EMPLOYMENT RELATIONS BOARD OF

THE

STATE OF OREGON

Case No. UP-039-21

(UNFAIR LABOR PRACTICE)

KLAMATH FALLS ASSOCIATION OF CLASSIFIED EMPLOYEES, Complainant, v. KLAMATH FALLS CITY SCHOOLS, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On April 6, 2023, this Board heard oral argument on Complainant's objections to a December 8, 2022, recommended order issued by Administrative Law Judge (ALJ) Martin Kehoe, after a hearing on June 2, 2022. The record closed on September 2, 2022, upon receipt of the parties' post-hearing briefs. After hearing oral argument, we invited interested parties to file *amicus curiae* briefs regarding the impact, if any, of ORS 243.804(5)(c) on the issues in this case. We also allowed the named parties to file supplemental briefs concerning those same issues and to address any issues raised by any *amici*.[1] Those supplemental briefs were due on September 22, 2023. Having considered the evidence and arguments of the named parties and the *amicus curiae* brief, we proceed with our consideration.[2]

Margaret S. Olney, Attorney at Law, Bennett Hartman, LLP, Portland, Oregon, represented the Complainant.

Nancy J. Hungerford, Attorney at Law, The Hungerford Law Firm, LLP, Oregon City, Oregon, represented the Respondent.

[1]The Oregon School Employees Association (OSEA) filed an *amicus curiae* brief. Neither named party filed further briefing after our invitation of *amicus curiae* briefs.

[2]Before the record closed, the parties jointly requested and obtained extensions of the deadline for post-hearing briefs. Subsequently, Respondent moved (without objection) to extend the time to file objections to the recommended order, until January 5, 2023, with any cross-objections from Complainant due by January 12, 2023. The Board offered oral argument dates as early as February 2023, and the parties mutually selected April 6, 2023. Due to a vacancy on the Board at the time of oral argument, the Board delayed its consideration of the parties' arguments until after May 1, 2023, to allow for a full three-member Board to participate in the decision of this case. That consideration prompted our invitation of *amicus curie* briefing.

On September 20, 2021, the Complainant, Klamath Falls Association of Classified Employees (KFACE or Association), filed an unfair labor practice complaint with the Employment Relations Board (Board) against the Respondent, Klamath Falls City Schools (District). On May 16, 2022, the District filed a timely answer.

The issues are:

(1) Did the District violate ORS 243.672(1)(a), (b), and (c) by searching Tanya Thornton's emails to discover union communications, and by threatening Thornton's job security?

(2) Did the District violate ORS 243.672(1)(a), (b), and (c) by disciplining union leader Lisa Danskin for using the District's email system for union communications?[3]

(3) Is KFACE entitled to a civil penalty?

As set forth below, we conclude that (1) the District violated ORS 243.672(1)(a) and (c), but not (1)(b), when it threatened Thornton's job security[4]; (2) the District violated ORS 243.672(1)(a) and (b) by disciplining Danskin for using the District's email system for union communications; and (3) KFACE is entitled to a civil penalty for its actions regarding Thornton.

RULINGS

1. Before the hearing, the District asked the ALJ to defer ruling on the first issue identified above, concerning the District's response to Tanya Thornton blind carbon copying (BCC'ing) an email to KFACE, because a related grievance was awaiting a hearing by an arbitrator. The District also asked the ALJ to place in abeyance the second issue identified above, concerning the District's response to Lisa Danskin's election-related email to her bargaining unit, until a related Oregon Secretary of State complaint filed against Danskin was resolved. The ALJ rejected both requests and set the matter for hearing. Upon review, we conclude that the ALJ acted properly and within his discretion. The complaint does not allege an ORS 243.672(1)(e) failure to bargain in good faith violation or an ORS 243.672(1)(g) contract violation. Further, neither Danskin nor the Secretary of State is a party to this case.

2. ORS 243.672(6) requires an injured party to file a complaint by 180 days following the occurrence of an unfair labor practice. The District has consistently objected to "any consideration" of events that occurred outside of that statutory 180-day filing period, including the events of the parties' "bonus days dispute" that is described in detail below, as well as other events that occurred in March 2021 but were outside of the relevant period. Upon review, we conclude that the ALJ properly overruled the objection.

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[3] Although the ALJ included in the proposed issue statement a question as to whether the District violated ORS 243.672(1)(a), (b), or (c) when it questioned Danskin about who wrote the email at issue, we do not see such a separate claim alleged in the complaint. Moreover, the Association did not brief that issue. Accordingly, we do not see it as a litigated issue in this case and we do not address it.

[4] As detailed below, because it would not affect our remedy, we decline to reach the separate question of whether the District's search of emails as part of its investigation constituted an independent violation of ORS 243.672(1)(a), (b), or (c).

The complaint in this case was filed on September 20, 2021.[5] 180 days before that date is March 24, 2021. Accordingly, the District is correct that any claim that Complainant knew of or reasonably should have known of before March 24, 2021, is time-barred. KFACE does not dispute that the bonus days dispute took place more than 180 days before its complaint was filed. Nevertheless, importantly, KFACE does not seek to assert claims that arise out of that dispute as the basis for its unfair labor practice claim. As KFACE explained in its opening statement, KFACE seeks to use the earlier incident as context for Thornton's conduct in March 2021, to demonstrate a general hostility and a lack of understanding of union rights, and as an example of the District's efforts to curb union activity. Put another way, and as stated in KFACE's post-hearing brief (at 13), it seeks to use the bonus days dispute as evidence of anti-union animus. Upon review, we generally agree with KFACE's position on this issue. The 180-day statute of limitations limits filings and claims, but does not bar evidence or background that is relevant to a timely-filed claim. *See Gault v. Portland Firefighters' Association, Local 43 and City of Portland Fire and Rescue Bureau*, Case No. FR-003-20 at 13 (2022); *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05 at 10, 22 PECBR 911, 920, *recons*, 23 PECBR 34 (2009), *aff'd*, 250 Or App 681, 282 P3d 2 (2012); *Grants Pass Association of Classified Employees/OEA/NEA and Bullington v. Grants Pass School District No. 7*, Case No. UP-05-07 at 34-35, 22 PECBR 806, 839-40 (2008). We also conclude that the ALJ correctly permitted the testimony and evidence in dispute.

Having addressed the issue of relevance, we turn to the question of whether KFACE's central claims were timely. Regarding the claims related to Thornton, the record indicates that the District searched Thornton's emails sometime between March 17 and 24, and that KFACE did not learn about the search until it was revealed to Thornton during the affiliated investigatory meeting that occurred on March 24, 2021, which is the date that we have determined is the cutoff date for this case. Notably, the Board applies a "discovery rule," which means that the limitations period begins to run when a party knew or reasonably should have known that an unfair labor practice has occurred. *Rogue River Educ. Ass'n v. Rogue River Sch. Dist. No. 35*, 244 Or App 181, 189-91, 260 P3d 619 (2011). The record otherwise indicates that, during that same meeting, Thornton was also warned that her job could "be in jeopardy," which logically serves as the factual basis for the claims regarding Thornton. Under those circumstances, we conclude that the claims regarding Thornton are timely. Regarding the claims concerning Danskin, the record shows that the District inquired about the author of Danskin's email in a June 2, 2021, investigatory meeting, and then

[5]The filing date was determined as follows. The complaint was signed and submitted to the Board on September 17, 2021, a Friday, via the Board's online case management system. That system's records indicate that the complaint and/or the associated filing fee was not received until after 5:00 p.m. that day. OAR 115-010-0033(1)(b) provides, "A complaint or answer will not be considered filed until the filing fees required by ORS 243.672(6) have been paid." When the complaint was filed in September 2021, the corresponding OAR still included a deadline of 5:00 p.m. *See Alexander v. Amalgamated Transit Union, Division 757*, Case No. UP-022-20 at 1-2 (2021) (citing *AFSCME Council 75, Local 2503 v. Hood River County (Public Works)*, Case No. UP-005-20 (2021)). OAR 115-010-0033(1)(d) has since been updated and provides, in relevant part, "If a document is filed by email, fax, or the Board's online case management system, and the Board's record indicates that the Board received the document on or before 11:59 p.m. Pacific Time on a business day, then the document is considered filed on that business day." OAR 115-010-0033(1)(d) (effective December 1, 2021). Under the then-current rules, the complaint was filed on Monday, September 20, 2021, which was the next business day after the evening that the complaint was submitted.

disciplined Danskin later that same day. Therefore, we also conclude that the claims concerning Danskin are timely.

3. During the hearing, the ALJ admitted all the exhibits that were offered by the parties except for Exh. R-12. That exhibit appears to be a copy of a September 8, 2020, letter to Oregon Education Association (OEA) members from "OEA General Counsel" Adam Arms titled "Political and Ideological Expression Questions and Answers." As indicated below, KFACE is an OEA "affiliate." KFACE objected to the exhibit's admission and claimed that the document was protected by attorney-client privilege. KFACE also described the exhibit as an "internal" communication and described General Counsel Arms as OEA's "in-house attorney." Relatedly, in the District's opening statement, the District's own attorney described the exhibit as "advice" from "the attorney for OEA." On its face, the exhibit purports to provide "legal guidance."

At the conclusion of the hearing, in response to KFACE's objection, the ALJ asked the District how it had acquired the document, and noted that he did not have any evidence of a waiver. The District simply responded that District Human Resources (HR) Director Renee Clark received the document from another school district. The District did not establish a foundation for the offered exhibit, either by witness testimony or other evidence. After considering the parties' positions on the matter, the ALJ deferred ruling on the objection until he issued his recommended order. At this time, we recognize that neither party has disputed the authenticity of the document. However, we also note that there is no evidence that the document was reviewed or relied on by Danskin or Clark during the events of this case, or any testimony regarding who was sent the document. Under the circumstances presented, we decline to admit Exh. R-12.

