

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-7-07

(UNFAIR LABOR PRACTICE)

AFSCME LOCAL 189,	)	
	)	
Complainant,	)	
	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSION OF LAW
CITY OF PORTLAND,	)	AND ORDER
	)	
Respondent.	)	
	)	

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On June 16, 2008, this Board heard oral argument on both parties' objections to a Recommended Order issued on April 25, 2008 by Administrative Law Judge (ALJ) Larry L. Witherell, following a hearing before ALJ B. Carlton Grew on July 17, 18, and 19, 2007 in Portland, Oregon, and July 23, 2007 in Salem, Oregon. The record closed with the submission of post-hearing briefs on September 14, 2007.

Monica A. Smith and Barbara J. Diamond, Attorneys at Law, Smith, Diamond & Olney, 1500 N.E. Irving, Suite 370, Portland, Oregon 97232-4207, represented Complainant.

Stephanie M. Harper, Deputy City Attorney, 1221 S.W. Fourth Avenue, Suite 430, Portland, Oregon 97204, represented Respondent.

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On March 8, 2007, AFSCME Local 189 (AFSCME) filed an unfair labor practice complaint against the City of Portland (City). On April 5, 2007, AFSCME filed an amended complaint. The complaint as amended alleges that the City violated ORS 243.672(1)(a) and (b). The City filed a timely answer to the amended complaint.

This case concerns several complaints against Angela Oswalt, a civilian employee of the Portland Police Bureau and a union vice president and grievance officer.

AFSCME alleges that the Portland Police Bureau's (PPB) response to the complaints against Oswald violated ORS 243.672(1)(a) and (b).

The issues in this case are:

1. Did the City order Angela Oswald, the union vice president, to answer questions about protected communications with union officers, union members, and City representatives on February 9 and March 30, 2007? If so, did this conduct violate ORS 243.672(1)(a) and (b)?
2. Did the City give Angela Oswald a letter of expectations, based in part on her protected activity, which threatened adverse action if she continued to engage in that protected activity? If so, did this conduct violate ORS 243.672(1)(a) and (b)?
3. Was the Angela Oswald letter of expectations based on complaints that had not been investigated, and was it delivered in an intimidating fashion? If so, did this conduct violate ORS 243.672(1)(a)?
4. Was the Angela Oswald letter of expectations created and delivered in an intimidating fashion, which had a direct impact on the union? If so, did this conduct violate ORS 243.672(1)(b)?
5. Should the City be required to pay a civil penalty to the union?

### RULINGS

1. The City filed a motion to dismiss the complaint as it relates to an alleged violation of ORS 243.672(1)(b). The ALJ properly deferred ruling on the motion until the issuance of the Recommended Order. The subsection (1)(b) allegation is resolved in the Conclusions of Law.

2. After oral argument before this Board, AFSCME called this Board's attention to a recent law review article that was published after the parties submitted their briefs. Mitchell H. Rubenstein, *Is a Full Labor Relations Evidentiary Privilege Developing?*, 29 Berkeley Journal of Employment and Labor Law 221 (June 2008). The article addresses a legal issue raised in this case. The City objected, and we permitted it to respond.

We generally expect parties to include in their briefs the citation to any authority on which they rely. Here, however, the article was not yet available when the briefs were due. In such circumstances, it is appropriate to allow the parties to submit

the new authority for this Board's consideration and allow the other party to comment. We will consider the article as an additional authority that was not previously available.

3. The other rulings of the ALJ have been reviewed and are correct.

### FINDINGS OF FACT

#### Introduction

1. The City is a public employer within the meaning of ORS 243.650(20).

2. The District Council of Trade Unions (DCTU) and AFSCME are labor organizations within the meaning of ORS 243.650(13).

3. The City and DCTU are signatories to a collective bargaining agreement for the period from July 1, 2006 to June 30, 2010. DCTU signed the collective bargaining agreement on behalf of its constituent member organizations that include AFSCME Local 189, Laborers' International Union Local 483, International Brotherhood of Electrical Workers Local 48, Machinists and Aerospace Workers District Lodge 24, Operating Engineers Local 701, Plumbers Local 290, and Painters and Allied Trades District Council 5. The collective bargaining agreement covers approximately 1,800 employees, including about 1,000 represented by AFSCME. AFSCME represents approximately 300 employees in the PPB in unsworn positions, including police desk clerks and police records specialists.

4. The AFSCME organization includes a president, executive vice president, secretary-treasurer, recording secretary, communications editor, and organizer. There are also nine second vice presidents/chapter chairs responsible for local divisions called chapters. Chapter F of AFSCME represents the employees in PPB. Chapter F has two second vice presidents/chapter chairs. The chapter chairs serve as chief stewards and work closely with the shop stewards. The second vice presidents/chapter chairs also serve on AFSCME's executive board.

5. At all relevant times, the following individuals were supervisory employees, designated representatives, and agents of PPB and the City within the meaning of ORS 243.650(23) and ORS 243.672(1):

Rod Beard – Assistant Chief  
Lynnae Berg – Assistant Chief  
Adele Boeglin – Administrative Supervisor (AS-1),  
North Precinct

Eric Brown – Lieutenant, North Precinct  
James Ferraris – Commander, North Precinct  
Vincent Jarmer – Captain, Personnel  
Brian Martinek – Assistant Chief, Personnel  
Ron McGee – Director of Labor Relations  
Rosanne Sizer – Chief of Police  
John Tellis – Captain, Internal Affairs

6. The chief of police reports to the commissioner of police, who is the mayor. PPB employs approximately 1,000 uniformed officers and 300 civilians, also referred to as unsworn employees. PPB is divided into three branches: the operations branch, the service branch, and the investigation branch. Each branch is headed by an assistant chief. Lynnae Berg is the assistant chief for the operations branch that includes the five precincts, transit division, school policing, and traffic. Brian Martinek is the assistant chief for the service branch which includes the personnel, records, and management divisions. Rod Beard is the assistant chief for the investigation branch that includes the detectives, drugs and vice, property evidence, and internal affairs divisions.

7. Angela Oswalt has worked for PPB as a police desk clerk (PDC) since August 1997. She has worked in all five precincts. Beginning in June or July 2006, Oswalt was assigned to the North precinct where her supervisor was Adele Boeglin, administrative supervisor (AS-1), until Boeglin retired on June 13, 2007.<sup>1</sup> PPB placed Oswalt on administrative leave on March 31, 2007, and she was still on leave in July 2007 at the time of the hearing in this matter.

8. Before the events of the present case, Oswalt had a romantic relationship with Derrick Foxworth, who at the time was the chief of police. In March 2006, Oswalt accused Foxworth of misconduct, including allegations of a sexual nature, and she asserted civil claims against the City.

Because of Chief Foxworth's position, the City's Department of Human Resources investigated Oswalt's allegations. In June 2006, after the special investigation was complete, the City reprimanded Chief Foxworth and removed him as chief of police, an at-will position serving at the pleasure of the mayor. Foxworth returned to his previous position as a captain in charge of a precinct. During some portion of the Foxworth investigation, Oswalt was placed on paid administrative leave. She returned to work in about June or July 2006 and was assigned to the North precinct.

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<sup>1</sup>Various documents in this case use either AS1 or AS-1 to refer to the position of administrative supervisor held by Boeglin. For purposes of consistency, we will use the term AS-1.

9. Assistant chiefs hold the rank of captain and constitute the chief's cabinet. They serve at the pleasure of the incumbent chief. In July 2006, the current chief of police, Rosanne Sizer, was appointed to replace Foxworth. She removed the assistant chiefs from the Foxworth administration and appointed new assistants with whom she was comfortable, and who reflected the vision and direction of her administration. The assistant chiefs under Chief Foxworth lost their recognized superior positions and were returned to lower-paid assignments as captains.

Commander Ferraris served as an assistant chief under Foxworth from September 2003 to July 2006. When the mayor appointed Chief Sizer, she removed Ferraris as assistant chief and reassigned him as commander of the North precinct.

Beginning in the summer of 2006, after the Foxworth incident, Oswalt was assigned to work at the North precinct under the authority of Commander Ferraris. As a result, PPB managers concluded there was a need for concern and sensitivity about how Oswalt should be treated during the investigation of the complaints described in this decision.

10. During the summer of 2006, Commander Ferraris read two letters from Oswalt's private attorney, addressed to the City, which referred to Ferraris. Ferraris believed that Oswalt and her attorney were warning the City and Ferraris not to retaliate against Oswalt for her role in the Foxworth investigation and the events described above. As a result, Ferraris told Oswalt that the staff at the North precinct supported her, and if she experienced any retaliation, mistreatment, undue influence or pressure, management would deal with it.

11. Oswalt has been a shop steward for AFSCME since 1997 or 1998. In 2005, she was elected vice president/chapter chair for AFSCME Local 189, Chapter F. She was re-elected in January 2007. As chapter chair she also serves as the chief steward.

12. AFSCME gives its shop stewards a training manual that stresses the importance of information flow. It instructs stewards to know their contract and work rules, share their knowledge and information with coworkers, and know and understand the issues and problems affecting members. Towards that end, it urges stewards to develop relationships with their coworkers and listen to employee concerns. Stewards serve as employee representatives in formal grievance proceedings, and in informal problem-solving efforts and discussions with management.

13. Employees regularly tell Oswalt their workplace concerns. Oswalt often takes those concerns to the next level of union leadership and PPB management. As vice president/chapter chair, Oswalt has talked about those concerns with superior officers or management within PPB. She routinely communicated with Captain Jarmer

and Assistant Chief Martinek, both of whom are responsible for personnel and labor issues at PPB. Oswalt also participated in grievance meetings and proceedings, and communicated with Captain Jarner about grievances. She represented employees in investigatory interviews conducted by the internal affairs division (IAD).

14. PPB depends on IAD's ability to secure accurate and reliable information. Accurate and reliable information is necessary so that PPB can assess allegations against officers and employees, and where misconduct is established, take appropriate actions to maintain the public's confidence in PPB.

15. IAD receives approximately 300 complaints per year. Fewer than a third are subjected to a full-scale investigation. Complaints from citizens go to the independent police review division (IPRD) and then are referred to Captain Tellis at IAD for a second review. Tellis then decides whether to assign the matter for a full investigation, make an administrative referral, or refer it for mediation. The IPRD lacks jurisdiction over complaints about unsworn PPB employees and complaints generated from within PPB; it reviews only those complaints about sworn personnel originating from the public or from outside PPB.

All complaints can be subject to a full IAD inquiry or they can be referred to the precinct for an investigation by a sergeant. A precinct investigation is generally the procedure chosen when the issue is less serious or the desired result is to improve the performance and professionalism of the employee, rather than issue discipline. However, when an officer or employee faces several complaints that range in degrees of seriousness, all the complaints can be investigated by IAD, even those that might otherwise be subject to a precinct investigation if they stood alone. All the complaints that come to IAD are reviewed by either Captain Tellis or his lieutenant, and then assigned to one of the IAD investigators. After the investigation, the investigator writes a summary report. The case is then referred to the subject employee's commanding officer, who writes a report on the findings and assesses whether the conduct violated any PPB policy or procedure.

16. The Portland Police Bureau Manual of Policy and Procedure details the steps in an internal affairs investigation. This includes expectations for the investigator, the officer in charge of IAD, and the subject employee's commander.

Based on the manual, the investigator (in the present case Sergeant Roger Axthelm) is expected to:

- "b. Conduct a complete, thorough, and objective investigation.

“\* \* \* \* \*

- “d. Tape record all interviews of members and if possible of all non-Bureau complainants or witnesses. \* \* \* If an interview is not recorded, the investigator will document the circumstances that precluded the recording in the interview narrative report.
- “e. Advise all involved members [of] his/her rights as prescribed by the appropriate bargaining agreement.
- “f. Write an Individual Narrative Report for each person interviewed.
- “g. Write an Investigative Summary Report, which outlines the overall results of the investigation, and, if needed, makes conclusions regarding the reliability of witnesses, and the importance and relevance of facts involved in the alleged misconduct. Investigators will not recommend a finding.”

Based on the manual, the officer in charge of IAD (in the present case Captain Tellis) is expected to:

- “a. Review all citizens complaints received from IPR and determine how the complaints will be addressed.
- “b. During the course of an investigation of a complaint, the IAD manager may determine that there are additional allegations regarding member conduct that need to be included in the investigation.
- “c. Review all investigations to ensure accuracy and completeness, and to ensure that contractual, directive, and city code requirements have been met for citizens and members.
- “d. Forward the completed IAD investigation to the accused member’s [commander or unit manager] who is responsible for case review and finding(s). Forward a copy of the investigator’s summary to the IPR director for review.

- “e. Ensure the accused member’s [commander] has recommended a finding on the completed investigation, that the finding cites the appropriate section of the Manual of Policy and Procedure, and the finding is supported by a preponderance of the evidence. If the IAD manager believes that the recommended finding is not supported by a preponderance of the evidence, he/she will forward the case to the Personnel manager as a controverted finding.
- “f. Within two weeks of the return of a completed case, dispose of the case as follows:
  - “1. If the case involves a finding of other than sustained or controverted, close the case, make the appropriate entries and provide a letter of disposition for the complainant and accused member. Forward the letter to the IPR director who will attach a confirmation letter and mail the letters to the complainant and IAD will notify the member(s) (through channels).
  - “2. If the case involves a controverted or sustained finding, forward the completed case and findings to the Personnel manager for Review Level Committee processing. At the end of Review Level, provide notice of the outcome as noted above. The accused member(s) will be notified of the outcome by Personnel.”

