

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-7-08

(UNFAIR LABOR PRACTICE)

CLACKAMAS COUNTY EMPLOYEES' ASSOCIATION,	)	
	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
CLACKAMAS COUNTY/CLACKAMAS COUNTY DISTRICT ATTORNEY,	)	AND ORDER
	)	
	)	
Respondent.	)	
_____	)	

On October 10, 2008, this Board heard oral argument on both parties' objections to a Recommended Order issued on August 18, 2008, by Administrative Law Judge (ALJ) Larry L. Witherell following a hearing on June 11, 2008, in Oregon City, Oregon. The record closed with the receipt of the parties' post-hearing briefs on July 9, 2008.

Kevin Keaney, Attorney at Law, Portland, Oregon 97232, represented Complainant.

David W. Anderson, Assistant County Counsel, Clackamas County, Oregon City, Oregon 97045, represented Respondent.

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On February 19, 2008, the Clackamas County Employees Association (Association) filed this unfair labor practice complaint alleging that the Clackamas County/Clackamas County District Attorney violated ORS 243.672(1)(a) by making certain statements to an Association representative.

The issue is: Did the County District Attorney violate ORS 243.672(1)(a) by making threatening statements to an Association representative at a January 31, 2008 meeting?

### RULINGS

The rulings of the ALJ have been reviewed and are correct.<sup>1</sup>

### FINDINGS OF FACT

#### Introduction

1. The County is a public employer within the meaning of ORS 243.650(20).
2. The Association is a labor organization within the meaning of ORS 243.650(13).
3. The County and the Association were parties to a collective bargaining agreement covering the period from 2006 to 2009.
4. The Association represents a unit of all County employees except temporary employees, part-time employees, deputy district attorneys, elected officials, department heads, and supervisory and confidential employees.
5. During the relevant times and events, the following individuals held the following positions with the County:  
  
Nancy Drury—Director, Employee Services  
John S. Foote—District Attorney  
Danielle Reece—Office Manager, District Attorney’s Office  
Kathleen Smith—Executive Assistant, District Attorney’s Office
6. During the relevant times and events, the following individuals held the following positions with the Association:

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<sup>1</sup>The parties voluntarily sequestered the witnesses. Only John Bailey, the Association’s first witness, sat through the testimony of all the witnesses.

John Bailey—Service Representative  
Linda Evans—Representative  
Felipe Morales—Vice President  
Virginia Smithers—President

Bailey has worked with the Association for approximately 30 years, assisting in negotiations, handling grievances, training officers and representatives, and serving on various committees. Bailey is not a County employee. Evans, Morales, and Smithers are all County employees .

7. Wendy Acton began working as a receptionist (office specialist 1) in the District Attorney's office on February 1, 2007. She was subject to a 12-month probationary period. Her last day reporting to work was January 25, 2008.

On Friday, January 25, 2007, Reece called Acton into her office to meet with her, Executive Assistant Smith, and Association Representative Evans. Reece gave Acton a letter and informed Acton that she was being put on a two-week, paid administrative leave pending a proposed dismissal. Reece then stated that she could not discuss anything with Acton, and that Acton needed to read the letter.

The letter, which was signed by District Attorney Foote and dated January 25, 2008, stated:

"The County Code provides a 12-month probationary period which is an integral part of the selection process. It provides the department with the opportunity to observe the employee's work, to train, and to aid the employee in adjustment to the position, and to reject any employee whose work performance fails to meet required work standards.

"Please accept this letter as notice of proposed dismissal as a probationary employee, effective January 31. During the past twelve (12) months, there have been performance issues that have been addressed with you. In several areas you have failed to meet performance expectations including the following"

The January 25 letter reviewed four areas of alleged deficiencies in Acton's work. The letter concluded by stating that Foote had scheduled a January 30, 2008 meeting with Acton

“where you will have an opportunity to offer information to refute or mitigate the proposed dismissal. You have been placed on paid Administrative Leave through 5:00pm [sic] Thursday, January 31, 2008. Additional pay for six (6) days will be included on your final paycheck if the decision is made to terminate your employment as a probationary employee on January 31, 2008. After a review of all information, I will send you written notification of my decision. If you so choose, you may submit a written resignation prior to my final decision.”

The January 25 letter indicated that copies of the letter were sent to Office Manager Reece, Director of Employee Services Drury, County Employee Relations Manager Larry Parks, Assistant County Counsel Dave Anderson, Association President Smithers, and Association Service Representative Bailey.

