argument because it was not plead as an affirmative defense. Rather, in its Answer, the District only cited its own policies and ORS 260.432. This means that it cannot now assert that the union "waived" email access rights guaranteed by ORS

[10] The ALJ's reliance on school board policy is similarly misplaced. To the extent it conflicts with the statute, the statute governs.

243.804(5) by agreeing to the [unlawful] contract language, even if that language may seem "clear and unmistakable." *See, Portland Fire Fighters' Association, IADFF Local 43 v. City of Portland*, 302 Or App 395 (2020) (ERB erred in finding that Association waived it right to bargain by inaction where City never asserted the affirmative defense of waiver by inaction); *OSEA v. Parkrose School District*, UP-030-12, 25 PECBR 783, 790, *reconsid*, 25 PECBR 845 (2013); 25 PECBRE 979 (2014) (consent order) (District could not rely on waiver by contract where that was not plead as an affirmative defense). While this case does not allege a bargaining violation under ORS 243.7672(1)(e), the same waiver analysis applies where the District seeks to rely on a contractual provision waiving statutorily provided rights as a defense to a claim that it acted unlawfully. That is, to rely on the bargaining agreement as evidence that the Association had waived statutory rights to use work emails to communicate about "political" union business, the District was required to plead the contract as an affirmative defense.[11] It did not. That should end the inquiry.

H. The District's Motive is Not Dispositive

In the Recommended Order, the ALJ holds that Danskin's discipline was not a violation of ORS 243.782(1)(a), (b), or (c) because the District was "motivated by a desire

[11] That the District is making an waiver argument that needs to be plead as an affirmative defense is clear from a review of its post-hearing brief. There, it argued that "the Union has bargained away any right to use District bulletin boards or "mail facilities including email" to "espouse a political candidate." Respondent's Post-Hearing Brief at 31, 33.

to comply with ORS 260.432 and its policies, rather than a desire to restrain or interfere with protected rights." The ALJ also concludes that the discipline had little impact on the Association. Recommended Order, p. 24. These conclusions are wrong and beside the point. There is no dispute that the District disciplined Danskin for union activity – sending the email about the Association's endorsements. The question is whether that union activity loses its protection under ORS 260.432 because it is "political." As discussed above, it does not. Therefore, the District violated ORS 260.432 by disciplining Danskin. This is true even if the District, in good faith, believed that the email communication was unlawful.[12]

Second, the ALJ's finding that Danskin still uses her email for "union business," avoids the key question of what constitutes "union business." As Danskin testified, she has felt extremely nervous using email for any "union business." She continued to do so for non-political communications, but that does not negate the actual chilling impact on her of receiving the discipline. Danskin Test., 1:14:05 (26). And, of course, the imposition of discipline on Danskin would chill others from engaging in the same lawful protected political activity.

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[12] Although not necessary to find a violation of ORS 243.672(1)(a)(and (c), the record when read as a whole supports the conclusion that the District issued the discipline, in part, because the endorsement was for a retired KFACE leader. District administrators were aware of the email and did nothing. It was only when Clark, who had already demonstrated her desire to limit union activity, that the District investigated. And, when she did so, she seemed very interested in knowing *who* wrote the email. Altogether, this evidences supports the Association's larger concern that the District was pushing back exactly because the union was getting stronger.

I. The District's Violation Warrants a Civil Penalty, Reimbursement of Filing Fees and a Posting.

In the Recommended Order, the ALJ essentially concludes that, although the District violated ORS 243.672(1)(a) and (c) when Clark threatened to discipline Thornton for communicating with the union, no civil penalty, filing fee or even posting is appropriate. First, for the reasons discussed above, the Board should find that the District engaged in additional violations when it searched Thornton's emails because she had blind carbon copied the union, and by disciplining Danskin for sending the email about the school board endorsements. When those violations are included, the balance tips squarely in favor of ordering these remedies.

In addition, the ALJ errs when he characterizes the founded violation – telling an employee that she could lose her job if she communicates with the union – as a "single" and "unknowing" violation and therefore not "egregious." This conclusion ignores the fact that Clark's directive is patently unlawful under well-established precedent and "far removed from the standard of good practice under the PECBA. *Hood River Employees Local Union No. 2503-2/AFSCME Council 75/AFL-CIO v. Hood River County*, Case No. UP-92-94, 16 PECBR 433 (1996), *AWOP* 146 Or App 777, 932 P2d 1216 (1997). To reiterate, Clark told Thornton, a non-confidential employee, that Thornton could not share any concerns about potential contract violations that she became aware of through her work, unless they involved her personally. Clark testified that

communicating with the Union was Clark's job, not Thornton's.[13] Clark Test., 7:24:20 (Tr, p. 145) (FTR 4:23:30 p.m.). Of course, a bedrock principal of the PECBA is that employees have a protected right to join together and communicate with one another about working conditions. *Association of Engineering Employees of Oregon v. State of Oregon, supra.,* at 15. Simply put, there is no ambiguity in the law about the right of bargaining unit employees to communicate about union matters. This is the kind of "egregious" or "flagrantly bad" conduct for which a civil penalty is appropriate.

4. CONCLUSION

For the reasons stated herein, the Klamath Falls Association of Classified Employees requests that the Board find that the Klamath City School District violated ORS 243.671(1)(a), (b) and (c). It should be ordered to pay a penalty for its egregious violation and electronically post notice of its violation so that KFACE members have notice of the District's wrongdoing, as well as their right to engage in protected activity without retaliation.