According to the manual, the subject member’s commander (in the present case Captain Ferraris) is expected to:

- “d. Determine which section(s) of the Manual of Policy and Procedure may have been violated based on a preponderance of the evidence.
- “e. Recommend a finding for each allegation, listing the members who should have entries on their IAD records, and articulate in writing the justification for each finding.”



17. According to the manual, a performance review board (PRB) composed of community members and bureau personnel reviews and evaluates all sustained findings against police personnel when the recommended discipline is suspension without pay or greater. The PRB also reviews the subject employee's performance and service history, and then makes a recommendation to the chief, who is responsible for determining the course of action and imposing any discipline.

A separate section of the manual is entitled "Discipline Process—Less Than Suspension." It identifies three types of discipline below a suspension—a Letter of Expectation, Command Counseling, or a Letter of Reprimand. The commander or unit manager drafts the proposed document, as appropriate. The branch chief then reviews it and passes it on to the chief for approval and signature.

18. Sergeant Axthelm has worked for PPB since 1994 and was assigned to IAD in December 2006. Axthelm investigates cases assigned to him by an IAD lieutenant or Captain Tellis. He typically interviews witnesses and produces a written summary of the facts. As an investigator, he does not reach conclusions or make recommendations as to whether a policy or procedure has been violated. Axthelm reports to either an IAD lieutenant or Captain Tellis, who reports to Rod Beard, assistant chief for the investigation branch of PPB.

#### Citizen Complaint—Alleged Traffic Violation

19. On about October 3, 2006, a citizen contacted Leslie Stevens, director of the IPRD and complained that Oswalt had committed traffic violations in her private vehicle. The alleged traffic violations occurred in Clackamas County.

Later in October 2006, IPRD interviewed the citizen complainant. IPRD has jurisdiction only over sworn officers and not civilian or unsworn employees of PPB. On November 9, 2006, Stevens notified the citizen complainant that "I have reviewed your intake interview and determined that IPR will take no further action on the complaint. Our investigation has concluded that the person driving the vehicle was not a sworn member of the Police Bureau. IPR only has jurisdiction over sworn police officers."

At some point in time, Captain Tellis contacted the Clackamas County Sheriff's Office to learn whether a private citizen can initiate a traffic citation, as is permitted in the City of Portland. Because Clackamas County has no such procedure, Tellis did not advise the citizen complainant to contact Clackamas County.

December 11, 2006 E-Mail and Alleged Distribution of Rumors

20. Under the collective bargaining agreement, qualified employees in the bargaining unit have the right to be interviewed for promotions within PPB, and if there are two qualified applicants from the AFSCME Local 189 unit, then PPB cannot fill the position with an outside appointment.

21. Prior to December 11, 2006, some employees contacted Oswalt about whether Boeglin, AS-1 at the North precinct, was going to retire. Some wanted to know if interested employees could apply for Boeglin's position. Others told Oswalt that they heard the "position had already been filled."

There had been concerns in the past that members of the AFSCME bargaining unit were not given an opportunity to apply or be considered for promotion to a supervisory position. In 2005, there was a controversy when it appeared that an individual was selected for an open AS-1 position without consideration of other possible candidates. The controversy generated letters to the chief and the mayor. PPB had to repeat the hiring process and re-interview applicants because of concerns over the fairness and integrity of the process.

22. Prior to December 11, 2006, Oswalt informed AFSCME representative James Hester about the employee inquiries and concerns. He advised her to take the concerns to Captain Jarmer and Assistant Chief Martinek. Jarmer is responsible for personnel development and Martinek is responsible for the non-sworn employees of PPB who are represented by AFSCME. Bringing such workplace concerns to the attention of PPB management is an appropriate activity for Oswalt, who is a vice president/chapter chair of AFSCME.

23. On December 11, 2006, at 8:47 a.m., Oswalt sent an e-mail about employee concerns to AFSCME President Carol Stahlke, Captain Jarmer, and Assistant Chief Martinek. The subject line of the e-mail was "Promising positions." The e-mail stated:

"Hello

"Over the last year several individuals have inquired about the current AS1 position opening up at North as Boeglin retires in June. To date, I have been approached by numerous officers and employees advising Boeglin has already promised her position to a new PASS [police administrative service specialist] currently working at North Barbara Erspamer [sic]

\* \* \*

"Alarming, is Boeglin did this very same promising of her position with the previous PASS who left North (Karen Robida). Introducing Robida as the person taking her place when she leaves. Robida had no intentions of becoming an ASI.

"With all due respect and as a top concern regarding fairness to the DCTU members on the current list I ask attention to this matter be addressed. Previously the organization went through a horrendous ordeal the last time a ASI position was promised to an employee which generated numerous letters to the previous chief and the mayors office. Captain Jarmer please send me the current AS-1 list and advise if the DCTU members on the list are still eligible for the position or if a new list is to be generated.

"In closing, I think it is fair to request promotions follow the proper procedure regarding seniority, promotions, the Bureau of Human Resources and the DCTU contract."

24. Oswalt signed the e-mail: "Angela Oswalt V.P. PPB/AFSCME Portland Police Bureau." Oswalt sent the e-mail in her capacity as a union official.

25. When Captain Jarmer received Oswalt's December 11 e-mail, he did not consider referring the document to anyone to be evaluated for potential discipline. On December 14, 2006, Captain Jarmer responded to Oswalt:

"Hello Angela,

"The process for the replacement of Adele when/if she retires will follow the well-established rules regarding competitive examination for the position. While I am not versed in the specifics of the process, I can assure DCTU that all eligible employees who are qualified for the position will be considered.

"I will ask that BHR [Bureau of Human Resources] Walter Swanson to either supply you with the eligibility list or direct you how to access it if it maintained [*sic*] electronically. I am not sure if there is an eligibility list for Admin supervisor, but Walter can find out.

"In addition, your e-mail refers to a a [*sic*] communication issue that may be appropriate to handle within the precinct chain of command. My e-mail does not confirm there is an issue; it merely points out an avenue of inquiry for you to pursue."

26. Director of Labor Relations Ron McGee called Oswalt and assured her that any position or vacancy would be handled according to the DCTU contract. On December 15, 2006, Oswalt responded to Captain Jarmer:

"Thank you Captain I did receive a call from Mr. Ron McGee regarding the issue. If it is helpful the last AS1 list was established about 2 years ago when BHR had to re-open & re-interview all applicants as a result of the same issue. I have the entire file but it is in storage and I am not able to get to it at this time. Angela."

Oswalt was fully satisfied by the responses from McGee and Jarmer. She considered the matter resolved and closed.

27. On December 11, 2006, at 12:34 p.m., Jarmer forwarded Oswalt's e-mail to Commander Ferraris at the North precinct. Jarmer considered the substance of the e-mail to concern "people in north precinct talking about people in north precinct related to a position in north precinct." Jarmer wanted Ferraris to be aware of the issue because he was not listed as a recipient of Oswalt's e-mail. Jarmer asked Ferraris to "[p]lease read and advise if this is an issue." Jarmer also sent Assistant Chief Berg a copy of the message. Jarmer did not receive any response from Ferraris and considered the matter resolved. Oswalt was not aware that her e-mail had been forwarded to anyone else.

Ferraris in turn forwarded a copy of the e-mail to Boeglin. He wanted to find out what she knew about the matter. When Boeglin received the e-mail, she went to talk with Ferraris. He stated he would talk to Captain Jarmer and Assistant Chief Martinek about the matter.

Boeglin shared the e-mail with her supervisor, Lieutenant Eric Brown, and with Barbara Erspamer. Boeglin, Erspamer, and Brown then met with Commander Ferraris. Boeglin and Erspamer were upset about the suggestion that Boeglin promised Erspamer the AS-1 position when Boeglin retired. Boeglin denied to both Brown and

Ferraris that she promised the position to Erspamer. Boeglin and Erspamer were concerned about how they were portrayed in Oswald's e-mail. Although Boeglin can make a recommendation, she lacked authority to hire or appoint her replacement. Ferraris said he would take care of the matter.

28. Ferraris instructed Boeglin to send him an e-mail saying she never told Oswald when or if she intended to retire. Boeglin sent Ferraris such an e-mail on December 13, 2006.

Ferraris also instructed Erspamer to send him an e-mail with her concerns. Ferraris told Erspamer that if she wanted to make a formal complaint, he would assist her. Erspamer did not want to make a formal complaint. Instead, she sent Ferraris an e-mail on December 13, 2006, setting out her concerns.

29. Boeglin retired on June 13, 2007. Ferraris appointed Erspamer to replace her on an acting and temporary basis. The AS-1 position at the North precinct is scheduled to be eliminated.

#### Jane Doe Incident and Alleged Failure to Provide Information

30. In 2004, Oswald represented employee Jane Doe<sup>2</sup> in an IAD investigation. This incident was the first acquaintance and only interaction between Doe and Oswald. They have not socialized, become friends, or had any other professional or social contact.

31. In December 2005, Doe was involved in an off-duty incident that resulted in another investigation. She was disciplined because of the incident. Oswald did not represent Doe in the investigation of the 2005 incident.

32. In early January 2007, Oswald spoke on the phone with Robyn Brown, who was at that time a former employee of PPB and a former vice president/chapter chair for Chapter F in AFSCME Local 189. Brown left PPB in May or June 2006 and was no longer a member of the AFSCME bargaining unit at the time of the telephone call. The purpose of the call was to discuss the transfer of some union files from Brown to Oswald. However, during the telephone conversation, Brown said she heard at a Christmas party that Doe had been mistreated at the records department, and that other employees were allegedly accessing and discussing Doe's private records.

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<sup>2</sup>Jane Doe is a pseudonym.

33. After Oswalt spoke with Brown, she telephoned Doe on January 10, 2007. Oswalt reminded Doe that she represented her in 2004.<sup>3</sup> Oswalt told Doe that someone reported hearing a conversation about Doe at a Christmas party in which the participants discussed Doe's mistreatment when she worked in the records department. Oswalt asked if that was true. By this time, Doe had left the records department and transferred to the information and referral department.

Doe told Oswalt that some employees had "ganged up on her and had targeted her by using a police report that was to make her look bad," and that Doe and another employee had been in a competition for Doe's present position in the information and referral division. Doe believed the other employees at records had used a police report in an attempt to prevent her from getting her present position.

34. After her conversation with Doe, Oswalt contacted AFSCME representative Hester. Hester told Oswalt that Doe could and should file a complaint with IAD. Thereafter, Oswalt informed Doe that she should file a complaint.<sup>4</sup>

35. On January 18, 2007, Doe sent the following e-mail to Captain Tellis in IAD, with copies to Lauri Steward at IPRD and Hester at AFSCME:

"Dear Captain Tellis,

"\* \* \* \* \*

"On January 10, 2007, I received a phone call from Ms Angela Oswalt which has caused me great concern. At a recent Christmas Party, I was told that my case was discussed again. I understand that this discussion did not occur during business hours, however this was a confidential case that was not made public. Additionally, I just learned that my report may have been copied and distributed, which has seriously

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<sup>3</sup>Oswalt asserts that she also told Doe she was calling in her capacity as a union official. Doe denied it. As a witness, Oswalt lacked details, and often rambled. When questions called for specificity, she engaged in self-serving generalizations. In particular, she was unable to provide a coherent, understandable version of her telephone conversation(s) with Doe. She had to be re-asked questions or directed to the correct answer by leading questions from counsel. As a result, notwithstanding her assertion to the contrary, we cannot conclude that Oswalt specifically represented to Doe that she was calling as a union official.

<sup>4</sup>If there were more than one telephone conversation between Oswalt and Doe, the separate specifics are lacking. It appears that Oswalt has combined the conversations.

effected me. To learn that a break [sic] of confidentiality and a violation of the code of ethics is a major concern to me and for other bureau members.”

36. Captain Tellis gave Sergeant Axthelm the January 18, 2007 e-mail from Doe and assigned him to investigate the facts.

On the same day, Axthelm contacted Doe for an informal discussion. Doe expressed concern that a police report written about her in 2005 was the subject of communications by two PPB employees, one of whom worked in the records department.

Doe told Axthelm that Oswalt had called her and said that the information (Doe’s 2005 investigation and files) had been discussed at a Christmas party and that Oswalt would inform any investigating agency about where she got the information.<sup>5</sup>

37. Axthelm decided to interview Oswalt because she was specifically named in Doe’s e-mail to Captain Tellis.

On January 25, 2007, Axthelm ordered Oswalt to appear at IAD on January 30, 2007, to be interviewed as a witness regarding a “[c]onduct complaint” that occurred between January 2006 and January 2007. Axthelm also told Oswalt that she could bring a union representative to the interview and that failure to obey the order could result in discipline. Axthelm knew that Doe was a union member and that Oswalt was a union official.

