EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-039-21

(UNFAIR LABOR PRACTICE)

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| KLAMATH FALLS ASSOCIATION OF CLASSIFIED EMPLOYEES,<br><br>Complainant,<br><br>v.<br><br>KLAMATH FALLS CITY SCHOOLS,<br><br>Respondent. | ) | AMENDED RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER |

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on June 2, 2022. The record closed on September 2, 2022, upon receipt of the parties' post-hearing briefs.

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

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

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

The issues in this case are: (1) Did the District violate ORS 243.672(1)(a), (b), and (c) by searching Tanya Thornton's emails to discover union communications, and by threatening Thornton's job security? (2) Did the District violate ORS 243.672(1)(a), (b), and (c) by disciplining union leader Lisa Danskin for using the District's email system for union communications, and by inquiring into who wrote an April 23, 2021 union email? (3) Is KFACE entitled to a civil penalty? As set forth below, we conclude that the District violated ORS 243.672(1)(a) and (c) when it threatened Thornton's job security, but reject the remaining claims. We also conclude that a civil penalty is unwarranted.

## RULINGS

1. Before the hearing, the District asked the ALJ to defer ruling on the first issue identified above, concerning the District's response to Tanya Thornton blind carbon copying (BCC'ing) an email to KFACE, because a related grievance was awaiting a hearing by an arbitrator. The District also asked the ALJ to place the second issue identified above, concerning the District's response to Lisa Danskin's election-related email to her bargaining unit, in abeyance until a related Oregon Secretary of State complaint filed against Danskin is resolved. (District brief at 2, 9:23-9:28 a.m.) The ALJ rejected both requests and set the matter for hearing. Upon review, we conclude that the ALJ acted properly and within his discretion when he did so. The complaint does not allege an ORS 243.672(1)(e) failure to bargain in good faith violation or an ORS 243.672(1)(g) contract violation. Further, neither Danskin nor the Secretary of State is a party to this case. As explained below, we have also rejected all of KFACE's claims involving the District's response to Danskin's email.

*2.* ORS 243.672(6) requires an injured party to file a complaint no later than 180 days following the occurrence of an unfair labor practice. The District has consistently objected to "any consideration" of events that occurred outside of that statutory 180-day filing period, including the events of the parties' "bonus days dispute" described in detail below, as well as other events that occurred in March 2021 but were outside of the relevant time period. (Answer, 9:17-9:19 a.m.) Upon review, we conclude that the ALJ properly overruled the objection.

Initially, we note that the complaint was signed and submitted to the Board on September 17, 2021, a Friday, via the Board's online case management system. However, that system's records indicate that the complaint and/or the associated filing fee was not received until after 5:00 p.m. that day. OAR 115-010-0033(1)(b) provides, "A complaint or answer will not be considered filed until the filing fees required by ORS 243.672(6) have been paid." Currently, OAR 115-010-0033(1)(d) provides, in relevant part, "If a document is filed by email, fax, or the Board's online case management system, and the Board's record indicates that the Board received the document on or before 11:59 p.m. Pacific Time on a business day, then the document is considered filed on that business day." However, the language of OAR 115-010-0033(1)(d) and its 11:59 p.m. filing deadline only became effective on December 1, 2021. When the complaint was filed in September 2021, the corresponding OAR still included the historical deadline of 5:00 p.m. *See Alexander v. Amalgamated Transit Union, Division 757*, Case No. UP-022-20 at 1-2, _ PECBR _, _ (2021) (citing *AFSCME Council 75, Local 2503 v. Hood River County (Public Works)*, Case No. UP-005-20, _ PECBR _ (2021)). As a result, we conclude that the complaint was actually filed on September 20, 2021, the first Monday after the Friday evening during which the complaint was submitted. Moreover, 180 days before that date is March 24, 2021. Accordingly, the District is correct that any *claims* concerning events that occurred before March 24, 2021 are time-barred.

KFACE does not dispute that the bonus days dispute took place more than 180 days before its complaint was filed. Nevertheless, importantly, KFACE does not seek to use that untimely dispute as the basis for an unfair labor practice claim. As KFACE explained in its opening statement, KFACE merely seeks to use the earlier incident as context for Tanya Thornton's conduct in March 2021, to demonstrate a general hostility and a lack of understanding of union rights, and as an example of the District's efforts to curb union activity. (9:06-9:09 a.m.) As stated

in KFACE's post-hearing brief (at 13), KFACE seeks to use the bonus days dispute as evidence of anti-union animus. Upon review, we generally agree with KFACE's position for this dispute, as the 180-day statute of limitations limits filings and claims, and does not bar evidence or background that is relevant to a timely-filed claim. *See Gault v. Portland Firefighters' Association, Local 43 and City of Portland Fire and Rescue Bureau*, Case No. FR-003-20 at 13, _ PECBR _, _ (2022); *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05 at 10, 22 PECBR 911, 920, *recons*, 23 PECBR 34 (2009), *aff'd*, 250 Or App 681, 282 P3d 2 (2012); *Grants Pass Association of Classified Employees/OEA/NEA and Sharon Bullington v. Grants Pass School District No. 7*, Case No. UP-05-07 at 34-35, 22 PECBR 806, 839-40 (2008). We also conclude that the ALJ correctly permitted the testimony and evidence in dispute.

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

3. During the hearing, the ALJ admitted all of the exhibits that were offered by the parties except for Exh. R-12. (4:25-4:29 p.m.) That exhibit appears to be a copy of a September 8, 2020 letter to Oregon Education Association (OEA) members from "OEA General Counsel" Adam Arms titled "Political and Ideological Expression Questions and Answers." As indicated below, KFACE is an OEA "affiliate." KFACE objected to the exhibit's admission and claimed that the document was protected by attorney-client privilege. (2:22-2:25 p.m., 4:26-4:28 p.m., KFACE brief at 14.) KFACE also described the exhibit as an "internal" communication, and described General Counsel Arms as OEA's "in-house attorney." (9:02 a.m., 2:22 p.m.) Relatedly, in the District's opening statement, the District's own attorney described the exhibit as "advice" from "the attorney for OEA" (9:26-9:27 a.m.) On its face, the exhibit purports to provide "legal guidance."

At the conclusion of the hearing, in response to KFACE's objection, the ALJ asked the District how it had acquired the document, and noted that he did not have any evidence of a waiver. The District simply responded that District Human Resources Director Renee Clark received the document from another school district. The District did not utilize a witness to establish a foundation for the exhibit. After considering the parties' positions on the matter, the ALJ opted to defer ruling on the objection until he issued his recommended order. (4:26-4:29 p.m.) At this time, we recognize that neither party has disputed the authenticity of the document. (9:02 a.m.)

However, under the circumstances presented, we hereby decline to admit Exh. R-12. We also note that there is no evidence that the document was reviewed or relied upon by Danskin or Clark during the events of this case, or any testimony regarding who was sent the document.

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

## FINDINGS OF FACT

### Background

1. The District is a "public employer" within the meaning of ORS 243.650(20). It employs around 400 to 450 employees in total. (2:48-2:49 p.m.)

2. KFACE, a union, is a "labor organization" within the meaning of ORS 243.650(13). It is the exclusive representative of a bargaining unit that includes certain (but not all) "classified" District employees. Supervisors, confidential employees, substitutes, teachers, and temporary employees are specifically excluded from the unit. (Exh. C-1 at 3-4.)

3. At all times material, KFACE and the District were parties to a collective bargaining agreement (CBA). By its terms, the CBA was effective from July 1, 2018 through June 30, 2022. (Exh. C-1 at 52.)

