

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-52-11

(UNFAIR LABOR PRACTICE)

|                            |   |                     |
|----------------------------|---|---------------------|
| MILWAUKIE POLICE EMPLOYEES | ) |                     |
| ASSOCIATION,               | ) |                     |
|                            | ) |                     |
| Complainant,               | ) |                     |
|                            | ) |                     |
| v.                         | ) | RULINGS,            |
|                            | ) | FINDINGS OF FACT,   |
|                            | ) | CONCLUSIONS OF LAW, |
| CITY OF MILWAUKIE,         | ) | AND ORDER           |
|                            | ) |                     |
| Respondent.                | ) |                     |
|                            | ) |                     |

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On June 25, 2012, this Board heard oral argument on Complainant's objections to a Recommended Order issued on April 19, 2012, by Administrative Law Judge (ALJ) Wendy L. Greenwald, after a hearing on November 22 and December 21, 2011, in Salem, Oregon. The record closed on January 30, 2012, following receipt of the parties' post-hearing briefs.

Daryl S. Garrettson, Attorney at Law, Lafayette, Oregon, represented Complainant.

Martin C. Dolan and Patricia Pascone, Attorneys at Law, Dolan Griggs, LLP, Portland, Oregon, represented Respondent.

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On August 2, 2011, the Milwaukie Police Employees Association (Association) filed this unfair labor practice complaint against the City of Milwaukie (City). The complaint alleges that the City violated ORS 243.672(1)(a) and (b) by requiring officers to take their breaks and meal periods within the City limits after employees testified at an arbitration proceeding, and that the City violated (1)(e) by implementing the change without bargaining with the Association. The City filed a timely answer to the complaint.

The issues presented are:

1. Did Chief Jordan's announcement in July 2011 that the City would follow its policy of requiring members of the bargaining unit to take their meal and rest periods inside of the City limits interfere with, restrain, or coerce employees in the exercise of their protected rights guaranteed by ORS 243.662 in violation of ORS 243.672(1)(a)?

2. Did Chief Jordan's announcement in July 2011 that the City would follow its policy of requiring members of the bargaining unit to take their meal and rest periods inside of the City limits, dominate or interfere with the existence or administration of the Association in violation of ORS 243.672(1)(b)?

3. In July 2011, did the City change the parties' past practice of allowing bargaining unit employees to take their meal and rest periods outside of the City limits without notice to, or bargaining with, the Association in violation of ORS 243.672(1)(e)?

4. If the City violated ORS 243.672(1)(a), (b), or (e), what is the appropriate remedy?

### RULINGS

The rulings of the ALJ were reviewed and are correct.

### FINDINGS OF FACT

1. The Association is the exclusive representative of a bargaining unit of employees working in the Milwaukie Police Department (Department) at the City, a public employer. The bargaining unit includes employees in the classifications of police recruit, police officer, and police sergeant.

#### Collective Bargaining Agreement Language

2. The Association and the City were parties to a collective bargaining agreement effective July 1, 2010 through June 30, 2012 (Agreement).

3. Article 2 of the parties' Agreement, entitled "**Management Rights**," provides in relevant part:

#### ***A. Responsibilities***

"The parties agree that the CITY retains all the customary, usual and exclusive rights, decision-making, prerogatives, functions, and authority connected with or in any way incident to its responsibility to manage the affairs of the CITY or any part of it. Rights of employees in the bargaining unit and the ASSOCIATION are limited to those set forth in the Agreement or provided by Oregon Constitution and Charter of the City of Milwaukie and the CITY retains all prerogatives, functions and rights not subject to the terms of this Agreement. However, the City and the Association are subject to the bargaining obligations of the Public Employees Collective Bargaining Act.

#### ***1. Rights***

"It is recognized that the CITY has and will continue to retain the exclusive right and responsibility to operate and manage the Police Department, its facilities, properties and the activities of its employees, insofar as this right does not conflict

with terms of this Agreement without limiting the generality of the foregoing, it is expressly recognized that the CITY's operational and managerial responsibility includes:

“\* \* \* \* \*

- “d) The maintenance and control and use of property, facilities and personnel;
- “e) The determination of safety, health and property protection measures where legal responsibility of the CITY or other governmental unit is involved;
- “f) The right to enforce the rules and regulations now in effect and to establish new rules and regulations from time to time not in conflict with this Agreement;
- “g) The determination of the size of the working force, the allocation and assignment of work to employees and the determination of policies affecting the selection of employees;

“\* \* \* \* \*

- “i) The direction of all working forces in the system, including the right to hire, suspend, discharge or discipline, or transfer employees.”

4. Article 3, Section B of the parties' Agreement, entitled “*Maintenance of standards/existing conditions*,” provides:

“Subject to available funds, all mandatory subjects of bargaining relating to wages, hours and working conditions not specifically mentioned in this Agreement shall be maintained at not less than the level in effect at the time of the signing of this Agreement.”<sup>1</sup>

5. Under Article 6, “**Hours of Work**,” Section F, “*Lunches & breaks*,” employees working an 8 or 10 hour shift “shall be provided one (1) thirty (30) – minute paid meal period and two (2) fifteen (15) – minute paid rest periods per shift, to the extent possible and consistent with the operational requirements of the Department. Employees remain subject to call or interruption during all meal and rest periods.”

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<sup>1</sup>While the Association relied on Article 3, Section B, *Maintenance of standards/existing conditions*, in support of its position that the City was obligated to bargain before restricting the location of employees' breaks, it neither included a claim that the City's actions violated ORS 243.672(1)(g), nor presented evidence that it had filed a grievance contesting the City's actions.

The language in Section F was proposed by the City and added to the parties' Agreement as a result of the City's last best offer being awarded by the interest arbitrator in June 2011. The Association and City have never bargained over restricting the location of employees' meals and rest breaks to inside the City limits.

### Background

6. Larry Kanzler was the Department's police chief from 1999 through 2008. At the time he began at the Department, sergeants were the next highest ranking officers. Under Kanzler, the sergeants acted as the shift supervisors.

7. When Kanzler became chief, he discovered that Department policies were out of date and sometimes in conflict with the City's Human Resources (HR) Department policies. As a result, he began the process of updating Department policies to bring them in line with current laws and practices, initially focusing on what he considered to be critical policies, such as those related to the use of force.

