

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-043-11

(UNFAIR LABOR PRACTICE)

ASSOCIATION OF ENGINEERING)	
EMPLOYEES OF OREGON,)	
)	
Complainant,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND ORDER
STATE OF OREGON, DEPARTMENT)	
OF ADMINISTRATIVE SERVICES,)	
)	
Respondent.)	
)	

This matter was submitted directly to the Board after the parties agreed to waive a hearing and agreed to stipulated facts and joint exhibits. The record closed on December 17, 2012, following receipt of the parties' briefs.

Julie Falender, Attorney at Law, Tedesco Law Group, Portland, Oregon, represented Complainant.

Tessa M. Sugahara, Attorney-in-Charge, Labor and Employment Section, Oregon Department of Justice, Salem, Oregon, represented Respondent.

On July 19, 2011, the Association of Engineering Employees of Oregon (Association) filed this unfair labor practice complaint alleging that the State of Oregon, Department of Administrative Services (State) violated ORS 243.672(1)(a), (b) and (c) as a result of certain actions taken by the State during negotiations for a successor collective bargaining agreement. The Association later amended its complaint, adding allegations that the State violated ORS 243.672(1)(e) and withdrawing certain allegations. On March 1, 2013, the parties were notified that the matter was being held in abeyance until a third Board member was appointed, confirmed, and had time to review the matter. On May 30, the Board notified the parties that an Order would be issued by mid-June.

The issues presented are:

1. Did the State violate ORS 243.672(1)(e) when it unilaterally changed the *status quo* with regard to the use of the State's e-mail system during the hiatus period?¹
2. Did the State's directives prohibiting the use of the State e-mail system for Association-related communications during the hiatus period violate ORS 243.672(1)(a) and (1)(c)?
3. Did the State violate ORS 243.672(1)(b) or (1)(e) when, during the hiatus period, it decided to cease providing the Association with copies of disciplinary documents issued to bargaining unit members?
4. Did the State violate ORS 243.672(1)(e) when it ceased granting Association leave during the hiatus period?
5. If the State violated ORS 243.672(1)(a), (b), (c) or (e), what is the appropriate remedy?

For the reasons set forth below, we conclude that the State violated ORS 243.672(1)(e) when during the hiatus period it decided to: (1) prohibit the use of the State e-mail system for Association-related communications as previously allowed under Article 71 of the expired contract; (2) prohibit managers from providing copies of disciplinary documents to the Association as required by Article 24, Section 1 of the expired contract; and (3) prohibit managers from granting or extending Association leave under Article 9, Section 6 of the expired contract. In addition, the State violated ORS 243.672(1)(a) when it prohibited the use of its e-mail system for any Association-related communications. Finally, the State's decision to cease providing copies of disciplinary documents to the Association did not violate ORS 243.672(1)(b). Because of our disposition of these claims, we do not address whether the State violated ORS 243.672(1)(c).

RULINGS

On December 17, 2012, the State submitted its 40-page closing brief, in violation of OAR 115-010-0077(3). ("Briefs shall not exceed 30 pages, unless expressly permitted by the Board or its agent.") On December 18, the Association objected to the length of the brief and asked the Board to disregard it. The State subsequently submitted a Post-Filing Motion to Request Brief in Excess of 30 Pages. We granted the Association's objection in part by striking pages 31 through 40 of the State's brief, and denied the State's Motion in its entirety. The stricken pages were not considered in reaching our decision, although they remain part of the record.

¹The "hiatus period" refers to the time after the expiration of the parties' collective bargaining agreement and before the completion of the parties' bargaining obligation for a new agreement under the PECBA. *Teamsters Local 223 v. City of Medford*, Case No. UP-053-10, 24 PECBR 169 (2011), *recons*, 24 PECBR 225 (2011).

FINDINGS OF FACT

We adopt the following findings of fact from the parties' stipulation of facts and joint exhibits:

1. The Association is a labor organization that represents certain employees of the State who work in three agencies: the Oregon Department of Transportation, the Oregon Department of Forestry, and the Oregon Parks and Recreation Department (Agencies).

2. The State of Oregon, Department of Administrative Services (DAS) is the exclusive bargaining representative for the State, which is a public employer.

3. The Association and the State were parties to a collective bargaining agreement that was effective from July 1, 2009, through June 30, 2011.

4. The parties were in negotiations for a successor agreement when the contract expired on June 30, 2011, but did not reach an agreement before expiration.

5. In the past, the parties had agreed to extend the existing collective bargaining agreement after the expiration date provided for in the contract.

DAS Guidelines

6. On June 29, 2011, DAS Director Michael Jordan sent a memorandum to all agency directors, human resource directors and human resource managers regarding the upcoming expiration of the collective bargaining agreements between the State and various unions, including the Association. This memorandum stated that:

"Labor contract negotiations continue to move forward with all parties engaged at the bargaining tables. Representatives for the State and AFSCME and SEIU are currently in mediation which is the second phase of the negotiations process in the [PECBA]. The parties have been engaged in mediation with the Employment Relations Board's State Conciliator for multiple sessions and are continuing to meet to reach resolution.

"The attached guidelines address one immediate issue that State Government must address, which is the expiration of the current collective bargaining agreements and the fact they are not being extended. Importantly, the State, as the employer, is required to maintain in effect the same wages, hours and mandatory terms and conditions of employment for represented bargaining unit employees that existed at the time the contract expired until the entire bargaining process is concluded. That process will not conclude until at least the end of July."

7. Attached to the memorandum was a document entitled "General Guidelines for Employer Representatives when a Collective Bargaining Agreement Expires." (DAS Guidelines). The DAS Guidelines specifically enumerated certain subjects that would not be

continued once the agreements expired because DAS believed them to be permissive for bargaining. The DAS Guidelines stated in relevant part that:

“Current situation: As already reported by the news media, the State has advised the multiple unions representing State employees that when the current collective bargaining agreements expire, they will not be extended. While that means the agreements are no longer in force it also triggers a legal doctrine commonly referred to ‘as the status quo period.’ The legal effect of this doctrine is that the State must maintain certain conditions of employment for a period of time that runs until the dispute resolution process is at a point where the State would implement the terms of a Final Offer or, in the case of non-strike units, an arbitrator made an award.

“Status quo obligations: During the status quo period, an employer is required to maintain in effect certain terms of employment (e.g. wages, hours of work) and other terms and conditions of employment that are called ‘mandatory subjects’ in the context of bargaining. The status quo is generally going to be what the expired contract provided for regarding that mandatory subject.

“If a subject is not mandatory it is legally described as ‘permissive’ and the State is not required to maintain these terms even though they may be found in an expired collective bargaining agreement.

“This is a challenging and complex area of labor law that is subject to interpretation and application of various tests. For purposes of general guidance some examples are listed below. It is important to review both sections. Mandatory areas will remain while those under the permissive section - even if found in an expired contract - will not be continued after the agreements expire.

“* * * * *

“Permissive subjects: These are some of the items that will *not be* continued once the agreements expire on June 30, 2011. Set out below are specific provisions in some or all of the current agreements that will not continue during the status quo period of time. [Emphasis in original.]

“(1) Access to state email systems – There would be no use of the State’s email system by union staff or state employees holding positions in the union. If examples are found they need to be reported to the agency HR unit.

“* * * * *

“(3) Notice to the unions of Corrective Action, Discipline and Dismissal - Personnel decisions will continue to be made but the notice to the unions, where required by an expired contract, is discontinued.

“(4) Leaves of Absence for Union Business - - Those employees already on leave will be allowed to continue under continuing terms and conditions of employment for employees, but no new leaves or extensions will be granted during the status quo period.” (Emphases in original.)

8. On June 30, 2011, DAS Labor Relations Manager Glenn West sent a letter advising Association Co-Executive Director Dawn Nicholson that the expired agreement would not be extended by the State. The letter also discussed the State’s *status quo* obligations, and included a copy of the DAS Guidelines.

Use of the State E-Mail System

9. Article 71 of the expired agreement allowed the Association and its represented employees to utilize the State e-mail system, subject to certain conditions. Article 71 provided that:

“E-Mail Messaging System. Association representatives and AEE-represented employees may use an Agency’s e-mail messaging system to communicate about Association business provided that all of the following conditions are followed:

- “1. Use shall not contain false, unlawful, offensive or derogatory statements against any person, organization or group of persons. Statements shall not contain profanity, vulgarity, sexual content, character slurs, threats or threats of violence. The content of the e-mail shall not contain rude or hostile references to race, marital status, age, gender, sexual orientation, religious or political beliefs, national origin, health or disability.
- “2. Except as modified by this Article, Agency shall have the right to control its e-mail system, its uses or information.
- “3. The Agency reserves the right to trace, review, audit, access, intercept, recover or monitor use of its e-mail system without notice.
- “4. Use of the e-mail system will not adversely affect the use of or hinder the performance of an Agency’s computer system for Agency business.
- “5. E-mail messages sent simultaneously to more than five (5) people shall be no more than approximately one (1) page and in plain or rich text format. Such group e-mails shall not include attachments or contain graphics (except for the Association logo). Recipients of such group e-mails shall not use the ‘Reply All’ function.
- “6. E-mail usage shall comply with Agency policies applicable to all users such as protection of confidential information and security of equipment.
- “7. The Agency will not incur any additional costs for e-mail usage including printing.

- “8. The Union will hold the Employer and Agency harmless against any lawsuits, claims, complaints or other legal or administrative actions where action is taken against the Union or its agents (including Association staff, Association officers and Key Members) regarding any communications or effect [*sic*] any communications that are a direct result of the use of e-mail under this Agreement.
- “9. Such e-mail communications shall only be between AEE-represented employees and/or managers, within their respective Agency, and the Association. However, for purposes of negotiations, bargaining team members may communicate across agencies. Additionally, DAS[-] recognized joint multi-agency labor/management committee members and the Association Board of Directors may communicate across agencies. The Association shall provide the names of its Board of Directors to DAS.
- “10. Use of Agency’s e-mail system shall be on employee’s non-paid time.
- “11. E-mail communications may include links to the Association website, which may be accessed on non-paid time.
- “12. Nothing shall prohibit an employee from forwarding an e-mail message to his/her home computer.
- “13. E-mail shall not be used to lobby, solicit, recruit, persuade for or against any political candidate, ballot measure, legislative bill or law, or to initiate or coordinate strikes, walkouts, work stoppages, or activities that violate the Contract.
- “14. Should the Employer believe that the Association’s staff has violated this Letter of Agreement, the Employer will notify the Association’s Executive Director, in writing, within thirty (30) calendar days from the date of the alleged misuse of an Agency’s e-mail system. The Executive Director shall respond, in writing, within thirty (30) days and include the action that will be taken to enforce the Letter of Agreement. If, despite these actions, the violation continues, the Employer will notify the Association, in writing, within thirty (30) calendar days that the alleged misuse may be arbitrated.”

10. On July 7, 2011, Parks and Recreation Department Director Tim Wood sent out a memorandum to all employees of his agency concerning the use of e-mail for union business during the *status quo* period. The messages stated that:

“As the collective bargaining process continues there is a change concerning use of agency’s e-mail systems. I want to provide clear direction to all parties on the use of agency e-mail systems for union business. **At this time, and until further notice, union business is not to be conducted through the state’s e-mail systems.** [Emphasis in original.]

“This means no messages will be sent by or on behalf of the union through the agency’s e-mail system, whether the communication is from union staff or agency staff holding union positions. Any agency staff receiving a message inadvertently sent concerning union business must advise your immediate supervisor of the communication without responding to it.

“The use of the agency’s e-mail system by staff for non-work related purposes remains in place. That means your internet access (whether for various acceptable sites or to a private email account) is subject to existing agency policy. If you have any questions concerning the scope of such permitted use it is important to contact Human Resources Manager, Tasha Petersen, to get clarification before you use the system. Our goal is to have the policy followed and avoid any personnel issues concerning such use.