4. KFACE is one of a number of local, affiliated unions that make up a "coordinating body" known as the Klamath-Lake UniServ Council. (9:51-9:52 a.m., 10:00-10:01 a.m., 1:16-1:19 p.m., Exh. C-12.) KFACE is also affiliated with OEA, the Oregon Association of Classified Employees, and the National Education Association. (Exh. C-1 at 3.) Ryan Olds has worked for OEA as a "UniServ Consultant," which is essentially a union representative or field representative, since February 2019. One of his assignments is to serve the KFACE bargaining unit. (1:15-1:18 p.m., 2:18 p.m.)

5. Outside of the KFACE bargaining unit, certain other "classified" District employees are unrepresented, while certain other "classified" employees are part of a separate unit/union of fewer than 40 custodial and maintenance employees known as "CPOKF." A third unit/union, the Klamath Falls Education Association (KFEA), includes the District's teachers and has been described as the "certified union." Like KFACE, KFEA is also an OEA affiliate/unit, and is part of the UniServ Council. Each of the District's two non-KFACE units/unions has its own CBA with the District. (9:52 a.m., 9:59 a.m., 10:37-10:38 a.m., 11:24-11:25 a.m., 2:49 p.m., Exh. C-12 at 1.)

### Bonus Days Dispute (Tanya Thornton)

6. Tanya Thornton currently works for the District as the Payroll Lead in the District's Business Office in the Payroll Department. She has held that position since February 2020. In May 2018, Thornton started working for the District as a Payroll Specialist. (10:51-10:53 a.m., 10:57 a.m., 11:23 a.m.) Thornton has never been reprimanded. (11:39 a.m.)

7. As Payroll Lead, Thornton is generally responsible for, among other things, making sure that payroll is accurate and timely, for answering employees' questions about payroll, and for training and leading the Payroll Specialists of the Payroll Department. (10:53-10:55 a.m., 2:51-2:52 p.m., Exh. R-4.) The Payroll Lead is also responsible for "the interpretation and the effective implementation of several different salary and labor contracts for administrators, teachers, classified and other employees * * *." (11:22-11:24 a.m., 2:59-3:01 p.m., Exh. R-4 at 1.)

8. Thornton is an active member of KFACE, and is currently on KFACE's bargaining team. (2:11-2:13 p.m.)

9. Neither party considers Thornton a "confidential employee" within the meaning of ORS 243.650(6).[1] Nevertheless, in Thornton's current role of Payroll Lead, she does have access to some confidential employee information. For example, Thornton has access to employees' Social Security numbers, personal telephone numbers, home addresses, and certain benefits-related information. (10:54-10:55 a.m., 1:06-1:08 p.m., 1:11-1:13 p.m., 2:11-2:13 p.m.) As stated in a 2020 job posting for the position, the Payroll Lead "performs technical and confidential accounting work * * *." (Exh. R-4 at 1.)

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

> "Employees with perfect attendance for the previous school year (July I-June 30) shall have the option of three (3) days of salary or three (3) days off with pay during the subsequent year.
>
> "Employees with one (1) day absence for the previous school year (July 1- June 30) shall have the option of two (2) days of salary or two (2) days off with pay during the subsequent year.
>
> "Employees with two (2) days absence for the previous school year (July 1 – June 30) shall have the option of one (1) day of salary or one (1) day off with pay during the subsequent year.
>
> "Absences due to work injuries will not count as absences in this section."

(Exh. C-1 at 16.)

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

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

language of Article 8, Section I of KFACE's CBA only alludes to *attendance* and does not overtly reference a date of hire as the custodial and maintenance union's CBA does. The teachers/certified union's CBA does not address bonus days at all. (11:26-11:29 a.m., 1:35-1:40 p.m., 2:30 p.m., 3:01-3:03 p.m., 3:47-3:49 p.m.)

12. Every July, including July 2021, the District has determined which employees qualify for bonus days for the new school year. In or around October 2021, Cheryl Reinhardt, who at the time was the Head Secretary at Klamath Union High School, contacted Thornton via email, questioned whether a particular KFACE-represented employee had been awarded bonus days in error, and asked Thornton's department to investigate the issue. Subsequently, Thornton reviewed the relevant "past practice," some related notes left by a predecessor, and KFACE's CBA. Thornton ultimately determined that, according to that past practice, the employee in dispute did indeed qualify for the allotted bonus days. For the previous two years or more, Thornton and the Payroll Department had consistently used October 1st as the relevant *date of hire* when considering bonus days without any issues, and the relevant part of KFACE's CBA had not been changed during that time period. After Thornton made her determination, she shared her view with Reinhardt. (10:57-11:02 a.m., 11:26-11:30 a.m., 11:33-11:35 a.m., 1:37-1:38 p.m., 3:03-3:05 p.m.)

13. The District's Human Resources (HR) Director, Renee Clark, eventually looked into the bonus days dispute as well, after receiving a telephone call about it from Head Secretary Reinhardt. Clark has been the District's only HR Director since she started working for the District at the end of June 2019. Clark regularly works with the Payroll Department and Thornton. However, Clark has never been Thornton's supervisor, and, as indicated, Thornton does not work in the HR Department. (10:56-10:57 a.m., 2:47-2:51 p.m., 3:00-3:03 p.m., 3:12-3:13 p.m.)

14. After Director Clark reviewed the bonus days issue, Clark discussed the subject with Thornton (some or all of which occurred through email), and asked why Thornton was using the October 1st date when, at least according to Clark, KFACE's CBA used July 1 through June 30 as the relevant time period. During their discussion, Thornton explained that she had used October 1st as the relevant date of hire in accordance with past practice and Thornton's predecessor's notes. Before that discussion, Clark was unaware of the past practice of using October 1st as the date of hire, and Clark and Thornton had never discussed how to award bonus days. On October 16, 2021, after some back and forth, Clark ultimately decided that the affected District employees should have the bonus days that had been awarded to them rescinded. Clark then directed Thornton to notify those employees of that decision, and to explain the change and note that there had been an error. By the time that Clark gave Thornton that direction, Clark understood that, historically, the October 1st date had been used as the relevant date of hire. Clark also understood that she was changing the date of hire to July 1st to align with her own interpretation of the bonus days provision of the current KFACE CBA. (11:00-11:05 a.m., 3:02-3:06 p.m., 3:54-3:59 p.m., 4:18-4:19 p.m.)

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

> "Because our contract (KFACE) does not have language that speaks directly to the hire date of the employee a decision has been made by our Human Resource[s]

> department that affects the bonus days you have been awarded this year and therefore those days have been adjusted accordingly and are no longer available for you to use.
>
> "You must now be hired prior to the July 1st date and still qualify for all the other parameters of the contract to be eligible to receive bonus days in the new upcoming fiscal year. Because you were hired after that date I have been informed to remove those days on your available leave plans."
>
> "* * *
>
> "If you have questions or concerns please feel free to contact myself or you may reach out to Renee Clark in Human Resources.
>
> "I apologize for the confusion or inconvenience this may cause.
>
> "Thank you and have a great day!"

(Exhs. C-4, R-3 at 1.)

All of the language included in the October 27, 2020 letter was written by Thornton. (11:05 a.m.)

16. After emailing the October 27, 2020 letter, Thornton informed Director Clark that she had done so. Clark then thanked Thornton for doing so. Clark was not sent a copy of the letter at that time. Later, Clark received calls from employees who were upset about the rescissions, and Clark got a copy of Thornton's letter. Around the same time, KFACE filed a grievance concerning the rescissions, as KFACE viewed the matter as a change in practice. (3:06-3:08 p.m., 3:53-3:59 p.m., Exhs. C-2 and R-1.)

17. During the events of this case, Jeanne Morgan was a Business Manager for the Payroll Department, and was Thornton's supervisor/manager. As of the hearing for this case, however, Morgan's job title was Director of Business Affairs. (10:55-10:56 a.m., 2:50-2:52 p.m., 3:10-3:11 p.m., Exh. C-2 at 1.)