Respectfully submitted this 31st day of March, 2023.

/s/ Margaret S. Olney
Margaret S. Olney, OSB No. 881359
Of Attorneys for Complainant

[13] Clark is also a seasoned HR professional who had previous experience with public sector unions in Oregon. Clark Test., 5:48:09 (Tr, p. 107). (FTR 2:47:19 p.m.). Her flagrant violation cannot be excused by ignorance.

Restrictions on Political Advocacy by Public Employees

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Secretary of State

Elections Division Rev. 10/2022

Contents

Icons

The following icons are used in this manual to emphasize information:


alert icon
indicates alert; warning; attention needed


info icon
indicates additional information


deadline icon
indicates a deadline


example icon
indicates an example


form icon
indicates a reference to a form


search icon
indicates information located elsewhere

Assistance

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Using this Manual

This manual sets forth allowable and restricted political activities by public employees, consistent with ORS 260.432 *et seq.,* and advice from the Attorney General. Any conflict between this manual and ORS 260.432 must be resolved in favor of the statute. This manual is adopted by Oregon administrative rule (OAR) 165-013-0030 and violations of this rule are to be enforced as violations of ORS 260.432. Examples and lists are used for illustrative purposes only and are not meant to be exhaustive or exclusive. Also included is information about the Elections Division's prior review process and obtaining safe harbor approval for documents and other materials prior to publication or distribution.

When an activity in this manual is referred to as allowable, it means that it **does not** violate ORS 260.432. When the activity is referred to as restricted, it means that it **does** violate ORS 260.432 and a penalty may be assessed.

Essentially, public employees may not engage in certain political activity prohibited under ORS 260.432 while on the job during working hours or when acting in their official capacity. This manual details what it means to promote or oppose, and when a public employee is considered to be "on the job during working hours." Further, an Attorney General letter dated October 5, 1993 states:

> "Public bodies may use public funds to inform voters of facts pertinent to a measure, if the information is not used to lead voters to support or oppose a particular position in the election. However, we also have pointed out that 'informational' material may be found to 'promote or oppose' a measure even if it does not do so in so many words if the information presented to the public clearly favors or opposes the measure and, taken as a whole, clearly is intended to generate votes for or against a measure."

Who Must Comply With ORS 260.432?

All non-elected public employees are prohibited from engaging in political activity proscribed by ORS 260.432. No person, including elected officials or a public employer, may direct a public employee to engage in certain political advocacy proscribed by the statute. See Candidates and Elected Officials, below.

Federal employees, including persons principally employed by state or local executive agencies in connection with programs financed in whole or in part by federal loans or grants, are covered by the federal Hatch Act, which is administered by the U.S. Office of Special Counsel.

Candidates and Elected Officials

An elected official may engage in political advocacy during work time. Elected officials are not considered public employees for the purposes of ORS 260.432. An individual appointed to fill a vacancy in an elective public office is considered an elected official for purposes of this statute.

Elected officials cannot request public employees who are on the job during working hours or acting in an official capacity to engage in political advocacy prohibited under ORS 260.432. A request made by an elected official is considered a command.

An elected official's quote, opinion piece, letter or speech advocating a political position may be published in a public agency's newsletter or other publication produced or distributed by public employees so long as public employees did not alter or edit the content in a substantive way. Equal access must be granted to any individual, candidate or political committee.

See Material Produced by Governing Bodies, page 16.

See Voters' Pamphlet, page 13, for an exception to this standard.

Public employees may not prepare advocacy material, including but not limited to the text for a speech, a press release, constituent mail that advocates a vote, candidate filing forms, voters' pamphlet filing forms, file contribution and expenditure transactions online, etc. during their work time.

An elected official, as part of a governing body, may vote to support or oppose a measure under consideration for referral. The elected official may publicly discuss the vote. Elected officials may not use public employee staff time to develop political advocacy proscribed by ORS 260.432, except for administrative functions.

An elected official may only solicit volunteer help from public employees during employee breaks or other personal time.

Appointed Board Members and Commissioners

ORS 260.432 applies to all appointed board and commission members when they are acting in their official capacity. This includes, but is not limited to, attending a meeting of the board or commission, working on a duty assigned by the board or commission, working on official publications (including website materials) for the board or commission, or when appearing at an event in an official capacity.

Appointed board or commission members may use their titles to engage in political advocacy (including endorsing candidates, measures, etc.) so long as they are not acting in their official capacity when making the endorsement or authorizing the use of their title.

A candidate approaches a planning commission board member and asks for their endorsement. The candidate asks if they can use the board member's title, and the board member agrees. This is allowable if the board member was on their personal time when they authorized the endorsement.

A candidate, attending a planning commission meeting, asks the board members for an endorsement and some board members agree. The board members are not allowed to do this because they are at a meeting and therefore acting in an official capacity.

See Use of Public Employee Title on page 7 for more information.

Salaried and Hourly Employees

Hourly employees' work time includes any time they are "on the job during work hours" which includes any time for which the employee is compensated. This includes, but is not limited to, regular work hours, overtime, travel or conferences. Activities associated with attending a conference, such as award dinners or other sponsored events, could qualify as being "on the job during working hours" and are subject to the provisions of ORS 260.432.

Salaried employees' work time is not as easily measured as hourly workers. If the work performed falls generally within the job duties of the public employee, the work is deemed to be performed in an official capacity regardless of the time of day or location.