38. AFSCME representative Hester accompanied Oswalt to the IAD interview. Before the interview began, they were allowed to inspect the IAD worksheet which indicated that Doe was the complainant and that the investigation was based upon the January 18, 2007 e-mail from Doe to Captain Tellis.

Hester advised Oswalt that PPB could ask Oswalt about the telephone conversation, but he considered the subject to be a protected conversation. The transcript of the taped interview of Oswalt provides the following:

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<sup>5</sup>Oswalt testified that she does not recall telling Doe she would cooperate with investigators. A witness who is unable to recall a particular statement does not deny making it; the witness simply cannot recall the statement one way or the other. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 737 n 3 (2004). Doe has a specific recollection and has no stake in the outcome of this matter. For these reasons, we rely on Doe’s version of the conversation.

"AXTHELM: \* \* \* ANGELA OSWALT has been informed that this, that she is a witness in this case and that Sergeant Roger Axthelm is in charge of the investigation. I have advised ANGELA OSWALT that she could have representation present during the interview, and James Hester is here in that capacity. ANGELA OSWALT, I am ordering you to answer all questions fully and truthfully. If you fail to respond fully and truthfully, you may be disciplined up to and including dismissal. Do you understand that?

"OSWALT: Yes

"\* \* \* \* \*

"AXTHELM: \* \* \* you had a phone call to [Doe], a fellow employee of the Police Bureau. Could you tell me the nature of the call?

"OSWALT: Um, as I was her union rep on a case and I asked her some questions. Yeah, it's privileged information.

"AXTHELM: Okay, you're stating that the phone call you made on January 10<sup>th</sup>, 2007, that you contacted her in your specific role as a union representative, not as a friend and an acquaintance or a fellow employee, during that timeframe and she acknowledged that you also were acting as a union representative at that time.

"OSWALT: Correct.

"AXTHELM: Okay. Therefore, you feel that the information during that conversation was confidential because of the confidential nature between the union and employees.

"OSWALT: Correct.

"AXTHELM: You called Ms. [Doe] on January 10<sup>th</sup>, 2007 to advise her that you heard about an incident at Christmas, at a Christmas party. Where and when was the Christmas party?

"OSWALT: I don't know where, uh, when the Christmas party was and I was not present at the Christmas party.

"AXTHELM: Okay, so was the information you gained from a third person then?

"OSWALT: Correct.

"AXTHELM: Okay. And who was that person?

"OSWALT: That's privileged information.

"AXTHELM: Was that another member of AFSCME, who provided that information to you?

"OSWALT: Not any longer, no.



"AXTHELM: Okay, were they at that time?

"OSWALT: I had, I don't know. At the time of what?

"AXTHELM: At, at the time that you found out about the incident involving [DOE], that you ended up calling her about on January 10<sup>th</sup>, 2007? Was this person who advised you of the incident, the allegation against Ms. [DOE], that it was back in, basically back out that there was some information being spread. Was this person who told you a member of the Portland Police Bureau at that time?

"OSWALT: No.

"AXTHELM: Okay. So your classified information as far as being a union rep for this person does not apply at this point to that person.

"HESTER: Uh, we would argue it does and since the information, uh, is, uh, impacting one of our current members and members at that time, which would be [DOE].

"AXTHELM: Okay. So you, your feeling is then that the information she gained from an anonymous citizen was classified and that...

"HESTER: At this point in time we, we feel it's privileged.

"AXTHELM: And she was acting directly as a union representative at that time.

"HESTER: Uh...

"AXTHELM: Ms. OSWALT.

"HESTER: Yes.

"AXTHELM: Okay. Have you any conversations with [DOE] since January 10<sup>th</sup>, 2007?

"OSWALT: Yes.

"AXTHELM: Could you tell me approximately how many times?

"OSWALT: That's privileged information.

"AXTHELM: Could you tell me if you initiated the contact or if she initiated the contact with you?

"OSWALT: That's privileged information.

"\* \* \* \* \*

"AXTHELM: Have you ever discussed this incident with anyone else besides [DOE] on January 10<sup>th</sup>, 2007?

"OSWALT: That's privileged information.

"\* \* \* \* \*

"AXTHELM: Is there anything further you want to add during this issue at this time?

"OSWALT: No.

"AXTHELM: Okay. Sir?

"HESTER: No, I think we're good.

"AXTHELM: Okay. Obviously, the discussions into the issues of confidentiality between union positions will be discussed and, and possibly we may have a follow-up interview after discussing it with a couple other people.

"\* \* \* \* \*

"HESTER: Yeah, at the, we may want to try and work those things out, uh, you know, between, obviously the Bureau's, you know, talked to the City Attorney's Office.

"\* \* \* \* \*

"HESTER: And we've talked with our attorneys, so we may want to have them work that out one on one.

"\* \* \* \* \*

"HESTER: Instead of putting us all in the middle...

"\* \* \* \* \*

"HESTER: ...and then we can go from there. But maybe...

"AXTHELM: Depending how the investigation proceeds, we'll look at that.

"HESTER: Yeah, and that's just a suggestion. That way, 'cause, you know, it's not our intent to impede that, impede an investigation, so, um, but we also want to protect the rights of the union as a whole.

"AXTHELM: Sure. Very understandable. Okay. Today's date, I mean the time off, time off will be at 10:24." (Bold in original.)

39. Hester had advised Oswalt not to answer questions concerning her conversations which the union considered privileged communications between the union and its members. Hester considered it his and the union's responsibility to protect stewards and union officers from retaliation, and he believed it would be more difficult to recruit stewards if they could become the target of an investigation because of their activities on behalf of members.

Oswalt believed that as shop steward and vice president, "if the members were to disclose information to me and I was to tell, they wouldn't trust us, they wouldn't come to us, so the employer's not supposed to ask those questions, and they never have before."

40. Brown, the person who told Oswalt about the Christmas party conversation, was not an employee of PPB at the time of the telephone conversation

with Oswald or thereafter. Since Brown was not an employee of PPB, she could not be required to participate in an IAD investigation.

41. Axthelm formally interviewed Doe on January 31, 2007. Axthelm focused on two issues: whether Oswald told Doe she was willing to share her information with investigators, and whether Oswald was acting as a union representative during the conversation with Doe. The transcript sets out the following:

"[DOE]: And [Oswald] said that, you know, she encouraged me, that you know, it's something that I should maybe think about because it's not right that my confidentiality was being talked about. And she knew what had happened with...

"\* \* \* \* \*

"[DOE]: \* \* \* she definitely knew verbatim what had happened.

"AXTHELM: And she left [*sic*] you know that she knew that. Did she spell it out to you?

"[DOE]: She told me it was someone who attended a Christmas Party, made her aware of all of this stuff.

"\* \* \* \* \*

"[DOE]: And I asked her who it was and she would not tell me. She said she would give that information to you guys.

"AXTHELM: And she said that she would give that information to us.

"[DOE]: And she, well she...

"AXTHELM: Internal Affairs?

"[DOE]: Yeah, well whoever was going to investigate it.

"\* \* \* \* \*

"AXTHELM: Okay. And, and did Ms. OSWALT, did she tell you that she was personally at the party?

"[DOE]: No.

"AXTHELM: No. Okay. But she told you that she heard, heard this from somebody, right?

"[DOE]: Yup.

"AXTHELM: And she wouldn't tell you who that was.

"[DOE]: No, she wouldn't.

"\* \* \* \* \*

"AXTHELM: At any time did Ms. OSWALT tell or state to you that she was notifying you about this information as an official basis as an official business as to your union rep?

"[DOE]: No.

"AXTHELM: Okay. Did you tell her that you were talking to her as a union rep to employee?

"[DOE]: No, no, I, um, the union was brought up in it. I didn't, I mean I didn't know, I mean I can't tell you if she was coming to me as, as a representative of my union or whatnot.

"\* \* \* \* \*

"[DOE]: She was just telling me, she basically has told me that the union stands behind me. I mean the legality. But I haven't, I'm not, my concern is getting a complaint. I haven't thought about a union rep. I mean [Oswalt] happened to be part of the union when she disclosed and the information was provided to her.

"AXTHELM: Right. But as that conversation went, it was basically as two...

"[DOE]: Two people talking.

"AXTHELM: ...two people talking.

"[DOE]: Yeah.

"AXTHELM: I mean there was nothing, you, you felt you were just talking to [Oswalt]. It wasn't a union issue, and you...

"[DOE]: Right.

"AXTHELM: ...what you would perceive from her, it was just basically...

"[DOE]: Right.

"AXTHELM: ...another acquaintance, not...

"[DOE]: And she did, she did tell me, she asked me why I never contacted the union and I just said because of what was going on at that time. I wasn't thinking of, I, I don't, my ordeal in 2006. I wasn't wanting to bring it up.

"\* \* \* \* \*

"[DOE]: But I know now that she was talking to people in the union about it, so...

"\* \* \* \* \*

"AXTHELM: And that she would make that known to whoever was investigating the case, correct?

"[DOE]: That's what [Oswalt] said, yes.

"AXTHELM: And that, did she tell you that verbatim?

"[DOE]: Yeah, that's what I understood and I asked her who was it, she didn't feel comfortable telling me. And I, I was fine. I didn't really want to know who was talking on it.

"\* \* \* \* \*

"[DOE]: And then when I said well, I'll let you know when I file it, I was under the understanding that she would.

"AXTHELM: Okay. Have you talked with Ms. OSWALT anytime since your conversation on January 10<sup>th</sup>?

"\* \* \* \* \*

"[DOE]: And then I talked to her the other day when she told me about the union, I needed to talk to, I think the president \_\_ James [*sic*] of the union about this, I could do that. And she just reassured me that, you know, the union would stand behind me if need be. And that I was doing the right thing.

"\* \* \* \* \*

"AXTHELM: Okay. And then the times that, the last time that you spoke with Ms. OSWALT about a week ago, it was related to this issue. Do you feel that this was an employee to union conversation or not?

"[DOE]: The last time I talked to her?

"AXTHELM: Yeah, a week ago.

"[DOE]: Um, I couldn't answer. I mean I know the union was brought up and to, I guess she might have looked at it as being of a union and I'm looking at it, I guess I don't see her because she is bringing, she brought the incident to me.

"\* \* \* \* \*

"[DOE]: As, uh, a person of concern. So I guess I haven't seeked [*sic*] the union. I, I mean I guess she could represent me and I, I don't...

"AXTHELM: Okay.

"[DOE]: ...that's never been brought up...

"AXTHELM: Okay.

"[DOE]: ...who in a union rep doing anything right now.

"AXTHELM: Okay, okay. And there is no mention by her that...

"[DOE]: Just that the union rep \_\_\_\_\_ [*sic*]

"AXTHELM: The union rep were here. She just basically said that the union stands behind you?

"[DOE]: Yeah." (Bold in original.)

#### Citizen Complaint about Alleged Abusive Conduct

42. On about January 23, 2007, a civilian complained to IPRD that Oswalt verbally abused the citizen. IPRD does not have jurisdiction over civilian employees, so on January 24, IPRD referred the citizen complaint to Commander

Ferraris at the North precinct. Ferraris consulted with Assistant Chief Berg and they decided to refer this complaint to IAD rather than handle it as a service complaint within the precinct. Their decision was based in part on a desire to handle the complaint outside of the precinct for the reasons set out in Findings of Fact 8 and 9.

#### PPB Response to and Handling of Complaints Against Oswald

43. Some time between early October 2006 and mid-January 2007, IPRD notified Commander Ferraris at the North precinct about the citizen complaint alleging Oswald committed certain traffic violations described in Finding of Fact 19. On January 25, 2007, Captain Tellis of Internal Affairs informed Ferraris that “[a]fter reviewing the information provided by the complainant, relevant police reports \* \* \* I have determined that there is no basis for a full IAD investigation.” Tellis referred the complaint back to the precinct to be treated as a “Service Complaint.”

44. In late January or early February 2007, Ferraris and Tellis discussed the allegations against Oswald. Ferraris was concerned about a “number of allegations bubbling up.” Ferraris concluded that “if all of these were packaged up as one investigation and done by the internal affairs division, that would be kind of an arm’s length, unbiased, third-party investigation, and that that would be the cleanest way to handle that.”

45. In early February 2007, Assistant Chief Berg and Commander Ferraris discussed the traffic complaint. Because of the circumstances described in Findings of Fact 8 and 9, they decided it should be combined with the other complaints involving Oswald and handled by IAD rather than by the precinct. Employees who are subject to complaints and investigations are not usually told why their complaint is being handled by IAD rather than the precinct or vice versa. On about February 12, Ferraris referred the traffic complaint and file back to IAD. Captain Tellis assigned Sergeant Axthelm to investigate.

46. On February 7, 2007, Berg met with Ferraris, one or more of the assistant chiefs and representatives from human resources, the City Attorney’s office, and IAD. The meeting focused on the multiple allegations involving Oswald. The participants also discussed Oswald’s December 11, 2006 e-mail and the issue of spreading rumors. The meeting set the direction for PPB’s handling of the complaints against Oswald.

47. After Axthelm interviewed Oswald on January 30, 2007, he advised Captain Tellis that Oswald refused to answer the questions. Axthelm was instructed to interview Oswald a second time.

