

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-27-10

(UNFAIR LABOR PRACTICE)

CITY OF PORTLAND PROFESSIONAL)
EMPLOYEES ASSOCIATION,)

Complainant,)

v.)

CITY OF PORTLAND,)

Respondent.)
_____)

RULINGS,
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

On March 14, 2012, this Board heard oral argument on Complainant's objections to a Recommended Order issued on January 26, 2012, by Administrative Law Judge (ALJ) B. Carlton Grew, after a hearing held on January 20, 2011, in Portland, Oregon. The record closed on April 5, 2011, with the submission of the parties' post-hearing briefs.

Michael Tedesco, Tedesco Law Group, Portland, Oregon, represented Complainant at the hearing. Sarah Drescher, Tedesco Law Group, represented Complainant at oral argument.

Matthew V. Farley, Deputy City Attorney, City of Portland, Oregon, represented Respondent.

On May 26, 2010, the City of Portland Professional Employees Association (Association) filed this Complaint alleging that the City of Portland (City) engaged in unfair labor practices by providing paid leave to its witnesses in an arbitration while denying paid leave to the Association's witnesses. Respondent filed its timely Answer on December 21, 2010.

The issues in this case are:

1. Did the City provide paid leave to its witnesses in the Lawrence Frey grievance arbitration while denying paid leave to the Association's witnesses in violation of the "in the exercise" prong of ORS 243.672(1)(a)?

2. Were the City's actions in providing paid leave to its arbitration witnesses while denying paid leave to the Association's witnesses authorized by contract?

3. Would City payment to witnesses called by the Association to testify constitute assistance to the Association in violation of ORS 243.672(1)(b)?

4. If the Association prevails, should the City be required to pay the Association a civil penalty?

RULINGS

At hearing, the City sought to introduce evidence of provisions in collective bargaining agreements between the City and other labor organizations, and evidence of the City's practice regarding arbitrations with those other labor organizations. The City offered this evidence to support its interpretation of the City/Association agreement, but offered no evidence that Association officials knew or should have known of that interpretation or those practices. The ALJ properly excluded this evidence as irrelevant. In its post-hearing brief, the City offered additional reasons for accepting this evidence. The ALJ properly adhered to his ruling on the grounds that the additional reasons for accepting the evidence were not presented while the evidentiary record in the case remained open and while opposing counsel had the opportunity to provide argument in opposition and, if necessary, evidence to rebut this evidence.

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

FINDINGS OF FACT

1. The City is a public employer as defined by ORS 243.650(20). The Association is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of City employees.

2. The Association and the City were parties to a collective bargaining agreement in effect from July 1, 2007 through June 30, 2010.

3. Article 22, Section 3(e) of the collective bargaining agreement provides that "only the Association, with or without the consent of the aggrieved employee(s), shall have the right to seek resolution of the grievance matter through arbitration." Article 22, Section 6 of the agreement states:

"Expenses for the arbitrator's services and the proceedings shall be borne by each party in equal share. However, each party shall be responsible for any other expenses incurred by them."

4. This provision appeared in the parties' first collective bargaining agreement in 1970, and remained substantively unchanged for over 40 years except for the inclusion of a "loser pays"

provision from 1981 to 1986. There is no existing bargaining history relevant to the issues in this case.

5. The City has a formal policy regarding wages for employees called as witnesses in legal proceedings. City Human Resources Administrative Rule (HRAR) 6.10 "Attending Court or other Legal Proceeding Related to Employment" states:

"Any employee who must attend court or other legal proceedings arising from actions taken in the course of employment shall be considered 'at work' and shall receive regular wages. This provision does not apply to an employee who is a plaintiff in a lawsuit or other legal proceeding against the City.^[1] The employee must either be subpoenaed or otherwise released by the director of their bureau or designee to attend court or other legal proceeding. Employees must notify their supervisor of subpoenas related to their jobs or other requests to appear in court or other legal proceeding.

"* * * * *

"Non-Job Related Court or other Legal Proceedings Leave Rule

"When an employee is subpoenaed or directed by a proper authority to appear as a party or witness in any legal proceeding that is not connected with the employee's officially assigned duties, the employee shall be granted leave but must use vacation, compensatory time or leave without pay.