If a salaried employee applies for expense reimbursement for a function or event, the employee is deemed to be on the job during working hours for the applicable time period. A regular workday may not be defined for a position, or may not have a specific time period or schedule. Whether the employee is on the job during work hours is determined by the activities performed and whether the person is acting, or appears to be acting, in an official capacity.

The Elections Division suggests that salaried employees keep personal notes to record when they are on or off duty. During public appearances, the employee is encouraged to specifically announce to the audience that they are not acting in their official capacity. However, such an announcement would not negate a subsequent statement or action that indicates the public employee is acting in his or her official capacity (such as handing out official publications, or speaking on behalf of the public employer).

Certain activities that are always undertaken in an official capacity (regardless of time of day or location) and are therefore always subject to the provisions of ORS 260.432 include:

- → Drafting material for, or approving material, to be posted on an official website;
- → Drafting or distributing an official publication from the public agency; and
- → Appearing at an event as a representative of a public agency.

ex If a salaried police officer attends a meeting about a measure on their own time (i.e. while not "on duty") and advocates for the measure, the officer should announce to the audience that they are there in their capacity as a citizen, and are not representing the police department.

However, if the police officer hands out official publications from the public agency, the police officer would be acting in his or her official capacity (despite their previous announcement) and would be subject to the requirements of ORS 260.432.

ex A school superintendent acts in their official capacity at all school board meetings and school functions.

ex A public employee may be acting in their official capacity even when using personal equipment and personal time, if the activity is related to work duties. A public employee who, on their own computer on the weekend, drafts a press release about how a measure might affect their agency, and signs the document with their title, is acting in their official capacity.

However, a public employee has the right to participate in political activity on their own time. A public employee is not on the job during working hours or acting in their official capacity solely because they may be subject to a call back to duty at any time.

See Use of Public Employee Title on page 7 for more information.

Volunteer Personnel at a Public Agency

Volunteers, other than members of boards or commissions, who receive no compensation are not considered public employees and therefore are not subject to the provisions of ORS 260.432(2) which prohibits public employees from engaging in political advocacy while on the job during working hours or in their official capacity. However, all persons are subject to the provisions of ORS 260.432(1) which prohibits anyone from directing a

public employee to engage in prohibited political advocacy set forth in the statute. Workers compensation coverage is not considered compensation.

If a public employee directs a volunteer to generate and distribute a flyer advocating for or against a measure, this would constitute a violation of ORS 260.432 on the part of the public employee.

Government Contractors

Public employees may not direct government contractors to engage in political advocacy as part of the contracting service.

Contractors are bound by the policies of the agency and the terms of the contract. A public employee may be liable under the statute if they direct a contractor to engage in prohibited political advocacy.

A school district may hire a public relations firm to help communicate with the public about an upcoming measure. If the public relations firm drafts material to be approved and disseminated by public employees, the material must be impartial. If the material is not impartial, the public employee who approved it would be liable for a violation of ORS 260.432.

National Voter Registration Act (NVRA) and ORS 247.208(3)

While the restrictions imposed under ORS 260.432 apply generally to all public employees, ORS 247.208(3) imposes a separate and rigorous set of restrictions that apply only to persons who provide voter registration services required under the National Voter Registration Act (NVRA). NVRA is a federal law enacted by Congress in 1993.

Public employees or other persons providing NVRA-required voter registration services on behalf of a designated agency may not:

- → seek to influence the political preference or party registration of a person registering to vote;
- → attempt to discourage a customer from registering to vote;
- → display any indications of political preference or party allegiance (including the choice of candidates for partisan political office); make any statement or take any action while assisting a person with voter registration that would lead the person to believe the voter registration has any bearing on the availability of services or benefits;
- → seek to induce any person to register to vote or to vote in any particular manner.

These restrictions prohibit public employees from wearing political buttons while performing NVRA services, which is more restrictive than the general rule that is explained on page 8.

See OAR 165-005-0070 for detailed guidelines.

Overview of Common Activities

Essentially, public employees may not use their work time to engage in certain types of political advocacy. This applies only to activities restricted by ORS 260.432, such as supporting or opposing measures, candidates, recalls, political committees or petitions. The following are examples of when provisions of ORS 260.432 begin to apply:

- → for initiative, referendum and recall petition efforts, as soon as a prospective petition is filed with the appropriate elections filing officer (for a statewide initiative, this is the date the sponsorship prospective petition is filed);
- → for a ballot measure referred to the ballot by a governing body (district, city, county, state) as soon as the measure is certified to the ballot. A county, city or district measure is certified to the ballot when the elections official files the referral with the county election office;
- → for a candidate, as soon as the person becomes a candidate under the definition in ORS 260.005(1); and

→ for political committees, whenever the political committee is active regardless of whether or not the committee is registered on ORESTAR.

The prohibition ceases to apply at 8:00 pm on the date of the election at which the candidate, measure, recall or referendum is being voted on. The prohibition ceases to apply to a petition (initiative, referendum or recall) on the date the petition is withdrawn or becomes void. The prohibition ceases to apply when the political committee is discontinued.

The prohibitions may begin to apply again immediately after an election.

If a candidate wins the election and thereafter makes expenditures or receives contributions, ORS 260.432 applies.

An elected official or public employer may not require or direct public employees to prepare or distribute advocacy materials, or otherwise engage in prohibited political advocacy while on the job during working hours or while acting in their official capacity. Oregon election law does not specify any amount of work time that may be used before a violation could occur. Accordingly, a public employee may be found in violation even though they used a minimal amount of work time.

Notice to Public Employees

Public employers are required to post a notice to employees about the requirements of ORS 260.432 in a conspicuous place.