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

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

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

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

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

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

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

(Exhs. C-2 and R-1.)

19. Although then-Business Manager Morgan emailed and signed the November 4, 2020 letter of expectations, it was actually authored by Paul Hillyer, who was the District Superintendent at the time. Hillyer also instructed Morgan to deliver the letter to Thornton.[2] Director Clark was not involved with the drafting of the letter. Additionally, as of the hearing, Clark believed that the portion of the letter that alleged that Thornton "chose not to follow H.R. directions" was inaccurate. Clark also believed that the portion of the letter that spoke of "staff being angry" at the HR Department was actually the result of the bonus days being rescinded. That said, according to Clark, Thornton was issued the letter because of the "tone" of Thornton's email and the "accusation" made therein. (11:06-11:07 a.m., 1:34-1:35 p.m., 3:49-3:57 p.m.)

20. The District does not consider letters of expectations to be discipline. The District uses such letters in order to help an employee understand that he or she needs improvement in some area. If the issue with an employee is more egregious, the District will use a written reprimand or more serious discipline. (3:11-3:12 p.m.)

21. Dawn English worked for the District for 24 years, then retired from the District in June 2020. When English retired, she was KFACE's President. Later, English was one of the candidates in the District's 2021 Board of Education election (which is discussed below), which English did not win. She currently works as "cadre" for the OEA, where she started working in August 2020. (1:00-1:04 p.m., 1:08 p.m., 1:11 p.m.)

22. After Thornton received the letter of expectations, Thornton contacted then-KFACE President English, explained the situation, shared that she felt that she was being "retaliated against," and asked for KFACE to look into the matter for her. When Thornton received the letter, Thornton was "very upset." Thornton also felt like Director Clark was "out to get [her],"

[2]According to the District's post-hearing brief (at 4), Hillyer was the Superintendent prior to June 30, 2021.

and that Clark was looking for mistakes so that Clark could "get rid of" Thornton. (11:06-11:10 a.m.) After communicating with Thornton, English told UniServ Consultant Olds about the issue, then Olds exchanged emails with Clark about possibly rescinding the letter of expectations. (1:28-1:34 p.m., 3:52 p.m., Exh. R-2, Exh. R-3.)

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

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

(Exh. R-2 at 1-2.)

24. After her November 13, 2020 email, Director Clark met with KFACE about the letter of expectations. (3:08-3:10 p.m.) By that time, Clark was well aware that KFACE was "very concerned" about issue. (4:03-4:05 p.m., Exh. C-3 at 1-2.)

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

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

(Exh. R-5 at 2.)[3]

26. Neither Thornton nor former KFACE President English was involved in the parties' discussions that resulted in the MOU. (11:36 a.m., 1:11 a.m.)

27. As of the hearing, the parties had not yet reached a tentative agreement over the bonus days/date of hire issue. (3:08-3:10 p.m.)

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

> "After today's discussion, the District is rescinding the Letter of Expectations that you were issued on November 4, 2020. That being said, we want to reiterate that from here on out when a change is made to an employee's payroll (wheather [sic]

[3]A copy of this MOU is marked as Exh. R-5 at 2 as indicated, but the document appears in the middle of what is marked as Exh. R-6 in the District's "combined" grouping of exhibits.

> that is a result of an error or directive from a supervisor/administrator), an email must be composed and approved by the HR Director that will be sent to the affected employee and you must copy both Jeannie [sic] [Morgan] and myself on such occasions. Failure to do so, will result in disciplinary action."

(Exhs. C-6 and R-5.)

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

29. Some District employees are considered "permanent" employees. Others are considered "temporary" employees. According to Article 1, Section B of the parties' CBA, temporary employees are not intended to work for more than "90 continuous working days." Further, if a temporary employee works for more than 90 days, that employee's position is supposed to become a permanent one. (11:10-11:12 a.m., 11:37-11:42 a.m., 3:13-3:15 p.m., Exh. C-1 at 4.)

30. In March 2021, Thornton learned that one ostensibly temporary District employee had likely been working for more than 90 days. Subsequently, on March 17, 2021, Thornton sent an email to Director Clark asking Clark for direction regarding how to proceed, using Thornton's District email account. Simultaneously, Thornton also BCC'd the same email to then-KFACE President Heather Wisener, who is also a District employee but does not work in HR or Payroll. Because Thornton's March 17, 2021 was BCC'd to Wisener, at that time, Clark was unaware that Wisener had also been sent the same email. Afterward, Clark and Thornton exchanged a number of additional emails about how to calculate the 90 days. (11:10-11:14 a.m., 11:44-11:45 a.m., 3:15-3:19 p.m., 12:58-12:59 p.m., Exh. C-7, Exh. R-14.)

31. Thornton BCC'd KFACE President Wisener because Thornton did not believe that the HR Department would have brought the issue to KFACE's attention on its own, and because Thornton believed that KFACE needed to be made aware of the matter. In addition, Thornton intentionally BCC'd Wisener instead of simply carbon copying her because Thornton was worried that Director Clark would retaliate against her for alerting KFACE of the issue. That worry about retaliation was based on Thornton's "past experiences" with Clark, including but not limited to the 2020 bonus days dispute. (11:13-11:14 a.m., 11:38-11:39 a.m.)

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

did not discuss the matter with Thornton, or ask Thornton how Wisener had received a copy of the March 17, 2021 email. (3:15-3:22 p.m., 3:59-4:06 p.m.)

33. On March 24, 2021, Thornton was invited to an investigatory meeting with Director Clark and Thornton's supervisor, Business Manager Morgan, that would occur the same day. Thornton was not told that the meeting was going to be about the BCC'd email until right before the meeting was scheduled to begin, after Thornton asked if she needed to have union representation for the meeting. (11:14-11:15 a.m., Answer at 3.)

34. During the March 24, 2021 investigatory meeting, Thornton asked Director Clark how Clark had learned of the BCC to KFACE. In response, Clark told Thornton that she had had IT review all of Thornton's emails, and that Clark did so because she wanted to know whether there were other BCCs and to whom those emails had been sent. Thornton then told Clark "to have at it," as Thornton did not feel that she had anything to hide. During the same meeting, Clark also instructed Thornton that Thornton could only share information that she had learned of as Payroll Lead with KFACE if that information related to Thornton "directly" and "personally;" that Thornton's concerns about other employees should only be shared with Clark directly and not with KFACE; and that if Thornton shared anything with KFACE that did not relate to Thornton directly, Thornton would be violating the law and Thornton's "job would be in jeopardy." Ultimately, however, Thornton was not disciplined for BCC'ing KFACE. (11:15-11:18 a.m., 11:42-11:44 a.m., 3:22 p.m., 4:02-4:06 p.m., 4:21-4:24 p.m.)

35. Director Clark believes that it is her job, not Thornton's, "to interact with the union." Clark also believes that interacting with KFACE is not a "position requirement" for Thornton, and that doing so is "beyond [Thornton's] capacity" in Thornton's position. (4:06 p.m., 4:21-4:23 p.m.)

36. UniServ/OEA tells the employees it represents that, when using a work email account, they "run the risk" of those emails being searched. (1:42-1:43 p.m.) Further, the District's staff handbook explicitly warns that District email accounts "are not private and may be subject to monitoring" and that electronic communications may be reviewed by school administrators (as detailed below). (Exh. R-6 at 5, 6.) Nevertheless, when Thornton learned that Director Clark had had Thornton's emails searched, Thornton felt that the search was a violation of her privacy, and once again felt that Clark was looking for something that would enable Clark to "get rid of" Thornton. (11:17-11:18 a.m., 11:42-11:44 a.m.)