"Whether appearing as a witness or a party in a court or other related legal proceeding not related to the employee's officially assigned duties, the time is not

¹City witness Riffe expressed some uncertainty over the application of the 'plaintiff exception' rule in collective bargaining arbitrations:

"Q. * * * In the Frey case, who was the plaintiff?

"A. Well, the grievant was Larry Frey.

"* * *

"Q. There wasn't one, was there?

"A. I mean, it would say it's Larry Frey. It's the equivalent of a plaintiff.

"Q. Oh, the equivalent of a plaintiff. Larry Frey wasn't a plaintiff, he was a grievant.

"A. Or the union.

"Q. The union?

"A. Be the union.

"Q. And did you believe and do you believe that an arbitration proceeding is a proceeding against the city?

"A. Yes.

"Q. So it's the city belief.

"A. Sure."

considered as work time for Fair Labor Standards Act (FLSA) or any other purpose and is not included in total hours worked per week.”

6. Human Resources Administrator Anna Kanwit is the author of HRAR 6.10. She based the rule on the City’s obligations under the FLSA, and intended that the rule would require the City to pay witnesses when: (1) the employee appears and testifies about actions the employee took in the course of his or her employment; or (2) when the City orders the employee to testify, in which case the employee’s employment for that time is that appearance and testimony. City witnesses testified that the City does not pay employees it does not direct to testify who testify about matters the employee simply “observed at his work” while in the course of his or her employment.

7. The City’s witness pay policy has been applied to employee witnesses in a variety of forums including Towing Board hearings, Civil Service Board hearings, and other legal proceedings, in addition to the 2010 Lawrence Frey grievance arbitration between the parties.

8. The City sent the Association advance copies of HRAR 6.10 several weeks before it was first codified in 2002, and before revisions were implemented in 2004. The Association did not demand to bargain this policy, make objections, or challenge it, although the Association had done so regarding other HRAR policies. City officials believe that the witness pay policy does not contradict the City/Association collective bargaining agreement.

9. The Association has never paid the wages of any City employee witnesses who attended an arbitration.

10. The City and the Association have only arbitrated a few grievances prior to the 2010 Frey grievance within the memory of the witnesses at hearing, and only one between 1996 and 2010. The only prior arbitration about which representatives of the parties recall details was the Dixon arbitration in 2006. The City paid regular wages of two of the witnesses called by the Association in that arbitration, Doug Bloem and Dawn Hottenroth.

11. The City had a salary code “Union Activities,” which was a wage category used by the City for times when Association matters involved the City as well, such as grievance and bargaining meetings. The City also had a salary code “COPPEA Reimbursable Time,” which was time when Association officers engaged in internal union business, such as attending executive board meetings. Pursuant to the collective bargaining agreement, the City initially paid union officers for “COPPEA Reimbursable Time,” and the Association reimbursed the City for that time.² The Association did not reimburse the City for time coded as “Union Activities.”

12. At the time of hearing, Bloem had worked for the City for 24 years. He testified that he attended both days of the Dixon grievance arbitration, on December 11 and 12, 2006. Bloem was

²“COPPEA Reimbursable Time” is the only reference in the record to individuals who may have acted as employees of the Association. There is no evidence that any witness who testified at the Frey arbitration did so in the capacity of an employee of the Association.

the President of the Association at the time and testified as a witness for the Association at the hearing. Bloem was paid by the City for both days. Bloem coded his time for attending the Dixon arbitration as "Union Activities." Bloem informed his supervisor that he would need to attend that two-day arbitration, and his supervisor approved his attendance and his time sheet thereafter. Bloem was never informed that he had incorrectly coded that time.

13. At the time of hearing, Hottenroth had been a City employee for 18 years. She was president of the Association from 1996 through 2000. She was called as a witness for the Association in the Dixon arbitration on December 11, 2006. Like Bloem, Hottenroth received approval from her supervisor to code her time sheet in a way to reflect that her time testifying was compensable by the City. Hottenroth was never informed that she had incorrectly coded that time.

14. Neither Bloem nor Hottenroth were aware of the City's interpretation of Article 22 or the City's application of City policies regarding testimony at arbitration hearings prior to the Frey grievance. Both believed in good faith that they were entitled to paid leave for attending and testifying at arbitration hearings, and acted accordingly.