4. All other rulings by the ALJ were reviewed and are correct.

FINDINGS OF FACT

Background

1. The District is a "public employer" within the meaning of ORS 243.650(20). It employs around 400 to 450 employees in total.

2. KFACE is a "labor organization" within the meaning of ORS 243.650(13). It is the exclusive representative of a bargaining unit that includes certain (but not all) "classified" District employees. Supervisors, confidential employees, substitutes, teachers, and temporary employees are specifically excluded from the unit.

3. At all times material, KFACE and the District were parties to a collective bargaining agreement (CBA). By its terms, the CBA was effective from July 1, 2018, through June 30, 2022.

4. KFACE is one of a number of local, affiliated unions that make up a "coordinating body" known as the Klamath-Lake UniServ Council. KFACE is also affiliated with OEA, the Oregon Association of Classified Employees, and the National Education Association. Ryan Olds has worked for OEA as a "UniServ Consultant," which is essentially a union representative or field representative, since February 2019. One of his assignments is to serve the KFACE bargaining unit.

5. Outside of the KFACE bargaining unit, certain other "classified" District employees are unrepresented, while certain other "classified" employees are part of a separate unit/union of fewer than 40 custodial and maintenance employees known as "CPOKF." A third unit/union, the Klamath Falls Education Association (KFEA), includes the District's teachers and has been described as the "certified union." Like KFACE, KFEA is also an OEA affiliate/unit, and is part of the UniServ Council. Each of the District's two non-KFACE units/unions has its own CBA with the District.

Bonus Days Dispute (Tanya Thornton)

6. Tanya Thornton currently works for the District as the Payroll Lead in the District's Business Office in the Payroll Department. She has held that position since February 2020. In May 2018, Thornton started working for the District as a Payroll Specialist. Thornton has never been reprimanded.

7. As Payroll Lead, Thornton is generally responsible for, among other things, making sure that payroll is accurate and timely, answering employees' questions about payroll, and training and leading the Payroll Specialists of the Payroll Department. The Payroll Lead is also responsible for "the interpretation and the effective implementation of several different salary and labor contracts for administrators, teachers, classified and other employees * * *."

8. Thornton is an active member of KFACE, and is currently on KFACE's bargaining team.

9. Neither party considers Thornton a "confidential employee" within the meaning of ORS 243.650(6).[6] Nevertheless, in Thornton's current role of Payroll Lead, she has access to some confidential employee information. For example, Thornton has access to employees' Social Security numbers, personal telephone numbers, home addresses, and certain benefits-related information. As stated in a 2020 job posting for the position, the Payroll Lead "performs technical and confidential accounting work * * *."

10. Article 8, Section I, of the parties' CBA addresses "bonus days" for KFACE bargaining unit employees. It states,

> "Employees with perfect attendance for the previous school year (July 1-June 30) shall have the option of three (3) days of salary or three (3) days off with pay during the subsequent year.
>
> "Employees with one (1) day absence for the previous school year (July 1-June 30) shall have the option of two (2) days of salary or two (2) days off with pay during the subsequent year.

[6]ORS 243.650(6) defines a "confidential employee" as "one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining."

"Employees with two (2) days absence for the previous school year (July 1-June 30) shall have the option of one (1) day of salary or one (1) day off with pay during the subsequent year.

"Absences due to work injuries will not count as absences in this section."

11. The CBA between the District and the District's custodial and maintenance employees union (a copy of which is not in the record) contains language that resembles that of the KFACE CBA's Article 8, Section I, and similarly provides for bonus days. However, that CBA specifically uses October 1 through June 30 as its designated time period (rather than July 1 through June 30, as KFACE's CBA does), specifically requires that someone be *hired* at the outset of that particular period, and is uniquely based on accident-free days rather than attendance. The language of Article 8, Section I, of KFACE's CBA only alludes to *attendance* and does not overtly reference a date of hire as the custodial and maintenance union's CBA does. The teachers/certified union's CBA does not address bonus days at all.

12. Every July, including July 2020, the District has determined which employees qualify for bonus days for the new school year. In or around October 2020, Cheryl Reinhardt, who at the time was the Head Secretary at Klamath Union High School, contacted Thornton via email, questioned whether a particular KFACE-represented employee had been awarded bonus days in error, and asked Thornton's department to investigate the issue. Subsequently, Thornton reviewed the relevant "past practice," some related notes left by a predecessor, and KFACE's CBA. Thornton ultimately concluded that, according to that past practice, the employee at issue qualified for the allotted bonus days. For the previous two years or more, Thornton and the Payroll Department had consistently used October 1 as the relevant *date of hire* when considering bonus days, without any issues. The relevant part of KFACE's CBA had not been changed during that period. After Thornton formed her conclusion, she shared her perspective with Reinhardt.

13. The District's HR Director, Renee Clark, eventually looked into the bonus days dispute as well, after receiving a telephone call about it from Head Secretary Reinhardt. Clark has been the District's only HR Director since she started working for the District at the end of June 2019. Clark regularly works with the Payroll Department and Thornton. However, Clark has never been Thornton's supervisor, and, as indicated, Thornton does not work in the HR Department.

14. After Director Clark reviewed the bonus days issue, Clark discussed the subject with Thornton (some or all of which occurred through email) and asked why Thornton was using the October 1 date when, at least according to Clark, KFACE's CBA used July 1 through June 30 as the relevant period. During their discussion, Thornton explained that she had used October 1 as the relevant date of hire in accordance with the past practice that she had identified using her predecessor's notes. Before that discussion, Clark was unaware of a past practice of using October 1 as the date of hire, and Clark and Thornton had never discussed how to award bonus days. On October 16, 2020, after some back and forth, Clark ultimately decided that the affected District employees should have the bonus days that had been awarded to them rescinded. Clark then directed Thornton to notify those employees of that decision, and to explain the change and note that there had been an error. By the time that Clark gave Thornton that direction, Clark understood that, historically, the October 1 date had been used as the relevant date of hire. Clark also understood that she was changing the date of hire to July 1 to align with her own interpretation of the bonus days provision of the current KFACE CBA.

15. On October 27, 2020, Thornton sent a letter to the affected employees via email as directed. It stated, in relevant part,

> "Because our contract (KFACE) does not have language that speaks directly to the hire date of the employee a decision has been made by our Human Resource[s] department that affects the bonus days you have been awarded this year and therefore those days have been adjusted accordingly and are no longer available for you to use.
>
> "You must now be hired prior to the July 1st date and still qualify for all the other parameters of the contract to be eligible to receive bonus days in the new upcoming fiscal year. Because you were hired after that date I have been informed to remove those days on your available leave plans.
>
> "* * * * *
>
> "If you have questions or concerns please feel free to contact myself or you may reach out to Renee Clark in Human Resources.
>
> "I apologize for the confusion or inconvenience this may cause.
>
> "Thank you and have a great day!"

All of the language that was included in the October 27, 2020, letter was written by Thornton.

16. After emailing the October 27, 2020, letter, Thornton informed Director Clark that she had done so. Clark then thanked Thornton for doing so. Clark was not sent a copy of the letter at that time. Later, Clark received calls from employees who were upset about the rescissions, and Clark got a copy of Thornton's letter. Around the same time, KFACE filed a grievance concerning the rescissions, as KFACE viewed the matter as a change in practice.

17. During the events of this case, Jeanne Morgan was a Business Manager for the Payroll Department, and was Thornton's supervisor/manager. As of the hearing for this case, however, Morgan's job title was Director of Business Affairs.

18. On November 4, 2020, then-Business Manager Morgan emailed Thornton a "letter of expectations" that was signed by Morgan. The email stated:

> "Because of how you chose not to follow H.R. directions related to the eligibility for bonus days for KFACE employees based on work attendance, a number of unnecessary consequences resulted including staff being angry at our human resources department and a grievance filed with the union. The grievance potentially will now take a great deal of time to resolve from our H.R. department, our superintendent, and our school board. This could have been avoided if certain steps had been followed. It is my expectation that in the future these steps will be followed or further discipline could result. These are my expectations:

"1. When unsure about how to interpret and implement contract provisions, always check with the Human Resources Director.

"2. Once direction is given from him/her on a contract provision follow it exactly as directed.

"3. In communicating to employees about contract provisions such communication will not be done in a way that could lead to defraying blame to any individual or department.

"4. This communication will always be done in an honest straightforward manner and include the contract information to facilitate understanding by the employee.

"Again, it is my expectation that you follow these expectations in all future incidents related to implementing all district contracts and working with employees of the district."

19. Although then-Business Manager Morgan emailed and signed the November 4, 2020, letter of expectations, it was authored by Paul Hillyer, who was the District Superintendent at the time. Hillyer also instructed Morgan to deliver the letter to Thornton. Director Clark was not involved in drafting the letter. Additionally, as of the hearing, Clark believed that the portion of the letter that alleged that Thornton "chose not to follow H.R. directions" was inaccurate. Clark also believed that the portion of the letter that spoke of "staff being angry" at the HR Department was the result of the bonus days being rescinded. That said, according to Clark, Thornton was issued the letter because of the "tone" of Thornton's email and the "accusation" made therein.

20. The District does not consider letters of expectations to be discipline. The District uses such letters in order to help an employee understand that they need improvement in some area. If the issue with an employee is more egregious, the District will use a written reprimand or more serious discipline.

21. Dawn English worked for the District for 24 years, then retired from the District in June 2020. When English retired, she was KFACE's President. Later, English was one of the candidates in the District's 2021 Board of Education election (which is discussed below), which English did not win. She currently works as "cadre" for the OEA, where she started working in August 2020.

22. After Thornton received the letter of expectations, Thornton contacted then-KFACE President English, explained the situation, shared that she felt that she was being "retaliated against," and asked for KFACE to look into the matter for her. When Thornton received the letter, Thornton was "very upset." Thornton also felt like Director Clark was "out to get [her]," and that Clark was looking for mistakes so that Clark could "get rid of" Thornton. After communicating with Thornton, English told UniServ Consultant Olds about the issue, then Olds exchanged emails with Clark about possibly rescinding the letter of expectations.