48. On February 6, 2007, Oswald was summoned to attend a second interview scheduled for February 9, 2007. She was "ordered to appear at the office of the Internal Affairs Division \* \* \* to be interviewed as a witness regarding a Conduct complaint that occurred between December 25, 2005 to present at an unknown location." The order informed her of her right to bring a union representative and warned her that failure to obey the order could result in discipline.

The purpose of the February 9, 2007 interview was to provide Oswald another opportunity to answer Axthelm's questions. Captain Tellis had instructed Axthelm to emphasize that Oswald needed to answer all questions fully and truthfully. At the meeting, Sergeant Axthelm warned Oswald a second time: "I am ordering you to answer all questions fully and truthfully. If you fail to respond fully and truthfully, you may be disciplined up to and including dismissal."

Axthelm then explained that

"Bureau employee, [DOE], contacted the Internal Affairs Division and filed a complaint about the release of confidential information that she only learned of because you called her to tell her. We're investigating the release of confidential information you're, in fact, a witness to those events. Miss OSWALT, you were just advised that if you do not answer these questions fully and truthfully, you may be disciplined up to and including dismissal. I've had contact with the City Attorney's Office, Human Resources, and the Chief's Office prior to this, our second interview. I'm advising that according to the advice I was given by, and the circumstances of this situation, you have no grounds to confidentiality between a union representative and a union member when it comes to being questioned by the employer."

Axthelm then warned Oswald a third time:

"Therefore, I am telling you, with the backing of the City Attorney's Office, Bureau of Human Resources, and the Chief's Office, that if you do not answer these questions fully and truthfully, you will be disciplined up to and including dismissal – do you understand that?"

At this point in the interview, Hester, the AFSCME representative who accompanied Oswald to the meeting, notified the City that "threatening a union official

with discipline is an unfair labor practice. \* \* \* ANGELA will \* \* \* answer your questions, but will be... Please be advised we'll be filing an unfair labor practice [sic]."

49. After three threats of disciplinary action, Oswalt and Hester agreed she would answer the questions, notwithstanding their position that the questions were unlawful. She answered the questions and told Axthelm that Brown was the source of her information about Doe. She also answered Axthelm's questions about the number and content of her conversations with Doe.

50. During the interview Axthelm stated: "[Doe] told me during our interview, that you advised [Doe] that you were uncomfortable sharing the name of the person who provided you with the information. However, you told [Doe] that you would share this information with Internal Affairs or whoever looked into these allegations. Is this a correct statement?" Oswalt responded: "I don't know if that's a correct statement or not." When asked again, "Did you tell her that you would provide that information to Internal Affairs or whoever looked into these allegations?" Oswalt answered, "I don't recall having that conversation."

51. Paragraph three of Policy 310.50, "Truthfulness," of the Portland Police Bureau Manual of Policy and Procedure (January 2007) states:

"Members are obligated under this directive to respond fully and truthfully to questions about any action taken that relates to the member's employment or position regardless of whether such information is requested during a formal investigation or during the daily course of business."

52. On February 9, 2007, after Axthelm interviewed Oswalt, he interviewed Doe a second time. Axthelm wanted to confirm with Doe that it was her expectation that Oswalt would cooperate by providing PPB the source of her information. Doe stated that in the telephone conversation, Oswalt

"felt really bad that that [the prior incident where employees accessed and distributed Doe's investigation files] was brought up, and why I never, you know, addressed the union on it, when I knew that it happened. And that was really it. And she just said, you know, if I wanted to...that, she encouraged me that, you know, to contact [Internal Affairs] to have an investigation done, because it wasn't right that someone was going into my confidential information.

"\* \* \* \* \*



"[DOE]: And when I asked her who had told her that, she would not disclose that to me."

In Doe's second interview, Axthelm again brought up Oswald's union capacity and status:

"AXTHELM: Has Miss OSWALT been a union rep for you at any time?

"[DOE]: Um, she was [sigh] a couple years ago.

"AXTHELM: Back in 2004?

"[DOE]: That might've been right, yeah.

"AXTHELM: Okay. So, specifically, she did not say anything about your case in 2005?

"[DOE]: No.

"\* \* \* \* \*

"[DOE]: I didn't feel like I had to ask her anything about it. To me, I mean, if she knew...I don't want to re-relive it, so I guess I just assume that she knew, since it was discussed somehow to her, so..."(Bold in original.)

53. On about February 14, 2007, Ferraris learned that someone at the North precinct may have improperly provided allegedly confidential information from PPB files to an unauthorized individual outside of PPB. On February 15, Ferraris learned that Oswald apparently was the employee involved. Ferraris again consulted with Assistant Chief Berg, and they decided to refer this matter to IAD. Again, the decision was based on their desire to have the complaint handled outside of the precinct because of the circumstances described in Findings of Fact 8 and 9.

54. Assistant Chief Berg knew about the series of pending misconduct complaints against Oswald. In early February 2007, Berg consulted with other PPB officials and decided to give Oswald a letter of expectations. Berg considered the complaints fairly serious and wanted to articulate the department's expectations. Oswald is within Berg's chain of command, which runs from Oswald to AS-1 Supervisor Boeglin, to Lieutenant Brown, to precinct Commander Ferraris, to Assistant Chief Berg.

Assistant Chief Berg decided to personally deliver the letter of expectations to Oswald for reasons related to the issues set out in Findings of Fact 8 and 9. Berg and the others believed that this delivery method would be more sensitive to Oswald's concerned anxieties. Berg knew Oswald on an informal basis and believed Oswald felt fairly comfortable around her. Prior to February 2007, Oswald had interacted with Berg in PPB trainings. Oswald had never before communicated with Berg about her responsibilities and position as a police desk clerk.

55. Berg drafted the letter of expectations on February 14, 2007, and provided it to the City Attorney's Office. Ferraris also reviewed, discussed, and agreed with the letter. On February 27, 2007, Berg delivered the letter to Oswalt.

The letter of expectations stated:

"The Bureau has received three complaints regarding your conduct. Two of those complaints come from citizens and relate to your off-duty conduct and one is a result of your conduct at work. You are a witness in a fourth complaint, which you were recently interviewed about. On first glance, it seems that a common thread leading to these complaints is your communication choices.

"The purpose of this memo is to let you know, first, that the three complaints will be investigated by the Internal Affairs Division. Second, I want to provide you clear notice about what is expected of you. Having worked for the bureau for as long as you have, these are expectations that you should be aware of. I have every confidence that you will meet these expectations.

- "• Be professional and courteous in your contacts related to work. It would be unprofessional conduct if you were to reference rumors orally or in written correspondence. If you do not know the information you are passing along to be accurate based on your own knowledge, do not pass it along. Making assertions based on inaccurate or incomplete information can result in disruption and dismay to others.
- "• You are also expected to behave professionally in your off-duty conduct. You are expected to refrain from behavior that would bring discredit to the bureau. It is absolutely not appropriate to say or do anything that would suggest that working for the bureau will allow you to direct official resources for personal reasons.

"I am enclosing Directive 310.00, Professional Conduct, Directive 310.40, Courtesy, and Directive 313.00, Misuse of

Official Position or Identification. Please review them and let me know if you have any questions about them.

"I am informed that you raised a personal safety concern on Friday, February 9, which was addressed by your supervisors at North Precinct. Employee safety is of the utmost concern to me and if there is anything more that feel [sic] should be done, please do not hesitate to let any sergeant, Lt. Brown, Commander Ferraris, or me know."

Berg intended the statement about spreading rumors to refer to Oswald's December 11 e-mail concerning Boeglin and Erspamer.

56. PPB's reputation in the community, and the trust of the community, are important to PPB in carrying out its mission. Berg viewed the complaints against Oswald as potentially impacting community trust and the department's reputation, and she issued the letter of expectations to reiterate the organization's expectations. The letter of expectations is not a determination by Berg or PPB that the underlying complaints had been substantiated.

Berg has given letters of expectations to employees and required command counseling for employees even when there was no ongoing investigation or pending complaint. The Portland Police Bureau Manual of Policy and Procedure, Section 341.00, contains the procedure for discipline less than a suspension. It identifies a letter of expectations as one such type of discipline. PPB did not follow the policy manual prior to issuing Oswald's letter of expectation.

57. Berg believed it was appropriate and necessary for the complaints against Oswald to be investigated by IAD rather than at the precinct level. Some of the complaints involve serious allegations, and serious allegations generally are handled directly by IAD. When complaints become more numerous or complex, it is often difficult for a precinct supervisor, who has many other duties, to give full attention to the complaints. Also, Berg and PPB wanted to avoid any possible appearance of retaliating against Oswald for the events involving former Chief Foxworth.

In the mid-afternoon on February 27, 2007, Berg went to the North precinct and asked to meet with Oswald in the conference room. Berg gave Oswald the letter of expectation and stated, "[w]ould you like to read this and I'll answer any questions that you might have." Oswald asked what the complaints were about. Berg stated that she could not discuss the content of the complaints. Again, Berg asked if Oswald had any questions and Oswald said no.

As a result of being given such a serious document by such a high ranking officer, Oswald broke down and cried throughout the remainder of her shift. Oswald never sought clarification from any PPB official about the impact of the letter of expectations on her union activities within PPB facilities.

58. Assistant Chief Berg considered Oswald's December 11 e-mail to be an inappropriate communication because "you're making allegations about the potential for people to be circumventing the civil service process and violating accountability and transparency and you don't have firsthand knowledge, that's a serious issue, especially when you're naming names and it happens to be somebody in a supervisory and leadership position." However, Berg concedes that it was appropriate for Oswald, as a union representative, to communicate her concerns to Jarmer and Martinek, given their responsibilities for personnel. Berg states that it was inappropriate to identify specific individuals and suggest that they engaged in "inappropriate behavior."

59. On February 27 or 28, 2007, Commander Ferraris and Captain Tellis decided to combine all of the complaints concerning Oswald into one investigation. On February 28, 2007, Tellis directed Axthelm to add the three allegations to the existing case involving Oswald and the traffic incident. Axthelm then sent an interoffice memorandum. The subject line was "Case # 2006-B-0021/ additional allegations." The memorandum in its entirety states:

"After our meeting this morning Capt. Tellis has elected to add the following allegations this [sic] case #.

"Allegation 2: (Conduct/Procedure) Angela Oswald, employee of the Portland Police Bureau, yelled at CO at the top of her lungs accusing Co [sic] of discarding her cigarette butts outside of the apartment building. Co [sic] said that Ms Oswald has threatened to have her arrested. Date 1/22/07 1858 hours at 8635 N. Leonard

"Allegations 3: (Procedure) Angela Oswald released and disseminated information from the PPDS system to an unknown woman who claimed to be the ex-wife of Michael Reed. This woman was provided the cases numbers from as far back as 1976. This woman requested that the Records Division provide her with the reports from all the case numbers that she was given. Date 2/13/07 0900-1000 hours North Precinct

"Allegation 4: (Conduct) Angela Oswald spread rumors stating that Adele Boeglin has been naming her replacement upon her retirement. Date 12/11/06 0847 hours North Precinct"

60. Policy 310.00, "Conduct, Professional" of the Portland Police Bureau Manual of Policy and Procedure (January 2007) states:

"Members shall not publicly criticize the Bureau, its policies, programs, actions or members, or perform any acts, or make any written or oral statements which would impair or diminish the orderly and effective operations, supervision, or discipline of the Bureau.

"Members shall not spread rumors in regard to other members, citizens, future policies or activities, or make statements regarding public events, crimes, or catastrophes, unless they know of their own knowledge that their statements are true."

61. Commander Ferraris and AFSCME disagreed on how union officials, who were also PPB employees, were to bring issues to the attention of PPB. Ferraris insisted that these employee officials had to communicate through him as part of the traditional chain of command. Ferraris considered Oswald's December 11, 2006 e-mail to Jarmer and Martinek as outside the required or expected channels of communications. He believed that it would have been more appropriate for Oswald to have brought the issues contained in the December 11 e-mail directly to him.

AFSCME took the position that its employee officials were not required to follow the constraints of the chain of command but could directly contact the PPB official with the appropriate area of responsibility, such as contacting Captain Jarmer or Assistant Chief Martinek about personnel, labor relations, or collective bargaining matters.

62. On October 10, 2006, Ferraris gave Oswald a memorandum entitled "Communication Outside of the Chain of Command." It stated:

"Recently you have communicated outside of the North Precinct chain of command on policy issues.

"While suggestions from employees are welcome, policy communication must be directed through the chain of

command. \* \* \* In simple terms, you report to AS1 Adele Boeglin who is your first line supervisor. She reports to a Lieutenant who reports to me. The supervisory and command staff at North Precinct is capable of responding to the issues you raised. If we are not able to address them, we will then seek guidance or answers from other resources outside of the Precinct or I will discuss the issue with my Branch Chief. We have a chain of command partly to keep decision/policy makers in the communication loop and so as to not unnecessarily take up others [*sic*] time when issues can be properly addressed here.

“\* \* \* [Y]ou are welcome to go outside of the chain of command to report any acts that may be construed as harassment, retaliation or discrimination.”