15. The City contends that these payments were erroneous, and resulted from the inexperience of Bloem and Hottenroth's supervisors.

Frey Arbitration

16. On July 15, 2009, the Association filed a grievance challenging the City's five-day suspension of bargaining unit member Lawrence Frey. The grievance proceeded to arbitration, and the hearing was held on April 29 and 30, 2010.

17. On April 13 and 15, 2010, the Association's legal counsel, Sarah Drescher, subpoenaed seven City employees to testify at the hearing. Drescher subpoenaed unit members Debra Casillas, George Emery, Charlie Ferranti, Karen Hume, Becci Miller, and Mark Peller.³ These individuals were also members of the Association. Drescher also subpoenaed Alfonso Moore, a City Human Resources Business Partner who conducts disciplinary investigations on behalf of the City and conducted the investigation of Frey. Moore is not a bargaining unit member and is exempt from overtime wages under the FLSA.

18. Prior to the hearing, Drescher notified City legal counsel, Catherine Riffe, that she had subpoenaed the employees. She also informed Riffe that she wanted grievant Frey to attend the entire hearing, but had not subpoenaed him. Drescher also informed Riffe that if the City called any of the subpoenaed employees, the Association would not need them to testify separately. Riffe told Drescher that Frey and the other employee witnesses would have to take unpaid or accrued leave.

³Casillas and Miller did not testify or appear at the hearing because Drescher decided that their testimony was not necessary. Ferranti and Hume were directed by the City to attend the hearing as witnesses for the City.

19. On April 20, 2010, Drescher e-mailed Riffe, asking whether the City was going to pay its own witnesses to testify. Drescher stated that if the City was paying its own witnesses, then the City was obligated to pay grievant Frey for his appearance and testimony at the hearing. Drescher cited and quoted Employment Relations Board (ERB) decisions regarding the issue of witness payment.

20. The Frey grievance arbitration took place on April 30, 2010.

21. The City did not subpoena any witnesses. The City, as employer, directed bargaining unit members Hume, Ferranti, and Marty Duitch to appear at the hearing to provide testimony. The City also directed City management employees Mark Greinke, Cloy Swartzendruber, and Nelson Zenzano to appear and testify. The City did not order Moore to appear and testify, but Moore did so in response to the Association's subpoena.

22. The Association did not reimburse its subpoenaed witnesses for any work time they lost or vacation or other leave they used.

23. The City paid the witnesses whom it directed, as employer, to attend the hearing and did not require them to use vacation or other leave to attend. The City did not pay the witnesses who appeared pursuant to the Association's subpoena except for Human Resources employee Moore. The City allowed the subpoenaed unit members to attend the hearing, but required them to use leave time in order to do so. Peller used .25 hours of vacation time, Emery used .5 hours of compensatory time, and Frey took two days of unpaid leave to attend the hearing. The following table summarizes the treatment of the various employee witnesses at the arbitration hearing:

Witness	Unit member?	Subpoena by Association?	Directed by City?	Testify?	Paid by City?	Used Comp Time; Vacation; Other Leave?
Debra Casillas	Yes	Yes	No	No	N/A	N/A
Becci Miller	Yes	Yes	No	No	N/A	N/A
Karen Hume	Yes	Yes	Yes	Yes	Yes	N/A
Charlie Ferranti	Yes	Yes	Yes	Yes	Yes	N/A
George Emery	Yes	Yes	No	Yes	No	Yes .5 hours comp time
Mark Peller	Yes	Yes	No	Yes	No	Yes .25 hours vacation
Marty Duitch	Yes	No	Yes	Yes	Yes	N/A
Alfonzo Moore	No	Yes	No	Yes	Yes	N/A
Mr. Frey (Grievant)	Yes	No – City released him	No	Yes	No	leave without pay
Mark Greinke	No	No	Yes	Yes	Yes	N/A
Cloy Swartzendruber	No	No	Yes	Yes	Yes	N/A
Nelson Zenzano	No	No	Yes	Yes	Yes	N/A

24. Following the hearing, Drescher and Riffe continued to communicate regarding the witness payment issue. On May 12, 2010, Riffe e-mailed Drescher that the City would pay

employees who testified on behalf of the City because “the employee is being directed to attend the hearing as part of their work.” Riffe stated that the City had a “longstanding practice, consistent with [HRAR] rule 6.10 * * * to not pay the grievant for attending the arbitration,” and that the labor agreement between the parties provided that each party was responsible for “expenses” incurred by them.