23. On November 13, 2020, in one email to Olds regarding the letter of expectations, Director Clark wrote:

> "We have the managerial right to give employees the expectation that they communicate honestly, accurately, and in accordance with contract language. That is what we told her she needs to do. Since it was not disciplinary and not a part of her official personnel record, it is not a union issue. We do have a right to direct employees."

24. After her November 13, 2020, email, Director Clark met with KFACE about the letter of expectations. By that time, Clark knew that KFACE was "very concerned" about the issue.

25. On December 3, 2020, the parties signed a memorandum of understanding (MOU) regarding how Article 8, Section I, of the KFACE CBA would be applied in the 2020-2021 school year. That MOU stated, in part:

> "While there is disagreement over the contract language of when an employee must have perfect attendance from July 1 – June 30, * * * and regardless of past practice, the District agrees to utilize the date of October 1, 2019, as the date in which an employee must be employed by to be eligible for Bonus Days in the 2020-21 school year. * * * Both parties agree to discuss this item during contract negotiations for future years and that this does not set a past practice or intent to extend."[7]

26. Neither Thornton nor former KFACE President English was involved in the parties' discussions that resulted in the MOU.

27. As of the hearing, the parties had not yet reached a tentative agreement over the bonus days/date of hire issue.

28. On December 8, 2020, Director Clark sent an email to Thornton. It stated:

> "After today's discussion, the District is rescinding the Letter of Expectations that you were issued on November 4, 2020. That being said, we want [to] reiterate that from here on out when a change is made to an employee's payroll ([whether] that is a result of an error or directive from a supervisor/administrator), an email must be composed and approved by the HR Director that will be sent to the affected employee and you must copy both [Jeanne Morgan] and myself on such communications. Failure to do so, will result in disciplinary action."

Blind Carbon Copy (BCC) Email Dispute (Tanya Thornton)

29. Some District employees are considered "permanent" employees. Others are considered "temporary" employees. According to Article 1, Section B of the parties' CBA, temporary employees are not intended to work for more than "90 continuous working days." Further, if a temporary employee works for more than 90 days, the employee's position is supposed to become a permanent one.

30. In March 2021, Thornton determined that a District employee had likely been working in a temporary position for more than 90 days. On March 17, 2021, Thornton sent an email to Director Clark asking Clark for direction regarding how to proceed. Thornton used her

[7]This exhibit is labeled as indicated above but was misfiled by the District as part of Exh. R-6.

District email account to send the email, which she simultaneously BCC'd to then-KFACE President Heather Wisener. Wisener is a District employee, but she does not work in HR or Payroll. Because Thornton's March 17, 2021, email was BCC'd to Wisener, Clark was not immediately aware that Wisener had also received the email. Afterward, Clark and Thornton exchanged a number of additional emails about how to calculate the 90 days.

31. Thornton sent the email to KFACE President Wisener because Thornton did not believe that the HR Department would have brought the issue to KFACE's attention on its own, and because Thornton believed that KFACE needed to be made aware of the matter. In addition, Thornton intentionally BCC'd Wisener (instead of simply carbon copying her) because Thornton was worried that Director Clark would retaliate against her for alerting KFACE of the issue. Thornton based her worry about retaliation on her "past experiences" with Clark, including but not limited to the 2020 bonus days dispute.

32. At some point on or around March 17, 2021, KFACE President Wisener spoke with Director Clark about the temporary employee issue and indicated to Clark that Wisener had learned of the issue through an email that Wisener had received from the District's Business Office. Shortly thereafter, Clark spoke with the District's legal counsel, and then directed the District's IT department to search Thornton's email account to see if Thornton had ever shared information with "anyone else" on other occasions via a BCC. Clark did not specifically direct IT to limit the search for other union communications. At the time, Clark was unaware that Thornton was an active KFACE supporter. Before Clark heard about the email being shared with Wisener, Clark believed that all her exchanges with Thornton had been kept confidential. Eventually, IT informed Clark that Thornton had only sent a BCC as part of the bonus days matter. During the period in which IT's search occurred, Clark did not discuss the matter with Thornton or ask Thornton how Wisener had received a copy of the March 17, 2021, email.

33. On March 24, 2021, Thornton was invited to an investigatory meeting with Director Clark and Thornton's supervisor, Business Manager Morgan, that would occur the same day. Thornton was not told that the meeting was going to be about the BCC'd email until right before the meeting was scheduled to begin, after Thornton asked if she needed to have union representation for the meeting.

34. During the March 24, 2021, investigatory meeting, Thornton asked Director Clark how Clark had learned of the BCC to KFACE. In response, Clark told Thornton that she had had IT review all of Thornton's emails, and that Clark did so because she wanted to know whether there were other BCCs and to whom those emails had been sent. Thornton then told Clark "to have at it," as Thornton did not feel that she had anything to hide. During the same meeting, Clark also instructed Thornton that Thornton could only share information that she had learned of as Payroll Lead with KFACE if that information related to Thornton "directly" and "personally"; that Thornton's concerns about other employees should only be shared with Clark directly and not with KFACE; and that if Thornton shared anything with KFACE that did not relate to Thornton directly, Thornton would be violating the law and Thornton's "job would be in jeopardy." Ultimately, however, Thornton was not disciplined for BCC'ing KFACE.

35. Director Clark believes that it is her job, not Thornton's, "to interact with the union." Clark also believes that interacting with KFACE is not a "position requirement" for Thornton, and that doing so is "beyond [Thornton's] capacity" in Thornton's position. Director

Clark also testified to her concern about whether Thornton was sharing information with or BCC'ing KFACE or other people on a regular basis.

36. UniServ/OEA tells employees represented by its affiliated unions that, when using a work email account, they "run the risk" of those emails being searched. Further, the District's staff handbook explicitly warns that District email accounts "are not private and may be subject to monitoring" and that electronic communications may be reviewed by school administrators (as detailed below). When Thornton learned that Director Clark had IT search Thornton's emails, Thornton felt that the search was a violation of her privacy, and that Clark was looking for something that would enable Clark to "get rid of" her.

37. In the spring of 2021, after Thornton's meeting with Director Clark about the BCC, and while English was still KFACE President, English encouraged Thornton to run to become an elected officer for KFACE. Later, Thornton told English that she would not do so because Thornton did not want "backlash" or "grief" from the District's HR Department, because Thornton did not want Clark to blame Thornton when KFACE learned more information, and because Thornton wanted to avoid having a "confrontation" and "drama" with Clark.

School Board Election Email Dispute (Lisa Danskin)

38. Lisa Danskin currently works for the District as a "special education paraprofessional" in a special education classroom at Klamath Union High School (the District's only high school). Danskin has held her current position for four years, but she started working for the District nine years ago. Danskin currently works with the same students throughout her entire workday.

39. Danskin has been a member of KFACE since she started working for the District. During Danskin's third year with the District, she became an active KFACE member. In or around 2018, Danskin became an elected "building rep" for KFACE and held that position for three years. During the 2020-2021 school year, Danskin became the Vice President of KFACE. On July 1, 2021, she started a term as KFACE's President.

40. Among other things, UniServ recruits and endorses "pro-labor, pro-education" candidates for the District's school board, which is called the Board of Education. In early 2021, UniServ, KFACE, and other local unions decided to become involved in the District's school board elections, and formed a school board committee that was "made up of elementary, high school, classified, and college staff." At some point, Danskin joined that committee and it chose to endorse and recommend a number of specific candidates, including former KFACE President English.

41. On April 23, 2021, at 10:37 a.m., while on a mid-workday break, Danskin used her personal laptop and District email account address to send an email to everyone in the KFACE bargaining unit (a group that included about 165 other employees). The subject of Danskin's email was "Why we recommended the following candidates…" In summary, the email noted that the District's school board election would occur on May 18, 2021, shared that the UniServ school board committee was recommending or endorsing three particular candidates for that election, and explained why the committee had chosen those three candidates. In particular, the email states:

> "We need board members who will support our workers and unions as well as our families. These are the reasons:

"**These candidates Support Unions and Working Families:**
" ● Each of these candidates understands and APPRECIATES the strength of unions.
" ● They care about working families.
" ● We did not support either incumbent in Zone 6 or 7 because they consistently do not listen to our voices and vote against our interests.
" ● One of them only responds to people he wants to. School Board members should be responsive to ALL constituents.
" ● While Tonie Kellom, who is running in Zone 7, is well known and beloved, however she has worked against our unions when she was part of the district negotiating team. She was often late, did not show up, or was not prepared. We need a strong union leader: Dawn English. Dawn will support classified and certified wage increases. Don't expect to see that from Tonie.
" ● We need board members who will support us in negotiations. It is clear the negotiations during the 2021/22 school year will be hard fought. We will need board members who support us."

At the end of the email, Danskin's signature block noted, among other things, that she was KFACE's Vice President.

42. Danskin had access to the email addresses of the recipients of her April 23, 2021, email because she was KFACE's Vice President at the time. The email was not sent to anyone in the custodial/maintenance bargaining unit.

43. In a subsequent email thread, Danskin wrote that the language used in the April 23, 2021, email was not "her words." In fact, Danskin did not write the April 23, 2021, email herself (other than her signature), and the email did not contain Danskin's "personal opinion." Rather, Danskin copied and pasted the entire email message from a single email that she had received from someone else. Moreover, Danskin was asked by someone else to send out the April 23, 2021, email, and that email included the agreed-upon views of the UniServ school board committee.

44. District employees in KFACE's bargaining unit regularly use their District email accounts to communicate with one another about "union business," and UniServ Consultant Olds frequently advises KFACE members to do so. One reason for that is because KFACE knows every bargaining unit employee's District email address, but does not have a complete list of employees' personal email addresses. In addition, many "classified" employees do not have personal email addresses. Furthermore, KFACE does not know how often employees check their personal email accounts, but presumes that employees generally do check their District email accounts.