37. In the spring of 2021, after Thornton's meeting with Director Clark about the BCC, and while English was still KFACE President, English encouraged Thornton to run to become an elected officer for KFACE. Later, Thornton told English that she would not do so because Thornton did not want "backlash" or "grief" from the District's HR Department, because Thornton did not want Clark to blame Thornton when KFACE learned more information, and because Thornton wanted to avoid having a "confrontation" and "drama" with Clark. (11:18-11:19 a.m., 1:04-10:06 p.m.)

School Board Election Email Dispute (Lisa Danskin)

38. Lisa Danskin currently works for the District as a "special education paraprofessional" at Klamath Union High School (the District's only high school) in a special education classroom. Danskin has held her current position for four years, but she started working for the District nine years ago. (9:48-9:51 a.m., 10:23-10:25 a.m.) Danskin currently works with the same students throughout her entire work day. (10:25-10:27 a.m.)

39. Danskin has been a member of KFACE since she started working for the District. During Danskin's third year with the District, she started being an active KFACE member. In or around 2018, Danskin became an elected "building rep" for KFACE, and held that position for three years. During the 2020-2021 school year, Danskin became the Vice President of KFACE. On July 1, 2021, she started as KFACE's President. (9:50-9:51 a.m., 10:24-10:25 a.m., Answer at 3.)

40. Among other things, UniServ endorses and recruits "pro-labor, pro-education" candidates for the District's Board of Education, which is the District's school board. (1:19-1:21 p.m.) In early 2021, UniServ, KFACE, and other local unions decided to get more involved in the District's school board elections, and formed a school board committee that was "made up of elementary, high school, classified, and college staff." (Exhs. C-14 at 1 and R-13 at 1.) At some point, Danskin joined that committee and it chose to endorse and recommend a number of specific candidates, including former KFACE President English. (9:53-9:55 a.m., 10:02-10:03 a.m., 1:21 p.m., 1:54-1:56 p.m., Exh. C-11, Exh. C-12.)

41. On April 23, 2021, at 10:37 a.m., Danskin sent an email to everyone in the KFACE bargaining unit (a group that included about 165 other employees) using her District email account/address. Danskin was on a mid-workday break when she sent the email (though not all of its recipients were also on a break at that time). Further, Danskin sent the email from her "own personal laptop." The subject of Danskin's email was "Why we recommended the following candidates…" In summary, the email noted that the District's school board election would be occurring on May 18, 2021, shared that the UniServ school board committee was recommending or endorsing three particular candidates for that election, and explained why the committee had chosen those three candidates. The email also speaks out against other candidates, including an individual named Tonie Kellom in particular. At the end of the email, Danskin's signature block noted, among other things, that she was KFACE's Vice President. (10:02-10:04 a.m., 10:11 a.m., 1:47 p.m., 10:27 a.m., 3:28-3:29 p.m., 3:38-3:39 p.m., Exh. C-8, Exh. C-14, Exh. R-13.)

42. Danskin had access to the email addresses of the recipients of her April 23, 2021 email because she was KFACE's Vice President at the time. The email was not sent to anyone in the custodial/maintenance bargaining unit. (10:36-10:39 a.m.)

43. In a subsequent email thread, Danskin wrote that the language used in the April 23, 2021 email was not "her words." (10:11 a.m.) In fact, Danskin did not write the April 23, 2021 email herself (other than her signature), and the email did not contain Danskin's "personal opinion." Rather, Danskin copied and pasted the entire email message from a single email that she had received from someone else. Moreover, Danskin was asked by someone else to send out the

April 23, 2021 email, and that email included the agreed-upon views of the UniServ school board committee. (10:02-10:04 a.m., 10:27-10:32 a.m., 10:35-10:36 a.m., 2:18 p.m., 2:25-2:26 p.m.)

44. District employees in KFACE's bargaining unit regularly use their District email accounts to communicate with one another about "union business," and UniServ Consultant Olds frequently advises KFACE members to do so. One reason for that is because KFACE knows every bargaining unit employee's District email address, but only has the majority of the employees' personal email addresses on file. In addition, many "classified" employees do not have personal email addresses. Furthermore, KFACE does not know how often employees check their personal email accounts, but presumes that employees generally do check their District email accounts. (9:56-10:00 a.m., 1:23-1:24 p.m., 2:25-2:27 p.m.)

45. After the May 18, 2021 school board election, on May 24, 2021, Reinhardt forwarded Danskin's April 23, 2021 email to Director Clark, who had not yet seen the email. When Danskin originally sent that email, Reinhardt was still the Head Secretary at Klamath Union High School. However, on May 24, 2021, Reinhardt worked in the District's HR Department in what the parties agree is a "confidential" position as defined by ORS 243.650(6). After reviewing Danskin's email, Clark spoke about it with District Superintendent of Schools Keith A. Brown, Klamath Union High School Principal Tony Swan (Danskin's supervisor), and Nancy J. Hungerford (the District's attorney). (10:05-10:06 a.m., 3:02-3:06 p.m., 3:22-3:25 p.m., 4:10 p.m., Exh. C-14 at 1.)

46. Shortly after May 24, 2021, Danskin was called into a June 2, 2021 investigatory meeting with Director Clark by Principal Swan. The meeting was attended by Principal Swan (who appeared as Danskin's supervisor), Clark, Heather Wisener (who was still KFACE's President at the time), Danskin, and UniServ Consultant Olds. The meeting occurred in person, but Olds, who represented Danskin during the meeting, attended the meeting via telephone (10:09-10:10 a.m., 1:47-1:50 p.m., 3:30 p.m.)

47. During the June 2, 2021 investigatory meeting, Director Clark asked Danskin when Danskin sent the April 23, 2021 email, and Danskin replied that she sent it during her break period. Clark also asked Danskin who wrote the email. In response to that question, UniServ Consultant Olds interjected and recommended to Danskin that she not answer it. Clark asked Danskin who wrote the email because Clark believed that the email was too long to have been written during an employee's break, and because previously Clark had heard that Danskin had indicated that she had not written the email. In accordance with Olds' advice, Danskin did not tell Clark who had authored the email. Shortly after that, the interview ended. In Clark's view, the tone of the interview was "very tense." (10:10-10:12 a.m., 1:24-1:25 p.m., 1:46-1:51 p.m., 3:26-3:39 p.m.)

48. UniServ Consultant Olds recommended that Danskin not reveal who wrote the April 23, 2021 email because, in his view, Danskin's email was permissible "internal union correspondence" about KFACE bargaining unit employees' "bosses," and because the email was part of a larger collective bargaining campaign. Additionally, Olds believed that revealing the email's author could risk getting another bargaining unit employee "in trouble." (1:46-1:56 p.m.) According to Olds, KFACE is permitted to use the District's email system for internal union correspondence "on any subject" as long as the unit employees do so "on the clock" and the usage

does not interfere with or disrupt District operations. Moreover, as indicated above, Olds encourages KFACE-represented employees to use the District's email system for all internal union communications. (1:24-1:25 p.m., 2:25-2:27 p.m.)

49. Director Clark believes that Danskin's April 23, 2021 email was a violation of District policy and the law because the email had "political association." During the June 2, 2021 meeting, Clark was also concerned that Danskin's email was being read and discussed by other District employees during work hours. (4:07-4:09 p.m.)

50. On June 2, 2021, at the end of the investigatory meeting, Principal Swan and Director Clark issued Danskin a letter of reprimand for her April 23, 2021 email.[4] In part, the letter stated that Danskin had violated Board Policy IIBGA-AR and ORS 260.432 "by promoting and opposing the election of candidates during the work day on District owned IMTC services and equipment." (Exh. C-8.) Among other things, Board Policy IIBGA-AR "strictly prohibits" using the District's electronic communications system for the "[t]ransmission of any materials regarding political campaigns," and states, "Transmission of any communications or materials regarding political campaigns prohibited by ORS 260.432 is not allowed." (4:16-4:18 p.m., Exh. R-10 at 3-5.)[5] The Policy also states, "Staff who violate general system user prohibitions shall be subject to discipline up to and including dismissal in accordance with Board policy, collective bargaining agreements and applicable provisions of law." (Exh. R-10 at 7.) ORS 260.432 generally establishes restrictions on political campaigning by public employees. (Exhs. C-10, R-8, R-11.) The letter was signed by Clark and Swan, but was authored by Clark. (3:29-3:32 p.m., Exh. C-8.)