“Thank you for your attention to this important matter.”

11. On July 8, 2011, Department of Transportation Deputy Director Clyde Saiki sent out an identical memorandum, except that it did not contain a specific Human Resources contact in the message. Deputy State Forester Paul Bell also sent out an e-mail that same day containing the same information to all staff in the Department of Forestry. The use limitations applied to all employees, including the Association bargaining unit members and bargaining unit employees represented by other unions.

12. Each agency with Association-represented employees has a written policy allowing “limited, incidental personal use” of the State’s e-mail and internet system. Use for union activities is allowed per the applicable contract. All exceptions for non-State business allowed under these policies continued during the hiatus period, other than the “union-business” exception.

13. In previous years, the Association has sent bargaining updates to members via their State e-mail addresses.

14. The Association posted updates on bargaining for the 2011-13 contract on the Association website that was accessible to its members who had voluntarily registered for a username and password on the “Members portion” of its public website, including during the hiatus period. In July 2011, approximately half of the Association members had registered a username and password on this website.

15. The Association’s membership application requests an employee’s work and personal e-mail address. Although voluntary, approximately half of the Association’s members provided a personal e-mail address. The Association is able to obtain the work e-mail addresses of all bargaining unit employees through the State address book, and the Association maintains a database of personal and work e-mail addresses of its members.

16. During the period of time following the contract's expiration, the State did not impose any limitations or restrictions on communications between employees and the Association through telephones or other media (e.g. telephone, inter or intra-campus or agency mail). Only use of the State e-mail system was suspended.

Notice of Corrective Actions, Disciplinary Actions and Dismissals

17. Article 24, Section 1 of the expired contract states:

“The Employer and the Association agree that the conduct of employees must reflect the best interest of the public. Conduct shall be measured by the employee's performance, safety record and attitude. Disciplinary action shall follow the principles of progressive discipline when appropriate.

“Regular status FLSA non-exempt employees reprimanded in writing, reduced in pay, demoted, suspended without pay or terminated and regular status FLSA exempt employees reprimanded in writing, suspended without pay in full week increments, demoted or terminated will be for just cause.

“Every letter of reprimand, suspension, demotion, reduction in pay or dismissal for disciplinary reasons given to any employee shall have attached or shall include a statement that the employee has fifteen (15) calendar days from the effective date of the action in which to exercise the right of appeal. Such letters and statements will be hand delivered and/or sent by certified return-receipt mail to the employee, except letters of reprimand, and a copy sent to the Association.”

18. From July 1, 2011 through July 28, 2011, the time in which the State was operating under the DAS Guidelines, the State did not issue any notices of suspension, demotion, reduction in pay or dismissal to Association members.

Leaves of Absence for Association Business

19. Article 9, Section 6 of the expired contract provides for leave to the Association President and 1st Vice President for Association business. This section provides that:

“The Employer recognizes the right of the Association to conduct its own affairs and that the Association's President and 1st Vice President may desire to be easily accessible to the Employer, the Agency and the employees alike. To maintain this accessibility, the Association's President and 1st Vice President shall be allowed up to one hundred (100) hours a year (each) of vacation, compensatory time, or leave without pay to conduct this business, when requested by the individual employee. When assistance is requested by the Employer, time required for such assistance will not be considered to be leave.”

20. On June 13, 2011, Association 1st Vice President Jody Frasier notified his supervisor of leave to travel and participate in collective bargaining for the dates of July 18, 19, 27 and 28, 2011. This leave request was not denied or subsequently rescinded by the State. Mr. Frasier's timesheet for July 2011, which he and his supervisor signed, allocated 28 hours of leave on those dates under payroll code "UBB," which is code for paid leave for participating in collective bargaining sessions.

21. Association President Jordon Orser was also credited with 24 hours of union leave for participating in Association business on July 19, 22 and 28, 2011. Those hours were allocated under payroll code "UBB," and the timesheets were signed by Mr. Orser and his supervisor.

22. Under Article 9, Section 6, the President and 1st Vice President of the Association are not required to provide management with notice of the need to take leave for Association activities. However, Association officers often provided management with such notice as a courtesy. Under the terms of the expired agreement, agency management could not deny Association leave.

Tentative Agreement

23. The parties signed a tentative agreement (TA) for a successor collective bargaining agreement on July 28, 2011. Contemporaneously, the State agreed to extend the provisions of the expired agreement until Association members had the opportunity to vote on the TA. By extending the agreement, the State effectively ceased enforcement of the DAS Guidelines.

CONCLUSIONS OF LAW

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

ORS 243.672(1)(e) Allegations

We first address the Association's claims that the State violated ORS 243.672(1)(e) when, during the hiatus period, it unilaterally ceased complying with the *status quo* established by three articles in the expired contract between the parties: (1) Article 71, which allowed the Association and its members to utilize the State's e-mail system to communicate about Association business, subject to certain agreed upon limitations; (2) Article 24, Section 1, which in relevant part required the State to provide the Association with copies of disciplinary documents for bargaining unit members; and (3) Article 9, Section 6, which allowed the Association President and 1st Vice President to utilize vacation leave, compensatory time, or leave without pay to attend to Association business. The Association contends that because these three articles concern mandatory subjects for bargaining, the State's unilateral decision to change the *status quo* before the completion of bargaining violated its duty to bargain in good faith with the Association under subsection (1)(e). The State responds that these three articles concern permissive subjects of bargaining and therefore, its unilateral actions were lawful.

Standards for Decision: ORS 243.672(1)(e)

ORS 243.672(1)(e) provides that it is an unfair labor practice for a public employer or its designated representative to “[r]efuse to bargain collectively in good faith with the exclusive representative” of its employees. In turn, collective bargaining is defined as

“the performance of the mutual obligation of a public employer and the representative of its employees to meet at reasonable times and confer in good faith with respect to employment relations for the purpose of negotiations concerning mandatory subjects of bargaining, to meet and confer in good faith in accordance with law with respect to any dispute concerning the interpretation or application of a collective bargaining agreement, and to execute written contracts incorporating agreements that have been reached on behalf of the public employer and the employees in the bargaining unit covered by such negotiations.”
ORS 243.650(4).

This Board has long recognized that an employer commits a *per se* violation of ORS 243.672(1)(e) if it makes a unilateral change in the *status quo* concerning a mandatory subject of bargaining without first completing its bargaining obligation under the PECBA. *See Assn. of Oregon Corrections Emp. v. State of Oregon*, 353 Or 170, 177, 295 P3d 38 (2013) (*AOCE*), citing to *Wasco County v. AFSCME*, 46 Or App 859, 613 P2d 1067 (1980) (upholding the Board’s authority to adopt the *per se* analysis in unilateral change cases). Thus, when the parties’ collective bargaining agreement expires and a new agreement has not been reached, an employer is obligated to maintain the *status quo* with regard to mandatory subjects of bargaining. This requirement is often referred to as the “*status quo* doctrine.” In *Oregon School Employees Association, Chapter 7 v. Salem School District 24J*, Case No. C-273-79, 6 PECBR 5036, 5046 (1982), we explained that this general rule “is grounded on the theory that a unilateral change frustrates the objectives of the [PECBA] much as does a flat refusal to bargain.”²

An employer must generally bargain over its decision to change a mandatory subject of bargaining before making its decision. An employer is not required to bargain over a decision to change a permissive subjective of bargaining, but it is required to bargain over the impacts of the decision on mandatory subjects of bargaining before implementing the change. *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575, 294 P3d 574 (2013).

In *AOCE*, the Oregon Supreme Court summarized our methodology for analyzing unilateral change allegations as follows:

“When reviewing an allegation of unlawful unilateral change, ERB considers (1) whether an employer made a change to an “established practice,” often referred to as the “status quo”; [Footnote omitted.] (2) whether the change concerned a mandatory subject of bargaining; and (3) whether the employer exhausted its duty

²We cited with approval the Supreme Court’s decision in *NLRB v. Katz*, 369 US 736, 747, 82 S Ct 1107 (1962), where the Court found that unilateral changes to mandatory subjects of bargaining were *per se* violations of Section 8(a)(5) of the National Labor Relations Act. *Salem School District 24J*, 6 PECBR at 5047.

to bargain. *Ass'n of Oregon Corr. Employees*, 20 PECBR 890, 897.” *AOCE*, 353 Or at 177.

If, upon completion of this analysis, we conclude that the employer was required to bargain a change but failed to do so, we then consider any affirmative defenses raised by the employer. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008). However, we need not apply our analysis in a mechanical manner and we may proceed to a particular step if that step will be dispositive of the issue. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 762 (2012).

To determine the *status quo*, we review the record to find “[w]hether the parties have, by their words or actions, defined their rights and responsibilities with regard to a given employment condition.” *Coos Bay Police Officers’ Association v. City of Coos Bay and Coos Bay Police Department*, Case No. UP-61-92, 14 PECBR 229, 233 (1993). The *status quo* may be established by various sources, including the terms of a current or expired collective bargaining agreement, work rules, policies, or an employer’s pattern of behavior. *AOCE*, 353 Or at 184. It may also be established by statute. *Tri-County Metropolitan Transportation District of Oregon v. Amalgamated Transit Union, Division 757*, Case No. UP-55-05, 22 PECBR 506, 552 (2008).

When determining whether a subject is mandatory for bargaining, we follow a two-step process. First, we identify the subject of the proposal. Second, we examine whether that subject is mandatory for bargaining. To answer the second question, we first determine whether the subject is specifically designated as mandatory or permissive under the statute, or whether we have addressed the status of the subject in a previous Board decision. *Springfield Police Association v. City of Springfield*, Case No. UP-28-96, 16 PECBR 712, 721 (1996). If the subject in dispute is specifically included in the definition of “employment relations” under ORS 243.650(7)(a), then the subject is mandatory for bargaining. *Portland Fire Fighters Assoc. v. City of Portland*, 305 Or 275, 282-83, 751 P2d 770 (1988). Under ORS 243.650 (7)(a), employment relations “includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment.”

If the subject does not fall into one of these categories, we next determine whether it is specifically excluded from the definition of employment relations under ORS 243.650(7)(g) (or in the case of school district bargaining, subsection (7)(e)). Subsection (7)(g) excludes:

“staffing levels and safety issues³ (except those staffing levels and safety issues that have a direct and substantial effect on the on-the-job safety of public employees), scheduling of services provided to the public, determination of the minimum qualifications necessary for any position, criteria for evaluation or

³As is often the case, there is an exception to the exception. For employees who are strike-prohibited under ORS 243.736, employment relations does include “safety issues that have an impact on the on-the-job safety of the employees or staffing levels that have a significant impact on the on-the-job safety of the employees.” ORS 243.650(7)(f).

performance appraisal, assignment of duties, workload when the effect on duties is insubstantial, reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work, and any other subject proposed that is permissive under paragraphs (b), (c) and (d) of this subsection.”

If the subject is not one of the enumerated permissive subjects in subsection (7)(g), we then review whether paragraphs (b) or (d) apply. Under ORS 243.650(7)(b), subjects determined to be permissive by this Board before June 6, 1995 continue to be permissive. Subsection (7)(d) provides that subjects that have an insubstantial or *de minimis* effect on public employee wages, hours, and other conditions of employment are permissive.

If the proposal does not fall within any of these categories, we review our prior cases to determine if we have previously decided whether the subject was a mandatory, permissive or prohibited subject for bargaining.⁴ Finally, if none of the foregoing steps are dispositive, we apply the balancing test in ORS 243.650(7)(c). *City of Springfield*, 16 PECBR at 721-22; *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 279, *recons*, 22 PECBR 444 (2008). Under this balancing test, a subject is permissive if we determine that it has “a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment.” ORS 243.650 (7)(c).