Visit the Elections Division's website to obtain a flyer for posting.

Use of Public Employee Title

Public employees may use their work title in political advocacy so long as the title is the only indication that the public employee is acting in an official capacity. Use of a title may give the impression that a public employee is acting in an official capacity, so it is suggested that public employees use caution. Public employees may not always have control over whether people or political groups add a title to a publication.

A public employee, after work on personal time, is asked whether they are willing to endorse a candidate with the purpose of including the endorsement on the candidate's website. The public employee agrees. Regardless of whether the candidate adds the title of the public employee on their own or whether the public employee specifically agrees for his or her title to be included, this is not prohibited by ORS 260.432 because the endorsement occurred after hours and the title is the only indication that the public employee is acting in an official capacity.

It is not allowable for a public employee to receive a call at work from a candidate and agree to endorse the candidate, regardless of whether the candidate includes the title in the endorsement, because the public employee is on the job during work hours.

See Salaried and Hourly Employees section on page 5.

Public Employers Discussing Possible Effects of a Measure with Public Employees

A public employer may tell employees about the possible effects of a measure so long as the information presented is impartial and balanced. Public employers may not encourage public employees to support or oppose the measure, implicitly or explicitly.

Pursuant to ORS 260.665, it is a crime to threaten loss of employment (or other loss) or offer a thing of value to induce someone to vote in a particular manner.

Distribution of Political Material within an Agency

Public employees may not distribute or post material that contains political advocacy while on the job during work hours. However, public employees may, as part of their job duties, process and distribute incoming mail addressed to specific employees that contains political advocacy.

Public employees can distribute political materials within an agency if they are not on the job during working hours or otherwise acting in their official capacity, other people would be granted equal access and it does not violate the public agency's policies.

ex A teacher may place information about their candidacy for a local office in the boxes of the other teachers at the school so long as any other candidate who asked would be allowed to distribute materials into the boxes and the material was distributed during their personal time

Political Buttons and Clothing

Except as prohibited under the National Voter Registration Act (NVRA) and ORS 247.208(3), public employees may wear political buttons or clothing at work so long as it does not violate their employer's policy.

A public employer may not request or require that public employees wear political clothing, buttons, etc.

ex It would not be a violation of ORS 260.432 for a teacher to choose to wear a "Vote Yes on Measure 1234" button to school. It would be a violation of the statute for school administration to give out "Vote Yes on Measure 1234" buttons and to encourage teachers to wear them to school.

Uniforms

Generally, wearing a uniform while engaging in political advocacy is governed by the uniform policy of the public agency that issues the uniform. Wearing a uniform to a political event, or while giving a political presentation, is not prohibited by ORS 260.432, unless other elements of the presentation violate the statute. Public employees who wear uniforms and engage in advocacy should notify the audience that they are not acting in their official capacity.

ex If a salaried police officer attends a meeting about a bond measure in their official uniform, it is not automatically a violation of ORS 260.432, unless they engage in some form of prohibited political advocacy while wearing the uniform. The officer should announce to the audience that they are there in their capacity as a citizen and are not representing the police department. However, if the police officer attends the meeting while in uniform and makes a statement showing support for the bond measure, this could constitute a violation of ORS 260.432.

Union Bulletin Boards

Public employee unions may have a designated bulletin board to post information. The location and contents of those bulletin boards are regulated by collective bargaining agreements and are not subject to the requirements of ORS 260.432.Unions may distribute political materials to their members pursuant to their contract.

Unions can email their members with political information so long as it does not require the employee to engage in political advocacy while on the job during working hours.

See Emails on page 10 regarding responding to or forwarding political emails.

Campaign Signs

Public employees may generally have political stickers on their personal property or post political signs in their work area, as long as they do so on personal time and such action does not violate any employer policy. Public employers are encouraged to have written policies about posting political material at work.

Oregon election law does not address the size, location or timing of political campaign signs. Many local public agencies (cities and counties) have ordinances or policies that address campaign signs.

Public employees may not display any indications of political preference or party allegiance or wear political buttons while performing NVRA services.

See National Voter Registration Act (NVRA) on page 6 for signage rules specific to NVRA employees.

Public Property

If a governing body makes their property available for political events, they must grant equal access for all individuals, candidates and committees to use that same public property. This includes charging the same fee or requiring the same permit.

Agencies may have policies that regulate the use of public property and/or other public resources. An agency's policy may be more restrictive than the requirements of ORS 260.432.

An elected official is not required to grant equal access to their office or equipment, even if it is in a public building.

ORS 294.100 provides a limited remedy for possible inappropriate use of public resources. That statute is not within the jurisdiction of the Elections Division, and therefore we cannot give advice about compliance with that statute.

Public Records

Governing bodies must grant equal access to public records. All persons should be charged according to the same fee schedule, if applicable.

Public employees may respond to public records requests with information that contains advocacy, but may not proactively distribute advocacy material in a manner prohibited by ORS 260.432.

See Websites on page 10, for information about links to previously published materials.

Agency Interaction with Media

A spokesperson for an agency may respond to media inquiries about the possible effects of a measure or initiative so long as the information they provide is balanced and impartial. The public employee must not state or imply support or opposition.

A public employee may draft and distribute an impartial news release, except for a news release regarding a resolution advocating a political position on a measure.

Information that is entirely factual can be considered advocacy if, for example, it omits the required cost information or indicates only what would happen if a measure passes and does not indicate what would happen if it does not pass. See Resolutions (Vote Taken) by a Governing Body, page 13.