45. After the May 18, 2021, school board election, on May 24, 2021, Reinhardt forwarded Danskin's April 23, 2021, email to Director Clark, who had not yet seen the email. When Danskin originally sent that email, Reinhardt was still the Head Secretary at Klamath Union High School. However, on May 24, 2021, Reinhardt worked in the District's HR Department in what the parties agree is a "confidential" position as defined by ORS 243.650(6). After reviewing Danskin's email, Clark spoke about it with District Superintendent of Schools Keith A. Brown, Klamath Union High School Principal Tony Swan (Danskin's supervisor), and Nancy J. Hungerford (the District's attorney).

46. Shortly after May 24, 2021, Danskin was called into a June 2, 2021, investigatory meeting with Director Clark by Principal Swan. The meeting was attended by Principal Swan (who appeared as Danskin's supervisor), Clark, Heather Wisener (who was still KFACE's President at the time), Danskin, and UniServ Consultant Olds. The meeting occurred in person, but Olds, who represented Danskin during the meeting, attended the meeting via telephone.

47. During the June 2, 2021, investigatory meeting, Director Clark asked Danskin when Danskin sent the April 23, 2021, email, and Danskin replied that she sent it during her break period. Clark also asked Danskin who wrote the email. In response to that question, UniServ Consultant Olds interjected and recommended to Danskin that she not answer it. Clark asked Danskin who wrote the email because Clark believed that the email was too long to have been written during an employee's break, and because previously Clark had heard that Danskin had indicated that she had not written the email. In accordance with Olds' advice, Danskin did not tell Clark who had authored the email. Shortly after that, the interview ended. In Clark's view, the tone of the interview was "very tense."

48. UniServ Consultant Olds recommended that Danskin not reveal who wrote the April 23, 2021, email because, in his view, Danskin's email was permissible "internal union correspondence" about KFACE bargaining unit employees' "bosses," and because the email was part of a larger collective bargaining campaign. Additionally, Olds believed that revealing the email's author could risk getting another bargaining unit employee "in trouble." According to Olds, KFACE is permitted to use the District's email system for internal union correspondence "on any subject" as long as the unit employees do not do so "on the clock" and the usage does not interfere with or disrupt District operations. Moreover, as indicated above, Olds encourages KFACE-represented employees to use the District's email system for all internal union communications.

49. Director Clark believes that Danskin's April 23, 2021, email was a violation of District policy and the law because the email had "political association." During the June 2, 2021, meeting, Clark was also concerned that Danskin's email was being read and discussed by other District employees during work hours.

50. On June 2, 2021, at the end of the investigatory meeting, Principal Swan and Director Clark issued Danskin a letter of reprimand for her April 23, 2021, email.[8] In part, the letter stated that Danskin had violated Board Policy IIBGA-AR and ORS 260.432 "by promoting and opposing the election of candidates during the workday on District owned IMTC services and equipment." Among other things, Board Policy IIBGA-AR "strictly prohibits" using the District's electronic communications system for the "[t]ransmission of any materials regarding political campaigns," and states that "[t]ransmission of any communications or materials regarding political campaigns prohibited by ORS 260.432 is not allowed."[9] The Policy also states that "[s]taff who

[8]The parties' pleadings and Danskin's testimony indicate that this meeting occurred on June 1, 2021. However, Director Clark testified to drafting the letter in the evening of June 1, 2021, and delivering it the next day. Danskin and Clark similarly testified that the letter was given to Danskin right after the investigatory meeting. Therefore, we find that the letter was delivered on June 2, 2021.

[9]The letter of reprimand also indicated that Board Policy IIBGA-AR references ORS 260.462. That appears to be a typographical error; the portion of Board Policy IIBGA-AR that is quoted in the letter of reprimand references ORS 260.432.

violate general system user prohibitions shall be subject to discipline up to and including dismissal in accordance with Board policy, collective bargaining agreements and applicable provisions of law." ORS 260.432 generally establishes restrictions on political campaigning by public employees. The letter was signed by Clark and Swan, but was authored by Clark.

51. The District's employee/staff handbook outlines Board Policy IIBGA-AR and contains the following language regarding computer usage:

> "Staff may be permitted to use the District's electronic communications system for personal use, in addition to official District business, consistent with Board policy, the general use prohibitions/guidelines/etiquette and other applicable provisions set forth in administrative regulations. Personal use of District-owned computers including internet and email access by employees, is prohibited during the employee's work hours. Additionally, employee use of District-owned computers may be permitted only when such use does not violate the provisions of ORS 244.040[10] and use is under the same terms and conditions that access is provided to the general public under the District's policy governing use of District equipment and materials.
>
> "Staff who violate Board policy or administrative regulations, including general system user prohibitions, shall be subject to discipline up to and including dismissal. Violations of law will be reported to law enforcement. Violations of applicable Teacher Standards and Practices Commission (TSPC) and Standards for Competent and Ethical Performance of Oregon Educators will be reported to TSPC.
>
> "The District retains ownership and control of its computers, hardware, software and data at all times. All communications and stored information transmitted received or contained in the District's information system are the Districts property and are to be used for authorized purposes only. Use of District equipment or software for unauthorized purposes is strictly prohibited. To maintain system integrity, monitor network etiquette and ensure that those authorized to use the District's system are in compliance with Board policy, administrative regulations and law, school administrators may routinely review user files and communications.
>
> "Files and other information, including email, sent or received, generated or stored on District servers are not private and may be subject to monitoring. By using the District's system, individuals consent to have that use monitored by authorized District personnel. The District reserves the right to access and disclose, as appropriate, all information and data contained on District computers and District-owned email systems."

The staff handbook does not specifically address sending emails involving union business.

[10]ORS 244.040 generally prohibits a public official from using his or her position or office to obtain financial gain.

52. Policy IIBGA-AR applies to all District employees who use the District's email system. Further, District employees receive training regarding the contents of the District's staff handbook, Board Policy IIBGA-AR, and the use of the District's email system. Moreover, Danskin has received such training, and also has read the staff handbook on or around August 24, 2020. Later, on October 29, 2020, Director Clark emailed District staff a reminder about ORS 260.432, which, as noted above, restricts the political activities of public employees.

53. When Danskin sent her April 23, 2021, email, Danskin was already aware of the District's policy banning the use of District resources for political activities, which she knew banned sending out political emails. However, Danskin did not view her April 23, 2021, email as political activity, as it did not concern candidates like "Trump or Biden." Instead, Danskin viewed the email as "union/school business."

54. Article 4, Section G, of the parties' CBA states, in part, "[U]se of school buildings, bulletin board, and mail facilities including e-mail shall be limited to Association business and shall not be [used] to espouse a political candidate, cause, measure, or any religious point of view."

55. Upon receiving the letter of reprimand, Danskin became apprehensive and nervous about sending out union-related email, including meeting announcements. Nevertheless, since receiving the letter of reprimand, Danskin has continued to use her work email account to conduct some union business. Further, KFACE continues to be interested in school board elections and maintain its position that Danskin's April 23, 2021, email was lawful.

56. Before the June 2, 2021, investigatory meeting, Danskin had not had much interaction with Director Clark. However, at the time of the meeting, Danskin was aware of some aspects of Clark's interactions with Thornton.

57. On June 3, 2021, KFACE and Danskin filed a grievance concerning the letter of reprimand. The grievance asserted that Danskin was disciplined without just cause in violation of the Public Employee Collective Bargaining Act (PECBA) and Article 7(a) (concerning "just cause") and Article 1 (titled "Recognition") of the parties' CBA. The grievance also asserted that Danskin had been disciplined "for concerted, protected activity for an internal union correspondence," and noted that she sent the email as the Vice President of KFACE.

58. On or around June 18, 2021, Tonie Kellom, who was an unsuccessful candidate in the May 2021 Board of Education election (and ran for the same open seat as former KFACE President English, who also lost the election), filed a written complaint against Danskin with the Oregon Secretary of State alleging a violation of ORS 260.432. Subsequently, Danskin received a letter from the Secretary of State notifying Danskin of the complaint. Although the District was aware that Kellom had filed the complaint, KFACE and Danskin were not told who filed complaint until the hearing for this case. As of the hearing, no known action had been taken on that complaint.

59. On June 22, 2021, Director Clark denied the Danskin grievance (at Level One) via an email.

60. On July 1, 2021, Danskin became KFACE's President.

61. On July 30, 2021, Superintendent of Schools Brown denied Danskin's grievance (at Level Two) via a letter.

62. On August 9, 2021, Olds and Danskin presented their case regarding Danskin's grievance to the District's Board of Education during a school board meeting. During that meeting, the Board of Education voted in open session and unanimously denied the grievance and upheld the Superintendent's earlier decision.

63. On August 11, 2021, Lori Theros, the Chair of the Board of Education, issued a letter that formally denied Danskin's grievance (at Level Three) and upheld Superintendent Brown's related decision.

64. On or around August 12, 2021, KFACE moved Danskin's grievance to the arbitration stage of the parties' grievance procedure (Level Four).

CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(a) and (c), but not (1)(b), by threatening Thornton's job security because she engaged in protected activity.

ORS 243.672(1)(a)

ORS 243.672(1)(a) makes it an unfair labor practice for a public employer or its designated representative to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.662 provides, "Public employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." The language of ORS 243.672(1)(a) provides two distinct prongs, one of which prohibits interference, restraint, and coercion "because of" the exercise of protected rights. Put another way, the "because of" prong prohibits the employer from basing its actions on an employee's protected activity. The other prong of ORS 243.672(1)(a) prohibits actions that interfere with, restrain, or coerce employees "in" the exercise of their protected rights. *Portland Assn. of Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000); *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 29, 22 PECBR 323, 351 (2008). Under either prong, and for all of the claims in the complaint, the burden of proof is on KFACE, while the District has the burden of proving affirmative defenses. *See* ORS 183.450(2); OAR 115-010-0070(5)(b).