AFSCME representative Hester responded to the memorandum:

“As a Vice President and Steward of AFSCME Local 189 – Ms. Oswald was perfectly within her rights to contact the Assistant Chief of Operations directly. I appreciate your desire to maintain the integrity of the chain of command. However, union officials when investigating a grievance or issues related to the Collective Bargaining Agreement are not bound by chain of command in any organization.”

63. PPB assigned Axthelm to investigate the series of complaints involving Oswald. On March 22, 2007, Oswald was ordered to appear at the office of IAD on March 30, 2007, to be interviewed as a subject regarding certain allegations. According to the IAD worksheet, the allegations being investigated included:

“1. On 10/03/2006, Ms Oswald violated traffic law while driving her private vehicle. (CONDUCT)

“2. On 01/22/2007, Ms Oswald yelled at [TW<sup>6</sup>] at the top of her lungs, accusing her of discarding cigarette butts outside

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<sup>6</sup>PPB’s Memorandum dated February 28, 2007 (see Finding of Fact 59) identifies the complaining party as “CO.” The record does not explain why the complainant is identified here as “TW,” even though they both refer to the same incident. The discrepancy has no impact on the outcome.

the apartment building and threatened to have her arrested.  
(CONDUCT)

“3. On 02/13/2007, Ms Oswalt released and disseminated information from the PPDS system to an unknown woman who claimed to be the ex-wife of Michael Reed. She provided the case numbers from as far back as 1976, and requested Records to provide her with copies of all the reports.  
(PROCEDURE)

“4. On 12/11/2006, Ms Oswalt spread rumors stating that Adele Boeglin has been naming her replacement upon her retirement. (CONDUCT)”

A March 23, 2007 memorandum warned Oswalt that she was

“accused of allegations of misconduct, other than those more specifically defined by another category, which tend to bring reproach or discredit upon the Bureau or City of Portland. These alleged acts could possibly result in disciplinary action, up to and including dismissal.

“Failure to obey this order can be grounds for possible disciplinary action.”

Oswalt was given no further information about these allegations prior to the March 30, 2007 interview.

64. At the March 30, 2007 interview, Axthelm directed Oswalt to answer all questions fully and truthfully, and he warned her that failure to do so could result in discipline. Hester and Oswalt agreed between themselves that she would not answer questions concerning the e-mail to Captain Jarmer. The information was based on confidential communications between members and Oswalt, their union representative. At the interview, Hester wanted to make it clear that Oswalt had a responsibility to AFSCME and its members, and she would not answer questions concerning confidential communications between Oswalt, representing AFSCME, and its members.

“**AXTHELM:** Okay. Are we ready to move to allegation four.

“**HESTER:** Uh, yeah we are. Um, the, I need a little bit of explanation here on where this one is heading from, by reading the allegation.

“**AXTHELM:** Allegation four?

"HESTER: Yeah. And the email here, um, you know, we're of the, uh, belief that, um, ANGELA was acting in her union capacity, so we're not sure...

"AXTHELM: Well, I can provide you with, for transcription purposes, what they're looking at is an email that Ms. OSWALT sent addressed to CAROL...

"\* \* \* \* \*

"HESTER: Which is the president of the local...

"\* \* \* \* \*

"AXTHELM: James Hester. And to Captain Vince Jarmer.

"HESTER: Uh-huh.

"AXTHELM: And Assistant Chief Martinek.

"HESTER: Right.

"AXTHELM: Dated 121106 at 0847 in the morning. That basically is the basis for it.

"HESTER: Uh-huh.

"AXTHELM: And then the questioning, will...

"HESTER: Okay.

"AXTHELM: See where we going [*sic*]

"HESTER: Yeah.

"AXTHELM: Do you want some time to discuss...

"HESTER: No, we're not. We're going to refuse to answer any questions related to this.

"AXTHELM: Okay, you're refusing to answer questions...

"HESTER: Well, this is a union matter. Um, and, uh...

"AXTHELM: Okay.

"\* \* \* \* \*

"AXTHELM: And, again, I reiterate to Ms. OSWALT that you are ordered to talk on these issues at this time and that it, that you respond fully and truthfully and you may be disciplined up to and including dismissal. And this is the time for that interview.

"HESTER: And we've, uh, discussed it with the union attorneys and ANGELA's, uh, personal attorneys \* \* \*.

"\* \* \* \* \*

"AXTHELM: Okay. At this time, I take it that you're refusing to answer any further questions, specifically on allegation four...

"HESTER: As they relate to union matters.

"OSWALT: Yeah.

"AXTHELM: However, it's still a refusal...



"HESTER: Uh-huh.

"AXTHELM: ...and the time we'll stop at 1209."

65. After the recorded interview ended, Axthelm again threatened to take the matter to personnel and to the chief, and stated that discipline would be forthcoming.

66. Oswalt reported to work on Saturday, March 31, 2007, an assignment for which she previously volunteered. When she reported to work, the sergeant told her to go home. When she asked why, the sergeant responded, "[w]e don't know anything about it. You're just not supposed to be in the building. You're supposed to go home." Oswalt left.

67. Oswalt's next regularly scheduled workday was Monday, April 2, 2007. During Oswalt's shift, a lieutenant, acting for Captain Jarmer in personnel, arrived and gave her a memorandum signed by Rosanne Sizer, chief of police. The subject was "Relief from PDC Duties and Responsibilities Until further Notice." It stated:

"**Effective April 2, 2007**, you are hereby relieved of any and all duties, responsibilities and authority as a Police Desk Clerk except your duty to respond to subpoena and court notices.

"In conjunction with this action, your police identification card will remain in the custody of the Police Bureau. This notice will not affect your assignment to the Personnel Division or the requirements to obey orders of Captain Vincent L. Jarmer." (Bold in original.)

Oswalt was required to sign a statement that she read and received a copy of the notice.

Oswalt was also given a second document, an instructional memorandum from Captain Jarmer. It informed her that "[e]**ffective April 2, 2007**, you are assigned to the Personnel Division." (Bold in original.) While assigned to this Division, Oswalt was required to make telephone contact with the personnel division every day. It further required her to remain within the Portland metropolitan area unless she obtained permission to leave from Captain Jarmer. The instructions stated that Oswalt was still subject to Internal Affairs interviews, must abide by the Bureau's Manual of Rules and Procedures, and was forbidden to enter non-public areas of police facilities without permission.

At the date of the hearing in July 2007, Oswalt remained on paid administrative leave and her IAD case was still under review through PPB processes.

68. Without her PPB identification documents, Oswalt could communicate with AFSCME bargaining unit members outside of PPB facilities only.

After her suspension, Oswalt was twice asked by a supervisor to attend a meeting related to union issues and to represent an employee. However, the supervisor had not received permission from personnel for Oswalt to enter PPB facilities. As result, Oswalt could not attend the meetings. On four other occasions, Oswalt was asked to attend union-related meetings at PPB facilities, but she had to arrange to have another official take her place.

### CONCLUSIONS OF LAW

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

#### Subsection (1)(a) Claim and December 11 E-Mail

2. The City violated ORS 243.672(1)(a) when (1) it initiated an investigation against Angela Oswalt based on her December 11, 2006 e-mail, and (2) it ordered Oswalt to answer questions about her December 11 e-mail and threatened her with discipline, including possible dismissal, if she failed to comply.

AFSCME's first claim for relief conflates two actions, the City's reaction to Oswalt's December 11 e-mail, and the City's reaction to Oswalt's conversations with former employee and union official Brown and employee Doe. For analytical purposes, we separate the two events. We first consider and analyze the allegation that the City violated ORS 243.672(1)(a) when it responded to Oswalt's December 11, 2006 e-mail communication by subjecting Oswalt to an internal affairs investigation and interrogation.

Angela Oswalt is an AFSCME vice president and chief steward. Bargaining unit members regularly contact her about their workplace concerns. In the fall of 2006, Oswalt's coworkers contacted her about a rumor that Supervisor Boeglin was about to retire and had already appointed Erspamer as her replacement. The employees expressed concern that they would not have the opportunity guaranteed in their contract to apply for the position. On December 11, 2006, Oswalt sent an e-mail to two PPB supervisors. She described the rumor about Boeglin and Erspamer, asked how the position would be filled, and asserted the employees' contractual and other rights. As a result of the e-mail, PPB charged Oswalt with misconduct, initiated an investigation into the charges, and

gave Oswalt a letter of expectations. AFSCME alleges that the City's actions violate ORS 243.672(1)(a).

ORS 243.662 guarantees public employees the "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." To protect and enforce these rights, ORS 243.672(1)(a) provides that a public employer may not "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." Subsection (1)(a) contains two separate violations, commonly referred to as the "because of" prong and the "in the exercise" prong. *Portland Association of Teachers and Poole v. Multnomah School District No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). AFSCME asserts that the City violated both prongs of subsection (1)(a).

#### *"Because of" Claim*

The "because of" portion of subsection (1)(a) prohibits the City from taking actions against an employee because the employee engaged in protected union activities. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 351 (2008). The emphasis is on the reason the employer acted. *Portland Association of Teachers*, 171 Or App at 623. AFSCME must show that Oswalt was engaged in protected activities and that the City was motivated by the protected activities to take action against Oswalt. *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168, 182 (2007) (*appeal pending*). "A complainant does not have to show that the employer acted with hostility or anti-union animus to demonstrate a violation of the 'because of' portion of subsection (1)(a). A complainant need only demonstrate that the employer was motivated by some PECBA [Public Employee Collective Bargaining Act]-protected activity to take the disputed action." *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108, 145 (2007); and *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 788 n 8 (1998).

We first determine whether Oswalt engaged in protected activity when she sent the December 11 e-mail. The legislature has delegated to this Board the authority to determine the range of activities that are protected within the meaning of ORS 243.662. *Central School District 13J v. Central Education Association*, Case No. UP-74-95, 17 PECBR 54, 70 (1997), *aff'd*, 155 Or App 92, 94, 962 P2d 763 (1998). We exercise this authority in a way that furthers the purposes and policies of the PECBA. One central policy objective of the PECBA is to encourage the "peaceful adjustment of disputes arising out of differences as to wages, hours, terms and other working conditions." ORS 243.656(3). This objective can be "attained only if employees and

their representatives are free to present their workplace disputes to the employer.” *Milwaukie Police Employees Association v. City of Milwaukie*, 22 PECBR at 185. See also *Lebanon Education Association/OEA v. Lebanon Community School District*, 22 PECBR at 351-52 (teacher acting in her role as a union representative engaged in protected activity when she sent an e-mail to a school board member concerning working conditions in the bargaining unit); *Slawson and IAFF, Local #1817 v. Jackson County Rural Fire Protection District*, Case No. UP-6-86, 9 PECBR 8921 (1986) (firefighter who acted as spokesman for the labor organization engaged in protected activity when he spoke to the fire district board about wage and hour laws); *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635 (1986) (teacher engaged in protected activity when he filed and pursued a contract grievance). Thus, it is core protected activity under the PECBA for an employee, who is also a union official or representative, to contact management in response to concerns expressed by other employees about conditions of employment, such as promotional opportunities and promotional rights under a collective bargaining agreement.

That is precisely what Oswalt did. On December 11, 2006, she e-mailed Captain Vincent Jarmer and Assistant Chief Martinek. Jarmer and Martinek are the management officials principally responsible for personnel issues within PPB. Oswalt conveyed concerns that other employees expressed to her about an opportunity to apply for an AS-1 supervisory position when Boeglin retired. Oswalt expressed particular concern about the rumor that Boeglin had already named Erspamer as her successor. The e-mail also referred to a similar problem in 2005 when employees believed they were not properly considered for a promotional opportunity.

We conclude that Oswalt’s e-mail to PPB managers relaying concerns expressed by bargaining unit members and asserting contract rights constituted protected activity. The City argues that it was unnecessary for Oswalt to name Boeglin and Erspamer in her e-mail. We disagree. Oswalt, in her capacity as a union representative, had a legitimate interest in clarifying the truth of the concern about Boeglin’s position. The City could not have reasonably investigated or responded to the concern without knowing who was involved.<sup>7</sup> But even if the names were unnecessary, including them in the e-mail does not cause the activity to lose its PECBA protection. See *Central School District 13J v. Central Education Association*, 17 PECBR at 70 (rude, discourteous, or impolitic behavior in pursuing protected rights does not remove the activity from the protection of the PECBA); *IAFF, Local 1395 v. City of Springfield*, Case No. UP-48-93, 15 PECBR 39 (1994) (otherwise lawful union activities do not lose protection under the

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<sup>7</sup>We note the inconsistency in the City’s position. Here, the City faults Oswalt for providing names that would allow the City to identify the position in dispute. Yet in the Doe incident, discussed in Conclusion of Law 4, the City faults Oswalt for refusing to provide similar information, *i.e.*, names that would allow it to investigate a complaint.

PECBA simply because they are exercised in a way that fails to meet the employer's expectation of proper decorum and diplomacy).