8. Acton contacted Association Vice President Morales soon after her meeting with Reece. Morales had previously served as an Association grievance representative, and accompanied employees to investigatory interviews. Acton told Morales that the meeting with Reece had not gone well and she was afraid the County was going to discharge her. Acton asked Morales to represent her at the January 30 meeting, and Morales agreed to do so. Morales was a software specialist in the technical services department and had no employment relationship with the District Attorney's office.

9. On January 29, 2008, Association President Smithers sent Association Representative Bailey an e-mail about Acton's January 30 pre-dismissal meeting. On that date, neither Bailey nor Smithers had received a copy of the District Attorney's January 25 letter.

Bailey contacted Director of Employee Services Drury and asked to re-schedule Acton's pre-dismissal meeting to January 31. Drury agreed to do so.

10. District Attorney Foote reissued his original January 25 letter. The only change he made from the original letter was to specify that the pre-dismissal meeting would be held on January 31. Bailey received a copy of the reissued letter by fax at about 3:00 p.m. on January 30. He also received a copy of the original January 25 letter by regular mail.

11. On January 30, during an unrelated meeting, Bailey informed Drury that the Association would contend that Acton was not a probationary employee because Acton would complete 12 months of service on January 31, 2008. Drury responded that the County disagreed with that position.

12. At the January 31 pre-dismissal meeting, Morales and Bailey represented Acton. District Attorney Foote and Office Manager Reece represented the County.

The District Attorney began the meeting by explaining that he was there to give Acton an opportunity to respond to his letter and present information for him to consider in reviewing her employment with the County. He invited Acton to tell him anything she wanted him to know about his proposed decision to discharge her.

13. Acton responded to the charges in Foote's January 25 letter, and told Foote that the information in the letter was not accurate. Acton stated that she thought she had done a very good job; that she had received a very good six-month evaluation; that she had always been prompt, courteous, and had received compliments from her coworkers and supervisors; and that she was very surprised that she was being discharged. Acton then asked the District Attorney to reconsider his decision.

14. When Acton finished speaking, Bailey told Foote that the Association contended that Acton was not a probationary employee, and therefore the County had to follow progressive discipline. Bailey also announced that if the District Attorney terminated Acton as a probationary employee, the Association would file a grievance.

Foote was surprised by Bailey's contention. He believed that Bailey had deliberately rescheduled Acton's pre-dismissal hearing to January 31 so that the Association could now contend that Acton had completed 12 months of employment with the County and was no longer a probationary employee. Foote began to yell at Bailey, accusing him of "playing games." Bailey was angered by Foote's remarks, and started to yell at Foote.

15. At some point during his angry exchange with Bailey, Foote looked at Association representative Morales. Foote was upset by Morales' expression, and told Morales to stop smirking.<sup>2</sup> Morales responded that he would do what he wanted to do. Foote told Morales to stop smirking, and said that if Morales continued to smirk, Foote

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<sup>2</sup>Based on his physical and facial demeanor, his posture, and his rather animated facial expressions while testifying at the hearing, which gave the impression of self-satisfaction or gloating, the ALJ can understand why the District Attorney believed Morales was smirking. A smirk is a "smile in a conceited, knowing or annoying, complacent way," *Webster's New Twentieth Century Dictionary of the English Language*, 1714 (1971 ed.); a "smile in an affected or conceited manner," *Webster's Third New International Dictionary*, 2151 (1971); or "[a]n affected, often offensively self-satisfied smile," *American Heritage Dictionary of the English Language*, 1642 (4<sup>th</sup> ed., 2000).

would remove Morales from his office and never again allow Morales in the District Attorney's office.<sup>3</sup>

Foote then apologized to Acton, explaining that what had occurred had nothing to do with Acton and that Foote was sorry Acton had to witness the altercation. Foote assured Acton that his argument with Morales and Bailey would not affect his decision about Acton's status, and asked if Acton had anything more to say. Acton and Foote then discussed the pre-dismissal letter.

Foote ended the meeting by telling Acton he would consider what she told him, and that Reece would call Acton later that afternoon with the final decision about Acton's employment. Foote then said good bye to Bailey and shook hands with him.

16. At about 5 p.m. on January 31, Executive Assistant Smith sent Acton an e-mail in which she told Acton that she was discharged.

17. Some time after the January 31 meeting, Foote told Executive Assistant Smith that it would be "business as usual" in the future, that the District Attorney's office would afford Morales "every professional courtesy that we had in the past," and that Morales would have complete access to the District Attorney's office. Foote repeated those instructions to Smith and Reece the next morning, on February 1, 2008.