See Elections Division Review of Materials starting on page 16.

Guest Opinions or Letters to the Editor

If a public employee is asked in their official capacity to produce a guest opinion related to a ballot measure or candidate, the content must be balanced and impartial.

A public employee may write a letter to the editor that contains political advocacy so long as they do so on their own time and not in their official capacity.

Contact Lists

Contact lists are considered public property if they are generated or supplied by a public agency. If contact lists are available to the public, a public employee must grant equal access to anyone who requests the list. The public body must charge the same fee, if applicable. This includes any list that the public body administers.

A candidate may not use any list administered by a public body that is not available to all other candidates. Candidates may use contact lists that they themselves create (including constituent contacts collected as an elected official) without granting equal access to other candidates.

ex This issue commonly arises with the use of personnel lists, public utility lists, email lists, voter lists, etc. Public bodies must allow equal access to these lists.

Emails

Elected officials can send emails that contain political advocacy to their employees, so long as it does not request the employees engage in political advocacy while on the job during working hours. The elected official cannot require that public employees read or respond to any email that contains political advocacy and cannot require them to engage in any sort of political advocacy. This includes requiring their attendance at a political event, wearing political attire or sharing political emails or content. Requests made by an elected official are considered a command.

- → Public employees may open and read emails that contain political advocacy. They may not, while on the job during working hours, send or forward emails that contain advocacy, except as outlined below. A public employee may:
- → forward an email containing advocacy to their personal email;
- → unsubscribe or otherwise ask to be removed from an email list while they are on the job during working hours; and forward an email containing links to advocacy material only when that material is pertinent to the agency and the public employee does not provide commentary.

Agencies are advised to have a policy on use of government email that incorporates the requirements of ORS 260.432.

Unions can email their members with political information so long as it does not require the employee to engage in political advocacy while on the job during working hours.

Websites

Advocacy material may not be posted on a government website or blog unless it is part of an official function of the agency.

(ex) An elections website may contain voters' pamphlet information and a public body may post information that is a record of a public meeting, even if such material contains advocacy.

Candidates and other political groups may link to government websites, but government websites may not contain links to advocacy material. A public employee could still be considered to be acting in their official capacity, even during their own personal time or when using personal equipment, when posting materials to an official agency website or social media account. This activity could constitute a violation of ORS 260.432.

Government websites may contain public records about measures or candidates. Those public records must be treated the same as other public records, which do not contain advocacy. Public records which contain advocacy cannot be proactively distributed or placed in a prominent location on a website when a measure or other restricted issue is pending.

Government agencies should have a policy in place for their website that incorporates the requirements of ORS 260.432.

(ex) A city manager may produce a memorandum to the city council about the need for a possible future bond measure referral. If the city council refers the bond measure, then that memorandum cannot be proactively distributed after the measure is certified. The city could respond to a public records request for the memorandum or maintain it with, for example, the minutes for the meeting in an archival section of the website.

Social Media (Twitter, Facebook, etc.)

Public employees may not post material to an official government's social media account that contains political advocacy prohibited by ORS 260.432. This includes "re-tweeting" or sharing a post or news article that contains political advocacy. Posts or shared materials must meet impartiality requirements, even when sharing outside links, articles or materials.

If a government agency interacts with individuals, candidates or political committees on social media the agency must ensure that they treat them all equally and that any agency interaction remains impartial. For

instance, if an agency allows comments on social media posts, it must ensure that comments in support of or opposition to the political issues are treated equally.

A public employee could be acting in their official capacity, even during their own personal time or when using personal equipment, when posting materials to an official agency website or social media account. This activity could constitute a violation of ORS 260.432.

ex An official school district facebook page posts a "get out the vote" message. Several people offer comments, both in support of and in opposition to, a school district bond measure that is on the ballot. ORS 260.432 prohibits the school district from deleting negative comments while maintaining positive committes. A school district may delete a comment opposing or promoting the measure if the comment violates school district comment policy.

Agencies are advised to have policies on use of government new media accounts that incorporate the requirements of ORS 260.432.

Images

The placement of an image can be as important as the image itself. An image that would not normally be persuasive on its own could urge a vote in support of or opposition to a measure, initiative, candidate, or recall, depending on its location in the document.

Logos used as part of an agency's normal activities are generally allowable under ORS 260.432, even if the image could be considered persuasive. Altered logos or images that are not used in the regular course of business may be violative of ORS 260.432.

ex A school bond measure is being considered in an upcoming election. The school district distributes a flyer with information about the measure. The logo used on the flyer is different than what is normally used for the school district and adds the phrase "For Our Future." Since this image is not generally used by the district, it would fall under the requirements of ORS 260.432 and may be found in violation.

Verbal Communication

ORS 260.432 does not restrict the right of a public employee to express personal political views during their personal time. However, it does restrict some verbal communication while on the job during working hours or while acting in an official capacity.

A public employee cannot engage in political advocacy, including promoting or opposing a political position while they are on the job during work hours.

ex A city manager gives a presentation to staff about a pending measure. During the presentation, he says "I hope we all agree that it is important that this measure passes". That verbal communication violates ORS 260.432.

Public Presentations and Speeches

A public employee cannot give a speech or presentation advocating a political position if they are on the job during working hours or acting in their official capacity. An elected official may give political presentations and speeches, so long as no public employee work time is utilized.