25. On May 18, 2010, Drescher and Riffe discussed the issue in a telephone call. Drescher threatened to file an unfair labor practice complaint if the City did not agree to provide paid leave to the witnesses who appeared at the hearing pursuant to the Association’s subpoena.

26. The City adhered to its decision to require the Association-subpoenaed unit employees to take leave for their appearance at the arbitration hearing.

27. On July 21, 2010, the arbitrator issued an award upholding the City’s discipline of Frey.⁴ In her decision and award, the arbitrator referred to the testimony of subpoenaed Association unit employee Emery in support of her ruling in favor of the City. The arbitrator noted that “Emery, Duitch and Ferranti reported [Frey’s] behavior to [Frey’s] supervisor.” The arbitrator also stated,

“As Emery further testified, [Frey] would not ‘back off’ and continued to be loud saying that things were stupid and that the right thing wasn’t being done. Another employee, Dat Nguyen, complained to Emery about [Frey’s] behavior. [Frey’s] failure to ‘back off’ or return to his work assignment at the Help Desk resulted in behavior that the City has properly characterized as discourteous, offensive and conduct unbecoming a City employee.”

28. There was no evidence that the City’s interpretation of its policy was inconsistent or in bad faith, or that the City treated employee witnesses in litigation involving labor organizations differently than witnesses in any other litigation.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The City’s provision of paid leave to City arbitration witnesses and Association witness Moore, while denying paid leave to the Association’s other witnesses, did not violate the “in the exercise” prong of ORS 243.672(1)(a).

ORS 243.672(1)(a) makes it an unfair labor practice for an employer to “[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.” The statute creates two violations. An employer violates the statute if it: (1) takes action “because of”

⁴The Arbitrator’s Opinion and Award was entitled “The Arbitration Between City of Portland (The Employer) and City of Portland Professional Employees Association (COPPEA) (The Association), Arbitrator’s Opinion and Award, Larry Frey Grievance.”

employees' exercise of Public Employee Collective Bargaining Act (PECBA) protected rights, or (2) takes action that interferes with employees "in the exercise of protected rights." *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000).

This case focuses on whether the City violated the "in the exercise" prong of the statute. There are two ways an employer may violate this portion of the statute. One violation occurs when we conclude that an employer violated the "because of" portion of the statute. If an employer takes unlawful action "because of" an employee's PECBA-protected activities, the natural and probable effect of the employer's conduct will be to chill the employee's exercise of protected rights. *State Teachers Education Association/OEA/NEA et al and Hurlbert et al v. Willamette Education Service District et al*, Case No. UP-14-99, 19 PECBR 228, 249 (2001), *AWOP*, 188 Or App 112, 70 P3d 902 (2003). An employer may also independently violate the "in the exercise" prong of subsection (1)(a). *Id.* These violations typically occur when an employer makes threatening or coercive statements regarding union activity; they can also occur, however, in the absence of direct threats or coercion. *Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495, 499 (1993), quoting *OPEU and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). Motive is irrelevant to our analysis of an "in the exercise" claim under subsection (1)(a). "[T]he essential issue is only whether, objectively viewed, the action that the employer took under the particular circumstances would chill union members generally in their exercise of protected rights." *Portland Assn. Teachers*, 171 Or App at 624.

This Board has considered whether an employer's witness payment policy violates the "in the exercise" prong of subsection (1)(a) in two cases, *Federation of Oregon Parole and Probation Officers v. Polk County*, Case No. UP-32-86, 9 PECBR 8958 (1986); *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon (TriMet)*, Case No. UP-62-05, 22 PECBR 911, *recons*, 23 PECBR 34 (2009), *aff'd*, 250 Or App 681, ___ P3d ___ (June 27, 2012).⁵

In *Polk County*, the employer's policy required that the employer pay for an employee's "[a]pppearance before a court, legislative committee or judicial or quasi judicial body as a witness in response to a subpoena" when the employee's appearance "is in connection with the employee's officially assigned duties." 9 PECBR at 8959. The union subpoenaed a bargaining unit member to