8. Department GENERAL ORDER SECTION NO. 8.00, which on its face had an effective date of April 20, 2000, and a review date of December 2005, "**Meals and Breaks**," provided in part:

"Members may take meals and breaks in accordance with the current collective bargaining agreement. Members may take meals at their homes, if homes are within the incorporated limits of this city. If the member's home is not within the city a supervisor may approve leaving the city for meals depending upon response time back to the member's duty area. Members are subject to recall from any break for duty or emergency."<sup>2</sup>

Nothing in the parties' collective bargaining agreements during this time addressed the location of employees' meal and rest breaks.

9. After Kanzler began work at the Department, he became aware that employees sometimes went outside of the City limits for meal and rest breaks. Kanzler also discovered that after 9:00 p.m., only one traditional restaurant, a couple of fast food establishments, several taverns, and a convenience store were open within the City limits. Several traditional restaurants remained open within a mile of the City limits, however. Kanzler discussed this situation with Sergeant Jim Colt, other sergeants, and some officers and decided that restricting employees to the few eating places available within the City limits was not reasonable because it limited the opportunity for employees to get out of their cars to take a break. Kanzler believed that allowing employees to do this contributed to their safety and success. Kanzler told the sergeants that he did not have a problem with employees taking their meal and rest breaks outside of the City limits if the sergeants managed their personnel in a manner that did not jeopardize the

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<sup>2</sup>The parties stipulated to the receipt of the document entitled Department GENERAL ORDER SECTION NO. 8.00 during the pre-hearing conference. However, neither Larry Kanzler nor John Hipes, the only witnesses questioned regarding the exhibit, had any recollection of this policy.

Department's mission of having sufficient officers to respond as needed. Kanzler told officers he did not want them in taverns or bars, except for business purposes. He directed one officer to stop eating at a club that featured partially nude dancers, because he felt it was inappropriate.

10. Kanzler never received a citizen complaint about officers eating or taking breaks outside of the City limits. He knew that the officers monitored their radios while on meal and rest breaks and interrupted breaks to respond to calls as needed. From 2002 until 2008, Kanzler monitored call load activity for the purpose of adjusting staffing levels and did not find that employees taking their breaks outside of the City limits affected response time.

11. Sometime prior to 2007, a captain position was created and Sergeant Colt was promoted to captain. In 2007, Kanzler placed then Captain Colt in charge of revising the Department's policies using the Lexipol system. Lexipol was a new electronic system that provided agencies with a comprehensive package of boilerplate policies which could be modified for use in their jurisdiction. The policies Lexipol provided the Department consisted of approximately 700 pages. Colt and Kanzler modified the boilerplate policy package and returned it to Lexipol for changes.

12. Policy 1034, "**Meal Periods and Breaks**," provides that:

**"1034.1.1 MEAL PERIODS**

"Sworn employees shall remain on duty subject to call during meal breaks. All other employees are not on call during meal breaks unless directed otherwise by a supervisor.

"Uniformed patrol and traffic officers shall request clearance from LOCom (Lake Oswego Communications) prior to taking a meal period. Uniformed officers shall take their breaks within the City limits unless on assignment outside of the City[.]

"The time spent for the meal period shall not exceed the authorized time allowed."

**"1034.1.2 15 MINUTE BREAKS**

"Each employee is entitled to a 15 minute break, near the mid point, for each four-hour work period. Only one 15 minute break shall be taken during each four hours of duty. No breaks shall be taken during the first or last hour of an employee's shift unless approved by a supervisor.

"Employees normally assigned to the police facility shall remain in the police facility for their breaks. This would not prohibit them from taking a break outside the facility if on official business.

“Field officers will take their breaks in their assigned areas, subject to call and shall monitor their radios. When field officers take their breaks away from their vehicles, they shall do so only with the knowledge and clearance of LOCom (Lake Oswego Communications).”<sup>3</sup>

13. Kanzler recalls that Policy 1034 was included in the original boilerplate policy package provided by Lexipol. Kanzler discussed Policy 1034 with Captain Colt and decided not to adopt it.<sup>4</sup> Kanzler was concerned that the policy created a safety hazard because it limited the places available where officers could get out of their cars to eat or have coffee. He was especially concerned about the officers on the graveyard shift, who might only have had few hours of sleep after working all night and being at court during the day.

14. When Colt and Kanzler reviewed the modified policy package from Lexipol, they found Lexipol had not made all of their requested modifications and had included some boilerplate policies they had requested be removed. Kanzler and Colt requested additional modifications from Lexipol three to five times. Each time, Lexipol returned the Department's requested revisions in a complete policy package, which did not use a legislative format to indicate where changes had been made. As a result, Kanzler and Colt were required to review the revised policy package page-by-page to determine if their requested changes had been made.

15. After receiving Lexipol's final revisions, Kanzler “staffed” the Lexipol policy package by providing it to the sergeants to review and provide feedback before it was implemented. At the time, because the policy manual was so long, the sergeants were told to only read the policies they would be responsible for implementing with subordinate staff. John Hipes, who has been a sergeant since 2000, recalled reviewing the Lexipol policy package. Hipes did not remember reading Policy 1034 at that time or ever being asked to implement that policy. Captain Steven Bartol, who was a sergeant in 2007, has no specific recollection of Policy 1034, but believes it was part of the Lexipol policy manual he reviewed. Bartol does not know if the City intended to adopt Policy 1034 or if it was inadvertently placed into the Department policies by Lexipol.

16. After the Lexipol policy package was implemented, officers were trained on the Lexipol system. Currently, officers are issued the policies electronically. When the officer logs onto the system, any new policies are provided to the officer to review and the system indicates whether the officer has reviewed them.

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<sup>3</sup>The copy of Policy 1034 that was introduced at the hearing had a footer, which provided “Adopted: 2011/06/28 © 1995-2011 Lexipol, LLC.” The reference to the adopted date reflects when Lexipol last issued the policy, not when the Department or City adopted the policy.

<sup>4</sup>It is unclear from the record whether this policy was ever formally adopted. Chief Kanzler testified that he never adopted Policy 1034. On the other hand, City Manager William Monahan testified that during a meeting with Kanzler in approximately October 2011, Kanzler stated either that he had written Policy 1034 or that it had been drafted during his tenure. However, based on our resolution of the subsection (1)(e) claim, we need not determine the existence of a past practice. Therefore, we need not decide whether Policy 1034 was formally adopted.