Use of the State E-Mail System for Association Business

2. The State’s unilateral decision to prohibit the use of its e-mail system for Association-related communications during the hiatus period violated ORS 243.672(1)(e).

The Association has raised a unilateral change claim under subsection (1)(e). We begin our analysis of this claim by noting what is not in dispute between the parties. Importantly, there is no dispute as to: (1) what the *status quo* was (Article 71 allowed employees, employees holding Association positions, and Association staff to use the State e-mail to communicate regarding Association business); and (2) that the *status quo* was changed unilaterally when the State decided that Article 71 was permissive and began prohibiting communications that were formerly allowed under that article. Thus, the only disputed issue is whether the subject or subjects contained in Article 71 are mandatory or permissive for bargaining, and if mandatory, whether Article 71’s provisions are included within a limited group of exceptions to the *status quo* doctrine that this Board has recognized.

To resolve this dispute, we first identify the subject or subjects at issue in the discontinued provisions of Article 71. Article 71 contains an agreement between the parties that Association representatives and Association members may utilize the State e-mail system to communicate regarding Association business. It provides 13 restrictions and rules regulating such use, including the requirement that e-mails comply with various employer policies on the

⁴Unlike the review we conduct under ORS 243.650(7)(b), where we only look at cases decided before June 6, 1995, our analysis of prior cases at this step of the process includes a review of all previous Board decisions that have not been modified or overturned by subsequent decisions of the Board, the courts or statutory revisions.

content, size and format of the messages; that the e-mails be sent and read on non-work time; and that they not interfere with the operations of the Agencies. Finally, Article 71 contains a provision that creates a process for the State to bring complaints about the use of the State e-mail system for Association communications. This process can culminate in binding arbitration of the State's complaint.

Based on these provisions, we find that the subject of Article 71 is the allowance of, and limitations on, the use of the State's e-mail system by its employees and their certified representative to communicate about union business.

Having determined the subject of Article 71, we next review whether this subject falls within one of the enumerated categories of subjects that the legislature has designated as mandatory or permissive. We find that this subject does not fall within one of those categories as it does not concern direct or indirect monetary benefits, hours, vacations, sick leave, or grievance procedures that are mandatory for bargaining under ORS 243.650(7)(a). Nor does the Article fall within the subjects specifically designated as permissive under ORS 243.650(7)(g).

We next review our case law to determine if we decided before June 6, 1995, that the allowance of, and limitations on, the use of an employer's e-mail system by its employees and their certified representative to communicate regarding union matters is permissive. If so, that subject remains permissive. See ORS 243.650(7)(b). Both parties assert that we have conclusively decided the mandatory/permissive nature of Article 71's provisions. Although we find several of the cases cited by the parties compelling, we do not find them to be directly controlling.

We begin by addressing the State's argument that we decided the at-issue subject to be permissive in *Oregon State Police Officers Association v. State of Oregon, Department of State Police*, Case No. UP-109-85, 9 PECBR 8794 (1986). In that case, the Board held that the "State violated ORS 243.672(1)(e) by implementing a change in its practice concerning the use of state vehicles by officers on standby status because the State refused to bargain over the impact of the change * * * before it was implemented." *Id.* at 8806. In reaching that decision, this Board reasoned that, "[o]n balance, the decision to discontinue the off-duty use of State vehicles [was] permissive," but that the "impact of this decision, however, falls within the definition of 'employment relations'" under ORS 243.650(7) because the "officers affected by the decision had been receiving an indirect monetary benefit under the prior policy, including avoiding of wear and tear on their personal vehicles and saving the fuel consumed in driving to and from work."⁵ *Id.* at 8806-07.

For this decision to be binding under ORS 243.650(7)(b), we must find the subject at issue in *Department of State Police* to be the same as the subject at issue in this matter. However, the nature of the subject of "the off-duty use of State vehicles by officers on standby status" is clearly not the same as the nature of the allowance of, and limitations on, the use of an employer's e-mail system by its employees and their certified representative to communicate

⁵Under ORS 243.650(7), "employment relations" includes "indirect monetary benefits."

regarding union matters. Therefore, we disagree with the State's assertion that *Department of State Police* decided that the subject of Article 71 is a permissive, non-mandatory subject of bargaining.

The State, however, cites the following language in *Department of State Police*, in support of its contention:

"The determination by an employer of the use of its equipment is an inherent management right essential to that employer's ability to determine its level of services, assignment of duties, and the general operation of the employer's enterprise." *Id.* at 8806.

This statement should not be read as applying to *all* employer equipment in *all* situations. Such a broad application would be unworkable and would render permissive various subjects that we have determined to be mandatory in previous decisions. Indeed, other cases have reached different conclusions on the mandatory/permissive nature of subjects that involve the use of employer equipment and other employer-owned property. *See City of Portland v. Portland Police Commanding Officers Association*, Case No. UP-19/26-9, 12 PECBR 424 (1990), *recons*, 12 PECBR 646 (1991) (proposal requiring the employer to provide take-home vehicles and raid gear for officers involved a mandatory subject of bargaining as it impacted direct or indirect monetary benefits and safety); *International Association of Fire Fighters, Local #2752 v. City of Hermiston*, Case No. UP-51-86, 9 PECBR 8964 (1986) (proposal requiring that firefighters have exclusive use of dormitory and living areas at the worksite concerned a mandatory subject of bargaining); *Springfield Education Association v. Springfield School District No. 19*, Case No. C-278, 1 PECBR 347 (1975), *aff'd after remand on other grounds*, 290 Or 217, 621 P2d 547 (1980) (proposals allowing the union to utilize the employer's school rooms for after-hours meetings at no cost, allowing the union to post union materials on bulletin boards in the faculty and work rooms on the employer's property, and granting the union the right to use "school facilities and equipment, including typewriters, mimeographing machines, other duplicating equipment, calculating machines, and all types of audio-visual equipment at reasonable times, when such equipment is not in use are all mandatory for bargaining); *South Lane Education Association v. South Lane School District*, Case No. C-280, 1 PECBR 459 (1975), *aff'd after remand on other grounds*, 290 Or 217, 621 P2d 547 (1980) (proposals nearly identical to those at issue in *Springfield School District* regarding the use of employer facilities and equipment are mandatory for bargaining); *Eugene Education Association v. Eugene School District 4J*, Case No. C-279, 1 PECBR 446 (1974) (proposals (1) allowing union to use school rooms and space for union meetings, (2) allowing the union to use inter-school mail for communications with members, (3) requiring that the district provide sufficient faculty rooms and furnishings, and (4) requiring classrooms to be properly maintained are all mandatory for bargaining).⁶

⁶Some of these cases involve not only the use of employer equipment, but also employer facilities, or a combination of the two. We find these two subjects to be similar in nature as both involve a property right held by the employer. As a result of this similarity, we find that these cases are relevant (but not controlling) to our analysis in this case.

As demonstrated by these cases, we analyze scope-of-bargaining disputes over subjects that involve the use of an employer's equipment or property on a subject-by-subject basis, and the results of our analysis will be driven by the nature of the employer equipment or facilities, the particular use involved, and the application of the analytical framework described above. In other words, the mere fact that a subject involves the use of an employer's equipment or property does not automatically render that subject permissive (or mandatory).

The off-duty use of employer-owned vehicles by police officers, the subject involved in *Department of State Police*, requires a much different level and type of use of "employer equipment" than does the use of the State's e-mail system by Association-represented employees to communicate with each other and their Association representatives regarding union business. Although the transmittal of e-mails inherently requires some utilization of the State's equipment, it is a significantly different type of equipment use than providing vehicles for employees to utilize on off-duty time. For example, because the State and its employees already regularly utilize e-mail for work related communications, the infrastructure and equipment necessary to transmit an Association-related e-mail are already in place. A proposal requiring the State to provide take-home vehicles, however, may require the State to purchase equipment it does not already have and provide significant additional capital outlays for maintenance, fuel and other costs associated with vehicle use. Further, vehicles, unlike e-mail, are not a type of employer equipment that can be utilized for communications regarding workplace matters. Therefore, we do not find the above-quoted language in *Department of State Police* dispositive or particularly probative concerning the question before us. For these reasons, we find *Department of State Police* inapposite; therefore, ORS 243.650(7)(b) does not apply.

In support of its position, the Association cites to a trio of cases, beginning with *Springfield School District*. In *Springfield School District*, we reviewed a labor organization's proposals allowing the union to utilize the employer's school rooms for after-hours meetings at no cost, allowing the union to post union materials on bulletin boards in the faculty and work rooms on the employer's property, and granting the union the right to use "school facilities and equipment, including typewriters, mimeographing machines, other duplicating equipment, calculating machines, and all types of audio-visual equipment at reasonable times, when such equipment is not otherwise in use." 1 PECBR at 355. We found these proposals, along with a proposal that the parties agree to print and distribute copies of the contract to employees, to be mandatory for bargaining. We reasoned that "[p]rovisions [that] require cooperation of the public employer with the exclusive representative in the discharge of the duty of fair representation under the Act are clearly for the benefit of both the public employer and his employees, and cannot be found improper assistance." *Id.* at 350. We also found union proposals requiring that the district provide teachers with a reference library, desks, closet and storage spaces, and other supplies mandatory for bargaining. *Id.* at 359. In *South Lane School District*, we held for a second time that the same types of proposals were mandatory because they "assist the incumbent labor organization in its duty of fair representation." *Id.* at 474.

Finally, the Association points to language in *Oregon University System v. Oregon Public Employees Union, Local 503*, Case No. UP-61-98, 19 PECBR 205 (2001), *recons*, 19 PECBR 431 (2001), *rev'd on other grounds*, 185 Or App 506, 60 P3d 567 (2002), where we briefly discussed the obligation to bargain over access to an employer's equipment for union

communications, even though that issue was not specifically before us.⁷ Specifically, we observed:

“the general rule in the private sector is that a union and its members do not have a statutory right to use the employer’s equipment to communicate. [Footnote omitted] In both the private sector and under the [PECBA], the subject of access to the employer’s equipment for union communications is typically mandatory for bargaining. * * * Thus, if a right to use equipment exists, it must be found in the collective bargaining agreement.” *OUS*, 19 PECBR at 434 (Order on Reconsideration) (citing *NLRB v. Proof Co.*, 242 F2d 560, 562 (7th Cir.), *cert denied*, 355 US 831 (1957); *Springfield School District*, 1 PECBR at 355).

The validity of this statement appears to have been accepted without the need for further discussion by this Board, and we quoted this statement with approval in our decision in *SEIU Local 503 v. State of Oregon, Oregon Judicial Department*, Case Nos. UP-52/62-03, 21 PECBR 98, 113-14 (2005), *aff’d*, 209 Or App 497, 149 P 3d 235 (2006) (*OJD III*). This previous recognition that the subject of access to an employer’s equipment for union communications is typically mandatory for bargaining provides strong support for our conclusion here—that the subject of the allowance of, and limitations on, the use of the State’s e-mail system by its employees and their certified representative to communicate about union business is mandatory for bargaining. However, because that precise question was not necessary to the outcome of those prior cases, we do not find those cases controlling here. Moreover, the evolution of e-mail and its use in workplace communications is an important topic that requires us to conduct a careful and comprehensive review of its bargaining status. Therefore, we will continue with our analysis.

⁷*OUS* involved a claim by the employer that the union violated ORS 243.672(2)(d) by using the employer’s e-mail system for union communications without employer permission, and by refusing to comply with the terms of two arbitration awards that concluded that the contract did not expressly allow for this type of use. We originally dismissed the complaint, finding that the complaint was in part untimely, and finding that the union had not refused to comply with the second arbitration award. We noted that the second arbitrator only found that the employer had not violated the contract by preventing the union from using its e-mail system for union communications. There was no finding by the arbitrator that the use of the e-mail system by the union violated the contract, and as a result, the award did not direct the union to cease utilizing the e-mail system; it merely dismissed the union’s grievance. Finally, we concluded that the union did not violate any specific provision of the contract by continuing to use the e-mail system after the arbitration awards. 19 PECBR at 215-18.