18. Since the January 31, 2008 meeting, Morales has not been barred from engaging in Association activities; has not been prevented from representing Association members; and has not been prevented from entering the District Attorney's office for Association activities or to represent Association members.

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<sup>3</sup>Everyone who attended the January 31 meeting testified at the hearing. The Association witnesses – Acton, Bailey, and Morales – all testified that Foote told Morales that Morales would be removed from the office if he did not stop smirking, and he also told Morales that Morales would never again be allowed in the District Attorney's office if he continued to smirk. Foote testified that he did not think that he made these statements to Morales. Reece could not remember what Foote said to Morales. The fact that a witness is uncertain about or cannot remember what happened does not deny that a particular event occurred. *Oregon AFSCME Council 75, Local #3843 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05, 22 PECBR 372, 386 n 8 (2008). Because the testimony of the three Association witnesses regarding Foote's statements was clear and consistent, we find it more likely than not that Foote made the threats attributed to him.

After the January 31 meeting, Morales represented two employees of the District Attorney's family support division in disciplinary matters. The family support division is located in a different building from the Courthouse in which Foote has his office.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The statements by the District Attorney to the representative of the Association did not violate ORS 243.672(1)(a).

### DISCUSSION

At a January 31 meeting at which Association Vice President Morales represented a bargaining unit member whom District Attorney Foote proposed to discharge, Foote became angry at Morales' expression and told Morales that if he did not stop smirking, Foote would remove him from the District Attorney's office and never allow him to return. The Association alleges that Foote's statements constituted a threat in violation of ORS 243.672(1)(a), which makes it an unfair labor practice for an employer to "[i]nterfere with, restrain, or coerce employees in or because" of the employees exercise of rights protected under the Public Employee Collective Bargaining Act (PECBA). According to the Association, Foote's angry remarks to Morales restrained Morales and other Association bargaining unit members "in the exercise" of their PECBA rights.

An employer's threatening statements violate subsection (1)(a) if the statements, when viewed objectively, would reasonably be expected to chill employees from exercising their protected rights. *Tigard Police Officers Association v. City of Tigard*, Case No. C-70-84, 8 PECBR 7989 (1985). We analyze the totality of the circumstances to determine whether the employer's conduct and statements would have the natural and probable tendency 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 Employees Union and Termine v. Malheur County*, Case No. UP-47-87, 10 PECBR 514, 521 (1988). As a result, a "possible effect" is not sufficient to sustain a finding of unlawful conduct. *Oregon School Employees Association v. Central Point School District*, Case No. UP-1-88, 10 PECBR 532, 538 (1988) (emphasis omitted). The subjective impression of employees is not relevant. *Spray Education Association v. Spray School District No. 1*, Case No. UP-91-87, 11 PECBR 20, 219-20 (1989). Nor is it necessary to provide evidence of employer anti-union animus. *Oregon School Employees Association v. The Dalles School District #12*, Case No. UP-75-87, 11 PECBR 167, 171-72 (1989).

In evaluating statements such as those made here by District Attorney Foote, we consider the context in which the comments were made. In certain situations, an employer violates subsection (1)(a) by threatening adverse action against employees who assert their PECBA-protected rights with adverse employment actions. *Tigard Police Officers Association v. City of Tigard*, 8 PECBR at 7999 (supervisor violated subsection (1)(a) by telling bargaining unit employees that they would not be promoted and could be demoted if they allowed sergeants to remain in the bargaining unit); *Josephine County Education Association v. Josephine County School District*, Case No. UP-94-85, 9 PECBR 8724 (1986) (principal violated subsection (1)(a) when he told teachers that positive aspects of their relationship could disappear if they filed grievances); *Sandy Education Association and Jane Daley v. Sandy Union High School District No. 2*, Case No. UP-42-87, 10 PECBR 389 (1988) (principal violated subsection (1)(a) when he told a teacher not to discuss workplace incident with other employees, including union officials); *Washington County Police Officers Association v. Washington County*, Case No. UP-99-89, 12 PECBR 910, 913 (1991) (sergeant violated subsection (1)(a) when he interrogated, criticized, and threatened to discipline a bargaining unit member who encouraged other employees to submit overtime requests).