The text of the e-mail makes it clear that Oswalt sent it in her capacity as a union official. She described the issue as "fairness to the DCTU members" and asked if bargaining unit members on the promotions list were still eligible or if a new list would be generated. She signed the e-mail "Angela Oswalt V.P. PPB/AFSCME Portland Police Bureau." In this capacity, Oswalt was passing along what she heard from other employees about the possible retirement of AS-1 Boeglin,<sup>8</sup> and then inquired about the process for replacing Boeglin when she retired. Because there were similar problems in 2005 with an appointment process, which even Captain Jarmer concedes was flawed, Oswalt concluded the e-mail by expressing a concern that "promotions [should] follow the proper procedure regarding seniority, promotions, the Bureau of Human Resources and the DCTU contract."

Oswalt's e-mail was well within the normal scope of activities for a local union official. "Monitoring of unit members' employment conditions, whether they are established in a negotiated contract or by past practice, is a primary responsibility of the exclusive representative." *Oregon AFSCME Council 75 v. Morrow County*, Case No. UP-38-96, 17 PECBR 17, 19 (1996), *adh'd to on recons*, 17 PECBR 75 (1997). Thus, AFSCME not only was entitled, but probably was obligated, to determine whether the rumors about Boeglin's replacement were true. We conclude without difficulty that Oswalt engaged in protected activity when she sent the December 11 e-mail to PPB managers relating concerns based on what she heard from other employees, asking about the promotions process, and asserting the rights of bargaining unit members.

We next consider whether the City acted against Oswalt because of her protected activity of sending the December 11, 2006 e-mail. *See Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733, 739-41

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<sup>8</sup>The accuracy of the information is irrelevant. The information Oswalt received from other employees gave her a reasonable basis to inquire, and she was expressly asserting contract rights. *See Central Education Association and Vilches v. Central School District 13J*, 17 PECBR at 70 (an employee's assertion of contract rights is protected activity, and the employee need not be correct so long as there is a reasonable basis for the assertion). The City correctly observes that union activity can lose its protected status if it is pursued in a seriously inappropriate manner. *Lane County Peace Officers Association v. Lane County Sheriff's Office*, Case No. UP-32-02, 20 PECBR 444, 458 and n 12 (2003) (stating rule and citing as examples criminal misconduct, violent conduct, contract breach, and inexcusable disparagement of the employer). Oswalt did not engage in misconduct when she repeated rumors she heard from other employees about working conditions. She repeated the rumors in her e-mail not because she wanted to circulate untrue information, but because she wanted to find out directly from PPB managers whether the rumors were true.

(2004) (describing proper analytical framework for a subsection (1)(a) “because of” claim). There is little dispute in this regard. The record demonstrates that the City took numerous actions against Oswalt because of the e-mail. It charged her with misconduct for sending the e-mail, subjected her to numerous investigatory interviews on the charges, warned her that she could be disciplined for her activities, gave her a “letter of expectations,” and placed her on administrative leave.

Commander Ferraris and Captain Tellis added the December 11 e-mail to three other complaints against Oswalt, and on February 28, 2007, referred the matter to IAD for investigation. On March 30, 2007, IAD ordered Oswalt to appear for an interview concerning four incidents, including her December 11 e-mail to Captain Jarmer. The specific allegation concerning the e-mail was that “[o]n 12/11/2006, Ms Oswalt spread rumors stating that Adele Boeglin has been naming her replacement upon her retirement.” Oswalt was warned that she was “accused of allegations of misconduct” that “could possibly result in disciplinary action, up to and including dismissal.” The IAD memorandum was Oswalt’s first notice that PPB had concerns about her December 11 e-mail. At the March 30, 2007 interview, Oswalt was directed to answer all questions fully and truthfully, and was warned that failure to do so could result in discipline. Oswalt refused to answer any questions concerning the December 11 e-mail on grounds that it concerned confidential communication. On Oswalt’s next scheduled work day, the City placed her on administrative leave and banned her from PPB property.

The City alleges it had legitimate reasons for its action. It points to its policy against disseminating rumors. Paragraph three of Policy 310.00 of the Portland Police Bureau Manual of Policy and Procedure states:

“Members shall not spread rumors in regard to other members, citizens, future policies or activities, or make statements regarding public events, crimes, or catastrophes, unless they know of their own knowledge that their statements are true.”

The City also asserts it acted legitimately because Oswalt’s e-mail criticized her supervisor, and because Oswalt did not follow the chain of command in choosing the recipients of the e-mail.

None of these reasons permit PPB to take adverse action against Oswalt because of her protected activity. We begin with the rule against disseminating rumors. One objective of the PECBA is to encourage “peaceful adjustment of disputes arising out of differences as to wages, hours, terms and other working conditions.” ORS 243.656(3). It is axiomatic that a dispute cannot be discussed and peacefully adjusted unless employees and their representatives are first permitted to bring the dispute to the

employer's attention. The twin goals of workplace peace and labor stability can be "attained only if employees and their representatives are free to present their workplace disputes to the employer." *Milwaukie Police Employees Association v. City of Milwaukie*, 22 PECBR at 185.

Here, the City's application<sup>9</sup> of its policy against disseminating rumors is contrary to the statutory objectives. Employees approached Oswalt with concerns about rumors that they might not receive a promotional opportunity. The City applied the policy to prohibit Oswalt, acting in her capacity as a union officer, from asking PPB managers about those rumors. A policy that prohibits such a discussion is not conducive to the peaceful settlement of workplace disputes. ORS 243.656(3). In addition, it interferes with the union's ability to carry out its obligation to its bargaining unit members to monitor employment conditions. *Oregon AFSCME Council 75 v. Morrow County*, 17 PECBR at 19. For these reasons, the City's anti-rumor policy does not justify its actions against Oswalt based on her December 11 e-mail.

The City next seeks to justify its actions by asserting that Oswalt's e-mail violated the chain of command. Commander Ferraris gave Oswalt a memorandum detailing his expectation that Oswalt work within the chain of command, and he insisted that Oswalt take any workplace concern to him or Boeglin, Oswalt's direct supervisor, rather than contacting Captain Jarmer or Assistant Chief Martinek. We rejected a similar defense in *Lebanon Education Association/OEA v. Lebanon Community School District*, 22 PECBR 323. The employer there maintained a rule that "[a]ll formal communications or reports to the Board [of Education] \* \* \* from \* \* \* teachers or other staff members will be submitted through the superintendent." *Id.* at 327. The employee president of the local union sent an e-mail to a school board member discussing employee workplace concerns. The employer subsequently disciplined the employee because the contact was outside the chain of command. We overturned the discipline. We recognized that the employer in general had "a legitimate interest in maintaining the authority of the administrators \* \* \* and in preferring that employees follow an appropriate chain of command in dealing with their workplace concerns." *Id.* at 353. We nevertheless held that when applying the channels policy to protected union activity, the employer's desire "does not excuse its obligations under the PECBA." *Id.* Accordingly, this Board held that disciplining an employee because she contacted a school board member on union business violated the "because of" provision of ORS 243.672(1)(a). See also *Junction City Police Association v. Junction City*, Case No. UP-18-89,

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<sup>9</sup>An employer policy can violate subsection (1)(a) even if it does not explicitly prohibit union activity. A policy may be unlawful if employees could reasonably read it as prohibiting union activity, if it is adopted in response to union activity, or if, as here, it is applied to prohibit or punish the exercise of protected activity. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

11 PECBR 780, 792-93 (1989) (city violated subsection (1)(a) when it threatened to discipline an employee for taking a concern to the union without first presenting it to the police chief). Under our case law, PPB's chain of command policy does not allow it to interfere with protected union activity.

The City also asserts that it can take action against Oswalt because her December 11 e-mail criticized her supervisor, Boeglin. In *Roseburg Education Association v. Douglas County School District*, Case No. UP-16-96, 16 PECBR 868 (1996), an employee, who was also a union representative, spoke to a new teacher about work-related difficulties, and in the process may have made negative statements about other staff members, including the school principal. The new teacher reported the comments to the principal, who then issued a "letter of concern" to the employee union representative. The employer claimed the comments "violated District standards concerning positive communications among teachers." *Id.* at 876. This Board held that the employer violated the PECBA by punishing the union representative with a "letter of concern" for the conversation with the new employee. The employee representative's objective in talking with the new teacher was "to resolve a problem which had arisen out of the employment relationship: a new teacher's concerns about her work performance." *Id.* at 875. This Board reasoned that "[f]ree and frank conversations regarding work-related concerns are an essential part of the peaceful dispute resolution process that the PECBA is designed to promote." *Id.* Although such conversations may occasionally contain critical or negative statements, they do not thereby lose their protected status. See also *Polk County Deputy Sheriff's Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 82 (1995) (a police sergeant's negative comment to a coworker about the sheriff—that the sheriff was "out to get" the coworker—was protected activity that could not lawfully be the subject of an IA investigation or the reason for suspending the employee). An employer is entitled to adopt rules to maintain civility in the workplace. Under the statute, however, those rules cannot be applied in a way that prohibits protected union activity.

The City relies on *Polk County*. There, the employer directed an employee union representative to refrain from contacting witnesses to a disciplinary matter during the representative's or the witness' work time. The union representative nevertheless contacted a witness while the witness was on duty. Contacting a witness as a union representative is clearly protected activity. Work time, however, is for work. This Board held that this contact constituted insubordination that provided a legitimate reason to discipline the employee. *Polk County* does not provide guidance because here, unlike *Polk County*, the City's directives constitute an outright ban on union activity rather than a reasonable time and place regulation. Its directives apply to Oswalt's conversations both on the job and on her free time, and they make no accommodation for legitimate union activity. In this regard, the current case more closely resembles *Thyfault and OEA v. Pendleton School District No. 16*, Case No. UP-101-90, 13 PECBR 275,



*adh'd to on recons*, 13 PECBR 380 (1991), *AWOP*, 116 Or App 675, 843 P2d 514 (1992), *rev den*, 316 Or 529, 854 P2d 940 (1993). The employer there prohibited an employee from contacting witnesses. The employer attempted to justify the ban with its concern that the employee might intimidate witnesses. We held that an employer cannot prohibit an employee from engaging in protected activity even if it reasonably suspects the employee might engage in misconduct in pursuing protected rights. *See also Portland Association of Teachers and Bailey v. Multnomah County School District #1*, 9 PECBR at 8646-47 (a good faith business purpose does not legitimize employer conduct which is caused by, and inherently destructive of, the exercise of protected rights).

We acknowledge that a public employer, especially a para-military organization such as PPB, has a generally valid interest in stopping the flow of untrue rumors, requiring employees to follow a chain of command, and preventing employees from leveling unfair public criticism of supervisors. Here, however, for the reasons discussed above, the City is not entitled to apply its anti-rumor rule, chain of command directive, or prohibition against criticizing supervisors in a way that interferes with Oswald's PECBA rights.

The City also argues that it is entitled to investigate Oswald and her December 11 e-mail because of the strong reactions of Erspamer and Boeglin. This argument is disingenuous since it was Captain Jarmer who forwarded Oswald's e-mail to Commander Ferraris, Ferraris who sent it to Boeglin, and Boeglin who showed it to Erspamer. Ferraris went so far as to solicit complaints from Boeglin and Erspamer after he distributed the e-mail. Any workplace disruption was due to the City's distribution of the e-mail beyond the original and appropriate recipients.

We also note that Jarmer, Ferraris, and Boeglin all distributed Oswald's e-mail—the e-mail that allegedly contained “rumors”—but they were not investigated, interrogated, threatened, or charged with violating the rule that prohibits spreading rumors. PPB cannot successfully argue that these others were merely investigating the rumor Oswald spread. Oswald was doing precisely the same thing on behalf of the union—investigating a “rumor” she heard from other employees. When a union activist is treated more harshly than other employees who engaged in similar conduct, we will infer that the employer acted because of the employee's exercise of protected rights. *Oregon School Employees Association v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8856 (1986).

We conclude that the City violated the “because of” provision of ORS 243.672(1)(a) when it charged, investigated, interrogated, and threatened to discipline Oswald because of her December 11 e-mail. We further conclude that, because the investigation was unlawful, the City violated ORS 243.672(1)(a) when it took action against Oswald for her refusal to participate in the investigation.

### *“In the Exercise” Claim*

To determine whether a public employer violated the “in the exercise” portion of subsection (1)(a), we examine whether the “natural and probable effect” of the employer’s conduct, viewed under the totality of the circumstances, “would tend to interfere with employees’ exercise of protected rights.” *Polk County*, 16 PECBR at 77. See also *Oregon Public Employees Union and Termine v. Malheur County, et al.*, Case No. UP-47-87, 10 PECBR 514, 521 (1988); *Oregon School Employees Association v. Central Point School District*, Case No. UP-1-88, 10 PECBR 532, 538 (1988) (a “possible” effect is not sufficient to sustain a finding of unlawful conduct (emphasis omitted)); *Spray Education Association and Short v. Spray School District No. 1*, Case No. UP-91-87, 11 PECBR 201, 219-20 (1989) (subjective impression of employees is not relevant); *Oregon School Employees Association v. The Dalles School District #12*, Case No. UP-75-87, 11 PECBR 167, 171-72 (1989) (evidence of employer’s motive is not required).