However, on reconsideration, we held that the union had violated the implied covenant of good faith and fair dealing as applied to the contract by continuing to use the e-mail system when the contract did not allow for such use. We concluded that this continuing conduct violated ORS 243.672(2)(d). 19 PECBR at 433-35. The Court of Appeals affirmed the portion of our order finding that the union did not violate ORS 243.672(2)(d) by breaching the contract or refusing to comply with the arbitrator’s award, but reversed our finding that the union had committed an unfair labor practice by breaching the implied duty of good faith and fair dealing. 185 Or App at 520. Although this case dealt with the use of an employer’s e-mail system for union communications, we were not called upon to decide the mandatory or permissive status of that subject.

Accordingly, we next turn to the State's assertion that the impact on employees of the prohibition on the use of e-mail for conducting Association business is insubstantial, rendering the subject permissive under ORS 243.650(7)(d). The State argues that the Association was obligated to provide evidence of incidents or patterns of employees being impacted by the decision, but failed to do so. This argument mischaracterizes our analysis of unilateral change allegations that occur during the hiatus period. When we determine whether a subject is permissive under ORS 243.650(7)(d) in this context, our focus is on the possible impact to the bargaining unit of the *subject* of the proposal, not on whether the Association has submitted evidence of specific past or present impacts of the proposal. *City of Springfield*, 16 PECBR at 720. The fact that only a short period of time passed between the change in the *status quo* and the settlement of the contract does not excuse the State's conduct if the subject is ultimately found to be mandatory.

With the proper focus in mind, we conclude that the subject of Article 71 (the use of, and limitations on the use of the State's e-mail system to communicate about Association business) has more than an insubstantial impact on the bargaining unit. Use of the State's e-mail system for Association-related messages allows for a convenient, fast, and effective method of communication between the Association and represented employees. A labor organization cannot operate effectively without communicating with its membership. Nor can an individual employee or group of employees obtain the full benefit of representation if they cannot freely communicate with their coworkers or their exclusive representative.

Numerous times, this Board has discussed the importance of free and open communications between union members and their representatives under the PECBA. *See generally AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 797 (2008) (conversations between union members and union representatives are confidential, because confidentiality "furthers the purposes and policies of PECBA by ensuring that employees have unfettered access to their union representatives"); *Sandy Education Association and Davey v. Sandy Union High School District No. 2 and Heaton*, Case No. 42-87, 10 PECBR 389, 397, *amended*, 10 PECBR 437 (1988) (prohibiting an employee from discussing workplace incidents with other bargaining unit members, including union officials, violated ORS 243.672(1)(a)). Of course, certain limitations on such communications are not necessarily unlawful. *See Polk County Deputy Sheriff's Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 84-85 (1995) (employer's prohibition of union officer from speaking with non-bargaining unit witness during work time was a lawful restriction of protected activity). However, the mere fact that some limitations are lawful does not mean that the impact on a bargaining unit of those limitations is insubstantial.

If we held that the subject of access to and restrictions on the use of the State's e-mail system had an insubstantial impact on bargaining unit members, we would undermine the policies and purposes of the PECBA. Those policies and purposes are best served by robust communications between employees and their exclusive representative. The record is clear that the Association and its members have historically used the State e-mail system to exchange communications regarding contract negotiations. These communications directly touch on a wide variety of mandatory subjects including wages, hours and working conditions. Limiting the availability of this important communication tool would necessarily impact, at least indirectly, each of those subjects as well. As a result, we conclude that the allowance of, and limitations on,

the use of the employer's e-mail system has a significant impact on the bargaining unit members' conditions of employment. Therefore, that subject is not permissive under ORS 243.650(7)(d).

Because the foregoing analysis does not conclusively resolve whether the subject of Article 71 is mandatory or permissive, we turn to the final step in our analysis: the balancing test under ORS 243.650(7)(c). In order to determine if the subject of access to and limitation on the use of the State's e-mail system to communicate about Association business has a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment, we must first identify the interests of both parties.

The State has an interest in controlling the access to and use of its communications systems and its equipment. This interest includes, among other things, the ability to protect against improper use of that system that might subject the State to liability, and the ability to ensure that employees are performing work for the employer while on paid time, rather than utilizing the e-mail system excessively for non-work purposes. There is also presumably at least some cost to the State to allow such use, though the record contains no evidence concerning the amount of that cost. To be sure, these are significant interests that weigh in favor of a finding that the subject is permissive under subsection (7)(c).

However, on this record, these concerns are largely generalized and speculative. Moreover, such concerns were addressed in the expired Article 71, which contained provisions that prevented additional costs to the State, required that e-mails comply with applicable policies regarding content, indemnified the State for disputes arising out of Association related e-mails, and limited the use of the e-mail system to non-work time. As these provisions demonstrate, collective bargaining is a dynamic process capable of addressing such significant concerns.

We turn to the subject's impact on employee wages, hours, or other terms and conditions of employment. As discussed above, the employees have an interest in being able to communicate with each other and with representatives of the Association about the wide range of issues that occur in the workplace and other Association issues. E-mail has become an essential part of today's workplace, surpassing yesterday's bulletin board, water cooler and mail room. Employers and employees rely on this means of communication more and more each year to conduct business and communicate about a wide variety of matters, particularly in bargaining units such as the Association's where employees are spread across multiple agencies and worksites. The ability of employees to communicate about matters of common concern is one of the lynchpins of collective bargaining, and fundamentally impacts employees' ability to collectively bargain over all aspects of wages, hours, and working conditions.

When we balance these competing interests, we find that the subject of access to and limitations on the use of the State's e-mail system has a greater impact on the employees' wages, hours and working conditions than it does on management's prerogatives.⁸ Accordingly, we find

⁸Our conclusion is consistent with the results reached in the previous cases cited by the Association, as the subject at issue also requires the State to assist the Association in the discharge of its obligation to fairly represent all members of the bargaining unit. As we noted above in our discussion of *South Lane School District* and *Springfield School District*, proposals requiring such assistance are generally mandatory for bargaining. *South Lane School District*, 1 PECBR at 473-74; *Springfield School District*, 1 PECBR at 355.

that Article 71’s language allowing and placing limits on the use of the State’s e-mail system for Association related communications is mandatory for bargaining.⁹

Our dissenting colleague disagrees with our balancing of these interests, noting that other methods of communication remain available for the Association and its members. We disagree with this reasoning. First, the dissent’s balancing of the subject minimizes the importance and unique nature of e-mail communication in the modern workplace. E-mail has become ubiquitous, largely supplanting many traditional forms of communication. This is particularly important given the nature of the Association bargaining unit, which has employees in three separate State agencies at multiple office locations. Moreover, the importance of e-mail is magnified given the changing nature of the workplace, including the increasing number of State employees who may be permitted or required to telecommute to perform their jobs. *See* ORS 240.855(2) (“It is the policy of the State of Oregon to encourage state agencies to allow employees to telecommute when there are opportunities for improved employee performance, reduced commuting miles or agency savings.”).

The dissent also concludes that “the impact on the Association in losing this one avenue of communication [access to the state e-mail system] is minimal.” The dissent reasons that the Association could have still communicated with its members through the State’s bulletin boards, telephone system, or the mail.

Our disagreement with this reasoning is twofold. First, as we have explained above, given the vital role that e-mail plays in shaping the terms and conditions of employment for today’s State employees, we do not agree that removing that avenue of communication has only a “minimal” impact regarding such terms and conditions of employment.

Additionally, the mere existence of lesser communication alternatives to the use of the State’s e-mail system does not, in our view, mean that access to the State’s e-mail system is a permissive subject of bargaining, particularly given that our case precedent indicates that those other alternatives are also mandatory subjects of bargaining. *See Springfield School District*, 1 PECBR at 355, 360 (subjects of “telephone facilities exclusively for teacher use,” union use of “inter-school mail service and teacher mail boxes for communications” with members, and union use of employer bulletin board all mandatory subjects of bargaining). Nearly any type of proposal on any subject has alternatives that an employer or a labor organization may find more

⁹This result is also consistent with a recent ruling from the National Labor Relations Board, which concluded that employer changes to e-mail policies that limited “personal use” by bargaining unit members were mandatory for bargaining. *See ANG Newspapers*, 350 NLRB 1175 (2007). Because the PECBA was adopted to model the National Labor Relations Act, we may look to cases decided under the federal law to assist us in interpreting the PECBA. Particularly helpful are cases decided before 1973, the year the PECBA was enacted. *Portland Association of Teachers v. Multnomah School District No. 1*, 171 Or App 616, 631 n 6, 16 P3d 1189 (2000) (citing *Elvin v. OPEU*, 313 Or 165, 177, 832 P2d 36 (1992)); *accord Southern Oregon Bargaining Council/Rogue River Education Association/OEA/NEA v. Rogue River School District 35*, Case No. UP-62-09, 23 PECBR 767, 790 n 21, *recons*, 23 PECBR 878 (2010). We have not been presented with a sufficient justification for creating a conflict between the PECBA and the NLRA regarding the mandatory/permissive nature of the State’s e-mail policy.

or less acceptable than the proposal offered by the other party during negotiations. The existence of such alternatives does not change the mandatory/permissive nature of the subject itself and render a subject permissive when it is otherwise mandatory.

Finally, we address the dissent's concern regarding the breadth of our opinion. As we understand the dissent's concern, our opinion "equates the use of the e-mail system to the mandatory subject of [the] use of [employer] bulletin boards." According to the dissent, we should not treat all communication-related employer systems the same. We agree with that premise. Our recitation to case precedent regarding bulletin boards, telephones, and other communication-related equipment demonstrates how this Board has treated similar, albeit not identical, communication-related equipment. Our inquiry, however, does not stop there. In other words, we do not merely equate access to the State's e-mail system to access to a bulletin board. To the contrary, we have attempted to explain the unique characteristics of e-mail and its transformative role in today's workplace, which, we have determined have an even *greater* impact on employee terms and conditions of employment than other historical communication-related equipment. Furthermore, we have considered the State's "significant interests," specifically as it relates to its e-mail system. Therefore, we do not agree with the dissent that we have failed to "look at the type and usage of" the State's e-mail system and merely "equate[d] bulletin boards and e-mail systems as 'forms of communication.'"

Having concluded that the subject of the discontinued provisions of Article 71 is mandatory for bargaining, we next turn to the State's argument that this subject falls within an exception to the *status quo* doctrine because the rights contained in Article 71 are "purely contractual rights." Although this Board has utilized the phrase "purely contractual rights" when referencing a group of subjects that fall within an established exception to the general rule we refer to as the *status quo* doctrine, this label is somewhat misleading. In order to clarify the proper scope of these limited exceptions, a review of their historical development is necessary.

Blue Mountain Community College Faculty Association v. Blue Mountain Community College, Case No. C-179-77, 3 PECBR 2025 (1978) (*Blue Mountain*) was the first Board case that recognized exceptions to the general rule that mandatory subjects of bargaining must be maintained during the hiatus period. In *Blue Mountain*, we held that the college was not required to maintain the *status quo* during the hiatus period when it came to granting sabbatical leaves for bargaining unit members. We discussed case law from the private sector and other public sector jurisdictions that recognized certain exceptions to the *status quo* doctrine. We then concluded that requiring the college to continue to grant sabbatical leave would "grant a bargaining advantage to the labor organization and reduce the flexibility of the parties in their effort to reach agreement." In order to maintain the balance of power through bargaining, we held that the college was not obligated to continue providing sabbatical leave during the hiatus period and had not violated ORS 243.672(1)(e) by discontinuing the applicable provisions of the expired contract. *Id.* at 2031-32.¹⁰

¹⁰In 1986, we abandoned the "balance of power" exception to the *status quo* doctrine, finding the exception too broad and difficult to apply with any predictability. *In the Matter of the Petition for Declaratory Ruling filed by Portland Community College*, Case No. DR-6-86, 9 PECBR 9018, 9023-24 (1986).