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

> "Staff may be permitted to use the District's electronic communications system for personal use, in addition to official District business, consistent with Board policy, the general use prohibitions/guidelines/etiquette and other applicable provisions set forth in administrative regulations. Personal use of District-owned computers including internet and email access by employees, is prohibited during the employee's work hours. Additionally, employee use of District-owned computers

[4]Danskin testified that the investigatory meeting may have occurred on June 1, 2021. (10:09 a.m., 10:42-10:43 a.m.) Further, the letter of reprimand is dated June 1, 2021. (Exh. C-8.) However, according to Director Clark's testimony, Clark actually wrote the letter during the evening of June 1, 2021, then sent the letter to Principal Swan for his signature. Clark also testified that Swan signed the letter on June 2, 2021 and then returned it to Clark between 10:00 or 11:00 a.m. on June 2, 2021, which Clark testified was a few hours before Clark and Swan met with Danskin. Danskin and Clark similarly testified that the letter was given to Danskin right after the investigatory meeting. (10:13-10:14 a.m., 3:29-3:32 p.m.) Nevertheless, both parties' post-hearing briefs, the complaint, and the answer all assert that the meeting occurred on June 1, 2021. Swan was not called to testify.

[5]The letter of reprimand (Exh. C-8) also indicated that Board Policy IIBGA-AR references ORS 260.462 in particular. However, that statute is not specifically referenced in Board Policy IIBGA-AR (Exh. R-10). Moreover, ORS 260.462 has been renumbered to ORS 260.655, which also is not referenced in Board Policy IIBGA-AR. ORS 260.655 generally prohibits using undue influence to affect registration, voting, candidacy, or signing petitions.

> may be permitted only when such use does not violate the provisions of ORS 244.040[6] and use is under the same terms and conditions that access is provided to the general public under the District's policy governing use of District equipment and materials.
>
> "Staff who violate Board policy or administrative regulations, including general system user prohibitions, shall be subject to discipline up to and including dismissal. Violations of law will be reported to law enforcement. Violations of applicable Teacher Standards and Practices Commission (TSPC) and Standards for Competent and Ethical Performance of Oregon Educators will be reported to TSPC.
>
> "The District retains ownership and control of its computers, hardware, software and data at all times. All communications and stored information transmitted received or contained in the District's information system are the Districts property and are to be used for authorized purposes only. Use of District equipment or software for unauthorized purposes is strictly prohibited. To maintain system integrity, monitor network etiquette and ensure that those authorized to use the District's system are in compliance with Board policy, administrative regulations and law, school administrators may routinely review user files and communications.
>
> "Files and other information, including email, sent or received, generated or stored on District servers are not private and may be subject to monitoring. By using the District's system, individuals consent to have that use monitored by authorized District personnel. The District reserves the right to access and disclose, as appropriate, all information and data contained on District computers and District-owned email systems."

(Exh. R-6 at 1, 5.)

The staff handbook does not specifically address sending emails involving union business. (4:09-4:10 p.m.)

52. Policy IIBGA-AR applies to all District employees who use the District's email system. (4:16-4:18 p.m.) Further, District employees receive training regarding the contents of the District's staff handbook, Board Policy IIBGA-AR, and the use of the District's email system. Moreover, Danskin has received such training, and also read the staff handbook on or around August 24, 2020. (2:53-2:57 p.m., 4:10-4:11 p.m., Exh. R-7.) Later, on October 29, 2020, Director Clark emailed District staff a reminder about ORS 260.432, which, as noted above, restricts the political activities of public employees. (Exh. C-8 at 1, Exh. R-8.)

53. When Danskin sent her April 23, 2021 email, Danskin was already aware of the District's policy banning the use of District resources for political activities, which she knew banned sending out political emails. However, Danskin did not view her April 23, 2021 email as

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

political activity, as it did not concern candidates like "Trump or Biden." Instead, Danskin viewed the email as "union/school business." (10:06-10:08 a.m., 10:13 a.m., Exh. R-7.)

54. Article 4, Section G of the parties' CBA states, in part, "Use of school buildings, bulletin board, and mail facilities including e-mail shall be limited to Association business and shall not be [used] to espouse a political candidate, cause, measure, or any religious point of view." (Exh. C-1 at 8.)

55. Upon receiving the letter of reprimand, Danskin became apprehensive and nervous about sending out "any" union-related email, even an email announcing a meeting. Nevertheless, since receiving the letter of reprimand, Danskin has continued to use her work email account to conduct some union business. Further, KFACE continues to be interested in school board elections and maintain its position that Danskin's April 23, 2021 email was lawful. (10:13-10:14 a.m., 10:17 a.m.)

56. Before the June 2, 2021 investigatory meeting, Danskin had not had much interaction with Director Clark. However, at the time of the meeting, Danskin was aware of some aspects of Clark's interactions with Thornton and how they affected KFACE members. (10:14-10:15 a.m., 10:42-10:44 a.m.)

57. On June 3, 2021, KFACE and Danskin filed a grievance concerning the letter of reprimand. The grievance asserted that Danskin was disciplined without just cause in violation of the Public Employee Collective Bargaining Act (PECBA) and Article 7(a) (concerning "just cause") and Article 1 (titled "Recognition") of the parties' CBA. The grievance also asserted that Danskin had been disciplined "for concerted, protected activity for an internal union correspondence," and noted that she sent the email as the Vice President of KFACE. (10:13-10:16 a.m., 1:24-1:25 p.m., 1:58-1:59 p.m., Exh. C-8.)

58. On or around June 18, 2021, Tonie Kellom, who was an unsuccessful candidate in the May 2021 Board of Education election (and ran for the same open seat as former KFACE President English, who also lost the election), filed a written complaint against Danskin with the Oregon Secretary of State alleging a violation of ORS 260.432. Subsequently, Danskin received a letter from the Secretary of State notifying Danskin of the complaint. KFACE and Danskin were not told who filed the Secretary of State complaint until the hearing for this case. Further, as of the hearing, no known action had been taken on that complaint. (10:03 a.m., 10:08 a.m., 10:21-10:23 a.m., 1:08 p.m., 2:13-2:14 p.m., 3:45-3:47 p.m., 4:10-4:11 p.m., Exh. C-15, Exh. R-13 at 1.)

59. On June 22, 2021, Director Clark denied the Danskin grievance (at Level One) via an email. (Exhs. C-9 and R-9 at 4.)

60. On July 1, 2021, Danskin became KFACE's President. (9:50-9:51 a.m., 10:24-10:25 a.m.)

61. On July 30, 2021, Superintendent of Schools Keith A. Brown denied Danskin's grievance (at Level Two) via a letter. (Exh. R-9 at 3.)

62. On August 9, 2021, Olds and Danskin presented their case regarding Danskin's grievance to the District's Board of Education during a school board meeting. During that meeting, the Board of Education voted in open session and unanimously denied the grievance and upheld the Superintendent's earlier decision. (10:15-10:16 a.m., 2:33-2:36 p.m., Exh. R-9 at 2-3.)

63. On August 11, 2021, Lori Theros, the Chair of the Board of Education, issued a letter formally denying Danskin's grievance (at Level Three) and upholding Superintendent Brown's related decision. (Exh. R-9 at 2.)

64. On or around August 12, 2021, KFACE moved Danskin's grievance to the arbitration stage of the parties' grievance procedure (Level Four). (Exh. R-9 at 1.)

