BEFORE THE EMPLOYMENT RELATIONS BOARD

OF THE STATE OF OREGON

KLAMATH FALLS ASSOCIATION OF CLASSIFED EMPLOYEES (KFACE), Complainant, vs. KLAMATH FALLS CITY SCHOOLS, Respondent.	Case No. UP-039-21 **COMPLAINANT'S OBJECTIONS TO RECOMMENDED ORDER**

1. INTRODUCTION

Pursuant to OAR 115-010-0090, Complainant objects to certain factual findings as well as the conclusions of law set out in the Recommended Order. As will be discussed below and in more detail in Complainant's Brief in Aid of Oral Argument, the Recommended Order errs by minimizing the impact of the District's unlawful conduct when the District's Human Resource Director (Clark) initiated a search of an Association member's emails because the member had bcc'd the Association president on an Association issue. That conduct must be considered in light of the District's earlier efforts to stifle protected activity, along with Clark's subsequent threat to the Association member that her job would be in jeopardy if she shared any information she learned in her position in the payroll department with the Association other than her own.

In addition, the Recommended Order errs in concluding that the District could lawfully discipline Association Vice-President Danskin for sending information to members about a school board endorsement using work email. Contrary to the Board Agent's finding, who serves on the school board is clearly "union business" within the meaning of ORS 243.804(5), and thus a subject on which the Association can communicate using employer email. Moreover, allowing union communication about political matters does not violate state election law. Finally, to the extent the District and the Board Agent rely on the parties' collective bargaining agreement, the District did not raise that defense – which is essentially a claim that the union waived its right under ORS 243.804(5) and therefore cannot rely on it now.

2. **OBJECTIONS TO FINDINGS OF FACT**

For the most part, the facts in this case are undisputed. Accordingly, while Complainant objects to many of the inferences and legal conclusions drawn by the Board Agent regarding those facts, it only specifically objects to the following paragraphs:

- Paragraph 13. Complainant object to the failure to find that Clark had prior Human Resource experience in the area, interacting with unions representing public employee.

- Paragraph 19. Complainant objects to the suggestion that Clark had no involvement or awareness of the content of the November 4, 2020, letter of expectation.
- Paragraph 32. Complainant objects to the suggestion that Clark's decision to ask the IT department to search Thornton's email was unrelated to Thornton's protected activity. Thornton directed the search because Thornton had "bcc'd" the Association and she wanted to know whether Thornton had done so on other issues. Rather than ask Thornton a direct question, in the same investigatory meeting in which Clark threatened Thornton's job if she shared information with the Association, Clark told Thornton that she was searching Thornton's emails.
- Paragraph 36. Complainant objects to the suggestion that it was unreasonable for Thornton to feel like she was being targeted by Clark when Clark searched her emails, because Thornton knew that the District had the right to monitor emails. While that may technically be true, the District provided no evidence that it had ever conducted a similar search for others. In addition, this inference ignores the fact that Thornton already felt targeted as a result of the Letter of Expectation issued in the fall (and subsequently rescinded) in which she was criticizing for raising a concern about a potential contract violation that resulted in a grievance. *See* ¶18.

- Paragraph 40, 43. These paragraphs refer, in places, to "uniserv" rather than Complainant. Complainant objects to the suggestion that activities by the UniServ Council of which KFACE is a member are not protected activities.
- Paragraph 54. While accurate, Complainant objects to any reliance on Article 4 of the parties' contract, because it was not referenced by the District or plead as an affirmative defense such as a waiver of rights set forth in ORS 243.804.
- Paragraph 55. Complainant objects to the suggestion in this paragraph that because the Association and President Danskin continued to use work emails for Association business, Danskin's testimony about feeling apprehensive and nervous about doing so is unreasonable, irrelevant or somehow invalid.
- Paragraph 58. Complainant objects to the omission in this paragraph of the fact that the District knew that who filed the complaint, when the Association did not.