17. Lexipol maintains its policy package electronically and provides periodic updates. The Department is required to review and request changes to any updated policies. If the Department fails to do this, Lexipol may include a boilerplate policy in the Department policy package, even though the Department had previously modified or removed that policy.

18. In July 2006, Chief Kanzler placed an officer on a plan of assistance after he determined that the officer did not have sufficient knowledge of the Department's policies. The plan of assistance required the officer to develop and maintain a working knowledge of the policies.

19. Kanzler does not recall Policy 1034 being in the Department policy package in 2008 when he left his employment with the City.

#### Current Administration

20. Current Police Chief Bob Jordan first began working at the Department in 2008. Operations Captain Steven Bartol currently oversees the Department's patrol unit. Sergeants are the shift supervisors and, during the graveyard shift, the sergeant is the highest ranking officer working in the Department.

21. Within two weeks of joining the Department, Jordan began reviewing the Department's policies. He continued this process over a period of time, during which at some point he became aware of Policy 1034. Policy 1034 was included in both the hard copy and the electronic copy of the policy manual.

22. In 2008, a few months after Jordan had come to work at the Department, an officer who was going to pick up food at a restaurant outside of the City limits asked Chief Jordan if he wanted to order food. At this point, Jordan was not completely familiar with all of the Department policies and did not know if the officer was going outside the City limits on police business and then bringing the food back.

23. In October 2010, Chief Jordan ordered an investigation into Sergeant John Doe's on-duty response to the potential suicide of a friend at her residence outside of the City limits.<sup>5</sup> The incident occurred within the Clackamas County Sheriff's Office jurisdiction and Deputy John Smith responded to the incident.<sup>6</sup> Deputy Smith subsequently wrote an incident report that did not refer to Sergeant Doe's presence.

24. In early December 2010, Chief Jordan reviewed the investigation report into Sergeant Doe's conduct, which included statements from several officers. Sergeant Ryan Burdick's statement reflected that: (1) he typically had coffee with Doe at the 82nd Avenue Starbucks, which was located approximately four minutes outside of the City limits; (2) that other officers frequently went on breaks to the 82nd Avenue Starbucks; and (3) that officers

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<sup>5</sup>John Doe is a pseudonym.

<sup>6</sup>John Smith is also a pseudonym.

frequently ate at Old Chicago restaurant, which was located approximately ten blocks outside of the City limits. Burdick stated that on such occasions, either he or at least one or two officers would stay in the City so as not to leave the shifts' presence in the City "a little bit thin." Officer John Redenbo's statement also included a reference to being with Sergeant Doe at the 82nd Avenue Starbucks.

25. On December 14, 2010, Chief Jordan sent Sergeant Doe a pre-dismissal notice. Jordan did not charge Doe with violating Policy 1034 or leaving the City for meal or rest breaks, but one of the charges related to citizens indicating that they had frequently observed Doe's police car outside of its jurisdiction for personal reasons. On December 27, 2010, Doe provided Jordan a written response to the charges, which stated in part, "[y]ou keep referencing the fact that I left the [C]ity. Our officers routinely travel to Old Chicago located at Causey and 82<sup>nd</sup> Avenue. That is just across the street from Oris Lane."

26. After Chief Jordan terminated Doe's employment, the Association grieved the termination. In reviewing information in preparation for the January 2011 Step III grievance hearing, City Manager William Monahan became aware of Policy 1034 and was concerned that it was not being enforced. Monahan had only worked at the City since October 2010. Monahan did not investigate whether Policy 1034 had been validly adopted or implemented by the City, whether it had been previously applied to employees, or why employees ate meals in restaurants outside the City limits.

27. On July 5, 6, 7, and 8, 2011, the arbitration hearing over Doe's termination was held.<sup>7</sup> During the City's presentation of evidence, the Association's attorney asked Chief Jordan whether he was aware that at least one or two officers took a break at the 82nd Avenue Starbucks every night. Jordan testified that he did not know that, but since the investigation into Doe's conduct he had learned the Department's "policy about that is not generally complied with. And so probably we would want to do something about that." Jordan later clarified in his testimony that:

"what I believe is that it's not generally complied with. But I don't know that with a certainty. So we have a policy that seems clear and a practice that may differentiate from that. So I probably need to fix that.

"\* \* \* \* \*

"The current policy - - the City has a policy that is written and it says that you're going to take your breaks in the city - - you have to take your meal breaks in the city. And so I've learned as a result of this investigation that on certain shifts that is disregarded. So I think at some point we have to take the City policy and look at how they follow it."

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<sup>7</sup>On September 14, 2011, the arbitrator issued an award reinstating Doe and reducing the termination to a written reprimand.

28. During the Association's presentation of evidence at the arbitration hearing, Sergeant Hipes testified that in his experience, employees had always been allowed to eat and take breaks outside of the City limits and that at times all the employees on his shift left the City limits for their breaks. Sergeant Jon Foreman, who was the Association President, testified that employees routinely took meals outside of the City.

29. When Chief Jordan heard Sergeant Hipes' testimony, he learned that employees' failure to comply with the meal and rest break policy was more open and widespread than he had previously believed. He was especially concerned to hear from Hipes that all of the officers on a shift would leave the City for their meal breaks and felt this put the City at risk because it meant that at times there might not be any officers in the City to respond to a call. Chief Jordan felt this created safety issues for the citizens and officers, and a public perception that the community was not safe. Jordan decided he needed to do something about the officers' failure to comply with the meal break policy, even though he had never received a complaint from a citizen about officers being at Old Chicago or the 82nd Avenue Starbucks.

30. In July 2011, after Doe's arbitration hearing, Chief Jordan met with City Manager Monahan and HR Director Cynthia Torsino to discuss the lack of compliance with Policy 1034. Jordan said he thought he should notify employees that Policy 1034 would be enforced and asked for Monahan's opinion. Monahan told Jordan that if the policy was in place he expected it to be enforced. Monahan believed that the public expected City employees, who are using City time and resources, to follow existing City policies and the failure of employees to do so would cause the public to lose faith in the City. Monahan had never received a complaint about officers being outside the City limits while on duty. Jordan said he intended to notify employees he would be enforcing Policy 1034. Jordan did not indicate he would be taking any disciplinary action.