We addressed in more detail the types of limited exceptions to the *status quo* doctrine in *Salem School District 24J*, stating:

“There are, in addition, certain purely contractual rights that expire along with the contract itself. These are rights or conditions that neither could nor would be binding without being included in the collective bargaining agreement. An employer does not make an unlawful unilateral change when it no longer affords such rights to the employees or their exclusive representative after the term of the contract. Such purely contractual rights include:

“1. Provisions governing permissive subjects of bargaining. Because the employer was under no obligation to negotiate about and agree to such provisions in the first place, the employer is not obligated to continue such provisions in effect when the contract expires.

“2. The procedure to adjudicate contract violations. A grievance procedure that provides the mechanism for appealing alleged contract violations does not have to be continued in force by the employer after the collective bargaining agreement expires except for grievances that matured during the contract period. In other words, an employer may have to continue to give its employees a paid holiday on Labor Day, but its failure to do so—when the collective bargaining agreement expired June 30—is not grievable under the contractual grievance procedure. [Footnote omitted.]

“3. Certain provisions concerning the rights of the exclusive representative. As an example, the right to receive fair share payments from nonmembers is entirely contractual. (See ORS 292.055(5).) An employer may cease making such deductions when the collective bargaining agreement expires.” *Salem School District 24J*, 6 PECBR at 5047-48.

In subsequent cases, we have referred to the three categories of subjects listed in *Salem School District 24J* as “purely contractual rights.” See *AFSCME Council 75, Local 2067 v. City of Salem*, Case No. UP-71-88, 11 PECBR 422, 426-28 (1989); *Oregon Nurses Association and Vaile v. Eastern Oregon Psychiatric Center*, Case No. UP-15-86, 9 PECBR 9236, 9251 (1986). However, despite the term’s recurrent use, we recognize that the vast majority of mandatory subjects of bargaining that are commonly included in collective bargaining agreements are “purely contractual,” in that employers are not required to continue providing these benefits or rights by law (the PECBA notwithstanding), but solely by virtue of the collective bargaining agreement. In the abstract, these subjects could all be considered “purely contractual rights,” but they are nevertheless not all excluded from the *status quo* doctrine. For the exception to apply, the subjects must be permissive or fall within the few specific exceptions to the general rule that we have previously recognized. Thus, the label “purely contractual rights” for this narrow group of exceptions is inapt, and should not be read literally.

With this limited view of the exceptions established, we next turn to the question of whether the right to use the State e-mail system for Association business under Article 71 fits within our three recognized exceptions set forth above. It does not. As discussed above, we have

determined that the provisions are mandatory for bargaining, not permissive. Further, Article 71 does not involve a procedure to adjudicate contract violations or the payment of fair share fees by bargaining unit members. We decline to further expand our limited exceptions to the *status quo* doctrine.

For the foregoing reasons, we conclude that the State violated ORS 243.672(1)(e) when it unilaterally changed the *status quo* established by Article 71 during the hiatus period.

Provision of Disciplinary Documents to the Association

3. The State violated ORS 243.672(1)(e) when it unilaterally ceased providing notice to the Association of disciplinary actions during the hiatus period.

Article 24, Section 1 of the expired contract requires the State to provide the Association with copies of disciplinary documents issued to bargaining unit members. This expired provision establishes the *status quo* for the Association's second unilateral change claim under subsection (1)(e). Again, it is undisputed that the State unilaterally changed the *status quo*. The issue before us is whether the discontinued provisions are mandatory or permissive for bargaining.

We begin our analysis by examining the language at issue to identify the specific subject in dispute. Article 24 contains the discipline and discharge provisions of the expired agreement. Section 1 contains language providing that the employer must have "just cause" to take the listed categories of disciplinary actions, and requiring that progressive discipline principles be followed when appropriate. Section 1 also contains the specific discontinued language at issue in this claim, which is the requirement that the State provide the Association with a copy of any disciplinary documents.

We have generally held that proposals regarding just cause standards for discipline are mandatory for bargaining. *See Multnomah County Corrections Officers' Association v. Multnomah County*, Case No. UP-21-86, 9 PECBR 9529, 9557-58 (1987). This includes not only the substantive standard of just cause, but also the procedures and guidelines for discipline. In *Portland Fire Fighters Association, Local 43, IAFF v. City of Portland*, Case No. UP-99-94, 16 PECBR 245, 252 (1995), *AWOP*, 142 Or App 206, 920 P2d 181 (1996), we explained our reasons for this holding, stating:

"We do not agree that disciplinary 'process' and the type and severity of discipline are conceptually separable from the principle of just cause and its grounding in fairness and due process. Disciplinary criteria, guidelines and procedures are fundamentally related to wages, hours, job security, just cause and progressive discipline, matters in which employees have a substantial interest and in which employers have little or no countervailing interests."

As we did in *City of Portland*, we find that the requirement that the State provide copies of disciplinary documents to the Association indistinguishable from the remainder of Article 24's provisions incorporating the standard of just cause for discipline.

There are a number of situations where an individual employee who is disciplined may be too intimidated, embarrassed, or unaware of their rights to challenge or respond to a disciplinary action in a manner consistent with the agreed upon disciplinary standards. As a result, they may not know that they can or should take a copy of their disciplinary action to a union representative for assistance. Requiring the employer to provide a copy of disciplinary documents to the Association ensures that employees are adequately represented and fully aware of their rights on matters that relate to their continued employment, due process, and possibly their wages (in the event of a monetary sanction).

Moreover, the disciplinary process does not necessarily end with the issuance of a disciplinary action. The ability of employees to challenge a disciplinary action can be a key component to a fair disciplinary process, and providing copies of disciplinary documents both to employees and the Association ensures that all impacted parties are informed of the possibility that such a challenge is needed. Further, the requirement to provide a copy of disciplinary documents to the Association ensures that the Association has all of the information that it needs to fulfill its statutory duty of fair representation to its bargaining unit members by monitoring disciplinary actions to ensure that they are in compliance with the just cause standards and other provisions of the contract. Accordingly, we conclude that Article 24, Section 1's requirement that the State provide copies of disciplinary documents to the Association relates to standards for discipline, disciplinary process and procedures, and minimum fairness. As a result, the subject is mandatory for bargaining.

The State characterizes this benefit as a right that solely benefits the Association; and one that is rendered irrelevant during the hiatus period because the grievance arbitration procedure is no longer available to the Association or its members. We disagree. Although the State is correct that the arbitration provisions are no longer available during the hiatus period, the Association may still contest disciplinary actions that it believes are taken without just cause as changes to the *status quo* in violation of ORS 243.672(1)(e). See *Oregon Education Association v. Willamette Education Service District*, Case No. UP-08-07, 22 PECBR 585, 607 (2008) (employer violated ORS 243.672(1)(e) by terminating a teacher in violation of the *status quo*, as established by the expired just cause and discipline provisions of the contract); *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108 (2007) (school district violated ORS 243.672(1)(e) by disciplining a teacher without just cause, contrary to the *status quo* established by the expired collective bargaining agreement). The enforcement mechanism is different, but the Association's obligation to represent the bargaining unit in such matters is not.

In fact, the change in enforcement mechanism makes the requirement that the Association receive copies of the disciplinary documents during the hiatus period even more important. In *On'Gele and Oregon Association of Corrections Employees v. Department of Corrections, Oregon State Penitentiary*, Case No. UP-42-93, 14 PECBR 825 (1993), we held that an individual employee did not have standing to bring a subsection (1)(e) complaint against the employer challenging their discipline during the hiatus period. We noted that because subsection (1)(e) makes it an unfair labor practice for a public employer to refuse to bargain in good faith *with the exclusive representative* of employees, the union, not the individual employee, is the "injured party" as defined under ORS 243.672(4). *Id.* at 429-30.

Without the requirement that the Association receive copies of each disciplinary document, its ability to enforce the *status quo* for employees will be compromised. When provided with copies of disciplinary documents, Association representatives are in a better position to understand whether a disciplinary action is in fact consistent with just cause and progressive discipline principles, whether an employer has complied with any required due process steps, or whether the discipline is proportionate to other similar disciplinary actions taken against employees in the unit. Finally, Association representatives will presumably have a greater understanding of the process to challenge disciplinary actions that may not comport with the *status quo*.¹¹

Accordingly, we conclude that the expired provisions of Article 24, Section 1, which contain the requirement to provide the Association with copies of disciplinary documents, are mandatory for bargaining.

Having concluded that the contested provisions of Article 24, Section 1 are mandatory for bargaining, we next address the State's affirmative defenses. The State asserts that because it did not issue any disciplinary actions to bargaining unit members that would have triggered the obligation to provide the Association with copies of the disciplinary documents, it did not violate subsection (1)(e).

We considered and rejected a similar argument in *Gresham Police Officers Association v. City of Gresham*, Case Nos. UP-6/18-09, 24 PECBR 55 (2010). In *City of Gresham*, the employer announced that it was changing its policies on a wide variety of subjects, including the effective date of salary advancements for bargaining unit members (and other City employees) and the use of sick leave. The City refused to bargain with the union, and the union filed a complaint alleging that the City's actions amounted to unilateral changes in violation of subsection (1)(e). The City defended its actions in part by asserting that it did not apply the newly amended policy to members of the bargaining unit. We held that:

¹¹We have held somewhat related proposals to be mandatory for bargaining. For example, in *Eastern Oregon Psychiatric Center*, 9 PECBR 9236, we were confronted with a situation where the employer sought to limit the union's access to documents in an employee's personnel file in a manner consistent with the terms of an expired contract that required employee approval before the union could access the contents of a personnel file. We held that the language limiting access to the personnel files by the union was a mandatory subject that survived after the contract expired. It stands to reason that if contract language *limiting* union access to personnel documents for bargaining unit members is a mandatory subject of bargaining, then contract language providing an affirmative right to a copy of employee disciplinary documents is likewise a mandatory subject of bargaining. We have also held that a proposal regarding limitations on how long certain documents can be kept in an employee's personnel files was mandatory for bargaining, as it involved the subjects of "disciplinary standards and procedures" and "minimum fairness" relating to personnel files. *City of Springfield*, 16 PECBR at 721. *See also Springfield Police Association v. City of Springfield*, Case No. UP-37-94, 15 PECBR 325 (1994), *aff'd in part, rev'd in part*, 134 Or App 26, 894 P2d 546, *on remand*, 16 PECBR 139 (1995) (we generally view proposals that relate to employee or union access to personnel files as mandatory and those that attempt to prescribe the contents as permissive).

“The fact that the City never implemented the change in salary-schedule advancement for GPOA bargaining unit members does not relieve the City of the need to bargain its decision to make the change. The subsection (1)(e) violation occurred when the City decided to change [the policy on salary advancement for employees]. The City had an obligation to bargain before it made the decision, and that obligation is not somehow retroactively dissolved because the City later decided not to implement the change. The lack of implementation may affect the remedy, but it does not change the fact that the City acted in bad faith.” *Id.* 24 PECBR at 70.

Similarly, in this case, the State unilaterally made the decision to cease complying with Article 24’s provisions during the hiatus period and announced that change through the DAS Guidelines and corresponding messages from top agency managers, all of which were sent to the Association and the employees. As noted above, if a subject is mandatory for bargaining, an employer must to complete the required bargaining *before* making a decision to change a mandatory subject of bargaining. *Three Rivers Sch. Dist.*, 254 Or App at 575. That the State took no disciplinary actions during the time in which it was operating under the DAS Guidelines does not change the fact that the State unilaterally changed a mandatory subject of bargaining in violation of subsection (1)(e). As we noted in *City of Gresham*, it is the decision that triggers the bargaining obligation, and the lack of specific harm resulting from the change merely alters the potential remedy for the violation.