There are two types of “in the exercise” violations. *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, 19 PECBR 228, 249 (2001), *AWOP*, 188 Or App 112, 70 P3d 903 (2003), *rev den*, 336 Or 509, 87 P3d 1136 (2004). “First, an employer that violates the ‘because of’ portion of subsection (1)(a) also commits a derivative violation of the ‘in the exercise’ portion. Second, an employer may also independently violate the ‘in the exercise’ portion, typically by coercive or threatening statements.” *Lebanon Education Association/OEA v. Lebanon Community School District*, 22 PECBR at 354.

We have already concluded that the City violated the “because of” portion of subsection (1)(a). A “because of” violation will almost always restrain, coerce, or interfere with employees “in the exercise” of their protected rights. *Lebanon Education Association/OEA v. Lebanon Community School District*, 22 PECBR at 354; *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, 9 PECBR at 8650. Here, accusing Oswalt of wrongdoing for exercising protected rights would naturally and probably chill Oswalt and other employees from exercising those protected rights in the future. For example, employees are protected in their right to talk with their union representatives and other bargaining unit members about their workplace concerns. *Sandy Education Association and Davey v. Sandy Union High School District No. 2*, Case No. UP-42-87, 10 PECBR 389, 397, *amended*, 10 PECBR 437 (1988). The City’s application of its anti-rumor policy to Oswalt would naturally and probably deter bargaining unit members from engaging in protected discussions with union representatives and fellow employees about workplace concerns. The City thereby committed a derivative violation of the “in the exercise” portion of subsection (1)(a).

We choose not to address the question of whether the City additionally committed an independent violation of the “in the exercise” portion of subsection (1)(a). We have already found two violations of subsection (1)(a)—one under each prong—and it would add nothing to the remedy to find a third. See *Lebanon Education Association/OEA v. Lebanon Community School District*, 22 PECBR at 354.

#### Subsection (1)(b) Claim and December 11 E-Mail

3. The City violated ORS 243.672(1)(b) when it placed Oswalt on administrative leave and denied her access to PPB facilities because she exercised protected rights.

Subsection (1)(a) protects the rights of employees; subsection (1)(b) is concerned with the rights of the union itself. Subsection (1)(b) makes it unlawful for a public employer to “[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization.” To establish a subsection (1)(b) violation,

“a complainant must prove that an employer took actions which impede or impair a labor organization in the performance of its statutory responsibilities. In establishing this violation a complaining labor organization must provide evidence to support the conclusion that *some actual interference* with its existence or administration occurred as a result of the employer’s actions.” *Junction City Police Association v. Junction City*, 11 PECBR at 789 (Emphasis added.)

We have concluded that the City acted unlawfully against Oswalt because of the December 11 e-mail she sent to PPB managers in her capacity as AFSCME vice president and chief steward. Oswalt also refused to participate in the City’s unlawful investigation and interrogation concerning the e-mail. On Oswalt’s next scheduled work day, the City placed Oswalt on administrative leave and denied her access to PPB facilities. During the period of her administrative leave, Oswalt was asked to represent employees in meetings with supervisors. However, without access to the facilities, Oswalt could not attend the meetings or represent the employees. As a result, AFSCME was unlawfully deprived of a union official “capable of performing the full range of her duties on behalf of the [union] and its members.” *Lebanon Education Association/OEA v. Lebanon Community School District*, 22 PECBR at 355. Accordingly, we conclude that the City impeded, impaired, and interfered with the union in performing its duties as exclusive bargaining representative and thus violated ORS 243.672(1)(b).

### Subsection (1)(a) Claim and Jane Doe Case

4. The City violated the “in the exercise” portion of ORS 243.672(1)(a) when it ordered Oswalt to answer questions about her confidential communications with bargaining unit member Doe. The City did not violate subsection (1)(a) when it ordered Oswalt to answer questions about her communications with non-employee Brown.

We turn next to AFSCME’s claim that the City violated both prongs of ORS 243.672(1)(a) when it ordered Oswalt to answer questions about her conversations with former employee and union official Brown and employee Doe.

In early January 2007, Oswalt had a telephone conversation with Brown, a former employee and union official. The purpose of the call was to discuss the transfer of some union files from Brown to Oswalt. During their conversation, Brown said she attended a Christmas party where she heard that some employees allegedly accessed confidential files concerning prior investigations of bargaining unit member Doe.

On January 10, 2007, Oswalt telephoned Doe and told her what Brown said. Oswalt encouraged Doe to take some form of action. The City interrogated Oswalt about those conversations, and through threats of discipline forced her to reveal the contents of those conversations. AFSCME asserts the City violated both prongs of ORS 243.672(1)(a).

#### *“Because of” Claim*

We follow the same analytical framework set out in Conclusion of Law 2. We first determine whether Oswalt engaged in protected activities. *Milwaukie Police Employees Association v. City of Milwaukie*, 22 PECBR at 182. Oswalt engaged in protected activities when she spoke with Brown and Doe about conditions of employment.<sup>10</sup> *Sandy Education Association v. Sandy Union High School District*, 10 PECBR at 397.

We next determine whether the City took adverse or employment-related action against Oswalt in response to Oswalt’s protected activities. *AFSCME Council 75 v. Umatilla County*, 20 PECBR at 739-41. On January 18, 2007, Doe sent a complaint to Captain Tellis in IAD. She stated that Oswalt called and said her case was discussed at a recent Christmas party. She also learned that a report concerning a PPB investigation of her off-duty conduct may have been copied and distributed, and she was upset about it.

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<sup>10</sup>The conditions of employment at issue include the confidentiality of the employee’s personnel files, private life issues, possible harassment by coworkers, and the procedures for filing a complaint with PPB.

IAD commenced an investigation. At the first informal interview, Doe told the IAD investigator that Oswald said she would assist in any investigation by providing information to the investigator. As a result, IAD summoned Oswald to an interview. The summons and procedure followed the standard protocol that applies to all witnesses at an IAD interview. It included a warning to “answer all questions fully and truthfully.” Oswald was not a subject of the investigation or interview but was a person with information. At the interview, the IAD investigator asked Oswald about her telephone call to Doe. Oswald responded that she asked Doe some questions in her capacity as her union representative and that the content of her conversations with Doe was privileged. When the investigator asked Oswald who provided her the information about the Christmas party, Oswald again responded that the information was privileged. Oswald did confirm that the source was not an employee or a member of the union at the time of the conversation. AFSCME representative Hester, who represented Oswald at the interview, also told the interviewer that Oswald’s conversations were privileged.

On January 31, 2007, confused by Oswald’s refusal to give information concerning Doe’s complaint, the IAD investigator again interviewed Doe. Doe reiterated that Oswald agreed to share her information with the investigator.

On February 9, 2007, IAD again interviewed Oswald. It reminded her of PPB rules that require full and truthful answers, and warned her that she could be subject to discipline for failing to do so. At the February 9 interview, Oswald answered the questions concerning the Doe and Brown conversations.

Asking Oswald about the events, communications, and information underlying Doe’s complaint to IAD does not constitute prohibited adverse or employment-related action. In *Klamath County Peace Officers Association v. Klamath County and Klamath County Sheriff’s Office*, Case No. UP-18-97, 17 PECBR 515, *recons*, 17 PECBR 579 (1998), this Board held that a sheriff was “entitled to conduct an investigation into possible misconduct by a County sergeant. [And i]n conducting that investigation, the Sheriff was entitled to determine the source of a rumor from employees whom the investigator reasonably believed possessed that information.” *Id.* at 525. Accordingly, the City is entitled to investigate employee misconduct and is entitled to interview a union official who may have relevant information. Questioning Oswald did not constitute adverse action.

Even if we assume *arguendo* that interviewing Oswald is adverse or employment-related action, the City’s conduct was not in response to Oswald’s protected

activities but rather in response to Doe's complaint.<sup>11</sup> Oswalt was a witness, someone with information. The City, acting in good faith, is entitled to interview employee witnesses about alleged employee misconduct. IAD interviewed Oswalt in the same manner it would interview any other employee witness, regardless of the source of their information or whether they had or had not been engaged in protective activities. AFSCME failed to prove that the City's interview of Oswalt violated the "because of" prong of ORS 243.672(1)(a). We will dismiss this allegation.

*"In Exercise of" Claim*

AFSCME also alleges that the City's interview of Oswalt violated the "in" prong of subsection (1)(a). The test is whether the natural and probable effect of the employer's conduct, viewed under the totality of the circumstances, would tend to interfere with employees' exercise of protected rights. *Blue Mountain Faculty Association v. Blue Mountain Community College*, 21 PECBR 673, 775 (2007). AFSCME claims that communications between union officials, and between a union official and an employee, are confidential, and that ordering a union official to reveal the contents of a confidential communication with a bargaining unit member would tend to chill employees from talking to their union representative. We agree.

Employees engage in PECBA-protected activity when they talk with their union representatives or with other bargaining unit members about their workplace concerns. *Sandy Education Association and Davey v. Sandy Union High School District No. 2*, 10 PECBR at 397. Maintaining the confidentiality of such discussions furthers the policies underlying the PECBA. Our recent decision in *Wy'East Education Association/ East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06, 22 PECBR 668 (2008), discusses at length how unwarranted employer surveillance tends to chill union activity. An employer's inquiry into discussions between employees and their exclusive bargaining representative is a form of surveillance, and the employer has no legitimate reason for such inquiries.

Keeping conversations confidential ensures employees unfettered access to their union representatives. If an employer could compel a union official to reveal the content of conversations with a bargaining unit member, and possibly use the information against the employee, employees would naturally and probably be reluctant to talk with or seek advice from their union representatives. In *Lane County Peace Officers*

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<sup>11</sup>Oswalt, acting in her capacity as an AFSCME representative, encouraged Doe to complain about the Christmas party conversation. Oswalt told Doe she would give the investigator information about the matter.

*Association v. Lane County Sheriff's Office*, Case No. UP-32-02, 20 PECBR 444, 464 (2003), we explained:

“[A]s a general rule, an employer may not interrogate union officers about their contacts with bargaining unit members or about the substance of those conversations. The reasons for such a limitation are obvious. In having such contacts, both the officer and the unit member are engaged in protected activities. Knowing that the employer could force either of them to disclose not only the contact but the subject of the conversation would almost certainly inhibit such exchanges, contrary to (1)(a).”<sup>12</sup>

Cases from other jurisdictions are consistent with *Lane County Peace Officers Association* in recognizing the confidentiality of conversations between bargaining unit members and their union representative. In *U.S. Department of the Treasury, Customs Service and National Treasury Employees Union*, 38 F.L.R.A 1300, 1308 (1991), the employer “requir[ed] a representative of the Union, to disclose, under threat of disciplinary action, the content or substance of statements made by an employee to that Union representative in the course of representing the employee in a disciplinary proceeding.” The Federal Labor Relations Authority (FLRA) concluded the statutory right of “each employee to be represented \* \* \* demand[s] that the employee be free to make full and frank disclosure to his or her representative in order that the employee have adequate advice and a proper defense.” The FLRA thus concluded that “those conversations constituted protected activity” and it was unlawful for the employer to compel disclosure of the union’s conversations with the employee. The FLRA reasoned that the conduct interfered with, restrained, and coerced the employee’s rights by inhibiting the union “from obtaining needed information from employees.” *Id.* at 1310.

The National Labor Relations Board (NLRB) reached a similar conclusion in *Cook Paint and Varnish Company*, 246 NLRB 646, 102 LRRM 1680 (1979), *enforcement denied*, 648 F2d 712, (DC Cir 1981), *supplemental decision and order*, 258 NLRB 1230,

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<sup>12</sup>This Board noted that certain conversations might not be confidential if they involved misconduct that took the conversation outside the realm of protected activity. As an example, this Board stated that a union official’s direction to union members to engage in picket line violence may not be protected. 20 PECBR at 464. There is no allegation here that the conversations between Doe and Oswalt constituted misconduct about which an employer is free to inquire.

108 LRRM 1150 (1981).<sup>13</sup> It held that an employer committed an unfair labor practice when, in the process of preparing for an upcoming arbitration hearing, it interrogated a union steward about information he received from an employee who was facing discipline, and the notes he kept in his capacity as steward. In its *supplemental decision* after remand from the Court of Appeals, the NLRB held that

“consultation between an employee potentially subject to discipline and his union steward constitutes protected activity in one of its purest forms. To allow Respondent here to compel the disclosure of this type of information under threat of discipline manifestly restrains employees in their willingness to candidly discuss matters with their chosen, statutory representatives. \* \* \* Respondent’s probe into the protected activities of [the union steward and the employee] has not only interfered with the protected activities of those two individuals but it has also cast a chilling effect over all of its employees and their stewards who seek to candidly communicate with each other over matters involving potential or actual discipline.” 258 NLRB at 1232.

In *City of Newburgh v. Harold R. Newman et al.*, 70 AD 2d 362, 421 NYS 2d 673 (1979), the court sustained the New York State Public Employment Relations Board’s (PERB) finding of a violation where the employer questioned a union official about his observation of, and communications with, a member who sought the union official’s assistance and advice concerning disciplinary charges being made against him. PERB held that the employer

“interfere[d] with an employee’s opportunity to consult with his union about anticipated charges.