31. Jordan then told Captain Bartol that he intended to enforce Policy 1034. Bartol told Jordan that the employees would be upset and have a lot of questions. Bartol also told Jordan that it would be nice to be able to go to Old Chicago because the only other option was a restaurant in the City limits where there had been some issues. Jordan told Bartol that he could tell the sergeants he was open to discussing compromises after the officers complied with Policy 1034 for several months.

32. Approximately a week prior to the July 20 sergeants' meeting, Chief Jordan met with Sergeant Foreman as part of his practice of meeting individually with all Department employees. The purpose of these meetings was to discuss individual work-related matters, such as whether an employee had sufficient training and equipment. During the meeting, Jordan and Foreman discussed Foreman's work-related issues. Jordan did not mention his intent to begin enforcing Policy 1034.

33. On July 20, 2011, Chief Jordan, Captain Bartol, and the sergeants attended a sergeants' staff meeting. At the end of the meeting, Jordan opened up a folder and handed out a document labeled, "1034.1.1 MEAL PERIODS." That document contained the following portion of the policy:

“Sworn employees shall remain on duty subject to call during meal breaks. All other employees are not on call during meal breaks unless directed otherwise by a supervisor.

“Uniformed patrol and traffic officers shall request clearance from LOCom (Lake Oswego Communications) prior to taking a meal period. Uniformed officers shall take their breaks within the City limits unless on assignment outside of the City. The time spent for the meal period shall not exceed the authorized time allowed.”

34. Jordan told the sergeants that he was aware this policy was being violated and directed the sergeants to begin enforcing the policy. He also stated that he would not be seeking to discipline employees for any prior behavior. Sergeant Burdick asked Jordan if they could still eat at Old Chicago, which was only seven blocks outside the City. Jordan replied something similar to I think you can read the policy or the policy speaks for itself.<sup>8</sup> Jordan did not offer to bargain with the Association over the enforcement of Policy 1034 prior to this meeting.

35. After Jordan left the meeting, the sergeants asked Captain Bartol if the new policy included drive-through restaurants and picking up food. Bartol told the sergeants that officers needed to stay in the City limits, but that Jordan had indicated he would be willing to discuss compromises after the policy was being complied with.

36. On August 2, 2011, the Association filed the unfair labor practice complaint in this matter. Association representatives did not talk with Jordan about his decision to enforce Policy 1034 or seek to bargain over the issue before filing the complaint.

#### Other Relevant Information

37. For over ten years prior to July 2011, officers often took breaks at the 82nd Avenue Starbucks and ate at a number of restaurants outside of the City limits subject to the authorization of their shift sergeant. Some of these restaurants were within a few blocks of the City and some a few miles. Generally, the farther away a restaurant was from the City, the longer it took an officer to respond to a call.

38. At the time of the events relevant to this matter, only one traditional restaurant, two fast food establishments, and a convenience store were open inside the City limits during the graveyard shift. Officers could eat at the City’s public safety building, which has a microwave and refrigerator. Officers on swing and graveyard are often in court during the day and may not have time to shop for food. There is also a barbeque at the public safety building, but officers usually do not have time during their meal period to cook food on a barbeque.

39. “Officer-friendly” restaurant is a term in the law enforcement community that refers to a safe place to eat in which an officer does not have to worry about his food being compromised in some manner, such as being spit in or otherwise contaminated. A restaurant is

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<sup>8</sup>Although there was conflicting testimony regarding the exact words Chief Jordan spoke, resolution of this conflict is not necessary to our decision.

generally known as officer friendly when the workers and clientele in the restaurant are not typically those the officers have either arrested or dealt with frequently.

40. While Kanzler was chief, Officer Tony Cerghino was rushed to the hospital after he had eaten at the one traditional restaurant open during the night shift inside the City limits. The doctor told Kanzler that the officer was suffering from food poisoning and that he suspected oven cleaner had been sprinkled on the officer's food. Several weeks prior to this incident, the Department had arrested a cook and a dishwasher who worked at the restaurant on drug charges.

41. Sergeant Hipes has taken meal and rest breaks outside of the City limits since he was hired as an officer in 1990. He was an Association President and Executive Board (E-Board) member prior to 2000. He previously had worked graveyard shift and currently worked day shift. Prior to July 2011, Hipes decided if the officers on his shift could eat outside of the City limits on a case-by-case basis after considering staffing levels, call volume, shift activities, and response time. Hipes never discussed a specific acceptable distance with his officers. Hipes ate at restaurants that were all within a mile of the City's limits, but he was more concerned about response time than distance. He does not believe that any of the current restaurants open at night in the City limits are officer-friendly and is not aware of anyone failing to respond in a timely manner due to taking meal or rest breaks outside of the City limits.

42. Sergeant Burdick has worked at the Department since 2002. At the time of the matters related to the hearing, he worked graveyard shift. Burdick was on the Association bargaining team during the last contract negotiations and is the Association sergeant at arms. He did not testify during Doe's arbitration. In Burdick's experience, it was an accepted practice to eat outside of the City limits prior to July 2011. In 2005, after Burdick and his recruit ate at a restaurant inside the City limits, Burdick became violently ill, was taken to the hospital, and remained ill for several days. He did not think it was food poisoning, but believed that someone had tampered with the food.

Burdick currently works on graveyard shift with two other officers. Prior to July 2011, the officers on Burdick's shift usually checked with him before going outside the City, unless they were picking up something quickly. Burdick took into account call volumes and staffing levels in allowing his officers to take their meal or rest breaks outside of the City. He also expected his officers to use common sense and judgment. He never received a complaint nor had an officer miss a call because of taking a break outside of the City limits. Burdick will not eat at one of the fast food establishments inside of the City limits because one of his officers cited or arrested a woman who works there.

43. Association President Foreman works on the graveyard shift. He testified at Doe's arbitration hearing that employees routinely took meals outside of the City limits.

44. Captain Bartol recalls that when he worked as a sergeant prior to Kanzler becoming chief, he was required to take breaks inside of the City limits. Bartol then became a detective. Later, after he returned to patrol under Chief Kanzler, he noticed several officers taking coffee breaks at the same time and outside of the City limits. Bartol brought this to Kanzler's and Captain Colt's attention, but did not receive a firm response. After this, Bartol

sometimes took meal and rest breaks outside of the City limits until the July 20 sergeants' meeting.

45. The meal break section of Policy 1034 states that officers are to request clearance from the LOCom dispatch center prior to taking a meal break. The dispatch center has no authority to grant officers clearance to take breaks or lunch; such authorization is granted by the shift sergeant. Officers do notify the dispatch center when taking meal and rest breaks, and address calls from LOCom before taking breaks.