Finally, we address the State’s argument that the provisions of Article 24 requiring the State to provide the Association with copies of disciplinary documents are “purely contractual rights” that need not be maintained during the hiatus period. This subject clearly does not fall within the recognized type of subjects that we have in the past excluded from the general rule of the *status quo* doctrine, and we again decline to expand those limited exceptions. Thus, the *status quo* established by Article 24, Section 1 must be maintained beyond the expiration of the contract.

In summary, we conclude that the requirement to provide the Association with copies of disciplinary documents concerns just cause standards and procedures for discipline, as well as the fundamental fairness of the disciplinary process, and that these subjects do not expire with the contract. *See Eastern Oregon Psychiatric Center*, 9 PECBR at 9250 (holding that expired just cause provisions of a contract “would survive the contract as part of the status quo concerning working conditions.”) For these reasons, we conclude that the State violated ORS 243.672(1)(e) when it decided to change the *status quo* established by the expired portion of Article 24, Section 1, requiring it to provide the Association with copies of disciplinary documents for bargaining unit members.

Discontinuation of Association Leave

4. The State violated ORS 243.672(1)(e) when it decided to cease providing leaves of absence for employees attending to Association business during the hiatus period, as required by Article 9, Section 6 of the expired contract.

The *status quo* regarding Association leave is established by Article 9, Section 6 of the expired contract, which requires the employer to allow the Association President and Vice President as much as 100 hours of vacation, compensatory time, or leave without pay to conduct Association business. Moreover, under Article 9, Section 6, if the Association officer's assistance is requested by the State, the time spent providing such assistance must be considered regular paid working time, not leave.

These provisions specifically affect several of the enumerated categories of employment relations contained in ORS 243.650(7)(a), including direct monetary benefits, hours, and vacation. As a result, the subject is mandatory for bargaining. We have held numerous times that such provisions were mandatory for bargaining. For example, in *AFSCME Local 173 v. Polk County*, Case No. UP-100-88, 11 PECBR 536 (1989), we held that the employer violated ORS 243.672(1)(e) when, after the contract expired during successor negotiations, it stopped paying union bargaining team members for time spent in negotiations during regular work hours as required by the expired contract. We noted that the payment of union negotiators concerned "monetary benefits" to the individuals involved in negotiations, and was thus a mandatory subject of bargaining. *Id.* at 541.

We reached a similar result in *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-91-93, 14 PECBR 832 (1993), where the union proposed that its President and Vice President be provided with paid leave time to conduct various types of union business, including time to attend grievance hearings, represent employees in investigatory meetings, attend meetings where the employer had requested a union representative be present, investigate potential grievances or unfair labor practices, attend arbitration or ERB hearings involving the association, and conduct union meetings. The employer only contested the last portion of the proposal, asserting that paid leave to conduct union meetings was either permissive for bargaining or prohibited as unlawful assistance to the union. *Id.* at 835-36.

We first held that the proposal to provide paid leave to attend union meetings did not constitute unlawful assistance, as the attendance at those meetings was "in whole or in substantial part, directly related to the parties' collective bargaining relationship." *Id.* at 861. We then held that the proposal was mandatory for bargaining, finding the subject "akin to that of 'vacations' and 'sick leave,' two subjects enumerated in ORS 243.650(7)." *Id.* at 862. *See also Eugene Education Association v. Eugene School District 4J and Miller*, Case No. C-93-79, 5 PECBR 3004 (1980) (holding that a proposal for unpaid leave for an employee to serve as an officer of a local union and be returned to substantially the same position upon return is mandatory); *Oregon School Employees Association v. School District No. 9 of Jackson County*, Case No. C-204-78, 4 PECBR 2352 (1979) (paid time for union members to attend grievance or negotiation sessions is mandatory for bargaining).

Consistent with these decisions, we conclude that the Association leave provisions of Article 9, section 6 involve the mandatory subjects of direct monetary benefits and vacation, and are mandatory for bargaining.

The State again asserts that the Association-leave provisions of Article 9 fall within the “purely contractual rights” exception to the *status quo* doctrine. This is not the first time this Board has been presented with this issue. In *Polk County*, we rejected an employer’s assertion that expired provisions allowing bargaining unit members paid time to bargain a successor agreement were “purely contractual rights” that expired with the old contract. We reasoned that the paid leave provisions, while providing a benefit to the union, were more fundamentally related to employee leave and pay, subjects that are mandatory for bargaining. *Polk County*, 11 PECBR at 540-42.

Although the contract language at issue is somewhat different from the language involved in *Polk County*, this language still provides for paid or unpaid leave for two employees who serve as Association officers to engage in activities that are directly related to the collective bargaining relationship. For example, as noted in Finding of Fact 20, paid Association leave under this article was used by Local 1st Vice President Frasier to participate in contract negotiations in July. This clearly provided a monetary benefit to Frasier. The fact that the Association also received a benefit from this paid leave does not allow us to place a clearly mandatory subject of bargaining into the limited group of exceptions that we have recognized to the *status quo* doctrine. Consequently, we find the *Polk County* holding to be applicable, and we will not expand the limited category of exceptions to the *status quo* doctrine to include leave for association officers when the leave provisions are mandatory for bargaining.

For the foregoing reasons, we conclude that the State’s unilateral decision to cease complying with the Association leave provisions of the expired contract during the hiatus period violated ORS 243.672(1)(e).

ORS 243.672(1)(a) Allegations

Standards for Decision: ORS 243.672 (1)(a) Claim

We now turn to the Association’s claim that the directives prohibiting the use of the State’s e-mail system for Association-related communications violated ORS 243.672(1)(a). Under subsection (1)(a), it is 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.” ORS 243.662 provides public employees with 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.” There are two different types of (1)(a) violations. First, an employer violates the statute if it takes actions that interfere with, restrain or coerce employees “because of” their exercise of PECBA-protected rights. Second, an employer violates this section if it takes 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).

The focus of our inquiry is different under each of the two “prongs” of ORS 243.672(1)(a). To decide if an employer violated the “because of” prong of the statute, we analyze the reasons for the employer’s conduct. An employer commits a violation if it takes action because of an employee’s exercise of rights protected by PECBA. We do not require that the complainant prove that the employer acted with actual anti-union animus or the subjective

intent to restrain or interfere with protected rights. Instead, a complainant must show “a direct causal nexus between the protected activity and the employer’s action.” *Id.* For claims brought under the “in the exercise” prong of (1)(a), we focus on the likely consequences of the employer’s actions. If the natural and probable effect of the employer action is to deter employees from exercising a protected right, then the action interferes with, restrains or coerces employees in the exercise of protected rights in violation of ORS 243.672(1)(a). *Id.*

An employer may violate the “in the exercise” prong in two different ways. First, this Board has recognized that a derivative “in the exercise” violation occurs when an employer violates the “because of” prong of the statute. When an employer takes an unlawful action because of an employee’s PECBA protected rights, the natural and probable effect of that action will be to chill the employee’s willingness to engage in further protected activities. *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 903 (2003).

Second, an employer may commit an independent or stand-alone violation of the “in the exercise” prong of subsection (1)(a). When deciding whether an employer committed a stand-alone (1)(a) violation, we determine whether the natural and probable effect of the employer’s conduct, viewed under the totality of the circumstances, would be to interfere with employees’ exercise of protected rights. *Polk County Deputy Sheriff’s Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 77 (1995); *Oregon Public Employes Union and Termine v. Malheur County, Commissioner Cox, Commissioner Hammack and Sheriff Mallea*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). We apply an objective standard. *Tigard Police Officers Association v. City of Tigard*, Case No. C-70-84, 8 PECBR 7989, 7999 (1985). Neither the subjective impression of employees nor the employer’s motive is relevant. Rather, we are concerned solely with the probable consequences of the employer’s actions. *Spray Education Association and Short v. Spray School District No. 1*, Case No. UP-91-87, 11 PECBR 201, 219-20 (1989).

Independent “in the exercise” violations often occur when an employer makes threatening or coercive statements regarding union activity. Violations can, however, also occur in the absence of direct threats or coercion and may be based on an employer’s implied coercion or threat of reprisal. *Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495, 499 (1993). An employer can violate the “in the exercise” prong of subsection (1)(a) by presenting an entirely lawful act in a way that leads other employees to believe the act was unlawfully based on protected activity. *Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School*, Case No. UP-34-08, 23 PECBR 316, 331 n 13 (2009).

5. The State’s directive, prohibiting the use of the State e-mail system for Association-related communications during the hiatus period, violated ORS 243.672(1)(a) by interfering with, restraining, or coercing Association members “because of” and “in the exercise of” rights guaranteed by ORS 243.662.

“Because of” Claim

We begin by considering the Association’s claim that the State’s decision to prohibit the use of its e-mail system for Association business violates the “because of” prong of subsection (1)(a). As a preliminary matter, we must determine whether the State took an action sufficient to establish a claim under ORS 243.672(1)(a). We conclude that it did.

The State made a concrete decision to stop complying with the expired provisions of Article 71 that specifically allowed for the use of its e-mail system for Association-related communications. DAS representatives issued general guidelines asserting that contract provisions relating to use of the State e-mail system were permissive and that such use would be discontinued during the hiatus period. Shortly thereafter, top-level managers from the Agencies sent a directive to the Association and bargaining unit members stating,

“As the collective bargaining process continues there is a change concerning use of agency’s e-mail systems. I want to provide clear direction to all parties on the use of agency e-mail systems for union business. **At this time, and until further notice, union business is not to be conducted through the state’s e-mail systems.** [Emphasis in original.]

“This means no messages will be sent by or on behalf of the union through the agency’s e-mail system, whether the communication is from union staff or agency staff holding union positions. Any agency staff receiving a message inadvertently sent concerning union business must advise your immediate supervisor of the communication without responding to it.”

These directives explicitly singled out Association-related communications, prohibiting any and all such communications on the State’s e-mail system while continuing to allow other personal use of the e-mail system. These directives appear to be even more broadly worded than the original DAS Guidelines. The decision and subsequent implementation of the decision to prohibit the use of the e-mail system for Association-related communications are sufficient, discrete actions to meet the requirement that the Association establish an “employer action” under subsection (1)(a).

We next turn to the question of whether members of the bargaining unit were engaged in protected activity at the time of the employer’s action. We conclude with little difficulty that they were. At the time that the directives were issued, the State and the Association were engaged in contract negotiations. The employees, through the Association, continued to bargain beyond the expiration of the contract. Additionally, Association members who were serving on the bargaining team were utilizing the e-mail system to communicate about the status of negotiations, as they had in years past. These activities are protected under ORS 243.662.

Finally, we determine whether there was a causal connection between the protected activity and the State’s action. The directives specifically targeted only Association-related e-mails, and barred all “use of the State’s email system by union staff or state employees holding positions in the union.” Moreover, the DAS Guidelines and Agency e-mails also did not single out any other type of communication as being prohibited—only Association-related

communications. Further, the directives specifically linked the prohibition to the failure of the parties to reach a settlement during the life of the expired agreement, and once a TA was reached, the State rescinded the directives and began complying with the *status quo* established by the expired contract.

This prohibition was not based on any legitimate, lawful motives. As we concluded above, the State violated ORS 243.672(1)(e) by unilaterally changing the *status quo* established by the expired Article 71. The State's mistaken opinion that the article was permissive and that it was not obligated to continue abiding by the terms of the expired contract at issue here does not render an unlawful action lawful, although it may impact the remedy that we order. We do not require a complainant to demonstrate that an employer acted with actual anti-union animus or the subjective intent to restrain or interfere with protected activities. We only require a causal connection between the employer's conduct and some protected activity. Here, that standard is met. As a result, we conclude that the State's action was directly in response to protected activities of Association members.