In other cases, we examined the totality of the circumstances and concluded the employer's statements did not naturally and probably chill employees in the exercise of protected rights. *AFSCME Local 88 v. Multnomah County*, Case No. UP-44-98, 18 PECBR 430, 437 (2000) (supervisor's letter – in which she asked a union representative for assistance in stopping shop stewards' behavior the supervisor found disruptive – was not a threat and did not violate subsection (1)(a)); *Oregon Public Employees Union v. Jefferson County*, Case No. UP-19-99, 18 PECBR 245 (1999) (county commissioner's statement to individuals picketing his business during a strike situation – that he wanted to “kill” people who said the commissioner was making money – did not violate subsection (1)(a)); *Hillcrest/MacLaren Education Association v. State of Oregon, Executive Department and Hillcrest/MacLaren Schools*, Case No. UP-99-91, 13 PECBR 866, 895-96 (1992) (principal's remark to a union representative in a private meeting about layoffs – that he was not sure if teacher jobs could be saved if the union “dug in its heels” did not violate subsection (1)(a)); *Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495, 499 (1993) (superintendent's letter – in which he sharply criticized teachers who requested mileage for attendance at a meeting – was not “directly coercive or threatening” and did not violate subsection (1)(a)).

Consistent with the conclusions we reached in these cases, we consider the entire context and the totality of the circumstances in determining whether District Attorney Foote's statements to Morales at their January 31 meeting violated the “in the exercise” prong of subsection (1)(a).

The purpose of the January 31 meeting was to give Acton, an employee whom Foote proposed to discharge, an opportunity to respond to the reasons for her discharge. Although Morales and Association service representative Bailey represented Acton at the meeting, Morales was primarily an observer and Bailey did virtually all of the talking. When Bailey asserted that Acton had completed 12 months of employment with the County and was no longer a probationary employee, Foote became angry. The meeting was originally scheduled for January 30. At the Association's request, Foote agreed to set it over for a day. Foote believed the Association had tricked him into the set over so it could argue that Acton had completed her probationary period. Foote and Bailey then argued heatedly about the Association's contention. In the midst of their exchange, Foote looked at Morales and decided Morales was smirking. Foote told Morales to stop smirking, and said that he would remove Morales from his office and never allow him to return if Morales did not stop smirking.

Given the circumstances of this meeting, we conclude that Foote's remarks to Morales were an expression of displeasure at Morales' behavior and not a serious, credible threat. The actual threat that Foote made – to remove Morales from his office and bar him from any future visits if Morales continued to smirk – was remote and vague. Unlike the employer representatives in *Washington County*, *City of Tigard*, *Josephine County*, and *Sandy Union High School*, Foote had no supervisory authority over Morales and never told Morales that he would suffer adverse employment consequences if he persisted in his behavior. We consider Foote's statements to Morales to be an isolated and impulsive outburst that resulted from Foote's belief that Bailey had deceived and manipulated him.<sup>4</sup> The real object of Foote's anger was Bailey; Morales had the misfortune to get caught in the midst of the argument between the two. We also note Foote's exchange with Morales lasted only a few seconds, and that Foote took no action to carry out his somewhat nebulous threats to expel Morales from his office or prevent him from returning. Instead, soon after the meeting, Foote advised his subordinates that it would be "business as usual" in regard to Morales's appearances in the District Attorney's office, and that Morales should be treated courteously in the future.

The Association argues that Foote's outburst had the natural and probable effect of chilling Acton in the exercise of her protected right to have a representative of her choice at her pre-dismissal meeting. We disagree. Morales came to the meeting at

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<sup>4</sup>See *McLoughlin Education Association v. McLoughlin High School*, Case No. C-212-82, 7 PECBR 5998, 6007 (1983) in which we concluded that the school district's attorney did not violate subsection (1)(a) when he angrily (and obscenely) criticized the teacher association's negotiator in front of a teacher's assistant and students. We held that the attorney's "ill-chosen action and words represented an impulsive reaction, taken immediately, to what he perceived as a personal affront to himself in his capacity as Respondent's [the school district's] representative."

Acton's request. His role appears to have been strictly a supportive one, since Bailey spoke for the Association and Morales said nothing. Foote never removed Morales from the meeting. The record is unclear as to whether Morales stopped making the expression Foote found offensive after Foote threatened him. Based on this evidence, we conclude that Foote's statements did not interfere with Acton's right to have the representative of her choice present at her meeting with Foote.

In sum, we conclude that Foote's remarks to Morales did not have the natural and probable effect of chilling Morales or any bargaining unit members in their exercise of protected rights. We base our conclusion on the totality of the circumstances – the impulsive and brief nature of Foote's statements, the lack of any threat of adverse employment-related consequences to Morales, and the fact that Foote promptly disavowed any intent to bar Morales from the District Attorney's office. Accordingly, Foote's statements did not violate ORS 243.672(1)(a). We will dismiss the complaint.<sup>5</sup>

ORDER

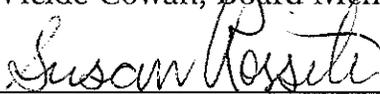
The complaint is dismissed.