## CONCLUSIONS OF LAW

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

2. The District violated ORS 243.672(1)(a) and (c) by threatening Thornton's job security for her performing protected activity, but did not violate subsection (1)(b) by doing so, and did not violate any of those subsections by searching Thornton's emails.

### ORS 243.672(1)(a)

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

To determine if an employer violated the "because of" prong, we ordinarily examine the employer's motives or reasons for the disputed action. However, it is unnecessary for a complainant to prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights. *Mult. Sch. Dist. No. 1*, 171 Or App at 623; *Lebanon Community School District*, UP-4-06 at 29, 22 PECBR at 351. Stated differently, evidence of employer hostility or anti-union animus is unnecessary to establish a claim under the "because of" prong. *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05 at 22-3, 22 PECBR 372, 393-94 (2008). When presented with "because of" claims, we typically examine the record as a whole to determine

what motivated the employer to act. *Mult. Sch. Dist. No. 1*, 171 Or App at 626. Our role, broadly, is to decide which party's explanation of the employer's reasons we believe. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan District of Oregon*, Case No. UP-48-97 at 8, 17 PECBR 780, 787 (1998).

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

KFACE alleges that the District violated both prongs in its dealing with Thornton. For the "because of" prong, KFACE initially states, "It is undisputed that Renee Clark decided to search Tanya Thornton's emails and conduct an investigatory interview on May 24, 2021 *because* Thornton alerted the Association President to a potential problem relating to a temporary position." (KFACE brief at 17, emphasis in original.) However, that particular characterization of what occurred only tells part of the story. In our view, the full record shows that, after Director Clark learned that Thornton had BCC'd an internal email to then-KFACE President Wisener, who did not work in HR or Payroll, Clark actually had IT search Thornton's emails *for all other BCCs* "to somebody else" (not for "union communications").

We largely agree with KFACE that employees generally have the right to inform their unions of suspected contract violations and other workplace concerns (and we generally disagree with Clark's stated opinion on that subject, as indicated below). *See Clackamas County Employees' Association v. Clackamas County*, Case No. UP-030-20 at 13-15, _ PECBR _, _ (2022). Nevertheless, that right does not also necessarily mean that a director cannot have IT search an employee's emails to see whether the employee was regularly BCC'ing internal emails. As UniServ/OEA tells the employees it represents, when using a work email account, they "run the risk" of those emails being searched. (1:43-1:43 p.m.) Moreover, Policy IIBGA-AR and the District's staff handbook explicitly warn that District emails "are not private and may be subject to monitoring" and that electronic communications may be reviewed by school administrators. (Exh. R-6 at 5, Exh. R-10 at 3.) Similarly, although Thornton is not a "confidential employee" within the meaning of ORS 243.650(6), she is still expected to perform "confidential accounting work" and has access to a variety of confidential employee information. (Exh. R-4 at 1.)

To be clear, we are ultimately unconvinced that Director Clark initiated the search because the BCC was union-related, or that Clark was specifically seeking to discover "union communications" (as specifically alleged in the complaint). Put differently, we do not conclude that Clark was subjectively or otherwise improperly motivated by Thornton's protected activity to have the search done. Instead, the evidence presented suggests that Clark was centrally concerned with the possibility of what she viewed as additional breaches of confidentiality—including in particular the possible sharing of confidential personnel-related or "student information"—via other BCCs. As a result, we do not conclude that the District violated the "because of" prong of ORS 243.672(1)(a) by searching Thornton's emails.

We also cannot conclude that the District's search violated the "in the exercise" prong of ORS 243.672(1)(a). Again, the record suggests that District employees are generally well aware that any of their District emails may be searched. Additionally, we recognize that the search at issue did not result in any actual discipline or other adverse employment action.[7] After the search, Thornton did choose not to run to become an elected KFACE officer. However, it is ultimately unclear whether it was the *search* in particular that led to that result, and the District generally had the right to perform that search.

Despite the foregoing, we do conclude that the District violated both prongs of ORS 243.672(1)(a) through the various *statements* that Director Clark made during the March 24, 2021 investigatory meeting. As detailed above, during that meeting, Clark instructed Thornton that Thornton could only share information that she had learned of as Payroll Lead with KFACE if that information related to Thornton directly and personally; that Thornton's concerns about other employees should only be shared with Clark directly and not with KFACE; and that if Thornton shared anything with KFACE that did not relate to Thornton directly, Thornton would be violating the law and Thornton's job would be in jeopardy. That instruction was plainly given because Thornton communicated about what is undoubtedly a contractual issue (specifically, one involving Article 1, Section B of the parties' CBA) with a union representative. We also conclude that Clark's instruction effectively threatened Thornton's employment over such a communication as alleged, and plainly misstated Thornton's PECBA rights.

To some degree, the District is correct that it had the right to expect that Thornton would defer to a director's CBA interpretations, as directed, when performing her work. (District brief at 23.) However, under PECBA, represented employees are generally free to discuss with other bargaining unit members and their union representatives any matter arising out of the employment relationship—not just those that affect an employee personally. Moreover, public employees generally have the right to participate in a union investigation of possible employer wrongdoing. *See* ORS 243.662; *Roseburg Education Association v. Douglas County School District*, Case No. UP-16-96 at 7-9, 16 PECBR 868, 874-76 (1996); *Sandy Education Association and Jane Davey v. Sandy Union High School District No. 2 and Kent Heaton*, Case No. UP-42-87 at 9, 10 PECBR 389, 397, *amended*, 10 PECBR 437 (1988).

[7]In the complaint (at 5), KFACE requested that the Board have the District rescind the "letter of discipline" issued to Thornton. As noted above, letters of expectation are generally not considered discipline or noted in an employee's official personnel record. Moreover, it is clear that the letter was already rescinded in December 2020. However, we do note that the letter of expectations did warn of "further discipline" if the expectations outlined in the letter were not met. (Exhs. C-2 and R-1, C-6 and R-5.)

The fact that communicating with Thornton's union is not a job "requirement" for Thornton's position (as Director Clark put it) has little if any bearing on this issue. As both parties agree, Thornton is not a "confidential employee" as defined by PECBA. Therefore, she generally has the right to inform her union of any suspected contract violations and other workplace concerns. The District may indeed have had a legitimate concern that, given the simultaneous nature of a BCC, Thornton plainly communicated her concern with her president during regular "work time." (District brief at 23-27.) However, there is no clear evidence that that specific concern was ever emphasized during the March 2021 meeting or a subsequent instruction. Instead, the emphasis was on the subject matter of Thornton's communication.

The District also disputes that an employee in Thornton's position could legitimately feel threatened or have been coerced. However, again, the evidence indicates that Director Clark explicitly warned that Thornton's job would be "in jeopardy" if Thornton repeated her actions, and that Clark alleged that Thornton's actions were illegal. Under similar circumstances, that kind of language would, at a minimum, deter a reasonable employee from speaking with his or her union about issues that did not directly involve him or her. It also follows that someone in Thornton's position would naturally tend to follow Clark's instructions once they were given.

The District alludes to *Elgin Education Association and Gale Wilson v. Elgin School District, No. 23*, Case No. UP-44-90, 12 PECBR 708, *recons*, 12 PECBR 768 (1991) when discussing KFACE's claims involving Thornton. (District brief at 23-24.) But the facts of that case do not resemble those presented here. At its core, that order stands for the proposition that "employees are not protected by the PECBA when using the authority and office granted to them by the employer to foment public anxiety and confusion over employer operations." 12 PECBR 768. Here, however, there is no indication that Thornton's email to Wisener was similarly "disruptive" to District operations (or that she had improperly shared confidential employee or student information as suspected). Thornton also did not seek out "third party assistance" as the employee at the center of that case did. In one sense, Thornton simply emailed her union president about a potential contract violation involving a single employee, without telling the HR Director about it.