Application of the OJD Cases

In its argument, the State relies heavily on its assertion that its decision to prohibit the use of its e-mail system for Association business does not violate ORS 243.672(1)(a) under our prior decision in *OJD III*. *OJD III* was part of a trio of cases concerning an employer's limitation on union-related communications between the Oregon Judicial Department and SEIU that also included *Service Employees International Union, Local 503, Oregon Public Employees Union v. State of Oregon, Judicial Department*, Case No. UP-03-04, 20 PECBR 864, (2005) (*OJD I*); and *SEIU Local 503, OPEU v. State of Oregon, Judicial Department*, Case No. UP-11-04, 21 PECBR 37, 46 (2005) (*OJD II*).¹² These cases are instructive, but for the following reasons, we conclude that the cases support, rather than contradict, our conclusion that the State violated ORS 243.672(1)(a).

In *OJD I*, we determined that the employer violated ORS 243.672(1)(a) when managers (1) directed a potential bargaining unit employee not to discuss union issues in conversations "in the office," when those conversations routinely included nonwork and personal subjects; and (2) directed the employee not to have planned, systematic conversations with other employees on union issues on work time when other work-time conversations routinely included nonwork and personal subjects. 20 PECBR at 875-76. In reaching that conclusion, we explained that "[w]hen a public employer seeks to place limits on employee communication about a union or labor relations issues, the rules must be narrowly tailored and must not unduly infringe on employees' protected rights to participate in union activities." *Id.* at 872 (citing *Oregon Public Employees Union v. Jefferson County*, Case No. UP-22-99, 18 PECBR 146, 152 (1999)). We further explained that:

"A rule prohibiting union-related speech or distribution of union-related materials in nonwork areas or on nonwork time is presumptively invalid. This presumption may be rebutted where, for example, special circumstances make the rule necessary to maintain production or discipline and where the employer's interest

¹²All three cases arose in the context of a union organizing campaign.

in light of the special circumstances outweighs the employees' interest in engaging in union-related speech. [Citations omitted.]

“A rule prohibiting union-related speech and distribution of materials in working areas or during work time is presumptively valid. This presumption can be rebutted by showing that the rule was discriminatorily promulgated or enforced. An employer may prohibit its employees from discussing nonwork-related or personal matters on work time, but it cannot permit discussions on those matters while prohibiting discussion of union matters.” *Id.* at 872-73.

In concluding that the employer violated ORS 243.672(1)(a) when a supervisor told an employee that he could not talk about union matters in the office, we reasoned that:

“On its face, this directive applies to both work time and nonwork time in the office. As to nonwork time, the directive is presumptively invalid, and the employer has not identified any special circumstances to overcome the presumption of invalidity. As to work time, the directive is presumptively valid. [The union] overcame this presumption by establishing that the directive was selectively applied to discussions about Union matters, but not to other personal, nonwork-related discussions among employees.” *Id.* at 875.

Our conclusion and reasoning in *OJD I* does not support the State's assertion that its guidelines and directives singling out only union-related e-mails and the use of the e-mail system by state employees holding positions in the union were lawful. To the contrary, we find our conclusion in *OJD I* consistent with our finding that the State's actions violated ORS 243.672(1)(a). In the present case, the DAS Guidelines stated that “[t]here would be no use of the State's email system by union staff or state employees holding positions in the union.” Such a prohibition goes beyond even the content-based directive that we found unlawful in *OJD I*, and singles out “state employees holding positions in the union.” Moreover, the various directives issued by multiple top-level State managers barred all Association-related use of the State's e-mail system, regardless of when and where that usage occurred. As in *OJD I*, the directives, as applied to nonwork time and nonwork areas, were presumptively invalid, and the State has not identified any special circumstances to overcome that presumption.

We acknowledge, however, the difficulty in directly correlating our rules regarding employee communications in “working/nonworking areas” to the context of using the State's e-mail system.¹³ But we need not resolve the somewhat metaphysical question of when or whether an employee's use of an employer's e-mail system (even when accessed from a “nonwork” location), can be considered to take place in a “nonwork” area. Even assuming, without deciding, that the State's “no-Association-related-e-mail” directives were presumptively valid, the directives were selectively issued regarding discussions about union matters, but not to other personal, nonwork-related e-mails. Indeed, the directives made that distinction explicit. Under such circumstances, we find that, like *OJD I*, the Association has overcome any presumptively valid rule.

¹³We note, however, as discussed below, that *OJD II* held that policies barring the use of an employer's e-mail system for union communications on nonwork time are presumptively invalid.

We now turn to *OJD II*, where we applied these same principles in reviewing whether it was unlawful for an employer to prevent union supporters from using the “reply all” function on the e-mail system to respond to communications that supporters viewed as negative towards the union. We first acknowledged precedent that employees do not have a statutory right to use the employer’s e-mail system, but noted that if the employer had a rule regulating e-mail usage, it cannot be applied in a discriminatory fashion. *OJD II*, 21 PECBR at 46. We concluded that the “reply-all” prohibition did not violate subsection (1)(a), providing the following reasoning:

“The policy is presumptively valid to the extent it regulates employee activities during work time, and SEIU has not overcome the presumption. OJD management regularly uses e-mail to disseminate business information to all OJD employees throughout the state. For 15 years, the ‘reply all’ function has been disabled. There is no evidence that * * * managers ever used the ‘reply all’ function. Nor is there evidence that OJD ever intended to allow its employees to use the ‘reply all’ function.

“Based on the evidence in the record, we conclude that OJD's ‘reply all’ policy is valid. The policy was not promulgated in response to actual or anticipated union activities, and it was not discriminatorily enforced.

“The policy is presumptively invalid to the extent it controls union activities during nonwork time. The State has overcome the presumption. When the ‘reply all’ function is used to respond to an agency-wide e-mail, it sends the response to 1800 employees. The evidence indicates that regular use of the ‘reply all’ function in these circumstances would result in a volume of mail that could create congestion in the system and hamper legitimate and necessary business uses. Further, the fact that judges and other staff receive these e-mails while they are in the courtroom constitutes an interruption of critical work that the State can legitimately control.” *Id.* at 46-47.

OJD II is notably distinguishable from this case. Most significantly, the *OJD II* policy barring use of the “reply all” function was facially neutral and applied to all e-mail communications, not just union-related communications. Here, as discussed above, the State’s guidelines and directives *singled out* union-related e-mails and the use of the e-mail system by state employees holding positions in the union. Additionally, the *OJD II* policy “was not promulgated in response to actual or anticipated union activities.” *Id.* at 46. Here, the record establishes that the State’s directive *was promulgated* in response to such actual or anticipated activities. Thus, even assuming the presumptive validity of the State’s directives, the Association has overcome that presumption.

Finally, under *OJD II*, the State’s directives are presumptively invalid with respect to e-mails sent on nonwork time.¹⁴ Unlike *OJD II*, however, the State here has not established that

¹⁴Again, we note the difficulty of applying a “nonwork area” presumption to the use of an e-mail system.

continuing to permit Association-related communications would “create congestion in the system and hamper legitimate and necessary business uses.”¹⁵ *Id.* 47. Likewise, the State has not submitted sufficient evidence that there was a compelling business need to ban such communications. Further, the directives prohibiting Association-related communications were not narrowly tailored as required under *Jefferson County*; they were overly broad and encompassed all Association-related communications. Consequently, we do not find that *OJD II* compels a conclusion that the State’s prohibition on Association-related communications is lawful.

Finally, in *OJD III*, we found that the employer did not violate subsection (1)(a) when one manager interpreted the employer’s facially-neutral policy on the acceptable use of its e-mail system as prohibiting union-related communications. Specifically, the policy at issue prohibited the use of the Department’s e-mail system for “personal lobbying, soliciting, recruiting, selling or persuading, for or against, commercial ventures, products, religions, or political causes or organizations.” 21 PECBR at 103. In dismissing the complaint, we found that the manager’s one-time prohibition was presumptively valid, and that the union had not overcome that presumption. In doing so, we emphasized that:

“We are not confronted with any issues unique to e-mail because the Department has chosen to treat the use of e-mail in the same fashion as the telephone. In addition * * * we are not concerned with a wide-ranging dispute covering thousands of employees at various campuses * * *. Nor do we rule on the Department’s rules as promulgated statewide, but only as interpreted by [one] administrator, on one occasion in 2003.” *Id.* at 114.

With those caveats in mind, we determined that the Department’s general rules on e-mail usage were presumptively valid. We then determined that the union had not overcome the presumption because it had “not introduced sufficient evidence of ‘personal use’ to overcome the presumption.” *Id.* at 116. Significantly, in reaching that conclusion, we reasoned that:

“[t]he Department’s policies do not discriminate against union-related messages. *They do not prohibit only union communications.* * * * The Department has acted to stop e-mail solicitations such as an employee’s solicitation for other employees to take her yoga class, a dog groomer seeking clients, and solicitations to attend a Pampered Chef cookware sale/party. The Department has also stopped employees from having lunchtime prayer services in a vacant courtroom.” *Id.* at 116 (emphasis added).

¹⁵Indeed, as noted above, the parties here have negotiated numerous restraints on Association-related e-mail usage, such that the State cannot legitimately advance the same arguments that we found sufficient in *OJD II* to overcome the presumptive invalidity of the policy’s application on nonwork time.

We acknowledged that the Department had permitted e-mail solicitations concerning Governor and Department-approved charity drives, as well as e-mails involving “team-building” activities. *Id.* We observed, however, that such e-mails were treated as “work related” under the Department’s policy, and we agreed with those characterizations. Based on the record presented in *OJD III*, we dismissed the complaint. *Id.*

The Court of Appeals affirmed our decision, observing that this Board’s order

“proceeded from the legal premise that, notwithstanding that OJD had opened its system to limited nonbusiness or personal uses, the ‘anti-solicitation’ prohibition remained enforceable unless OJD managers, as a matter of practice, expressly allowed or knowingly acquiesced in violations of that prohibition.” *OJD III*, 209 Or App at 515.

Concluding that we “correctly framed the legal analysis,” the court found the reasoning of our order, which it labeled the “nonabsolutist approach,” compelling. *Id.* The court then explained that its review was reduced to whether our order had properly applied that nonabsolutist “construct” to that dispute. *Id.* at 516. In answering that question in the affirmative, the court first observed that the union did not challenge the portion of our order that determined that the disputed e-mail “fell within a broader, categorical restriction against uses of the employer’s property *that was not limited to union-related communications.*” *Id.* at 516 (emphasis added). Rather, the union asserted that “OJD ha[d] failed to enforce that prohibition against other sorts of solicitations and, thus, preclusion of union-related messages [was] impermissibly discriminatory.” *Id.*

The court reasoned that the union’s “position founder[ed] on the allocation of the burden of proof and on the content of [that] record.” *Id.* Explaining that the union bore the burden of proof, the court determined that the union failed to make the necessary showing “that OJD had, as a matter of practice, either explicitly approved or knowingly acquiesced in the use of its e-mail systems for nonbusiness-related solicitations prohibited under its policy.” *Id.* The court acknowledged, as had our order, that OJD had “routinely and explicitly approve[d] communications soliciting participation in ‘Department-approved charity drives, such as the Governor’s charitable fund drive, Governor’s food drive, and Governor’s toy drive, and funds for the Oregon Food Bank and a needy family program.’” *Id.* at 517. The court approved of our conclusion, which the union did not dispute, that, “given the context, *viz.*, that the charitable drives were an intramural activity, communications regarding those drives were properly characterized as ‘business-related’” under OJD’s policy. *Id.* “Consequently, OJD’s approval—indeed, sponsorship—of those solicitations was not indicative of discrimination but, instead, constituted explicitly permitted use of OJD’s system for ‘business purposes.’” *Id.*

Ultimately, the court summarized its decision as follows:

“ERB did not err in concluding, on this record, that SEIU had failed to prove discriminatory enforcement in violation of ORS 243.672(1)(a). The disputed e-mail violated OJD’s general prohibition against use of its equipment for non-business-related solicitations, and SEIU failed to establish that OJD’s enforcement

of that prohibition in this instance deviated from its routine practice with respect to other, non-union-related communications.”
Id.