⁵The subject of pay for witnesses was also one of many addressed in a Consent Order, *International Union of Operating Engineers, Local 701 v. Grant County*, Case No. UP-08-09, 23 PECBR 513, 561-62 (2010). In that case, the union alleged that the county violated the "because of" portion of subsection (1)(a) when it paid management employee witnesses for both travel and appearance time for a hearing in Salem, but paid non-management employee witnesses only for their appearance time, pursuant to a collective bargaining agreement. The parties' collective bargaining agreement required the county to reimburse employees at their hourly rate for time they were required to appear as a witness, but specified that witness fees did not include per diem reimbursement. We noted that under the contract, the county had no obligation to pay employees for travel days and that the record contained no evidence that the county compensated witnesses for travel days when they testified at a different proceeding or on the county's behalf. Accordingly, we concluded that the county did not pay bargaining unit employees differently "because of" their exercise of protected activity in violation of subsection (1)(a).

testify at a representation hearing before this Board; the county refused to pay the bargaining unit member's salary during the time she was under subpoena solely because the employee's testimony "was rendered in a hearing sought by the labor organization." *Id.* at 8961. We noted that testifying at a hearing before this Board was an activity protected under ORS 243.662.⁶ We concluded that the county's failure to pay the bargaining unit member for time spent testifying violated the "in the exercise" portion of subsection (1)(a). *Id.* at 8961.

In *TriMet*, the employer's policy specified that witnesses who testified for the employer at grievance arbitrations would receive overtime pay for the time spent testifying. Bargaining unit members who testified for the union were required to take leave or unpaid time from work to testify, however. 22 PECBR at 949. We held that employees have a "PECBA-guaranteed right to participate in a contractual grievance arbitration." *Id.* at 950. Because the ability to testify freely was essential to the exercise of this right, we concluded that the employer's policy had "the natural and probable effect of unduly interfering with the employees' testimony. Both an employee's decision to testify and the content of the testimony will reasonably be influenced by the realization that the employee may pay a price for his or her testimony." *Id.* Accordingly, we held that the employer's witness compensation policy violated the "in the exercise" portion of subsection (1)(a).

Not all actions taken by an employer that union members assert chill their rights violate the "in the exercise" clause of subsection (1)(a). We distinguish between the "possible" and "natural and probable" effect of an employer's actions in determining whether a violation of the "in the exercise" prong of subsection (1)(a) has occurred. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 789 (1998), citing *OSEA v. Central Point School District*, Case No. UP-1-88, 10 PECBR 532, 538 (1988). For example, in *Central Point*, we concluded that a school district's lawful promotion of a bargaining unit member may have the *possible* effect of chilling protected activity, this was not the *natural and probable* effect of the employer's action and did not violate subsection (1)(e).

The facts here differ from those in *Polk County*, 9 PECBR 8958 and *TriMet*, 22 PECBR 911. All witnesses to City legal proceedings are treated in the same fashion—they receive pay for their testimony if, in the City's opinion, the proceeding arises "from actions taken in the course of [the individual's] employment [with the City]." Under the City's policy, the amount of pay a witness receives does not depend on whether a witnesses' testimony is favorable to the employer or whether the witness is testifying in a legal action initiated by a union. Under these circumstances, the City's policy may have a *possible* effect of discouraging bargaining unit members from participating in protected activities such as grievance arbitrations, but does not have the *natural and probable* effect of doing so. Accordingly, the City did not violate the "in the exercise" prong of subsection (1)(a)

⁶ORS 243.662 provides that "[p]ublic 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."

when it provided paid leave to City witnesses in the Frey arbitration while denying paid leave to the Association witnesses. We will dismiss the complaint.⁷

ORDER

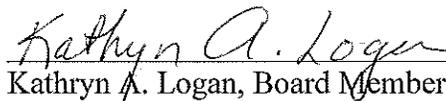
The Complaint is dismissed.

DATED this 5 day of September 2012.



Susan Rossiter, Chair

*Jason M. Weyand, Board Member



Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Member Weyand Dissenting:

The majority finds no violation. After careful review of the record and this Board's prior rulings, I disagree.

We have twice ruled that testifying in union-related hearings is protected activity and that an employer's disparate compensation of union and employer witnesses has the natural and probable effect of unduly interfering with employee testimony. First, in *Polk County*, we ruled that testifying in a Board proceeding was activity protected under ORS 243.662, and concluded that the county's failure to pay a bargaining unit member for time spent testifying while paying the employer's witness tended to "interfere with, restrain, or coerce employees in the exercise of rights protected by ORS 243.662." *Polk County* at 8961.