“An aspect of the right of public employees to organization and representation is the privilege of consulting with appropriate union officials as to matters affecting them as employees. \* \* \* To invade that confidentiality tends to inhibit the employees from seeking the advice of their union representatives as to matters affecting their interest.” 421 NYS at 675.

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<sup>13</sup>The National Labor Relations Act is similar in structure, language, and purpose to the PECBA, and decisions of the NLRB offer guidance in interpreting the PECBA. *Elvin v. Oregon Public Employees Union*, 313 Or 165, 175 and n 7, 832 P2d 36 (1992).



In affirming the PERB decision, the Court noted the limits of its holding:

“Any privilege established by the decision of [PERB] is strictly limited to communications between a union member and an officer of the union, and operates only as against the public employer, on a matter where the member has a right to be represented by a union representative, and then only where the observations and communications are made in the performance of a union duty. The purpose is the protection of the right to fully participate in an employee organization, with the full benefits thereof and inquiries such as the one herein would seriously hamper such participation.” *Id.* at 676.<sup>14</sup>

We apply those principles here. We begin with Oswald’s conversations with Robyn Brown. At a Christmas party, Brown overheard a discussion that someone at PPB may have improperly accessed Doe’s investigatory files. At the time Brown relayed this information to Oswald, Brown was no longer a PPB employee or an AFSCME official. The rationale for keeping certain conversations confidential is to encourage *employees* to contact their union when they feel it is necessary and to speak freely to the union representative. It would not further this underlying purpose to extend this protection to non-employees. The City did not violate subsection (1)(a) when it interrogated Oswald about her conversations with Brown.<sup>15</sup>

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<sup>14</sup>We similarly limit our holding. AFSCME urges us to impose a full evidentiary privilege that would apply against parties outside the labor-management relationship. We need not consider that issue here, and probably lack jurisdiction to impose such a privilege. *But see Seelig v. Shepard*, 152 Misc 2d 699, 578 NYS 2d 965 (1991) (New York court imposes full evidentiary privilege for union communications); 735 Ill. Comp. Stat. 5/8-803.5 (2008) (Illinois statute adopts a full labor relations privilege). *See generally* Mitchell H. Rubenstein, *Is a Full Labor Relations Evidentiary Privilege Developing?*, 29 Berkeley Journal of Employment and Labor Law 221 (June 2008).

<sup>15</sup>AFSCME does not raise, and we consequently do not decide, whether some other theory, such as the work-product doctrine or the prohibition against interfering with the administration of the union under subsection (1)(b), may protect from forced disclosure the information a union representative obtains from a non-employee. *See, e.g., Beaverton Police Association v. City of Beaverton*, Case No. UP-60-03, 20 PECBR 924, 933 (2005) (discussing work-product doctrine); *Oregon School Employees Association, Chapter 68 v. Colton School District*, Case No. C-124-81, 6 PECBR 5027, 5032 (1982) (in response to a request for information, a party need not provide confidential information such as notes of a grievance investigation); *Thyfault and OEA v. Pendleton School District No. 16*, Case No. UP-101-90, 13 PECBR 275, 283-84, *adh’d to on recons*, 13 PECBR 380

We reach a different conclusion regarding Oswald's contacts with Doe. Doe was an employee when she spoke to Oswald. The City argues that the conversation was not protected because Doe did not believe she was talking to Oswald as her union representative. The record indicates only that Doe did not think much about it, and to the extent she did, was unclear about Oswald's capacity. The circumstances indicate that Oswald was acting in her capacity as an AFSCME official. Oswald's only previous contact with Doe occurred when she acted as Doe's union representative in a prior matter. In the current situation, Oswald mentioned the union, offered Doe advice on how to proceed, promised that AFSCME would stand with her if she decided to proceed, and offered her a chance to talk with the AFSCME representative. These circumstances indicate that Doe was engaged in protected activity when she spoke with Oswald.

The City asserts that even if the conversations between Doe and Oswald were confidential, Doe waived the confidentiality. We disagree. Confidentiality protects all employees in the bargaining unit from the chilling effect of revealing private conversations. An employer cannot act in a way that chills employees even if an individual employee does not object.

Even if we were inclined to recognize a waiver defense in general, we would not apply it here. IAD called Doe into official interviews and asked her pointedly and repeatedly whether she contacted the union and whether she spoke to Oswald as her union representative. Requiring employees to report on their union activity violates subsection (1)(a). *Junction City Police Association v. Junction City*, 11 PECBR at 792-93. *See also Wy'East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, 22 PECBR at 702-704 (employer surveillance of an employee's union activity is inherently coercive). An employer has no legitimate reason to ask an employee about protected union activity. Some employees in these circumstances would naturally and probably feel coerced to waive any confidentiality right. A waiver must, among other things, be voluntary. *E.g., Oregon School Employees Association v. Coos Bay School District 9*, Case No. C-159-84, 8 PECBR 8248, 8260 (1985). We will not recognize a waiver obtained in the course of such inherently coercive interrogation.

We conclude that the City violated the "in" prong of ORS 243.672(1)(a) when it forced Oswald to reveal, on threat of discipline, the contents of her conversations with Doe.

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(1991), *AWOP*, 116 Or App 675, 843 P2d 514 (1992), *rev den*, 316 Or 529, 854 P2d 940 (1993) (employer violated subsection (1)(b) when it told union representatives to refrain from contacting witnesses in a potential dismissal case).

Subsection (1)(a) and Subsection (1)(b) Claims and the Letter of Expectations

5. The City violated ORS 243.672(1)(a), but not (1)(b), when on or about February 27, 2007, it issued Oswalt a letter of expectations that interfered with and restrained her union activities.

6. The City did not violate ORS 243.672(1)(a) or (b) by the manner and condition it issued the letter of expectations.

On February 27, 2007, the City gave Oswalt a letter of expectations. AFSCME asserts that the City violated subsection (1)(a) and (b) when it issued the letter.

Among the expectations was the statement: "It would be unprofessional conduct if you were to reference rumors orally or in written correspondence. If you do not know the information you are passing along to be accurate based on your own knowledge, do not pass it along. Making assertions based on inaccurate or incomplete information can result in disruption and dismay to others." Assistant Chief Berg, the primary author of the letter, concedes that this statement was directed at Oswalt's December 11 e-mail concerning the rumors about filling Boeglin's job when she retired.<sup>16</sup>

We previously concluded that Oswalt engaged in protected activity when she sent the December 11 e-mail. We further concluded that the City interfered with that protected activity when it applied its anti-rumor policy to the e-mail. The statement quoted above from the letter of expectations is essentially the same as the anti-rumor policy. It directs Oswalt to refrain from spreading rumors unless she has first-hand knowledge.

Most employees feel compelled to comply with their employer's directives, whether through loyalty, sense of duty, or fear of punishment. *Lebanon Education Association/OEA v. Lebanon Community School District*, 22 PECBR at 357. The anti-rumor expectation would prohibit Oswalt from engaging in conversations we found to be protected, such as Oswalt's discussions with employees and management about the rumors surrounding Boeglin's retirement, and her discussions with Doe about rumors

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<sup>16</sup>Although Berg intended the expectation to refer to the December 11 e-mail, we note that it would also apply to the Doe incident. Oswalt heard from a former employee that someone had accessed Doe's confidential files. Oswalt clearly engaged in protected activity in discussing this workplace issue with Doe. Oswalt lacked first-hand knowledge of the truth of the statement, so under the expectation, she would be prohibited from discussing it with Doe. This is another example of how the anti-rumor expectation would chill the exercise of protected rights.

that someone improperly accessed her files. We conclude that the letter of expectations had the natural and probable tendency to chill Oswalt in the exercise of her protected rights.

The parties argue at length about whether the letter of expectations is disciplinary. In most circumstances, a statement of performance expectations does not constitute discipline. Here, however, the PPB policy manual specifically recognizes a letter of expectation as a form of discipline that is less than a suspension. We need not resolve this dispute to find a violation of the “in” prong of subsection (1)(a).<sup>17</sup> The issue is whether the employer’s expectation has the natural and probable tendency to chill the exercise of protected rights. As discussed, the directive would prevent Oswalt from engaging in certain legitimate union activities. As such, the letter of expectations chills Oswalt from engaging in protected activity, a violation of the “in” prong of ORS 243.672(1)(a).

AFSCME also alleges that the City gave Oswalt the letter of expectations in a manner and under conditions that violated ORS 243.672(1)(a) and 243.672(1)(b). Specifically, it asserts that the City acted unlawfully “by choosing to deliver the memo in an intimidating fashion.”

In essence, AFSCME argues that it was unlawful for Assistant Chief Berg to deliver the letter of expectations personally to Oswalt. The reason Berg delivered the letter personally was benign. Because of the past situation involving Oswalt and the removal of the former chief of police, the City officials decided that rather than have Commander Ferraris deliver the letter, it would be a more sensitive and concerned approach to have Berg, a high-ranking female officer not associated with the past events, and with whom Oswalt had a respectful relationship, deliver the letter.

Accordingly, we conclude the City did not violate ORS 243.672(1)(a) or (b) by the manner in which it delivered the letter of expectations to Oswalt.

### REMEDY

We have concluded that the City violated ORS 243.672(1)(a) when it (1) brought charges against Angela Oswalt because of her December 11 e-mail, investigated those charges, and ordered Oswalt to answer questions about the e-mail;

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<sup>17</sup>The question of whether the City disciplined Oswalt would be relevant to the adverse action component of the “because” prong of subsection (1)(a). Here, however, we do not reach the “because” prong. We have concluded that the letter of expectations violates the “in” prong, and it would add nothing to the remedy to analyze the “because” allegation.

(2) ordered Oswalt to answer questions about her confidential communications with bargaining unit member Doe; and (3) gave Oswalt a letter of expectations that interfered with protected rights. We further concluded that the City violated ORS 243.672(1)(b) when it denied Oswalt access to PPB property, thereby limiting her ability to perform tasks on behalf of AFSCME, because she refused to answer questions about her December 11 e-mail. By statute, we must order the City to cease and desist from these violations. ORS 243.676(2)(b). In addition, we will order the City to discontinue any investigations or other actions against Oswalt arising out of her December 11 e-mail or her conversations with Doe; purge all of its files of documents arising out of the e-mail or conversations with Doe; and refrain from using any issues, activities, or concerns arising from the December 11 e-mail or the conversations with Doe in any employment-related action against Oswalt.

AFSCME also seeks a civil penalty. ORS 243.676(4)(a) permits this Board to award a civil penalty of up to \$1,000 when we find that the respondent committed an unfair labor practice "repetitively, knowing that the action taken was an unfair labor practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious." See *East County Bargaining Council v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986); *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206, 221 (2005). Although we found violations of subsections (1)(a) and (b), they were not repetitive, egregious, or committed with flagrant disregard of the law. Accordingly, we deny AFSCME's request. See *Roseburg Education Association v. Douglas County School District*, 16 PECBR at 876-77; *Association of Professors of Southern Oregon State College v. Oregon State System of Higher Education and Southern Oregon State College*, Case Nos. UP-13/118-93, 15 PECBR 347, 362 (1994); *Washington County Police Officers Association v. Washington County*, Case No. UP-99-89, 12 PECBR 910, 915 (1991). AFSCME further asks us to order the City to post a notice of its wrongdoing. A notice is not appropriate under the standards set forth in *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601, AWOP, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984).

### ORDER

1. The City violated ORS 243.672(1)(a) when brought charges against Angela Oswalt because of her December 11 e-mail, investigated those charges, and ordered Oswalt to answer questions about the e-mail; ordered Oswalt to answer questions about her confidential communications with bargaining unit member Doe; and gave Oswalt a letter of expectations that interfered with protected rights.

2. The City violated ORS 243.672(1)(b) when it denied Oswalt access to PPB property, thereby limiting her ability to perform tasks on behalf of AFSCME, because she refused to answer questions about her December 11 e-mail.

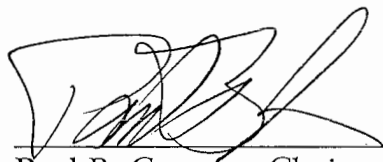
3. The City shall cease and desist from violating ORS 243.672(1)(a).

4. The City shall cease and desist from violating ORS 243.672(1)(b).

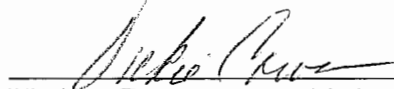
5. The City shall discontinue any investigation or other action against Angela Oswalt arising from the December 11 e-mail or her communications with Doe. The City shall rescind any action taken against Angela Oswalt based on the December 11 e-mail or her communications with Doe. The City shall purge all City files of documents concerning Angela Oswalt that arise from, or are based on, the December 11 e-mail or Oswalt's communications with Doe. The City shall not use the December 11 e-mail or Oswalt's communications with Doe, or any issues or concerns arising from those activities, in any employment-related action regarding Angela Oswalt.

6. The remainder of the complaint is dismissed.

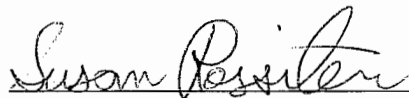
DATED this 23<sup>rd</sup> day of October 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.