We find that our conclusion (and the court’s) in *OJD III* is distinguishable from this case in numerous respects. Most importantly, *OJD III* did not concern a facially-discriminatory e-mail policy—*i.e.*, a policy that expressly singled out union-related e-mails as an exception to the State’s allowance of other “nonbusiness” e-mails. Here, in contrast, the State’s prohibition specifically targeted (and barred) Association-related e-mails and kept in place existing policies that permitted other personal or “nonbusiness” uses of the State’s e-mail system. That fundamental distinction alone is significant to distinguish *OJD III*, which was premised on a conclusion that the policy did not, on its face, “discriminate against union-related messages” and did not “*prohibit only union communications.*” See 21 PECBR at 116 (emphasis added); see also 209 Or App at 516 (restriction “not limited to union-related communication”). We decline to hold that the State may target for exclusion only union-related e-mails, while broadly permitting copious other “personal” or “nonbusiness” e-mails, or that the State may single out “state employees holding positions in the union.” Moreover, we find no support for such a sweeping proposition in *OJD III*, our prior case law, or federal precedent under the NLRA.¹⁶

Additionally, both our order and the court’s in *OJD III* were expressly limited to the policy and record developed in that case. We reached our conclusion in *OJD III* with the caveats that: (1) the dispute did not concern “any issues unique to e-mail because the Department ha[d] chosen to treat the use of e-mail in the same fashion as the telephone”; (2) we were “not concerned with a wide-ranging dispute covering thousands of employees”; and (3) we were not addressing a “statewide” policy, but rather only a single interpretation by one administrator on one occasion. See 21 PECBR at 114. Those concerns, which were absent in *OJD III*, are present here.

Likewise, after agreeing with our framework for analyzing the dispute, the court reduced its review to whether we had properly applied that framework to that dispute. 209 Or App at 516. Here, as detailed above, both the policy at issue here and the facts regarding the State’s selective application of that policy are materially different from *OJD III*.

In sum, in *OJD III*, the court affirmed our determination that the union had failed to prove discriminatory enforcement of a facially-neutral e-mail policy. See 209 Or App at 517. Simply put, the e-mail directives at issue here are not facially-neutral, but rather are facially discriminatory, in that they expressly singled out Association-related communications (and use by state employees holding union positions) in violation of ORS 243.672(1)(a). On a related note, unlike *OJD III*, the State’s e-mail prohibitions concerning Association-related communications did not involve a “general prohibition against use of [the State’s] equipment

¹⁶We again note that the directives issued by Agency managers here prohibited Association-related e-mail communications even on non-work hours, and that, under *OJD II*, such directives are presumptively invalid.

for non-business-related solicitations” but rather a *specific* prohibition against only Association-related communications. *See id.* Therefore, we distinguish *OJD III*.¹⁷

For these reasons, we find that the State’s prohibition of the use of its e-mail system interfered with, restrained, and coerced employees because of their exercise of protected rights under ORS 243.662. Accordingly, the State violated ORS 243.672(1)(a).

“In the Exercise of” Claim

We now turn to the Association’s claim that the State’s directive prohibiting the use of its e-mail system for Association-related business violated the “in the exercise of” prong of ORS 243.672(1)(a). We conclude that it did. As discussed above, we found that the State violated the “because of” prong of ORS 243.672(1)(a) when it issued the DAS Directives in response to the protected activities of the Association and its members. The natural and probable consequence of that action is to chill Association members in the exercise of protected rights going forward. As a result, the State has committed a derivative “in the exercise of” violation under subsection (1)(a).

ORS 243.672(1)(c) Allegation

6. In light of our decision above, we do not decide the Association’s claim that the State’s directive prohibiting the use of its e-mail system for Association-related communications violated ORS 243.672(1)(c) because doing so would add nothing to our remedy.

ORS 243.672(1)(b) Allegation

7. The State did not violate ORS 243.672(1)(b) when it ceased providing notice to the Association of disciplinary actions during the hiatus period.

¹⁷We also note that *OJD II* and *III* arose in the very different context of an ongoing organizing drive by a labor organization that was not certified as the exclusive representative of the affected employees. When a union is seeking to represent employees in a possible bargaining unit, it is at least arguably “soliciting” support from those employees, making the comparison to an employer’s generalized “anti-solicitation” rules somewhat more analogous. However, during an organizing campaign, the legal obligations of an employer are largely negative: they must refrain from certain activities that are coercive or that unlawfully assist a labor organization. Once a labor organization is certified or recognized as the exclusive representative of a group of employees, the obligations of the employer expand to include additional affirmative obligations, including but certainly not limited to the duty to bargain in good faith, the obligation to provide notice of changes to the exclusive representative, the duty to provide information relevant to possible contract violations or for use in developing bargaining proposals, and the obligation to withhold dues. As a result, comparing the State’s “no-Association-related-e-mail” directives to the type of general non-solicitation policies at issue in *OJD II* and *OJD III* is not particularly apt.

Legal Standards: ORS 243.672(1)(b)

A public employer commits an unfair labor practice under ORS 243.672(1)(b) if it dominates, interferes with, or assists in the formation, existence or administration of a labor organization. Where a labor organization alleges that the employer dominated or interfered with the administration of the union, we generally require that a complainant prove that an employer took actions that impeded or impaired the labor organization in the performance of its statutory responsibilities. The proffered evidence must establish that the employer's actions resulted in actual interference with the labor organization. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 794 (2008). However, as we held in *Santiam Correctional Institution*, some actions by an employer are "so inimical to the core values of the PECBA that they violate subsection (1)(b), even if there is no proof that these statements directly affected any union activity." 22 PECBR at 398; *see also AFSCME, Local 2909 v. City of Albany*, Case No. UP-26-98, 18 PECBR 26, -39 (1999) (employer bypassing the union and presenting new bargaining proposals directly to employees violated (1)(b) even without an adverse impact to the union); *Oregon Public Employees Union v. Jefferson County*, Case No. UP-20-99, 18 PECBR 310, 318 (1999) (County commissioner's statement to local union president that he wanted the bargaining unit to be represented by a different labor organization and that he would not negotiate with certain representatives of the labor organization violated (1)(b) even without a showing of actual interference).

Analysis: ORS 243.672(1)(b)

The stipulated facts demonstrate that no disciplinary actions were taken by the State during the period in which the State was operating under the DAS Guidelines. Thus, the State would not have been obligated to provide the Association with any notices of corrective action during that period, even if it had continued to comply with the requirements of Article 24, Section 1. As a result, the Association has not established any actual domination or interference with the administration of the Association.

Nor do we consider the State's actions of such a nature as to obviate the need for some evidence of an actual adverse impact on the Association. In the cases where we have found no need for evidence of actual interference, the alleged violations have generally been of the type that on their face would have the likely impact of negatively affecting a labor organization. Further, these situations were often ones in which establishing evidence of a particular concrete impact would be difficult. Here, the State's action was not sufficiently egregious to meet this standard. Nor do we find that actual impact would be difficult to establish had there been any. Accordingly, we will dismiss this claim.¹⁸

¹⁸We do not address the issue of whether we would have found a violation if the record contained evidence that the State had taken disciplinary actions during the time in which it operated under the DAS Guidelines.

Remedy

The Association requests that we order the State to cease and desist its unlawful actions, comply with the terms of the expired agreement, post a notice of the violations on all union billboards and distribute the notice electronically to all bargaining unit members, and make all employees affected by the violations whole. We will order the State to cease and desist from any further violations, but we need not order the State to comply with the terms of the expired agreement, as a successor has been reached since the complaint was filed and the parties are operating under that agreement.

We order employers to post a notice of violations if we determine that the violation

“(1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was perpetrated by a significant number of a Respondent’s personnel; (4) affected a significant portion of bargaining unit employees; (5) had a significant potential or actual impact on the functioning of the designated bargaining representative as the representative; or (6) involved a strike, lockout, or discharge.” *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82, 6 PECBR 5590, 5601 (1983).

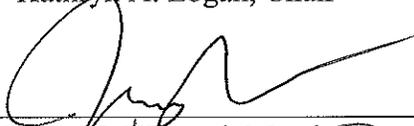
Not all of these criteria must be satisfied to justify a posting. *Blue Mountain Community College*, 21 PECBR at 782. After applying these factors to the present case, we conclude that it would not be appropriate to require the State to post a notice of the violations.

ORDER

1. The State shall cease and desist from violating ORS 243.672(1)(a) and (1)(e) as described above.
2. The remainder of the Complaint is dismissed.

DATED this 11 day of June 2013.

*Kathryn A. Logan, Chair



Jason M. Weyand, Member



Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Logan, Concurring In Part, Dissenting In Part:

The majority opinion concludes that the State violated ORS 243.672(1)(e) when it unilaterally prohibited the use of the State's e-mail system for Association-related communications. As I disagree with the majority's decision, I respectfully dissent from this portion of the Order.

The subject at issue is whether access to and use of the State's e-mail system is mandatory or permissive for bargaining. Although the parties argue that the subject has already been decided by this Board, they each reach a different result. Due to the lack of clarity on the matter, I agree with the majority that the subject should be balanced.

The State's interest in its computer equipment and e-mail system is set forth in the State's Acceptable Use of State Information Assets Policy. This Policy states that the computers and e-mail are provided for business purposes of the State, and are made available to users to "optimize the business process" of the State. The information systems must be appropriately secured "to properly protect state information systems." Further, the Policy reflects the State's concerns regarding security of confidential information, data protection, and operational efficiency of its systems. As for e-mail, it may be used for union business "per the contract." The Association acknowledges the State's right to control this system in the expired collective bargaining agreement: "[e]xcept as modified by this Article, Agency shall have the right to control its e-mail system, its uses or information." These interests are critically important to the State and its operations.

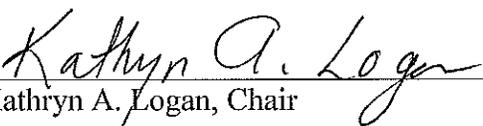
The employees', as well as the Associations', interest in the system is that it provides an easy way to communicate. While not allowing use of that system may make communicating with and among bargaining unit members a bit more complicated, the ability to communicate remains intact through many other means of communication that existed long before e-mail. The bulletin boards still existed, the mail system was available, telephones remained accessible, and personal e-mail addresses could be used by the employees and Association. The only limitation was on use of the State's email system. The impact on the employees' wages, hours and working conditions due to that limitation was minimal.

In balancing the interests, I find that the subject of access to and use of the State's equipment and e-mail system has a greater impact on management's prerogative than it does on employee wages, hours and other conditions of employment. Therefore, pursuant to the terms of ORS 243.650(7)(c), the subject is permissive.

Finally, I have some concerns about what I foresee as the scope of the majority opinion. The majority equates the use of the e-mail system to the mandatory subject of use of union bulletin boards. The arguable impact of the majority opinion is, however, that once a piece of employer equipment may be used for communication, bargaining over that use is mandatory. Not all manners and forms of communication, however, are the same. Bulletin boards are not computer systems. Bulletin boards are nailed to a wall in the breakroom with items physically attached to it with push pins. Computers, however, sit on many employees' desks, and the e-mail system allows for dynamic conversations and instant communication. I see little similarity between the types of usage that may occur with a bulletin board and a computer.

This Board, rather than equate bulletin boards and e-mails systems as “forms of communication,” should look at the type and usage of a communication system.

As the use of the e-mail system by Association representatives was a permissive subject of bargaining, the State did not violate ORS 243.672(1)(e). I respectfully dissent.



*Kathryn A. Logan, Chair