We reached the same result in *TriMet*, 22 PECBR 911, but this time in the context of testimony during a grievance arbitration. In support of this decision, we stated:

"Although the circumstances in *Polk County* are different from those presented here, we conclude that the principle involved is the same. Just as

⁷Because of our disposition of the Complaint, we need not address the other defenses offered by the City.

employees have a PECBA-guaranteed right to participate in a hearing before this Board, they also have a PECBA-guaranteed right to participate in a contractual grievance arbitration. *See Central Education Association and Vilches v. Central School District 13J*, UP-74-95, 17 PECBR 54 (1996), *order modified on recons*, 17 PECBR 93 (1997), *aff'd* 155 Or App 92, 962 P2d 763 (1998) (asserting rights under a collective bargaining agreement is protected activity). Essential to exercising this right is the ability to testify freely. An employer policy that pays bargaining unit members a different amount depending on whether their testimony is favorable to the employer has the natural and probable effect of unduly interfering with the employees' testimony. *Both an employee's decision to testify and the content of the testimony will reasonably be influenced by the realization that the employee may pay a price for his or her testimony.* * * * *We conclude that the disparate payments TriMet made to witnesses at the Doe arbitration violate the 'in the exercise' prong of subsection (1)(a).*" (Emphasis added.) *Id.* at 950.

I see no meaningful distinction between our holdings in *Polk County* and *TriMet* and the issue presented in this matter. The employees called as witnesses by the Association engaged in protected activity when they testified at the Frey arbitration. The City refused to pay Association witnesses,⁸ but did pay all witnesses called by the City in support of its case. In keeping with our prior precedent, I conclude that the City's disparate payment of witnesses violates the "in the exercise" prong of ORS 243.672(1)(a).

The City's disparate payment of witnesses will have the natural and probable effect of chilling bargaining unit members in their exercise of a wide variety of protected activities. Most notably, the City's practice will likely discourage Frye and other bargaining unit employees from filing grievances in order to avoid the significant economic cost they would face should those grievances proceed to arbitration.

In the Frey arbitration, the Association contested a five-day disciplinary suspension on behalf of the grievant. The City refused to grant Frey paid leave to attend and testify at the hearing. Instead, the City forced him to choose between using two days of accrued leave and taking two days of leave without pay. This resulted in a significant economic cost. Going forward, Frey and other bargaining unit members who become aware of a contract violation will know that if a grievance is filed and it goes to arbitration, they will be subjected to a similar economic cost should they testify during the Association's case.⁹

⁸The City did pay non-bargaining unit witness Moore, who was subpoenaed by the Association. However, Moore was a Human Resources employee who was essentially an adverse witness to Frye. The City's payment of Moore does not negate the likely chilling impact on the bargaining unit. To the contrary, the City's decision to pay the only non-bargaining unit member subpoenaed by the Association will likely have the opposite effect.

⁹The bargaining unit is relatively small, and several witnesses in the unit were called as witnesses by the City or the Association. As a result, it is reasonable to infer knowledge of the disparate payment to a large portion of the bargaining unit, if not the entire unit.

The end result is that employees will be forced to choose between paying a financial cost to fight what they believe to be a contract violation, or avoiding that cost by ignoring the violation. Many rational employees will choose to accept or ignore the violation rather than utilizing the grievance procedure, particularly if the potential economic benefit to be derived from the grievance would not significantly outweigh the value of the time they might have to spend testifying or attending the hearing.

In addition to the impact on potential grievants, we must also consider the likely chilling effect on bargaining unit members whose testimony is needed to either support a grievance or rebut an affirmative defense by the employer. If these prospective witnesses know that they will be forced to take leave without pay or accrued leave to testify, they are going to be less willing to do so. This will be especially true in grievances where the potential witness has no direct financial interest. Employees are also likely to be chilled in their willingness to testify openly and candidly by the not-so-subtle message that is sent by the City's disparate payment of witnesses. If you stand with the City, you get paid for your testimony. If you stand with the Association, you go unpaid. This creates a tense, adversarial atmosphere and could reasonably cause employees to fear retaliation for participating in the grievance process.