To determine if an employer violated the "because of" prong, we ordinarily examine the employer's motives or reasons for the disputed action. However, it is unnecessary for a complainant to prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. *Mult. Sch. Dist. No. 1*, 171 Or App at 623; *Lebanon Community School District*, UP-4-06 at 29, 22 PECBR at 351. Stated differently, evidence of employer hostility or anti-union animus regarding the activity that prompted the employer's action is unnecessary to establish a claim under the "because of" prong. *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05 at 22-23, 22 PECBR 372, 393-94 (2008). When presented with "because of" claims, we typically examine the record as a whole to determine what motivated the employer to act. *Mult. Sch. Dist. No. 1*, 171 Or App at 626 ("The ultimate issue of whether an employer acted

coercively and was motivated to do so by the exercise of protected activity is a factual determination, one that ERB must make considering the nature of the action taken and the circumstances in which it was taken."). Our role, broadly, is to decide which party's explanation of the employer's reasons we believe. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan District*, Case No. UP-48-97 at 8, 17 PECBR 780, 787 (1998).

When we analyze an employer's actions under the "in" prong, we focus on the likely consequences or effects of the employer's actions on employees. An employer commits an "in" the exercise violation if the employer's conduct, when viewed objectively under the totality of the circumstances, has the natural and probable effect of deterring employees from engaging in activity protected by PECBA. Because this standard is objective, neither the employer's motive nor the extent to which employees actually were coerced is controlling. *Mult. Sch. Dist. No. 1*, 171 Or App at 623-24; *Service Employees International Union Local 503, Oregon Public Employees Union v. City of Tigard*, Case No. UP-040-13 at 8-9, 26 PECBR 131, 137-38 (2014). Put simply, our test for this prong is: Would a reasonable employee be chilled from exercising PECBA rights by the employer's conduct? *Oregon Public Employees Union v. Jefferson County*, Case No. UP-55-98 at 14, 18 PECBR 109, 122, *recons*, 18 PECBR 199 (1999). Additionally, an employer that commits a "because of" violation also generally commits a derivative "in" violation because the natural and probable effect of the employer's unlawful action is to chill the exercise of protected rights. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case Nos. UP-42/50-12 at 28, 25 PECBR 640, 667 (2013) (citing *Clackamas County Employees' Assn. v. Clackamas County*, 243 Or App 34, 259 P3d 932 (2011)).

KFACE alleges that the District violated both prongs of ORS 243.672(1)(a) through the various statements that Director Clark made during the March 24, 2021, investigatory meeting. It is well settled that a public employer's directive to a bargaining unit member not to discuss a work-related incident or workplace concerns with coworkers or their exclusive representative violates ORS 243.672(1)(a). *See Sandy Education Association and Davey v. Sandy Union High School District No. 2 and Heaton*, Case No. UP-42-87 at 9, 10 PECBR 389, 397, *amended*, 10 PECBR 437 (1988). This Board has emphasized that the purposes of PECBA "can be attained only when employes are free to discuss with other unit members and union representatives any matters arising out of the employment relationship." *Id.*

Here, as detailed above, during that meeting Clark instructed Thornton that (1) Thornton could only share information that she had learned of as Payroll Lead with KFACE if that information related to Thornton directly and personally; (2) that Thornton's concerns about other employees should only be shared with Clark directly and not with KFACE; and (3) that if Thornton shared anything with KFACE that did not relate to Thornton directly, Thornton would be violating the law and Thornton's job would be in jeopardy. We conclude that these instructions were given because of—and, indeed, in direct response to—Thornton's communication with a union representative about a contractual issue, specifically one involving Article 1, Section B, of the parties' CBA. We also conclude that Clark's instruction effectively threatened Thornton's employment over this communication and plainly misstated Thornton's PECBA rights. Such a threat is a blatant violation of ORS 243.672(1)(a). *See Sandy Union High School District No. 2*, UP-42-87 at 9, 10 PECBR at 397.

In arguing to the contrary, the District contends that it had the right to expect that Thornton would defer to a director's CBA interpretations, as directed, when performing her work. That

argument, however, does not address the core legal issue before us. Under PECBA, represented employees are generally free to discuss with other bargaining unit members and their union representatives any matter arising out of the employment relationship—not just those that affect an employee personally. Moreover, public employees generally have the right to participate in a union investigation of possible employer wrongdoing. *See* ORS 243.662; *Roseburg Education Association v. Douglas County School District*, Case No. UP-16-96 at 7-9, 16 PECBR 868, 874-76 (1996); *Sandy Union High School District No. 2*, UP-42-87 at 9, 10 PECBR at 397. Had KFACE approached Thornton to ask if she was aware of any employees who had been temporarily assigned for longer than 90 days, Thornton would have been able to respond to that inquiry. Correspondingly, Thornton was similarly permitted to alert KFACE to the issue. The fact that communicating with Thornton's union is not a job "requirement" for Thornton's position (as Director Clark put it) has no bearing on this issue. As both parties agree, Thornton is not a "confidential employee" as defined by PECBA. Therefore, she generally has the right to inform her union of any suspected contract violations and other workplace concerns. *Id.*

In reaching this conclusion, we recognize that a public employer may generally enforce reasonable policies governing the release of information, direct employees to follow those policies, and reasonably investigate suspected violations of those policies. However, when doing so, a public employer must also account for employees' PECBA rights. Here, there is no indication that Thornton failed to adequately perform her assigned tasks. Nor is there any indication that her communication related to any personal or confidential information of another employee or that otherwise invoked genuine data security concerns. Rather, the topic of the email was an arcane contractual issue, and PECBA plainly protects KFACE's right as the exclusive representative to interface with unit members about whether the contract language was being followed. Although Clark expressed some generalized concerns about information security, those concerns do not credibly relate to the substance of the information that was at issue. Moreover, Clark's instructions, which were given after the District confirmed that Thornton had sent a single email on the contract question, were broadly restrictive and made no distinctions relative to the type of information involved.

We also are not persuaded by the District's argument that Clark was concerned that Thornton was using her regular "work time" to communicate with the union president. It is not clear how much time the District believes that Thornton spent to send her email to the union president, and we see no indication that it could have taken more than mere seconds to add an email address to the BCC line. Nor is there any clear evidence that that specific concern was ever emphasized during the March 2021 meeting or a subsequent instruction. Instead, the emphasis was on the subject matter of Thornton's communication.

The District also disputes that an employee in Thornton's position could legitimately feel threatened or have been coerced. To begin, it is not necessary that a complainant prove that an employee was actually coerced or actually felt threatened to establish a "because of" violation of ORS 243.672(1)(a). Regardless, we disagree with the District's argument. The evidence establishes that Director Clark explicitly warned that Thornton's job would be "in jeopardy" if Thornton repeated her actions, and that Clark alleged that Thornton's actions were illegal. Under similar circumstances, that kind of language would, at a minimum, deter a reasonable employee from speaking with their union about issues that did not directly involve them. It also follows that someone in Thornton's position would naturally tend to follow Clark's instructions once they were given.

Finally, we reject the District's arguments that rely on our precedent in *Elgin Education Association and Wilson v. Elgin School District, No. 23*, Case No. UP-44-90, 12 PECBR 708, *recons*, 12 PECBR 768 (1991). The facts of that case do not resemble those presented here. At its core, that order stands for the proposition that "employees are not protected by the PECBA when using the authority and office granted to them by the employer to foment *public* anxiety and confusion over employer operations." UP-44-90, *recons*, at 1, 12 PECBR at 768 (emphasis added). Here, however, there is no indication that Thornton's email was sent "to foment public anxiety and confusion over [the District's] operations." *See id.* Thornton simply emailed her union president about a potential contract violation involving a single employee. Such internal union communications do not logically broadcast information to the public or otherwise adversely impact public perception. Moreover, there was no evidence presented that Thornton's actions had any effect on public understanding or perception of the subject matter. For the reasons addressed above, Thornton's activity was protected under PECBA, and Clark's threat that Thornton would lose her job if she engaged in that activity again is unquestionably a violation of the "because of" prong of ORS 243.672(1)(a).

Having concluded that the District interfered with, restrained, or coerced Thornton because of her protected activity, we also find a derivative "in" violation. A "because of" violation "almost always restrains, coerces, or interferes in the exercise of protected rights." *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-2-08, at 20, 23 PECBR 108, 127 (2009) (citing *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 42, 22 PECBR 323, 351 (2008)). Here, the District's conduct provides no exception to that general principle, and we find that the District's conduct would have the natural and probable effect of deterring employees from engaging in the protected activity of discussing employment matters with their exclusive representative. Because our remedy would not be affected, we do not address the question of whether the District also committed an independent "in" violation of subsection (1)(a). *See AFSCME Local 189 v. City of Portland*, Case No. UP-7-07 at 43, 22 PECBR 752, 794 (2008) (citing *Lebanon Community School District*, UP-4-06 at 42, 22 PECBR at 354).

KFACE also asks us to conclude that the District separately violated ORS 234.672(1)(a) because Clark decided to search Thornton's emails as part of her inquiry that resulted in the March 24, 2021, investigatory meeting.[11] We have already concluded that Clark's conduct at the meeting violated ORS 243.672(1)(a). We find it unnecessary to separately determine whether an additional action leading up to the unlawful conduct also independently violated that provision, as doing so would not affect our remedy. *See id.*

ORS 243.672(1)(c)

ORS 243.672(1)(c) states, in relevant part, that it is an unfair labor practice for a public employer or its designated representative to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of discouraging membership in an employee organization." In this context, we have defined the word "membership" very broadly to protect a wide variety of union activities. Our test for determining whether a violation of subsection (1)(c)

[11]Clark maintained that she only directed a search to determine whether Thornton had blind copied others on emails, whereas KFACE asserted that Clark directed the search to uncover other union communications.

has occurred is similar to the one we use in determining a violation of the "because of" prong of subsection (1)(a). In short, an employer's conduct violates ORS 243.672(1)(c) if there is a causal connection between an employee's protected activity and the employer's action. *Tri-County Metropolitan Transportation District of Oregon*, UP-62-05 at 34, 22 PECBR at 944 (citing *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02 at 16, 20 PECBR 337, 352, *recons*, 20 PECBR 388 (2003)); *State of Oregon, Department of Corrections, Santiam Correctional Institution*, UP-51-05 at 25, 22 PECBR at 396 (citing *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06 at 12, 22 PECBR 212, 223 (2007)).