ORS 243.672(1)(b)

ORS 243.672(1)(b) makes it is an unfair labor practice for a public employer or its designated representative to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." Fundamentally, subsection (1)(b) is concerned with the rights of the union itself, rather than the rights of the bargaining unit employees. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07 at 43, 22 PECBR 752, 794 (2008). To prevail on a (1)(b) claim, a labor organization must demonstrate that the employer's actions actually, directly, and adversely affected the labor organization's ability to serve as the exclusive representative. *Clackamas County*, UP-030-20 at 8, _ PECBR at _ (citing *State of Oregon, Department of Corrections, Santiam Correctional Institution*, UP-51-05 at 26, 22 PECBR at 397. Stated differently, the complainant 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. *City of Portland*, UP-7-07 at 43, 22 PECBR at 794 (quoting *Junction City Police Association v. Junction City*, Case No. UP-18-89 at 10, 11 PECBR 780, 789 (1989)). A (1)(b) violation is not

proven by a showing that the action *may* have a foreseeable effect on a labor organization. *Sandy Union High School District No. 2 and Kent Heaton*, UP-42-87 at 10, 10 PECBR at 398 (citing *Oregon State Employees Association v. Coos Bay-North Bend Water Board*, Case No. C-122-80, 5 PECBR 4047 (1980)).

For this claim, in its post-hearing brief (at 22), KFACE exclusively argues that the District violated ORS 243.672(1)(b) because, as a result of the threatening and legally inaccurate instruction Director Clark gave Thornton in March 2021, Thornton decided not to run for an elected office in KFACE. We see some merit in KFACE's argument. *See State of Oregon, Department of Corrections, Santiam Correctional Institution*, UP-51-05 at 29, 22 PECBR at 400 (in which employer's statements undermined the union's internal elections process); *Sandy Union High School District No. 2 and Kent Heaton*, UP-42-87 at 10, 10 PECBR at 398. However, we ultimately conclude that there is an insufficiently direct or substantial link between Clark's directive and Thornton's subsequent decision not to run for office. We also find it significant that the directive was given to just one employee.

We likewise do not conclude that the District violated subsection (1)(b) when it searched Thornton's emails as KFACE alleged in the complaint. The record establishes that, until the hearing for this case, Director Clark was unaware that Thornton was ever interested in becoming more active in the union. In addition, there is no indication that Clark or the search that she ordered were ever focused on elections in particular, or even on KFACE. Moreover, as with the other (1)(b) claim, Clark's actions were directed at one employee rather than the union. It also follows that KFACE cannot be adversely affected by such a search, given that the District has always made it clear that it has the right to search employees' District emails.

ORS 243.672(1)(c)

ORS 243.672(1)(c) states, in relevant part, that it is an unfair labor practice for a public employer or its designated representative to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of discouraging membership in an employee organization." In this context, we have defined the word "membership" very broadly to protect a wide variety of union activities. Additionally, our test for determining whether a violation of subsection (1)(c) has occurred is similar to the one we use in determining a violation of the "because of" prong of subsection (1)(a). In short, an employer's conduct violates (1)(c) if there is a causal connection between an employee's protected activity and the employer's action. *Tri-County Metropolitan Transportation District of Oregon*, UP-62-05 at 34, 22 PECBR at 944 (citing *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02 at 16, 20 PECBR 337, 352, *recons*, 20 PECBR 388 (2003)); *State of Oregon, Department of Corrections, Santiam Correctional Institution*, UP-51-05 at 25, 22 PECBR at 396 (citing *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06 at 12, 22 PECBR 212, 223 (2007)).

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

KFACE's ORS 243.672(1)(a) claim, we do not conclude that the District violated subsection (1)(c) when Clark had Thornton's emails searched. Again, we conclude that Clark had Thornton's emails searched primarily because Thornton had *BCC'd* someone other than Clark, not simply because Thornton had communicated with a union representative as KFACE alleged, or because Clark was trying to seek out or limit union communications in general.

Conclusion

For the reasons outlined above, we conclude that the District violated both prongs of ORS 243.672(1)(a) as well as subsection (1)(c) when Director Clark threatened Thornton's job security for her performing protected activity. However, KFACE's claims involving the District's search of Thornton's emails as well as both of KFACE's ORS 243.672(1)(b) claims involving Thornton are dismissed.

3. The District did not violate ORS 243.672(1)(a), (b), or (c) by disciplining Danskin for using the District's email system for her April 23, 2021 email, or by inquiring into who wrote that email.

As noted above, the District's letter of reprimand for Danskin stated, in part, that Danskin violated Board Policy IIBGA-AR and ORS 260.432. KFACE primarily contends that Danskin's April 23, 2021 email did not actually violate ORS 260.432. We appreciate that that statute is not the law that is directly at issue in this case, and that (as both parties have noted) the Board is generally not responsible for enforcing that statute. Nevertheless, we must consider the statute in order to examine the reasonableness of the District's response to Danskin's activity. The District pleads as an affirmative defense that, regardless of any of the alleged violations, the District was compelled by ORS 260.432 to ensure that public employees under its supervision did not violate elections laws by using the District's time and equipment to campaign for or against candidates in an election. (Answer at 5.) It also generally follows that, if Danskin's activity did violate ORS 260.432 or some other law, it cannot also be considered PECBA-protected activity.

Of particular relevance here, ORS 260.432(2) provides,

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

On its face, Danskin's April 23, 2021 email promotes the election of certain candidates and opposes others. Although it is clear that the endorsement reflects the views of the school board committee rather than Danskin's personal views, the email was ultimately issued by Danskin, who is undoubtedly a "public employee." We recognize that ORS 260.432(2) ostensibly limits the statute's prohibition to activities taken "while on the job during working hours," and that Danskin was on a mid-workday break when she sent her email. However, it is unclear whether such a break can nevertheless be considered "on the job during working hours" for purposes of ORS 260.432. We further note that the Oregon Secretary of State's manual addressing ORS 260.432, which was

formally adopted via OAR 165-013-0030 (and which KFACE relies upon in this case), states, "Oregon election law does not specify any amount of work time that may be used before a violation occurs, so a public employee may be found in violation even though they used a minimal amount of work time." (Exh. C-10 at 4.) It also states, "If the work performed falls generally within the job duties of the public employee, the work is performed in an official capacity regardless of the time of day or location. (Exh. C-10 at 5.) Those circumstances generally support the District's position.

KFACE contends that the Board "should find that Danskin had a right to use work email for union business, free from censorship or interference by the District." In support of that argument, KFACE generally relies upon ORS 243.804(5), which states, in relevant part, that "[a]n exclusive representative shall have the right to use the electronic email systems or other similar communication systems of a public employer to communicate with the employees in the bargaining unit regarding * * * [m]atters involving the governance or business of the labor organization." KFACE also argues, "Making an endorsement about school board candidates who hold the power to approve collective bargaining agreements, set working conditions and policies and hire and fire employees is clearly 'union business.'" (KFACE brief at 22-24.)

At this time, we remain unconvinced that the email's political endorsements are "union business" as that term is ordinarily understood, particularly when the term is closely paired with labor organization "governance" as it is in the statute. Although not dispositive, we note that the parties' own CBA distinguishes "Association business" from "espous[ing] a political candidate." (Exh. C-1 at 8.) Separately, above, we have determined that *KFACE* is Danskin's "exclusive representative," not the "UniServ Council committee that generated the recommendations" (as KFACE put it in its brief, at 29) and represents the views of a number of local, affiliated unions with members who presumably work for *other employers* including a local college. We also conclude, as KFACE does, that ORS 243.804(5) must be read in conjunction with ORS 260.432. We further note that a specific provision controls over a general one, and recognize that ORS 243.804(5) does not overtly address political campaigning as ORS 260.432 does. *See Burt v. Blumenauer*, 65 Or App 399, 405, 672 P2d 51 (1983), *aff'd*, 299 Or 55, 699 P2d 168 (1985) (citing ORS 174.020).