My colleagues disagree, concluding that bargaining unit employees will not reasonably be chilled by the City's disparate compensation of witnesses. They reach this conclusion because they find that the City made the decision to not pay Association witnesses based upon its interpretation of HRAR 6.10 and not a desire to interfere with PECBA-protected rights.

I disagree with this ruling for several reasons. First, this approach focuses on the reasons the City engaged in disparate compensation of witnesses. Thus, it appears to be inconsistent with our oft stated rule that the employer's motive is irrelevant to our analysis on an independent "in the exercise of" claim under (1)(a). See *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733 (2004); *Oregon Public Employees Union and Termine v. Malheur County, Commissioner Cox, Commissioner Hammack and Sheriff Mallea*, Case No. UP-47-87, 10 PECBR 514 (1988); *Spray Education Association and Short v. Spray School District No. 1*, Case No. UP-91-87, 11 PECBR 201 (1989). This disregard for employer motive has not only been consistently stated in our opinions, but has also been repeatedly approved of by the Court of Appeals. See *Portland Assn. Teachers*, 171 Or App at 623-24; *Wy'East Education Association, East County Bargaining Council and Oregon Education Association v. Oregon Trail School District No. 46*, 244 Or App 194, 208, 260 P3d 626 (2011). This line of cases makes it clear that the appropriate focus of our inquiry is on the likely impact to the employees, and not on the reasons the employer chose to act as it did. The City's belief or claim that it complied with its policy does little or nothing to reduce the likely chilling effect.

Second, based on the facts, I disagree with the majority's conclusion that the City did not base its payment of witnesses upon whose position the witness testified in favor of. Bargaining unit members called by the City to support the case for discipline against Frey were paid for the time they spent testifying. Bargaining unit members called by the Association to testify in favor of the grievance did not get paid. The only Association subpoenaed witness that did receive pay was Human Resources employee Moore, who was called as an adverse witness by the Association and who supported the City's position in the arbitration.

Regardless of its reasons for the disparate compensation of bargaining unit members, the City's alleged compliance with HRAR 6.10 does not change the fact that the manner in which it applied the policy in the Frey arbitration will have the natural and probable effect of chilling bargaining unit members' willingness to engage in protected activities. The City cannot evade a (1)(a) claim merely by demonstrating compliance with a policy that does not violate the PECBA on its face. If we allowed such a defense, we would create a significant loophole in the statute that would severely undermine this important protection. Accordingly, this Board has held several times that employer actions taken under the color of such policies violate the PECBA if done in a manner that would reasonably chill protected activities. For example, in *AFSCME Local 189 v. City of Portland*, 22 PECBR 752 (2008), we found that the City violated ORS 243.672(1)(a) in its treatment of an AFSCME steward. In reaching that decision, we rejected the City's assertion that it was entitled to discipline the steward under its policies prohibiting gossip and requiring employees to follow the chain of command. Neither of these policies expressly prohibited union activities, but we held that while the employer was entitled to adopt rules to maintain civility in the workplace, under the PECBA "those rules cannot be applied in a way that prohibits protected union activity." *City of Portland* at 791.

We further explained the interplay between facially neutral employer policies and the protections of ORS 243.672(1)(a):

"An employer policy can violate subsection (1)(a) even if it does not explicitly prohibit union activity. A policy may be unlawful if employees could reasonably read it as prohibiting union activity, if it is adopted in response to union activity, or if, as here, it is applied to prohibit or punish the exercise of protected activity. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)." *City of Portland* at 790 n 9.

This holding is consistent with our approach in similar cases over the past two decades. See also *Lebanon Education Association/OEA v. Lebanon Community School District*, 22 PECBR 323 (2008) (overturning discipline of a union president under facially neutral policy requiring teachers to communicate with the school board only through the superintendent); *Roseburg Education Association v. Douglas County School District*, Case No. UP-16-96, 16 PECBR 868 (1996) (finding a (1)(a) violation where employee was given a "letter of concern" for allegedly violating the employer's policy requiring positive communications between staff because the manner in which the employer implemented the policy interfered with protected union activity).