In this case, there is a clear causal connection between Thornton's protected activity, which was Thornton communicating with her union president about a potential contract dispute, and the District's action, which was Director Clark's instruction and threat that limited Thornton's PECBA-protected communications with her union. For that reason, we also conclude that District violated ORS 243.672(1)(c).[12]

ORS 243.672(1)(b)

ORS 243.672(1)(b) makes it an unfair labor practice for a public employer or its designated representative to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." Fundamentally, subsection (1)(b) is concerned with the rights of the union itself, rather than the rights of the bargaining unit employees. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07 at 43, 22 PECBR 752, 794 (2008). To prevail on a (1)(b) claim, a labor organization must demonstrate that the employer's actions actually, directly, and adversely affected the labor organization's ability to serve as the exclusive representative. *Clackamas County Employees' Association v. Clackamas County*, Case No. UP-030-20 at 8 (citing *State of Oregon, Department of Corrections, Santiam Correctional Institution*, UP-51-05 at 26, 22 PECBR at 397). Stated differently, the complainant must prove that the employer's actions resulted in some actual interference with its existence or administration. *City of Portland*, UP-7-07 at 43, 22 PECBR at 794. A (1)(b) violation is not proven by a showing that the action *may* have a foreseeable effect on a labor organization. *Sandy Union High School District No. 2*, UP-42-87 at 10, 10 PECBR at 398 (citing *Oregon State Employees Association v. Coos Bay-North Bend Water Board*, Case No. C-122-80, 5 PECBR 4047 (1980)).

For this claim, KFACE argues that the District violated ORS 243.672(1)(b) because Thornton decided not to run for an elected office in KFACE due to Clark's unlawful statements described above. As set forth above, a violation of (1)(b) requires evidence that the District's actions actually, directly, and adversely affected KFACE's ability to serve as the exclusive representative. KFACE's claim rests on testimony that then-President English met with Thornton in the spring of 2021, after the March 2021 investigatory meeting, and approached Thornton to see

[12]Where a subsection (l)(a) violation has been proven, we need not consider a parallel (l)(c) claim that is based on the same facts. *State Teachers Education Association/OEA/NEA and Andrews et al. v. Willamette Education Service District and State of Oregon, Department of Education*, Case No. UP-14-99 at 33, 19 PECBR 228, 260 (2001), *aff'd without opinion*, 188 Or App 112, 70 P3d 903 (2003), *rev den*, 336 Or 509, 87 P3d 1136 (2004). Here, the ALJ reached the parallel (1)(c) claim and determined (correctly) that a (1)(c) claim was established. The District did not object or cross-object to that conclusion, and we adopt and affirm it. As noted above, with respect to any separate parallel (1)(c) claim based independently on Clark's search of emails, our remedy would not be affected, and we decline to address that issue.

if she would be interested in running for a KFACE office position. At some later point, Thornton told English that she did not want to do so because Thornton wanted to avoid having a "confrontation" and "drama" with Clark. Although we do not discount that Clark's unlawful actions in March 2021 may have influenced Thornton's subsequent decision to not want to run for a KFACE elected office, we find the evidence insufficient to establish actual, direct, and adverse interference with KFACE's ability to serve as the exclusive representative. In reaching that decision, we note that there was no pending union election or even an identified union office that Thornton might be considering. Rather, the evidence is that English thought that Thornton might make a good candidate at some point for being an elected officer and approached her to consider that possibility. Thornton's desire to avoid drama and confrontation with Clark, if she were elected to an office, does not establish the requisite interference with the administration of KFACE. Simply put, the connection between Clark's unlawful conduct and any potential interference with KFACE's ability to serve as the exclusive representative is too speculative and attenuated on this record for us to find that KFACE met its burden of proof on this claim. We require greater evidence than was presented here of actual, direct, and adverse interference with the exclusive representative's ability to perform its legally-protected functions. *Cf. State of Oregon, Department of Corrections, Santiam Correctional Institution*, UP-51-05 at 29, 22 PECBR at 400 (employer's statements that an active candidate for union office was "evil" and that a bargaining unit member should vote for his opponent in the election violated ORS 243.672(1)(b)); *Sandy Union High School District No. 2*, UP-42-87 at 10, 10 PECBR at 398 (employer's directive that employee refrain from communicating with union officials violated ORS 243.672(1)(b) because evidence established that the employee later refused to cooperate with the union such that it impaired the union's ability to administer the collective bargaining agreement and carry out other representational functions). Accordingly, we dismiss the allegation under ORS 243.672(1)(b).[13]

3. The District violated ORS 243.672(1)(b) by disciplining Danskin for using the District's email system for her April 23, 2021, email.

We turn to whether the District's disciplinary action against Danskin, KFACE's then-Vice President, interfered with administration of KFACE, in violation of ORS 243.672(1)(b). We briefly recount the relevant facts. On April 23, 2021, Danskin, while on a midday break from work, sent an email from her personal laptop to the approximately 165 members of the KFACE bargaining unit using her District email account. At the time, Danskin was KFACE's Vice President (she became President, effective July 1, 2021). The subject of Danskin's email was "Why we recommended the following candidates…" and the body of the email communicated UniServ's recommendation or endorsement of three candidates for an upcoming District school board election. The email explained why the committee had chosen those three candidates, and why it opposed other candidates. At the end of the email, Danskin's signature block noted, among other things, that she was KFACE's Vice President. The District subsequently issued a letter of reprimand to Danskin for violating Board Policy IIBGA-AR and ORS 260.432.

The record establishes that KFACE understood that the composition of the school board potentially affected its ability to effectively represent its members, particularly in negotiating collective bargaining agreements that would garner the necessary approval of the school board.

[13]With respect to any argument that the search of Thornton's emails also violated ORS 243.672(1)(b), the record evidence on direct, actual, and adverse interference with KFACE's ability to serve as the exclusive representative is even more lacking.

Thus, as a union officer, Danskin sent the email to notify the membership of the UniServ Council's endorsement and position on school board candidates for the upcoming election. KFACE argues that by disciplining and attempting to curb Danskin from that activity as a union officer, the District interfered with the administration of KFACE, which necessarily involves communicating with its members on matters related to its role as the exclusive representative. KFACE further argues that, as an officer of the exclusive representative, Danskin had a right under ORS 243.804(5) to use the District's email system to send the email.

The District does not dispute that it disciplined Danskin for sending the email, but argues that its discipline did not violate ORS 243.672(1)(b) because: (1) KFACE waived the right to use the District's email system under the terms of the parties' CBA; (2) the email was prohibited under a separate law, ORS 260.432; and (3) ORS 243.804(5) does not apply to Danskin's email, which means that the District could discipline Danskin for violating its internal policy prohibiting using the District's email system for sending materials on political campaigns.[14]

We begin with the District's waiver argument. "Waiver" is an affirmative defense that must be pleaded. *See Portland Fire Fighters' Association, IAFF Local 43 v. City of Portland*, 302 Or App 395 (2020) (holding that ERB erred in finding that the Association waived its right to bargain by inaction where the City did not plead the affirmative defense of waiver by inaction). Here, the District did not plead a waiver by contract in its answer. Therefore, we do not consider it. *See id.*

We next address the District's argument that it disciplined Danskin to comply with ORS 260.432, which 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."

By its terms, ORS 260.432 only prohibits public employees from engaging in the proscribed activity "while on the job during working hours." Here, the record establishes that Danskin sent the email while on a midday break from work. We reject the argument that an employee who is on a bona fide break from work may be deemed "on the job during working hours" within the meaning of the statute. To the contrary, when an employee is on a break, whether it be a meal break or other sanctioned break, they are not "on the job." *Cf.* 38 Op Atty Gen 526, 526-527 (1977) (analyzing ORS 260.432 and stating "The use of the words '... while on the job...' indicates legislative recognition that an employe is within the law if, for example, he or she devotes the lunch hour to a political task. In brief, the law allows public employes to voluntarily engage in political activities on their own time.") The District has not cited any statutory or legal authority for concluding that

[14]Because we conclude, as set forth below, that Danskin's email was protected by ORS 243.804(5), any argument that the District could discipline her based solely on its unilateral internal policy is foreclosed.

an employee remains "on the job" under ORS 260.432 when they are on a sanctioned work break.[15] Nor has the District presented persuasive evidence or argument that Danskin was not on a work break when she sent the email. Accordingly, we disagree with the District's argument that Danskin's otherwise protected activity was unlawful (or lost its protection) under ORS 260.432.

Finally, we turn to whether Danskin's email was authorized under ORS 243.804(5). This is the first occasion that this Board has had to interpret that statute, which 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."

KFACE argues that Danskin, as KFACE's then-Vice President, used the District's electronic mail system to communicate with employees in KFACE's bargaining unit regarding a matter involving the governance or business of KFACE. Therefore, KFACE argues that Danskin had the statutory right under ORS 243.804(5)(c) to send the email, and that the District's discipline because of that email interfered with the administration of the union, in violation of ORS 243.672(1)(b). Likewise, the *amicus curiae* brief of OSEA argues that school board elections are vital and essential business matters for labor organizations representing K-12 school employees in Oregon. It argues that the role of the school board in administering CBAs and making decisions regarding grievances makes school members "decision-makers in the most consequential matters of OSEA business." More generally, it also argues that votes on levies and bonds have a direct impact on school budgets and, by extension, on the bargaining process. Therefore, it argues that the exclusive representative's right to use a public employer's electronic mail system, as set forth in ORS 243.804(5), must be extended to such communications. The District contends that the subject of the email was not a matter involving the governance or business of the union under the statute.