46. The rest break section of Policy 1034 requires officers to take their breaks in their assigned area. The patrol area is divided into two districts. Jordan does not require officers to take their rest breaks in their assigned district. This policy section also requires Department employees who are normally assigned to the police facility to remain there during their breaks. Department non-sworn clerical personnel are assigned to the facility. Detectives, captains, and the police chief, who take breaks out of the facility, have an office in the facility, but are not considered to be assigned there because their jobs take them out of the building.

47. The following Department policies provide for procedures that do not conform to the Department's current practice: (1) Policy 384 addresses the operation of a public safety camera system that does not exist at the City; (2) Policy 464 provides that the police chief is to designate a community liaison for homeless individuals, which Chief Jordan has not done; and (3) Policy 402 requires the patrol commander to submit an annual overview related to racial/bias profiling, which Captain Bartol has never done.

48. Policy 106.2 "**RESPONSIBILITIES**," provides that the Chief of Police has ultimate responsibility and authority for the content of the Department's policy manual. Policy 106.2.1 "**CHIEF OF POLICE**," further provides that [t]he Chief \* \* \* shall continue to issue Departmental Directives which shall modify those provisions of the manual to which they pertain. Departmental Directives shall remain in effect until such time as they may be permanently incorporated into the manual." Policy 106.2.2 "**STAFF**," provides that staff, including the Chief, Captain, and Watch Commanders, "shall review all recommendations regarding proposed changes to the manual at staff meetings."

49. At some point after July 2011, former Chief Kanzler met with City Manager Monahan about Jordan's enforcement of Policy 1034, suggested that Monahan fire Chief Jordan, and offered to act as the interim chief while a new chief was being hired.

50. Bargaining unit employees are very unhappy with the City's enforcement of Policy 1034. Several bargaining unit members believe that Policy 1034 is being enforced because of testimony by Association witnesses during Doe's arbitration hearing. As a result, Association President Foreman feels there is a chilling effect on the issues he is willing to raise.

#### CONCLUSIONS OF LAW

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

2. Chief Jordan's testimony during the Doe Arbitration about his intent to enforce the City's written, but previously unenforced, policy requiring members of the bargaining unit to take their meal and rest periods inside of the City limits did not interfere with, restrain, or coerce employees in the exercise of their protected rights under ORS 243.662, in violation of ORS 243.672(1)(a).<sup>9</sup>

3. The City did not interfere with, restrain, or coerce employees because of or in the exercise of their protected rights under ORS 243.662, in violation of ORS 243.672(1)(a), when it enforced Policy 1034, requiring employees to take their meal and rest periods within the City limits.<sup>10</sup>

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

ORS 243.672(1)(a) makes it an unfair labor practice for an employer to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662."<sup>11</sup> There are two 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 Public Employee Collective Bargaining Act (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. 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 violates this portion of (1)(a) 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." *Portland Assn. Teachers*, 171 Or App at 624 n 3. The focus of our analysis under the "in the exercise" prong of

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<sup>9</sup>The Association characterizes Chief Jordan's testimony as unlawful threats against employees in the bargaining unit. This Board consistently considers alleged employer threats under our analytical framework for independent "in the exercise" claims under ORS 243.672(1)(a). While it is not clear from the Complainant's pleadings which prong of the statute this allegation was brought under, we will follow prior precedent and analyze Chief Jordan's testimony under this framework.

<sup>10</sup>The Association did not specifically plead a "because of" violation in its complaint, but did argue this theory at the hearing and in its brief. Consistent with our approach in *Oregon Public Employees Union, SEIU Local 503 v. Wallowa County*, Case No. UP-77-96, 17 PECBR 451, 465 n 15 (1997), we will consider the allegations under both prongs of ORS 243.672(1)(a). Parties should exercise caution, however, in drafting complaints under ORS 243.672(1)(a) and should specify which legal theory they are relying on.

<sup>11</sup>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."

(1)(a) is not on the employer's motive or reasons for acting, but 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 violated the "because of" prong of the statute. *State Teachers Education Association/OEA/NEA and Andrews et al. v. Willamette Education Service District and State of Oregon Department of Education*, Case No. UP-14-99, 19 PECBR 228, 249 (2001), *AWOP*, 188 Or App 112, 70 P3d 902 (2003). It logically follows that if an employer takes unlawful action because of an employee's PECBA-protected activities, the natural and probable effect of the employer's conduct will be to chill the employee's willingness to engage in further protected activities.

Second, this Board has also recognized that an employer may commit an independent or stand-alone violation of the "in the exercise" prong of subsection (1)(a). When deciding an independent claim, we determine whether the natural and probable effect of the employer's conduct, viewed under the totality of the circumstances, would tend to interfere with employees' exercise of protected rights. *Polk County 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. *Spray Education Association and Short v. Spray School District No. 1*, Case No. UP-91-87, 11 PECBR 201, 219-20 (1989). Rather, we are concerned solely with the probable consequences of the employer's actions.

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).<sup>12</sup>

We apply these principles to the facts of this case, which are essentially undisputed. Chief Jordan discovered during the investigation into Doe's conduct that employees were leaving the City limits during meal and rest periods in a manner inconsistent with Department policy. He testified about his discovery during the arbitration hearing and stated "we would probably want to do something about that," "I probably need to fix that," and "I think at some point we have to

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<sup>12</sup>The example we gave in that case was of an employer who discharged a union activist for stealing, but warned "other employees that 'this is what happens when you support the union.'" *Ridgeline Montessori Public Charter School*, 23 PECBR at 331 n 13.

take the City policy and look at how they follow it.” Jordan then heard testimony from Association witnesses regarding the extent to which employees left the City limits for meal and rest periods, including Sergeant Hipes’ testimony that all employees on his shift had been out of the City limits on breaks at the same time. Approximately two weeks after the arbitration hearing, Jordan notified employees that they were expected to comply with the Department policy that required them to take their meal and rest breaks inside the City limits. They were provided with excerpts of the applicable policy.

The Association argues that Chief Jordan’s statements during the arbitration about enforcing the policy on meal and rest break location and the subsequent enforcement of the policy violate ORS 243.672(1)(a). We will address each allegation in the order in which they occurred.