When making a presentation that contains political advocacy during non-work time, the public employee should announce that they are acting in their capacity as a private citizen. The employee should also document that they were not on the job during working hours.

ex Employees may document that they are not on the job by keeping: a log, payroll records that indicate when they were on the job, time off slips, etc.

Meetings

Public employees may attend meetings at which political issues are discussed, so long as they do not engage in political advocacy themselves while on the job during working hours or acting in their official capacity.

Public employees cannot be compelled to attend political presentations. If a public agency has a mandatory staff meeting and a political group is making a presentation, the agency must make it clear that attendance at the political presentation is optional. Public employees who do attend the political presentation must do so during non-work time. Political advocacy presentations should not occur in close proximity to events requiring public employee attendance.

Forums

An agency may sponsor a candidate forum if it is open to all candidates, though not all candidates must attend.

A forum to allow political proponents and opponents to debate ballot measures may be held using public employee work time so long as equal access is granted.

Public employees may use work time to arrange the forum and may perform administrative support functions in conjunction with the forum and may attend on work time.

All public employee involvement in the forum must be impartial. Public employees may not draft or select questions for the candidates.

Advertising

Agencies which raise funds through selling or hosting advertisements must grant equal access to any political group or person. The public body must charge the same fee, if any, to any individual, candidate or political committee for the same level of advertising space or time.

Public employees, while on the job during working hours should not design an advertisement or verbally promote, sponsor or oppose a candidate, political committee, measure, initiative or referendum at an event. A public employee may make edits to an advertisement that are administrative in nature, such as reviewing to ensure it will fit in the designated space, but should not make any changes that would alter the substance of the advertisement.

Public agencies are encouraged to have written policies on advertising which incorporate the requirements of ORS 260.432.

A school district produces game programs for football games. A candidate asks to have a half page ad placed in the program. A public employee charges the candidate the same fee any other person or group would have been charged for the space, and places the candidate's pre-designed ad into the program.

Video and Audio Productions

Video and Audio productions created or distributed by public employees must be impartial.
Public employees may not make recordings that advocate a political message prohibited by ORS 260.432. Public employees may not edit a video in a manner that results in advocacy.

Public employees may broadcast videos of meetings for public access channels and post the videos on government websites, even if the videos contain advocacy. Posting only excerpts of the meeting where there is advocacy with an intent to advocate would be a violation.

ORS 260.432 does not prohibit a public employee from videotaping or recording a city council meeting and post it on the city's official website. It may be a violation of ORS 260.432 if a public employee records a presentation supporting a ballot measure and distributes the video in an attempt to encourage support for the measure.

Scheduling Political Appearances

Public employees may maintain the schedule of elected official. Public employees may not solicit political scheduling opportunities for an elected official, but may respond to scheduling requests. Prohibited activities include, but are not limited to, organizing campaign events, communicating on political matters with the press or constituents, or initiating any other political activity on behalf of the official.

Visits by Candidate or Candidate Representative

A candidate may request to visit an agency work site. The agency must grant equal access to all candidates and should not initiate candidate visits, except for candidate forums.

Public employees involved in the arrangements for the visit may perform administrative duties necessary to arrange the event.

No public employee may take any actions to promote or oppose the candidate before or during the visit. This includes taking a political position when announcing the event, holding a campaign sign during the event or assisting the candidate in distributing campaign materials.

Voters' Pamphlet

A public employee's duties may include producing an official voters' pamphlet. Public employees may not prepare measure arguments or candidate statements for inclusion in the voters' pamphlet while on the job during work hours or in their official capacity.

See page 16 for information about ballot titles and explanatory statements.

Postcards

Postcards produced or distributed by public employees must be impartial, balanced, and must not otherwise be violative of ORS 260.432.

When a public employee is involved in the production of a series of small mailers, each piece must be individually impartial. Read together, the series of mailers must also be impartial. For ballot measure material, any discussion of the measure's effects must be balanced with the amount of taxes or fees.

"Get Out The Vote" Materials (GOTV)

Public employees may produce materials that generally promote voting so long as the material is impartial. The material can contain information about the date of the election, how to return ballots, etc. and can also include information about a measure, so long as the information is impartial.

Government Logos

A governing body must allow equal access to logos for political purposes, meaning that if any candidate is allowed to use the logo, all candidates must be allowed. An agency may not allow certain individuals to use their logos while prohibiting others from doing so. Agencies are encouraged to have written policies about use of their logos.

Government Letterhead

Election law does not regulate the use of government letterhead.

We recommend agencies have policies in place governing letterhead that incorporate the requirements of ORS 260.432.

State Seal

ORS 186.023 governs the use of the Oregon State Seal. Elected officials may use the state seal in an official capacity, but not as a candidate for public office.

For questions about the use of the Oregon State Seal, contact the Secretary of State, Executive Office at 503-986-1523.

Resolutions (vote taken) by a Governing Body

Elected boards of governing bodies may take a position on a ballot measure (or initiative, referendum or recall petition) provided there is no use of public employee work time to advocate that position.

With regard to a governing body's resolution that advocates a political position on a ballot measure, initiative, referendum or recall, a public employee:

May	May Not
Edit the public agency's name and board member names to conform it to the requirements for the resolution	Draft, type, or edit substantive content contained in the resolution
Prepare neutral, factual information for the board to use in taking a position on the measure, including impartial information on how the measure could affect the public agency.	Recommend how to vote on the resolution
Be available at the board meeting to offer impartial information upon request.	Sign a resolution, unless the public employee's signature is ministerial and included only to attest that the board took the vote
Respond to direct questions from the media about the resolution, if their response is impartial.	Prepare a news release or other announcement of the resolution.
If the public agency lists all votes on resolutions in a regularly published publication, they may include the vote in an impartial manner.	Include the vote or position of the governing body in a public agency newsletter or other publication.
Use work time to record the vote if that is part of the employee's work duties.	
Use work time for regular job duties, such as responding to public records requests, taking minutes, retyping the resolution to conform to the required format, etc.	