To determine whether Danskin's email is covered by ORS 243.804(5), we must interpret that statute. When this Board interprets and applies statutes, our goal is to determine and give effect to the legislature's intent. ORS 174.020. *See also Comcast Corp. v. Dept. of Rev.*, 356 Or 282, 295-97, 337 P3d 768 (2014) (citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) ("Our goal in interpreting a statute is to determine what meaning the legislature intended in drafting the statute.")). In doing so, we apply the analysis supplied by *PGE,* 317 Or 606, as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Because the words chosen

[15]We note that ORS 260.432 was amended in 2023 by SB 168 to expressly state that "'[w]hile on the job during working hours' does not include periods of time during which a public employee is taking time off for a meal break or rest break or periods of time during which a public employee is utilizing otherwise allowable time off in accordance with the labor laws of this state." Although that amendment, which takes effect January 1, 2024, is not controlling here and does not impact our statutory analysis, we note that it is consistent with our interpretation of the version of the statute that was in effect at the time of this case.

by the legislature are the best evidence of its intent, we first review the text and context of the statute in question. *Gaines*, 346 Or at 171-72. We then review any relevant legislative history. *Id.* If we are still unable to determine the legislature's intent, we then apply maxims of statutory construction. *Id.*

We begin with the context that ORS 243.804(5) is part of PECBA, ORS 243.650-243.809, which governs public-sector collective bargaining in Oregon. ORS 243.804(5) was enacted in 2019 as part of HB 2016 and was a legislative response to the decision of the Supreme Court of the United States in *Janus v. AFSCME, Council 31*, 585 US__, 138 S Ct 2448 (2018). In *Janus*, the Court ruled that it was unconstitutional for a public employee to have any agency fee or any other payment to a union deducted from the employee's wages, unless the employee affirmatively consented to that deduction or payment.[16] In reaching that conclusion, the Court took great pains to emphasize the distinction between public-sector and private-sector collective bargaining. Specifically, the Court emphasized that "collective bargaining with a government employer, unlike collective bargaining in the private sector, involves 'inherently "political"' speech." 138 S Ct at 2480 (quoting *Abood v. Detroit Bd. of Ed.*, 431 US 209, 97 S Ct 1782, 52 L Ed 2d 261 (1977)). The Court added that " 'decisionmaking by a public employer is above all a political process' driven more by policy concerns than economic ones," and further distinguished public-sector bargaining from private-sector bargaining by reasoning that "[i]n the public sector, core issues such as wages, pensions, and benefits are important political issues * * *." 138 S Ct at 2480 (quoting *Harris v. Quinn*, 573 US 616, 134 S Ct 2618, 189 L Ed 2d 620, 646 (2014)).

Because HB 2016 was enacted as a response to *Janus*, which was premised in part on public-sector bargaining being "inherently political," KFACE argues that this context sheds important light on the meaning and scope of the text of ORS 243.804(5). We agree that the context in which HB 2016 was enacted is relevant to assessing the legislative intent of ORS 243.804(5). It is not hyperbole to say that *Janus* fundamentally changed core concepts under PECBA, and there is no dispute that HB 2016, including ORS 243.804(5), was enacted as a direct response to *Janus*. *See*, *e.g.*, Staff Measure Summary, Senate Committee on Workforce, HB 2016, May 21, 2019 (discussing the purpose of HB 2016 with reference to the impacts of the *Janus* decision).

With that context in mind, we turn to the text of the statute. As set forth in the parties' briefings, the operative statutory phrase at issue is "[m]atters involving the governance or business of the labor organization," and particularly the terms "governance" and "business." As the court explained in *Comcast*, when the legislature does not define a statutory term, "we ordinarily look to the plain meaning of a statute's text as a key first step in determining what particular terms mean[,] * * * frequently consult[ing] dictionary definitions of the terms, on the assumption that, if the legislature did not give the term a specialized definition, the dictionary definition reflects the meaning that the legislature would naturally have intended." 356 Or at 295-96. However, "[a]n exception to that approach arises when the legislature uses technical terminology—so-called

[16]Before *Janus*, PECBA authorized "fair share" and "agency shop" arrangements. In short, those types of arrangements required public employees who were represented by a labor organization, but who chose to not be members of the labor organization, to pay their "fair share" to the labor organization for the reasonable costs of being represented by the organization. In that arrangement, the nonmember fair-share payer could be compelled to pay for chargeable costs related to the labor organization's representation of the employee, but could not be compelled to pay for non-chargeable costs related to, among other things, the labor organization's political activities.

'terms of art'—drawn from a specialized trade or field." *Id.* at 296. "In that circumstance, we look to the meaning and usage of those terms in the discipline from which the legislature borrowed them." *Id.* (citing examples). We "determine[] the meaning of those terms based on how they are used and understood in the specialized field, trade, or profession, and using sources that best accord with the legislature's intent." *Id.* Where the legislature uses words of common usage, we give them their "plain, natural, and ordinary meaning," *PGE*, 317 Or at 611, using a dictionary of common usage, *Pete's Mt. Homeowners Assn. v. Or. Water Res. Dept.*, 236 Or App 507, 516-17, 238 P3d 395 (2010).

We proceed to parse the language of ORS 243.804(5), and specifically "[m]atters involving the governance or business of the labor organization." The definition of "governance" is "the act or process of governing: GOVERNMENT," and "government" means, among other things "ADMINISTRATION." *Webster's Third New Int'l Dictionary* 982-83 (unabridged ed 2002). The definition of "business" includes "ROLE, FUNCTION" and "an activity engaged in toward an immediate specific end and usu. extending over a limited period of time: TASK, CHORE, MISSION, ASSIGNMENT." *Id.* at 302. "Involve" means "to have within or part of itself: CONTAIN, INCLUDE." *Id.* at 1191. Thus, the text of the statute indicates that the legislature intended to give an exclusive representative under PECBA the right to use the email system of the respective public employer to communicate with its represented employees regarding matters involving, containing, or including the administration, role, or functions of the exclusive representative as it relates to a specific goal. We further conclude that when we assess whether a communication falls within this provision that we do so through the lens of public-sector collective bargaining, as distinct from private-sector collective bargaining. In other words, we recognize that the administration, role, and function of a public-sector exclusive representative may be different from that of a private-sector exclusive representative.

As that definition relates to the instant case, the question is whether Danskin's email, as an officer of KFACE, constituted a communication with KFACE's represented employees involving, containing, or including the administration, role, or function of KFACE, with respect to the District.[17]

In answering that question, we recognize the role of the District's school board as it relates to KFACE and its role as the exclusive representative. As described above, District school-board members have the authority to ratify (or not) tentative agreements reached by KFACE's and the District's bargaining teams. Thus, part of KFACE's role as the exclusive representative is to work toward having a school board more willing to ratify agreements that KFACE's bargaining team reaches with the District's bargaining team. Danskin testified expressly about this function being of increased importance to KFACE in its role as exclusive representative. Danskin further testified that the email communication to its represented employees was in furtherance of that role. Moreover, the email itself expressly linked the candidates at issue to the role of the exclusive

[17]We reject any argument that, as an elected KFACE officer, Danskin's email was not sent on behalf of the exclusive representative merely because the UniServ Council committee generated the recommendations in the email. KFACE is one of several unions that make up a coordinating body that is known as UniServ. Thus, KFACE was merely transmitting recommendations related to its home district that it and other unions had agreed on. The involvement of other unions in generating these collective recommendations does not then deprive KFACE of its status as the exclusive representative or otherwise deprive it of its right, afforded under ORS 243.804(5), to communicate with unit members.

representative and its function of bargaining terms and conditions of employment on behalf of KFACE-represented District employees. Specifically, the email emphasized that one endorsed candidate would "support classified and certified wage increases" whereas another would not. The email identified a need for "board members who will support us in negotiations. It is clear the negotiations during the 2021/22 school year will be hard fought. We will need board members who support us."

The District does not deny, and the record supports, that the District's school board plays a meaningful (and often determinative) role in the collective bargaining relationship between KFACE and the District. Put another way, the District's school board has decision-making authority that directly impacts KFACE's ability, as the exclusive representative, to perform its function of negotiating contracts on behalf of its represented employees. The April 23, 2021, email communicated KFACE's perspective on candidates for that school board to its represented employees in furtherance of KFACE's role or function as the exclusive representative. Thus, we conclude that the email was about a matter involving, containing, or including the administration, role, or function of the exclusive representative as it relates to a specific goal (*i.e.*, the composition of a board with decision-making authority relative to KFACE's functioning as the exclusive representative of District-represented employees). On these facts, we conclude that the April 23, 2021, email fell under the protection of ORS 243.804(5)(c), meaning that KFACE (via its then-Vice President) had the statutory right to use the District's email system to send that communication. Because Danskin, in her capacity as a KFACE officer, had the statutory right to send the April 23, 2021, email, the District's discipline of her interfered with the administration of KFACE, in violation of ORS 243.672(1)(b).[18]

In reaching this conclusion, however, we do not go so far as to say, as KFACE (and, to a lesser extent, the *amicus curiae* brief) argues, that *any* communication regarding *any* election (be it local, state, or federal) would constitute a matter involving the "governance or business" of KFACE, within the meaning of ORS 243.804(5). Rather, we limit our conclusion to the case before us, which concerns an email regarding elected officials who have direct control and oversight in the ratification and administration of KFACE's collectively-bargained agreements. Additionally, we note that there is no evidence of a pattern of abusing or overtaxing the District's email system, or that this single email created any undue disruption in the workplace. We also reiterate that it was sent while the employee/union officer was off duty (on a break from work). Additionally, the record does not support that the text of the email contained material that would cause it to lose its protection under PECBA. *See Lane County Peace Officers Association v. Lane County Sheriff's Office*, Case No. UP-32-02 at 15 and n 12, 20 PECBR 444, 458 n 12 (2003) (finding that activity can lose its protected status if it is pursued in a seriously inappropriate manner, such as criminal misconduct, violent conduct, contract breach, and inexcusable disparagement of the employer). Accordingly, for the reasons explained above, we conclude that Danskin's email was protected by ORS 243.804(5)(c), and that the District violated ORS 243.672(1)(b) when it disciplined her for sending that email.