### Chief Jordan’s Testimony

We first consider whether the City committed a stand-alone “in the exercise” violation under ORS 243.672(1)(a), when Chief Jordan testified during the Doe arbitration that Policy 1034 needed to be enforced. The Association argues that Jordan’s testimony would have the natural and probable consequence of chilling protected activities. To analyze this Association claim, we review the totality of the circumstances surrounding this testimony.

The Association characterizes Chief Jordan’s testimony as a threat of retaliation against Association witnesses. We disagree. His comments were not directly or indirectly threatening and were not addressed to any individuals who testified. He merely stated his intent to prospectively ensure compliance with a policy that he had discovered was not being followed, as the City had the legitimate right to do. Nor did his comments suggest that any negative consequences were forthcoming for the employees who testified. He did not reference protected activity in his testimony, and his comments were not phrased in such a way that would cause employees to reasonably believe that his decision to enforce the policy was related to any protected activities by Association members.

The Association emphasizes the timing of Chief Jordan’s statements about enforcing Policy 1034, which were made during the course of a grievance arbitration proceeding in which Association members testified. However, the fact that Chief Jordan’s statements were made during his testimony in an arbitration hearing does not in and of itself have the natural and probable effect of chilling employees in their exercise of protected activities. Absent additional facts or circumstantial evidence that increases the likelihood of a chilling effect, this fact alone does not establish a successful claim.

Although it is possible that employees could be chilled by Chief Jordan’s statements, a *mere possibility* that such statements might chill employees does not constitute a violation of (1)(a). A violation occurs only where such a chilling effect would be the natural and probable consequence of the employer’s actions or statements. *Oregon School Employees Association v. Central Point School District*, Case No. UP-1-88, 10 PECBR 532, 538 (1988); *Polk County Deputy Sheriff’s Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 77 (1995). Here, the Association has established the former, but not the latter. After reviewing the totality of

the circumstances surrounding Chief Jordan's testimony, we conclude that the Association has not established that Jordan's statements would have the natural and probable consequence of deterring employees from engaging in protected employee activity. As a result, we will dismiss this portion of the complaint.

#### Enforcement of Policy Restricting Break and Meal Locations

##### "Because of" Claim

The Association argues that the City enforced Policy 1034 in retaliation for the employees' testimony at the Doe arbitration. They further assert that because the testimony was protected activity, the City's actions in enforcing the policy interfered with, restrained or coerced employees "because of" their exercise of protected activities in violation of ORS 243.672(1)(a).

We first determine whether the employees were engaged in protected activity when they testified. Sergeant Hipes and the other employees who provided testimony during the arbitration hearing were clearly engaged in protected activity within the meaning of ORS 243.662. Providing testimony in grievance or other union related procedures is protected activity. *See Amalgamated Transit Union, Division 757, v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05, 22 PECBR 911, 950, *recons*, 23 PECBR 34 (2009) (testifying in grievance arbitration is protected activity), *aff'd*, 250 Or App 681, 282 P3d 2 (2012); *Federation of Oregon Parole and Probation Officers v. Polk County*, Case No. UP-32-86, 9 PECBR 8958, 8960-61 (1986) (testifying in proceeding before ERB is protected activity).

We next turn to the question of whether the City's actions were motivated by the employees' exercise of protected activity. The parties assert different reasons for the City's decision to enforce Policy 1034. The Association contends that the City acted to retaliate against employees who provided testimony at the Doe arbitration that was contrary to the City's position in that proceeding. The City argues that it acted not because of the protected activity, but rather because it discovered information about the magnitude of non-compliance with Policy 1034. The City also claims that it enforced the policy due to its legitimate concerns about officer response time and the possible negative public perception of having officers taking meal and rest periods outside of the City limits.

The question then is whether the City acted because of a legitimate concern that was discovered during protected activity, or if it acted because of the protected activity itself. To answer this question, we focus on the strength of the causal link between the City's actions and the protected activities of the employees. *Portland Association of Teachers and Poole v. Multnomah School District No. 1*, Case No. UP-72-96, 17 PECBR 470 (1997), *rev'd and rem'd*, 171 Or App 616, 642, 16 P3d 1189 (2000), *Order on Remand*, 19 PECBR 284, 297-98 (2001).

We begin by noting that Chief Jordan had already decided to begin enforcing Policy 1034 prior to the Doe arbitration proceeding. During the arbitration hearing, Jordan testified that he had learned that Policy 1034 was not being fully complied with during his investigation into Doe's conduct. Because of that discovery, he stated that he intended to ensure compliance with the policy going forward. This testimony occurred during the City's case-in-chief, prior to the testimony of any of the Association witnesses. Jordan then learned from the Association's

witnesses' testimony that the non-compliance with Policy 1034 was more extensive than he originally believed, causing him greater concern about the situation. As Jordan had already decided that he needed to address the lack of compliance with the policy prior to the arbitration, it is clear that he was not responding to the protected activity, but rather responding to the non-compliance he discovered.

Jordan also provided valid reasons for the City's decision to enforce Policy 1034. Jordan testified that he was concerned about the potential lack of coverage in the City during rest and meal breaks if employees were outside of the City limits. The Association did not dispute that response time was a critical factor in providing Department services. Adequate coverage and response time became an even greater concern after Jordan heard Hipes testify that occasionally all of the employees on a shift left the City limits at the same time. Although Jordan had no evidence that employees taking breaks and meal periods outside of the City limits had ever prevented employees from responding in a timely manner, he was legitimately concerned that it would take employees longer to respond to locations within the City limits from restaurants outside of the City limits. The fact that he did not first research whether there was an actual impact on response time does not mean his concern was not valid, especially since he was seeking to enforce an existing policy.

In *Lane County Peace Officers Association v. Lane County Sheriff's Office*, Case No. UP-32-02, 20 PECBR 444 (2003), we addressed an analogous situation that involved the intersection of protected activity with the alleged violation of employer policies. In that case, the employer initiated an investigation into off-duty misconduct at the association's holiday party after receiving information about possibly serious violations of county policies. The association filed a complaint, asserting that investigating off-duty conduct at an association event violated ORS 243.672(1)(a) because the party was protected activity. We dismissed this portion of the complaint, explaining that an employer has the right to investigate and even issue discipline for certain types of misconduct that arise in the course of otherwise protected activities. We noted that "the cover of protected activity does not shield all conduct from employer investigation." *Lane County Sheriff's Office*, 20 PECBR at 458-59.<sup>13</sup>

Consistent with this approach, we reject the idea that an employer cannot enforce a policy just because the non-compliance was discovered during the course of protected activity. Put another way, protected activity cannot become a shield against employer enforcement of otherwise lawful policies absent additional evidence that the enforcement is directly in response to the protected activity.