Petitions and Measures

Public employees may produce and distribute advocacy material about referrals prior to the measure being certified to the ballot. Any public employee work time used to change, amend, edit, distribute, etc. a document found to be supporting or opposing a referral between the date it is certified to the ballot until the date of the pertinent election could be a violation of ORS 260.432.

The actions taken by a governing body and its public employees in the planning stages of a possible measure are not subject to ORS 260.432.

ex If a school district has a recurring bond levy, district employees may not proactively distribute any materials from the previous levies (even though those elections have passed) during the period between certification and the current election.

Ballot titles

Public employees are not liable under ORS 260.432 for drafting ballot titles as part of their regular job duties. Public employees may use work time to draft ballot titles. A public employee may also defend a challenged ballot title. Because the impartiality requirements and ballot title challenge process in ORS chapter 250 are distinct from the requirements of ORS 260.432, the Elections Division will not review ballot titles for impartiality.

Explanatory statements

Public employees are not liable under ORS 260.432 for drafting explanatory statements as part of their regular job duties. Public employees may use work time to draft explanatory statements. Because the impartiality requirements and explanatory statement process in ORS chapters 251 are distinct from the requirements of ORS 260.432, the Elections Division will not review explanatory statements for impartiality.

Lobbying and Legal Challenges

Public employee's work involvement in legal court challenges as part of their regular job duties is not a violation of ORS 260.432.

ex Examples of legal challenges include whether an initiative petition meets constitutional requirements, whether a ballot title complies with statutory standards, etc.

Legislative bills are not covered by ORS 260.432. Therefore, it is allowable, under election law, for public employees to lobby governing bodies. Once a measure has been certified to the ballot, political advocacy is restricted by ORS 260.432.

For more information about lobbying, contact the Oregon Government Ethics Commission.

Elections Division Review of Materials

Any covered communications produced by public employees while on the job during work hours or by a contracted entity must be balanced and impartial. At a public agency's request, the Elections Division will review materials created by the public agency to ensure compliance with ORS 260.432. If the document is submitted to the Elections Division and approved in writing it will be granted safe harbor. This means if a complaint is filed regarding safe harbor approved material, the Elections Division will not investigate or issue civil penalties as long as what is printed does not deviate from the approved version.

Who is Liable for Advocacy Material?

Any public employee who authors, drafts, or approves material that contains political advocacy may be in violation of ORS 260.432. This includes any public employee who creates material for inclusion in an advocacy document.

A supervisor who requests that an advocacy document be created, or oversees the project, may also be in violation of ORS 260.432, even if they are not the author of the document.

A public employee may design materials that are subsequently found to contain advocacy, so long as they are not involved in the development of substantive content. Additionally, a public employee may edit materials that are subsequently found to contain advocacy so long as their edits are administrative in nature (i.e. grammar, spelling and other non-substantive issues) and do not alter the content of the materials.

A public employee may not edit advocacy materials if they make or suggest substantive changes.

If a public employee, under their supervisor's direction, posts advocacy materials to a website or otherwise distributes them, they may not be liable for a violation of ORS 260.432. However, the supervisor who directed the distribution of materials may be in violation of ORS 260.432.

Submitting Documents for Review

Documents must be submitted in an editable format such as in a Microsoft Word document or a PDF. In the case of videotaped material, agencies are encouraged to submit a proposed script prior to submitting in video form.

The Elections Division will only review material which has not been previously published.

Review Process

Material submitted to the Elections Division under the Elections Division's Safe Harbor program is edited for compliance with ORS 260.432 and returned to the agency for review and further editing. Participating agencies are encouraged to build plenty of time into their communications plan if safe harbor approval is desired. Safe harbor approval is not guaranteed, even if the agency submits the material multiple times.

Review of the initial submission of material can take up to 5 business days. However, if five or more requests are submitted for review within one calendar week (Sunday through Saturday), the Elections Division will review the materials within 10 business days.

Each public agency may submit a total of 5 original submissions for review per election. Materials may be resubmitted once, for a total of two reviews. Resubmissions will be processed in as timely a fashion as possible, given other business demands on the Division.

Documents must be submitted no later than 21 days before the election in order to be reviewed by the Elections Division.

If the Elections Division receives a complaint after an agency's materials are granted safe harbor approval, the Division will not investigate or penalize the agency so long as:

1 The agency did not alter the approved materials;

2 The material was used in a manner consistent with all provisions of ORS 260.432

Once a document has received safe harbor approval, a governing body may include a disclaimer that reads: "This information was reviewed by the Oregon Elections Division for compliance with ORS 260.432." This is the only acceptable disclaimer or alteration that may be made post-approval.

If safe harbor is granted, the text of the material may be replicated in different formats so long as all the content is unchanged. If the content of safe harbor approved material is changed and published by the submitting agency, safe harbor protection is rescinded.

ex If an agency submits a postcard for review, the agency may use the exact same content on a mailer without receiving safe harbor approval for the mailer.