3. **OBJECTIONS TO CONCLUSIONS OF LAW**

A. Conclusion of Law 2 – ORS 243.672(1)(a)

Complainant objects to the Board Agent's conclusion that Clark's search of Thornton's emails was unrelated to Thornton's protected activity. Just because the District has the right to search employee emails does not mean that its decision to do so is lawful. It is undisputed that Clark asked for the search when she learned that the

Association had been bcc'd on a communication. Clark had no reason to believe that Thornton was sharing truly "confidential" information (such as employee social security numbers), nor did Clark offer this as a rationale at the investigatory meeting on March 24, 2021. Indeed, Calrk never even bothered to ask Thornton if she had bcc'd other emails or why Thornton did so in this case. Had she done so, Clark would have learned that Thornton did so exactly because she was fearful of retaliation by Clark. Of course, in that same meeting, Clark in fact threatened Thornton with discipline if she shared any information or concerns with the Association, except those that affected her personally. Clark's comments and actions must be considered together and in light of prior evidence of anti-union activity. When done so, it is clear that the District violated both the "in the exercise of" and "because of" prong of the ORS 243.672(1)(a) when it searched Thornton's email because of her protected activity. The Board Agent erred in concluding otherwise.

B. Conclusion of Law 2 – ORS 243.672(1)(b)

Complainant objects to the Board Agent's conclusion that the District did not violate ORS 243.672(1)(b) because there is not a "sufficient link" between Thornton's decision to not serve as an Association officer and the District's unlawful conduct. In addition, the Board Agent suggests that the District's conduct is excused because it was only directed at one employee. Finally, the Board Agent suggests that a violation could only be found if the District's unlawful search related to Association elections. All of

these conclusions and arguments are wrong. The evidence is undisputed that Thornton declined to run for Association office because she had been told her job would be in jeopardy if she shared information she learned in her position with the Association. That is a direct and substantial link and sufficient to establish a (1)(b) violation.

C. Conclusion of Law 2 – ORS 243.672(1)(c)

As with the (1)(a) claim, the Board Agent concludes that Clark's email search was lawful because the District had the right to search emails and because Clark was only concerned with the "bcc." For the same reasons discussed above, Complainant objects to this conclusion.

D. Conclusion of Law 3 – Political Activity

Complainant objects to the entirety of Board Agent's analysis of this claim. More specifically:

(1) The analysis of what constitutes activities taken on the job "while on the job during working hours" is flawed. Employees clearly have the right to engage in political activities on public property during non-work time. Discussions about whether a public official is acting in an official capacity is primarily relevant to those salaried employees for whom working hours are more fluid.

(2) The Board Agent's conclusion that political endorsements for school board members are not "union business" is wrong. The school board

is the employer and the body that ultimately directs and ratifies the collective bargaining agreement. How is taking a position about those elections not union business?

(3) The fact that a UniServ Council committee made the endorsements that were communicated by Danskin is irrelevant. The undisputed fact remains that Danskin, in her capacity as KFACE Vice President, communicated the information to members using work emails, in the same way that she communicated about other union business.

(4) Article 4 of the parties' collective bargaining agreement is not a clear waiver of rights provided under ORS 243.804, nor was it raised as a defense in the claim. In addition, the school board's policy cannot trump ORS 243.804(5).

(5) The fact that Danskin and the Association still use District email for certain purposes – and continue to assert the right to communicate about the Association's position on political matters -- is beside the point. Danskin remains tentative and apprehensive about doing so because of the District's actions.

(6) The Board Agent's conclusion that there was nothing improper about the District's efforts to find out who wrote the endorsement is wrong. While it is true that the District did not compel Danskin to answer, as

testified to by Olds and Danskin, the District seemed particularly interested in knowing that information and provided none of the justifications offered now at that time.

E. Conclusion of Law 4 and 5 -- Civil Penalty and Posting

Complainant objects to the Board Agent's conclusion that no civil penalty or posting is warranted because the violation was not repeated or conspicuously bad or flagrant. He based this conclusion on the fact that the threat occurred once in a single meeting with a single person. He also excused Clark's actions by saying that it appears Clark did not understand that she was acting unlawfully. However, threatening an employee's job if she communicates with the Association is a core and basic concept under the PECBA. There is simply no excuse for a Human Resources Director (who had experience elsewhere) to believe that she can threaten the job of an employee for communicating with her union about potential grievances or other concerns. Doing so is flagrantly bad. For the same reasons, the Board Agent erred in not requiring a notice of the District's unlawful conduct to be physically and electronically posted. Again, the violations are flagrant, and significantly impacted the functioning of the exclusive representative by deterring a strong union advocate from running for office.

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4. CONCLUSION

For the reasons stated herein, the Klamath Falls Association of Classified Employees objects to the Recommended Order.

Respectfully submitted this 5th day of January, 2023.

/s/ Margaret S. Olney
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