KFACE asserts that "it would make no sense to allow the union to post the exact same material on union bulletin boards throughout the District and not allow the distribution through email." It also notes that the Secretary of State's manual addressing ORS 260.432 provides that political advocacy materials can be "posted on union bulletin boards, consistent with collective bargaining agreements, and without violating ORS 260.432," and that "unions may also distribute materials to their members pursuant to their contract." (KFACE brief at 24-27, Exh. C-10 at 7.) As noted above, however, Article 4, Section G of the parties' CBA explicitly states, in part, "Use of school buildings, bulletin board, and main facilities *including e-mail* shall be limited to Association business and *shall not be [used] to espouse a political candidate*, cause, measure, or any religious point of view." (Exh. C-1 at 8, emphasis added.) KFACE also generally glosses over the fact that the District also disciplined Danskin for violating Board Policy IIBGA-AR, which plainly "strictly prohibits" the "[t]ransmission of any communications or materials regarding political campaigns," and warns that violators "shall be subject to discipline." (Exh. R-10 at 4-5.) As noted in the Secretary of State's manual, "Public agencies may have policies that regulate the

use of public property. The policy may be more restrictive than the requirements of ORS 260.432." (Exh. C-10 at 9.) The District's email system is District property. (Exh. R-6.)

Based on the record as a whole, we conclude that, for Danskin's discipline, the District was actually motivated by a desire to comply with ORS 260.432 and its policies, rather than a desire restrain or interfere with protected rights. We also recognize that the law on this issue is ambiguous, and generally appreciate the District's need to regulate its email accounts. Additionally, we take note of Danskin's testimony that, despite her interactions with Director Clark, Danskin still uses her District email account for what she considers "union business." UniServ Consultant Olds also continues to advise KFACE members to use District email for the same purposes as he did before Danskin was disciplined. Relatedly, there is no clear indication that Danskin's discipline would naturally or probably chill others from engaging in protected communications unrelated to promoting a political candidate. As a result, we conclude that the District did not violate ORS 243.672(1)(a), (b), or (c) by disciplining Danskin for her April 23, 2021 email.

As for KFACE's remaining claims, which concern whether Director Clark lawfully inquired into who wrote the April 23, 2021 email, there is no indication that Danskin was disciplined or otherwise penalized or treated differently in connection with that inquiry. KFACE argues that the District had no legitimate reason to inquire about who wrote Danskin's email—a question KFACE characterizes as "irrelevant." (KFACE brief at 23 n 7.) However, the evidence indicates that Clark was primarily concerned about Danskin and other employees spending a significant amount of work time on non-work matters, which is not improper on its own. We also note that, despite Clark's inquiry, Danskin was not actually compelled to provide that information or disciplined for failing to do so. In addition, the District did not even respond to Danskin's email and ask about its original author until well after the school board election took place. Danskin also went on to become KFACE's elected president after the inquiry. In the end, the evidence establishes no clear link between Clark's inquiry and KFACE's ability to serve as the exclusive representative. For those reasons, we also conclude that the District did not violate ORS 243.672(1)(a), (b), or (c) through its inquiry.

Conclusion

For the reasons outlined above, we conclude that the District did not violate ORS 243.672(1)(a), (b), or (c) by disciplining Danskin for her April 23, 2021 email, or by inquiring into who wrote that email.

4. No civil penalties are warranted.

As stated in ORS 243.676(4)(a) and subsection (A) of the same, "The [B]oard may award a civil penalty to any person as a result of an unfair labor practice complaint hearing, in the aggregate amount of up to $1,000 per case, without regard to attorney fees, if * * * [t]he complaint has been affirmed * * * and the [B]oard finds that the person who has committed, or is engaging, in an unfair labor practice has done so repetitively, knowing that the action taken was an unfair practice and took the action disregarding this knowledge, or that the action constituting the unfair labor practice was egregious * * *." In this context, the statutory term "person" can apply to a public employer. ORS 243.676(5). Previously, we have defined the term "egregious" as

"conspicuously bad" and "flagrant." *East County Bargaining Council (David Douglas Education Association) v. David Douglas High School District*, Case No. UP-84-86 at 11, 9 PECBR 9184, 9194 (1986). We have also stated that actions are "egregious" only if they were taken in knowing disregard of the law. *Association of Professors of Southern Oregon State College v. Oregon System of Higher Education and Southern Oregon State College*, Case No. UP-13/118-93 at 16, 15 PECBR 347, 362 (1994) (citing *David Douglas High School District*, UP-84-86 at 13, 9 PECBR at 9196). Further, the thrust of this Board's decisions involving civil penalties is that "egregious" offenses are those that tend to undermine the very nature of the collective bargaining process. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-27-02 at 24, 20 PECBR 571, 594 (2004).

Above, we concluded that the District violated ORS 243.672(1)(a) and (c) when Director Clark threatened Thornton's job security during a single meeting in March 2021 concerning Thornton's BCC'ing over a narrow and specific contract dispute, and have dismissed all of KFACE's other claims. Accordingly, KFACE has not proven that the District "repetitively" committed unfair labor practices. There is also no indication that Clark fully understood Thornton's PECBA rights or that she knew that she was unlawfully threatening her. We also see no other reason why Clark's language should be considered "egregious." Under those circumstances, we conclude that a civil penalty is unwarranted.

5. No posting is warranted.

KFACE has also requested that the Board post notices of the District's violations both physically and electronically. We will generally order an employer to post an official notice when its unlawful actions were: (1) calculated or flagrant; (2) part of a continuing course of illegal conduct; (3) perpetuated by a significant number of the employer's personnel; (4) affected a significant number of bargaining unit members; (5) significantly or potentially impacted the functioning of the exclusive representative; or (6) involved a strike, lockout, or discharge. Not all of those criteria need to be satisfied for us to order a posting. *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05 at 53, 22 PECBR 108, 157 (2007) (citing *Blue Mountain Faculty Association/Oregon Education Association/NEA and John Lamiman v. Blue Mountain Community College*, Case No. UP-22-05 at 110, 21 PECBR 673, 782 (2007); *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82 at 12, 6 PECBR 5590, 5601, *AWOP*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536, 678 P2d 738 (1984). However, in this case, no criterion has been met. Accordingly, we will not order a posting.

## PROPOSED ORDER

1. The District has violated ORS 243.672(1)(a) and (c).

2. The District shall cease and desist from violating ORS 243.672(1)(a) and (c) by threatening Thornton's job security for her performing of protected activity.

3. The remaining claims of the complaint are dismissed.

SIGNED AND ISSUED on December 8, 2022.

Martin Kehoe
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date that objections are received by the Board; "the date of service" of a recommended order means the date that the Board sends or personally serves the recommended order on the parties.) If one party has filed timely objections, but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections. Upon good cause shown, the Board may extend the time for filing objections and cross-objections. Objections and cross-objections must be simultaneously served on all parties of record in the case and proof of such service must be filed with this Board. Objections and cross-objections may be filed by uploading a PDF of the filing through the agency's Case Management System (preferred), which may be accessed at https://apps.oregon.gov/erb/cms/auth. Objections and cross-objections may also be filed by email by attaching the filing as a PDF and sending it to ERB.Filings@Oregon.gov. Objections and cross-objections may also be mailed, faxed, or hand-delivered to the Board. Objections and cross-objections that fail to comply with these requirements shall be deemed invalid and disregarded by the Board in making a final determination in the case. (*See* Board Rules 115-010-0010(10) and (11); 115-010-0090; 115-035-0040; and 115-070-0055.)