Review Criteria

The overall inquiry for determining impartiality is whether the material "promotes or opposes" a candidate, initiative, measure, political committee or recall. The Elections Division considers materials on a case-by-case basis and takes into account several factors, including but not limited to the following:

- → Materials must not implicitly or explicitly urge a yes or no vote;
- → Materials must be factually balanced;
- → If the material includes information about what a measure would pay for or do, it must also describe information about what would happen if the measure does not pass;
- → Materials must include the cost per $1,000 of assessed value.

Information that is entirely factual can still be considered advocacy if, for example, it omits the required cost information or indicates only what would happen if a measure passes and does not indicate what would happen if it does not pass.

The requirements are discussed in further detail below.

Vote Yes/No

The contents of the document must not urge a yes or no vote for the measure. There should be no "vote yes" or "vote no" language. The document must not include phrases such as:

- → "Vote Yes on Measure 99,"
- → "Support for Measure 99 is encouraged,"
- → "The County is asking voters to approve,"
- → "Why Should I Vote for Measure 99?"
- → "Voters are asked to support Measure 99,"
- → "At election time, please support the Home Rule Charter,"
- → "On May 15, 2012, Anytown voters are being asked to continue their support of the community youth by renewing the Youth Action Levy, Measure 57," and
- → "Please support our incumbent mayor."

Even if the remainder of the document is impartial, explicitly urging someone to vote in a particular manner would be a violation of ORS 260.432.

Balance of Factual Information

Documents produced by governing bodies must not be one sided. They must include a balance of factual information.

ex If a document indicates what would happen if a bond measure were to pass, it must also include information on what would happen if it did not pass. If the material includes just one side of a matter, it is potentially violative of ORS 260.432 because it is not balanced and impartial.

Description of Cost

If a measure proposes to affect taxes or fees, the cost of the measure to an individual taxpayer or consumer must be included. In the context of a bond levy, this is generally the cost per $1,000 of assessed value. The cost must not be worded in a way to minimize it. It is allowable to include an estimate if the exact cost is not known.

ex Describing a cost as "less than", "merely", or "only" is not compliant with ORS 260.432.

It is allowable to indicate that a bond renewal would not "raise taxes" where the public agency states that the bond, if renewed, would continue to cost $X.XX per $1000 of assessed value. It is also allowable to state how much the bond would raise taxes compared to the previous bond, so long as the full cost information is included.

ex "The ABC Library proposed bond would not raise taxes. If the bond is renewed the rate would remain at $1.23 per $1000 assessed value."

"The ABC School bond, if passed, would cause an increase of $0.25 per $1000 ofassessed value over the previous bond. The total rate if the bond is passed would be $1.45 per $1000 of assessed value."

For measures that use funding mechanisms other than cost per $1,000 of assessed value, the cost must be described in a way that clearly informs the public of how the measure would affect taxes.

The Elections Division does not review materials for the following:

- → typographical, or grammatical errors
- → accuracy or truthfulness of the content
- → accuracy of translated materials

! ORS 260.532 governs false statements in elections material. It prohibits false statements of material fact about candidates, political committees, or measures. That statute is not enforced through the Elections Division, but instead requires an aggrieved party to pursue their claim in court.

Persuasive or Minimizing Language and Images/Graphics

Material containing political advocacy that is published or otherwise distributed by an agency should only provide factual, balanced and unbiased information regarding the topic it is discussing. Persuasive language can include anything that urges an individual to vote in support of or opposition to a measure, recall, petition or candidate.

Avoid language that would be considered persuasive, emotional or vague. These types of words or phrases can be interpreted as persuasive and may be violative of ORS 260.432.

Commonly Used Words or Phrases & Alternatives

Common words or phrases to watch for when drafting a document that falls under ORS 260.432:

- → **Use** "**If** the bond measure passes, it would…" but **not** "The bond **will**…"

It is important to avoid language that might indicate certainty that the bond will pass or fail as this can be considered as persuasive. If the document reads that "The bond will…" it can lead a voter to believe that their vote against the bond is insignificant and they should either not vote or vote for the bond.

→ **Use** "Please remember to vote" but **not** "Please vote **for** Measure…"

Asking the reader to vote for the measure is violative of ORS 260.432 because this encourages them to vote in a certain way.

→ **Use** "The bond measure would cost $x…", but **not** "The bond would **only** cost $x…

Using the word "only" minimizes the cost of the bond and encourages a vote in support. Alternative wording may include, "If the bond passes, the tax rate would be…" By changing the wording the statement becomes neutral and provides factual information regarding the cost of the measure. It is important to also include language regarding the cost and consequences if the bond does not pass.

Unbalanced Language or Content

The material published or otherwise provided to voters should not be one-sided. It must include a balance of factual information and the information should fairly and neutrally explain the effect of the measure. The text should set out objective advantages or disadvantages of the measure.

ex If the bond passes, the city would hire five new police officers.

→ Information is only provided for what would happen if the bond passes. Material which omits information regarding what happens if the bond does not pass is unbalanced and biased.

Alternative language could be: If the bond passes, the city would hire five new officers. If the bond does not pass, staffing would remain at the current level, and taxes would not be increased.

Enforcement

Any Oregon elector may request an investigation into potential violations of Oregon election law. Requests may be submitted using the Elections Division's online form or in writing.

If a complaint is filed regarding safe harbor approved material, the Elections Division will not investigate or issue civil penalties as long as what is printed does not deviate from the approved version.

If the Elections Division opens an investigation and determines that a violation occurred, the procedures for contested cases outline in OAR chapter 165, ORS chapter 260 and ORS chapter 183 will be followed.