For the reasons stated above, we find that while Chief Jordan acted as a result of information he obtained during employees' exercise of protected activity, he did not act in response to the protected activity itself. We will dismiss this portion of the complaint.

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<sup>13</sup>We did find, however, that the county violated ORS 243.672(1)(a) by allowing their investigation to unlawfully extend into association business and by questioning association officers about their conversations with bargaining unit members. *Lane County Sheriff's Office*, 20 PECBR at 461-64.

### “In the Exercise” Claim

We next determine whether Chief Jordan's subsequent enforcement of Policy 1034 violated the “in the exercise” prong of subsection (1)(a). Having already dismissed the “because of” claim above, we do not find a derivative “in the exercise” violation. We must now decide whether the Association has established an independent “in the exercise” claim under ORS 243.672(1)(a).

The Association witnesses testified that some bargaining unit employees believe that Chief Jordan enforced Policy 1034 because of the testimony of Association witnesses, and as a result, employees will hesitate to testify in the future since their testimony could result in further adverse changes in their working conditions. The Association argues that this belief is proof that the City violated ORS 243.672(1)(a). We disagree, as the subjective response of employees to the employer action is not determinative of whether the natural and probable consequence of an employer's action is to chill protected activities. *Spray Education Association*, 11 PECBR at 219-20.

As previously stated, we apply an objective standard: we determine whether the natural and probable consequence of the City's conduct, viewed under the totality of the circumstances, would be to chill employees in their willingness to engage in protected activities. The only significant evidence put forward by the Association is the timing of the enforcement of Policy 1034, which occurred approximately two weeks after the Doe hearing. While the timing of the announcement is sufficiently close to the protected activity to raise a concern, it is not sufficient in itself to establish a likely chilling effect.

Having reviewed the totality of the circumstances, we conclude that the City's actions do not have the natural and probable consequence of chilling protected activities. Therefore, we will dismiss this portion of the complaint.

4. The City did not dominate or interfere with the existence or administration of the Association in violation of ORS 243.672(1)(b) when it enforced Policy 1034.

### Standards for Decision: ORS 243.672 (1)(b) Claim

Under ORS 243.672(1)(b), it is an unfair labor practice for a public employer to “[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization.” To establish a violation of subsection (1)(b), a complainant must prove “actual domination, interference, or assistance that has a ‘direct effect’ on a labor organization.” *Lane County Public Works Association, Local 626 v. Lane County*, Case No. UP-15-03, 20 PECBR 596, 608 (2004). As we have explained, “[u]nlawful employer interference ‘goes beyond merely interfering with [protected] rights of individual employees; it is aimed instead at the labor organization as an entity.’ Morris, The Developing Labor Law, (BNA 2d ed. 1983) at 282 (footnote deleted).” *AFSCME Council 75, AFL-CIO and Haphey and Bondiotti v. Linn County, Linn County Sheriff's Office and Sheriff Martinak*, Case No. UP-115-87, 11 PECBR 631, 656 (1989).

The Association argues that the City violated ORS 243.672(1)(b) because, in response to taking a position adverse to Chief Jordan during the arbitration process, the Chief punished the Association officers and the employees on their shifts. In support of its argument, the Association points out that the swing and graveyard shifts were most affected by Jordan's decision to enforce Policy 1034, and that the sergeants on these shifts were Association President Foreman and E-Board member Burdick, who were both active in Doe's defense and bargaining the parties' current Agreement. As a result, the Association contends that Jordan's decision has driven a wedge between the Association leadership and other Association members, and makes it unlikely that others will want to run for Association office.

As explained above, we determined that the City acted for lawful reasons. Further, the City did not take any actions that actually impeded or impaired the Association in carrying out its statutory responsibilities. Accordingly, we will dismiss this claim.

5. The City did not unilaterally change a mandatory subject of bargaining in violation of ORS 243.672(1)(e) when it enforced Policy 1034.

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

The Association alleges that the City unilaterally changed the parties' past practice of allowing bargaining unit employees to take their meal and rest periods outside of the City limits in violation of ORS 243.672(1)(e). In general, a public employer violates its duty to bargain in good faith under ORS 243.672(1)(e) if it makes a unilateral (*i.e.*, unbargained) change in the *status quo* concerning a subject that is mandatory for bargaining. In a unilateral change case, we must identify the *status quo* and determine whether the employer changed it. If the employer changed the *status quo*, we then decide whether the change concerns a mandatory subject for bargaining. If it does, we examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change. If the employer failed to complete its bargaining obligation, we then consider any affirmative defenses the employer raised (*e.g.*, waiver, emergency, or failure to exhaust contract remedies). *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008).

However, as we recently noted in *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case No. UP-24-09, 24 PECBR 730, 762 (2012), we need not apply these steps in a mechanical manner and may proceed to a particular step if that step will be dispositive of the issue. In this matter, the crux of the dispute is whether Policy 1034's provisions regarding the location of meal and rest periods is mandatory for bargaining. As a result, we will begin with that question.

In order to determine if a subject is mandatory, we must consider

“whether the disputed matter concerns a *per se* mandatory subject under ORS 243.650(7)(a), is considered mandatory under subsection (7)(f), or is defined as permissive under subsections (7)(b), (d), (e), or (g). If none of these steps resolve the bargaining status of the subject at issue, we apply the balancing test

required by subsection (7)(c). We determine whether the subject has ‘a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment.’ *Federation of Oregon Parole and Probation Officers v. Washington County*, Case No. UP-70-99, 19 PECBR 411, 425 (2001); and ORS 243.650(7)(c).” *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 279, *recons*, 22 PECBR 444, 449 (2008).

However, ORS 243.650(7)(b) provides that “[e]mployment relations” does not include subjects that this Board determined were permissive prior to June 6, 1995, and we need not apply the balancing test to subjects that fit this category.