[18]As noted, the District failed to plead any affirmative defenses arising under the parties' CBA and only pleaded an affirmative defense that was based on ORS 260.432. Therefore, we do not have occasion to analyze whether KFACE contractually waived the rights granted under ORS 243.804.

4. The District violated ORS 243.672(1)(a) by disciplining Danskin for using the District's email system for her April 23, 2021, email.

We next address whether the District's discipline of Danskin also violated ORS 243.672(1)(a). KFACE asserts that the email constituted protected activity under PECBA, and that the District disciplined her because of that protected activity, therefore violating ORS 243.672(1)(a).

As discussed earlier in this order, ORS 243.672(1)(a) prohibits a public employer from interfering with, restraining, or coercing employees in or because of the exercise of rights guaranteed by ORS 243.662, which consist of the right of public employees "to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." As also discussed above, this Board has long held that participating in the activities of labor organizations under the statute includes the right to discuss matters concerning those activities. Moreover, an employee serving as a union officer is engaged in protected activity when communicating with represented employees regarding the activities of the labor organization for the purpose of representation and collective bargaining. *See*, *e.g.*, *City of Portland*, UP-7-07, 22 PECBR 752 (discipline of employee/union officer for sending email protected by PECBA violated both ORS 243.672(1)(a) and (b)).

We first address whether Danskin was engaged in protected activity when she sent the email. We conclude that she was. First, as explained above, the email was permitted under ORS 243.804(5)(c). As an elected KFACE officer, Danskin had a statutory right to send the email in that capacity. As an employee, Danskin also enjoys the protections of ORS 243.672(1)(a), which includes participating in the activities of KFACE for the purpose of representation. As detailed above, the record establishes that the school board ultimately approves all agreements between KFACE and the District. As Danskin put it, and as the record supports, the members of the school board act as the District's "boss," and membership on that board directly impacts KFACE, because of the Board's role in approving and administering the parties' CBA, and thus constitutes an important issue to KFACE and its represented employees. There is no dispute that Danskin sent the email to KFACE's membership for the purpose of providing information pertinent to KFACE's represented employees on that issue. On this record, we find that Danskin's email constituted participating in the activities of KFACE within the meaning of ORS 243.662. Accordingly, the activity is protected.

We next turn to whether the District's discipline of Danskin constituted interference with, restraint, or coercion in or because of the exercise of that protected activity. *See* ORS 243.672(1)(a). Here, the record is unrebutted that the District disciplined Danskin because of that email, which we have found to be protected activity. In arguing against finding a violation, the District advances the same arguments that we have rejected above regarding the claim under ORS 243.672(1)(b). Specifically, the District asserts that: (1) KFACE waived the right to use the District's email system under the terms of the parties' CBA; (2) the email was prohibited under ORS 260.432; and (3) ORS 243.804(5) does not apply to Danskin's email, which means that the email was unprotected and the District could discipline Danskin for violating its internal policy regarding email usage. For the same reasons expressed above, we reject these defenses and arguments and conclude that the District disciplined Danskin because of the exercise of protected PECBA rights. The discipline therefore violated the "because of" prong of ORS 243.672(1)(a). We also find a derivative violation of the "in" prong of ORS 243.672(1)(a) because the natural and

probable effect of the District's action would be to chill the exercise of protected rights. *Tri-County Metropolitan Transportation District of Oregon*, UP-42/50-12 at 28, 25 PECBR at 667. Because the remedy would not change, we do not address whether there was an independent violation of the "in" prong of ORS 243.672(1)(a). Likewise, because we have found a subsection (l)(a) violation, we exercise our discretion to not consider the (1)(c) violation that is based on the same facts. *Willamette Education Service District and State of Oregon, Department of Education*, UP-14-99 at 33, 19 PECBR at 260.

Remedy

Because we have found that the District violated ORS 243.672(1)(a) and (c) with respect to Thornton, and violated ORS 243.672(1)(a) and (b) regarding Danskin, we order the District to cease and desist from engaging in that unlawful conduct. ORS 243.676(2)(b).

We also order affirmative action necessary to effectuate the purposes of PECBA. ORS 243.676(2)(c). Specifically, we order the District to post a notice of its violations. This order is consistent with our established approach to violations of this type. We will generally order an employer to post an official notice when its unlawful actions were: (1) calculated or flagrant; (2) part of a continuing course of illegal conduct; (3) perpetuated by a significant number of the employer's personnel; (4) affected a significant number of bargaining unit members; (5) significantly or potentially impacted the functioning of the exclusive representative; or (6) involved a strike, lockout, or discharge. Not all of those criteria need to be satisfied for us to order a posting. *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05 at 53, 22 PECBR 108, 157 (2007) (citing *Blue Mountain Faculty Association/Oregon Education Association/NEA and Lamiman v. Blue Mountain Community College*, Case No. UP-22-05 at 110, 21 PECBR 673, 782 (2007)); *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82 at 12, 6 PECBR 5590, 5601, *aff'd without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). Here, we find the District's directive to Thornton that she not communicate workplace concerns with her coworkers or the exclusive representative, and the subsequent threat to Thornton that her job would be "in jeopardy" if she disobeyed that directive, to be a flagrant violation of ORS 243.672(1)(a). Additionally, we conclude that the District's discipline of Danskin in violation of ORS 243.672(1)(a) and (b) potentially impacted the functioning of the exclusive representative, in that it interfered with the exclusive representative's rights under ORS 243.804(5).

In addition to a physical posting, we order the District to distribute the notice by email to bargaining unit employees because the record establishes that email was a common method of communication between the District and its employees. *See Oregon Tech American Association of University Professors v. Oregon Institute of Technology*, Case No. UP-023-20 at 37 (2020).

5. KFACE is entitled to a civil penalty for the District's discipline of Thornton.

Under ORS 243.676(4)(a)(A) "The [B]oard may award a civil penalty to any person as a result of an unfair labor practice complaint hearing, in the aggregate amount of up to $1,000 per case, without regard to attorney fees, if * * * [t]he complaint has been affirmed * * * and the [B]oard finds that the person who has committed, or is engaging, in an unfair labor practice has done so repetitively, knowing that the action taken was an unfair practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious

* * *." In this context, the statutory term "person" can apply to a public employer. ORS 243.676(5). Previously, we have defined the term "egregious" as "conspicuously bad" and "flagrant." *East County Bargaining Council (David Douglas Education Association) v. David Douglas High School District*, Case No. UP-84-86 at 11, 9 PECBR 9184, 9194 (1986).

As previously stated, we conclude that the District's violation of ORS 243.672(1)(a) and (c) regarding Thornton was flagrant. Accordingly, we award a civil penalty of $1,000.

ORDER

1. The District violated ORS 243.672(1)(a) and (c) when it directed Thornton not to communicate workplace concerns with her exclusive representative, and when it threatened her job if she did so again.

2. The District violated ORS 243.672(1)(a) and (b) when it disciplined Danskin for sending an email that was authorized under ORS 243.804(5).

3. The District shall cease and desist from violating ORS 243.672(1)(a) and (c) by threatening Thornton's job security because she engaged in protected activity.

4. The District shall cease and desist from violating ORS 243.672(1)(a) and (b) by disciplining Danskin for sending an email authorized by ORS 243.804(5).

5. Within 10 days of the date of this order, the District shall post and email the attached notice to bargaining unit employees.

6. The District shall pay KFACE a civil penalty of $1,000, within 30 days of the date of this order.

7. The claim that the District violated ORS 243.672(1)(b) when it directed Thornton not to communicate workplace concerns with her exclusive representative is dismissed.

DATED: October 16, 2023.

Adam L. Rhynard, Chair

Shirin Khosravi, Member

Benjamin O'Glasser, 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-039-21, *Klamath Falls Association of Classified Employees v. Klamath Falls City Schools*, and in order to effectuate the policies of the Public Employee Collective Bargaining Act, we hereby notify our employees that the Board found that Klamath Falls City Schools (District) committed an unfair labor practice in violation of ORS 243.672(1)(a) and (c) when it directed an employee (Thornton) not to communicate workplace concerns with her exclusive representative, and when it threatened her job if she did so again. The Board also found that District violated ORS 243.672(1)(a) and (b) when it disciplined an employee and union officer (Danskin) for sending an email that was authorized under ORS 243.804(5). To remedy this violation, the Board ordered the District to:

1. Cease and desist from violating ORS 243.672(1)(a) and (c) by threatening an employee's (Thornton's) job security because she engaged in protected activity.

2. Cease and desist from violating ORS 243.672(1)(a) and (b) by disciplining an employee and union officer (Danskin) for sending an email authorized by ORS 243.804(5).

3. Post and email this notice to bargaining unit employees within 10 days of the date of the Board's October 16, 2023, Order.

4. Based on its actions towards Thornton, pay Klamath Falls Association of Classified Employees a civil penalty of $1,000, within 30 days of the date of the Board's order.

Dated_____, 2023

EMPLOYER
By: _____

Title: _____

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for 30 consecutive days from the date of posting in each employer facility in which bargaining unit personnel are 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, 1225 Ferry Street S.E., Salem, Oregon, 97301-3807, phone 503-378-3807, EmpRel.Board@ERB.Oregon.gov.