Even assuming that the City's compliance with its policy is in fact relevant, after reviewing the record, I conclude that the City violated the terms of the policy in the Frey arbitration. Broken down, this policy requires that the following four basic elements be present in order for employees to receive compensation: (1) that the employees be required to attend court or "other legal proceedings;" (2) that the proceedings arise from actions taken in the course of employment; (3) that the employee not be a plaintiff in a lawsuit or other legal proceeding against the City; and (4) that the employee must be subpoenaed or otherwise released by the employer to attend the proceeding.

There is no dispute that the witnesses at issue were either released by the employer (in the case of the grievant) or subpoenaed to attend (in the case of the other two unpaid bargaining unit

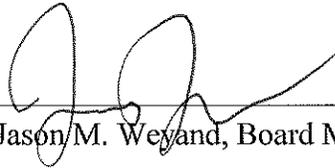
members). And an arbitration hearing is clearly a legal proceeding, so requirements 1 and 4 are met. Further, there should be no argument that the witnesses or grievant were “plaintiffs” in a legal action against the City. The collective bargaining agreement is between the City and the Association, and to the extent that there is a “plaintiff” in arbitration hearings under the contract, the plaintiff would be the Association. Thus, the third requirement is not in dispute, leaving only the question of whether the proceeding arose from actions taken in the course of employment.

The grievant in the arbitration was disciplined for conduct on the job and the witnesses testified about matters they observed and statements they made while doing their jobs. If the witnesses did not have jobs at the City, they would not have had anything relevant to testify about. As a result, they clearly were testifying about actions or events that arose in the course of their employment, and per the City’s own policy, the Association’s witnesses should have been granted paid leave.

Finally, in issuing our orders, we must be ever mindful of the public policy goals established by the Legislature when it enacted the PECBA. ORS 243.656 sets forth several policy statements that are particularly relevant to this dispute, and makes it clear that one of the primary purposes of the PECBA is to encourage peaceful and fair adjustments of disputes between public employees and public employers. This Board, in keeping with the state and federal courts, has for decades recognized a strong preference for binding arbitration as the primary means of dispute resolution between employees and employers. The rationale for this preference is perhaps best understood by referring to the series of United States Supreme Court cases on the important role of labor arbitrations collectively known as the *Steelworkers’* trilogy. *United Steelworkers of America v. American Mfg. Co.*, 363 US 564, 80 S. Ct. 1343, 4L. Ed. 2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 US 574, 80 S. Ct. 1347, 4L. Ed. 2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 US 593, 80 S. Ct. 1358, 4L. Ed. 2d 1424 (1960). In 1978, the Court of Appeals explicitly adopted the views expressed by these cases in *Corvallis Sch. Dist. v. Corvallis Education Assn.*, 35 Or App 531, 535, 581 P2d 972 (1978).

Inherent in this preference for arbitration of disputes and PECBA’s policy statement is the understanding that arbitration of grievances benefits employees, the employer, and the public at large. We should be mindful of the importance of this Board’s role in making sure that our decisions promote rather than inhibit the effectiveness of the grievance procedures agreed to by parties. For a grievance procedure to be effective, both sides must be able to participate fully without undue restraint. This is the core reason why we have previously held that testifying at union-related proceedings is a protected activity under the PECBA. Allowing the City to impose an economic restraint on the employees who testified for the Association reinforces employee fears of retaliation and creates a financial disincentive to participate in the grievance procedure. This will inevitably lead to the chilling effect described above and will significantly undermine the value of the grievance procedure. This is not consistent with the policies and purposes of the PECBA or our prior precedent.

For all of the reasons stated above, I must respectfully dissent from my colleagues. I would hold that the City did violate ORS 243.672(1)(a) by interfering with, restraining and coercing members of the Association in the exercise of their rights under the PECBA.¹⁰



*Jason/M. Weyand, Board Member

¹⁰I do not mean to imply that an employer cannot insist on some reasonable limits on how and when employees are compensated for testimony at grievance arbitrations or other union-related hearings. Both parties to such a hearing can and should work collaboratively with the other to minimize the disruption to the workplace and the cost to the employer. For example, parties can agree to limit the number of people in the hearing room for the hearing on paid time, discuss stipulations to avoid unnecessary or repetitive testimony, agree to allow witnesses to testify remotely to avoid travel time, or schedule witness testimony so that multiple people are not waiting outside the hearing room to testify while on paid time.