The Association asserts that the practice of permitting employees to take their meal and rest periods outside of the City limits concerns the subjects of off-duty time and safety. The City, however, argues that the subject of the dispute is management’s right to assign work. They cite to the Board’s pre-1995 decision in *Oregon State Police Officers Association v. State of Oregon, Department of State Police*, Case No. UP-109-85, 9 PECBR 8794 (1986), where we addressed an employer’s change in a practice allowing officers to take meals or rest breaks at their residences when the officer was assigned to the area where the officer lived. The employer asserted that the decision regarding the location of officers’ meal and rest breaks affected where officers could be assigned within an area during a shift, and management had an interest in officers varying their daily route rather than following an identifiable route within that area. We found that the change in practice did not affect the amount of time an officer had on a break, but did affect an officer’s ability to spend time at home during a shift. We concluded that the subject was permissive, stating:

“On balance, the decision here tends to have a greater effect on management’s assignment rights than on the working conditions of the employees and is therefore a permissive subject of bargaining. We also find that the decision did not have such a significant impact on employment conditions as would require the State to bargain concerning the effects of the decision. The Association’s argument that additional expense was incurred by the officers who were not permitted to go home for lunch was speculative and was insufficient to show a significant impact on employment conditions.” *State of Oregon, Department of State Police*, 9 PECBR at 8807.

The Association, however, contends that the circumstances here are analogous to those in *In the Matter of the Petition For Declaratory Ruling Filed Jointly by Oregon AFSCME Council 75, Local 3351, Oregon Association of Justice Attorneys and State of Oregon, Department of Justice*, Case No. DR-3-00, 19 PECBR 40, 46-49 (2001). In that case, the employer’s proposed policy change prohibited employees from being under the influence of alcohol or unlawful drugs during lunch, rest breaks, and anytime the employee represented the employer. We concluded that the policy change directly implicated the subject of off-duty personal conduct, which although typically mandatory, may be permissive if there is a direct nexus between the workplace and the off-duty conduct restriction. *Id.* at 47. We acknowledged that no employee had a valid interest in working under the influence of alcohol or drugs, and the employer had a legitimate interest in prohibiting its employees from engaging in illegal drug trafficking and

working under the influence of alcohol or drugs. We held, however, that the employer's interest was outweighed by the employees' fundamental interest in the unrestricted use of their personal time and the right to be free from an employer's intrusion into their private lives in matters not directly related to the job. As we explained, "[t]he relationship between the employer and employees centers on *employment*; in the main, it extends no further. On balance, the proposed policy is mandatory for bargaining." *Id.* at 49 (emphasis is original).

In *State of Oregon, Department of Justice*, 19 PECBR 40, the policy at issue implicated the subject of off-duty personal conduct. In reaching our decision, we specifically found that the employees' lunch breaks were entirely their own time. The officers in the present case do not have unrestricted use of their meal and rest periods. They are paid for their meal and rest periods, and remain subject to call or work interruption during that time per the terms of the collective bargaining agreement. They are required to monitor their radios while on breaks and to immediately respond to calls as required. Therefore, the policy at issue here is not focused on restricting purely off-duty conduct; instead, it concerns regulating employees' on-the-job conduct.

We hold that the subject in the policy at issue here is permissive based on our decision in *State of Oregon, Department of State Police*, 9 PECBR 8794. The City has a significant interest in the right of assignment, including the right to designate the location of the employees' work. Since the employees must be prepared to immediately respond to calls while on their breaks, the location of those breaks impacts their ability to respond to their work.

And while we acknowledge that the officers' concerns about having a safe place to eat are reasonable, these concerns are not sufficient to make the policy a mandatory subject of bargaining under ORS 243.650(7)(f).<sup>14</sup> As we noted in *State of Oregon, Department of Justice*, the reasonableness of a policy or position is not germane to its bargaining status. 19 PECBR at 48 and 48 n 5. Further, the enforcement of Policy 1034, requiring uniformed officers to take their meal and rest periods in the City limits does not require employees to eat at any particular establishment. Officers could bring meals from home or order food to be delivered to avoid the need to eat at any establishment they felt was not officer friendly. Although somewhat limited, safe options remain available for employees. Accordingly, the impact on potential officer safety is minimal and speculative based upon the record before us, and is insufficient to make the change a mandatory subject of bargaining under the auspices of ORS 243.650(7)(f).

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<sup>14</sup>ORS 243.650(7) expands the definition of "employment relations" for strike prohibited employees to 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 employees."

The Association also argues that the City was prohibited from unilaterally imposing such a restriction by policy because any restrictions on meals and rest period are limited to those included in the collective bargaining agreement under ORS 653.261(3)<sup>15</sup> and 839-020-0050(7).

Neither ORS 653.261 nor OAR 839-020-0050 are applicable to the issue in this case. The City's decision to restrict employees' meal and rest periods to inside the City limits did not impact the length of the employees' meal and rest breaks or when those breaks will occur within the work day. The only impact of that decision is to restrict the location of those breaks, which is not a subject addressed by ORS 653.261, OAR 839-020-0050, or the parties' Agreement. Therefore, those provisions do not prohibit the City's decision to require employees to take their meal and rest breaks inside the City limits.

For the reasons stated above, we find that the City did not violate ORS 243.672(1)(a), (b) or (e), and we will dismiss the complaint.

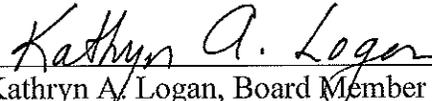
ORDER

The complaint is dismissed.

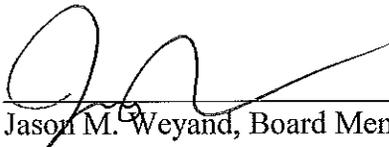
DATED this 12<sup>th</sup> day of December, 2012.



Susan Rossiter, Board Chair



Kathryn A. Logan, Board Member



Jason M. Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.

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<sup>15</sup>ORS 653.261(1) grants authority to the Commissioner of the Oregon Bureau of Labor and Industries to "adopt rules prescribing such minimum conditions of employment," including "minimum meal periods and rest periods." ORS 653.261(3) states that such rules do not apply to "individuals employed by this state or a political subdivision or quasi-municipal corporation thereof if other provisions of law or collective bargaining agreements prescribe rules pertaining to conditions of employment referred to in subsection (1) of this section, including meal periods, rest periods, maximum hours of work and overtime."

OAR 839-020-0050(7) provides that the meal and rest period provisions "may be modified by the terms of a collective bargaining agreement if the provisions of the collective bargaining agreement entered into by the employees specifically prescribe rules concerning meal periods and rest periods."