DATED this 15<sup>th</sup> day of April 2008.

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\*Paul B. Gamson, Chair

  
Vickie Cowan, Board Member

  
Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

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<sup>5</sup>The Association has not alleged, and we do not consider, whether Foote's statements to Morales violated ORS 243.672(1)(b), which makes it an unfair labor practice for an employer to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization."

\*Chair Gamson Dissenting.

I respectfully – and somewhat reluctantly – dissent. In my view, although the violation is relatively minor, the principles developed under the PECBA during the last 35 years require a conclusion that the County violated the “in the exercise” prong of ORS 243.672(1)(a).

The District Attorney’s (DA) anger is understandable. The DA notified probationary employee Acton that he intended to terminate her, and he set a date for a mitigation hearing where Acton would have an opportunity to present additional information and attempt to change the DA’s mind. The Association requested a one-day postponement of the hearing so the Association’s service representative (Bailey) could attend. The DA collegially agreed to the set-over to accommodate Bailey’s schedule. Then, at the hearing, Bailey took the position that because of the extra day, the employee had completed her one-year probationary period and was now a permanent employee. The DA believed he had been hoodwinked by the request for a set-over and angrily let Bailey know what he thought about his tactics.

Had it ended there, I would agree with my colleagues that there was no violation. Collective bargaining disputes involve important interests that often give rise to strong feelings. For that reason, the law tolerates conduct and language that might not be appropriate to the niceties of the drawing room. An employer’s use of harsh and vulgar language, *without threats or coercion*, does not violate subsection (1)(a). *McLoughlin Education Association v. McLoughlin Union High School District #3*, Case No. C-212-82, 7 PECBR 5998, 6001-6002, 6007-6008 (1983).

The DA, however, did not stop with an outburst of anger. He progressed to threats and coercion. As the DA was upbraiding Bailey, he turned to Morales, a second Association representative who was also in the room to represent Acton, and said something like “Wipe that smirk off your face, and if you don’t I’ll kick you out of this office and never let you back.”

I disagree with my colleagues about the legal significance of the DA’s threat to kick Morales out of the mitigation hearing. An independent violation of the “in the exercise” prong of subsection (1)(a) typically arises from threatening or coercive statements by an employer. *Wy’East Education Association v. Oregon Trail School District No. 46*, Case No. UP-16-06, 22 PECBR 668, 698 (2008); *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 219 (2007)

The issue is whether the DA's threats toward Morales "have the natural and probable effect" of discouraging Morales from exercising his rights under the PECBA. *Wy'East* at 701. In my view, the DA's comments had such an effect.

The first question is whether Morales was exercising a right under the PECBA. Allowing union representatives to engage in free and unfettered discussions with management furthers the underlying purposes and policies of the PECBA. Disputes are far more likely to be resolved if the parties can openly and candidly discuss them. *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 786-787; *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168, 185 (2007), *appeal pending*. Morales attended the mitigation hearing as Acton's union representative. As such, he had a PECBA-protected right to express himself on Acton's behalf. Morales communicated a clear non-verbal message to the DA—the DA understood it to be something like a smug "gotcha," or "We outsmarted you. Don't mess with our members."

Had Morales expressed himself with these words, there could be little doubt that he was engaged in protected activity. He attended the meeting as a union representative for a co-worker whose job was threatened. In the words of the statute, he was "participat[ing] in the activities of labor organizations \* \* \* for the purpose of representation \* \* \* on matters concerning employment relations." ORS 243.662. It should not matter that Morales communicated by facial expression rather than words. The point is that he was, by whatever means, communicating to the employer about the issue being discussed, *i.e.*, whether Acton was a probationary or a permanent employee. As such, his activity was protected.

Morales' message does not lose its PECBA protection because it was harsh or provocative. This Board has frequently permitted harsh expression in the rough and tumble world of labor-management relations. *E.g.*, *Wy'East Education Association*, 22 PECBR at 698-701 (aggressive picket-line shouting at school administrators is protected activity so long as there is no violence or credible threat of violence); *Central Education Association and Vilches v. Central School District 13J*, Case No. UP-74-95, 17 PECBR 54, 70 (1997), *aff'd* 155 Or App 92, 962 P2d 763 (1998) (rude, discourteous, or impolitic behavior in pursuing protected rights does not remove the activity from the protection of the PECBA); *International Association of Fire Fighters, Local 1395 v. City of Springfield*, Case No. UP-48-93, 15 PECBR 39 (1994) (otherwise lawful union activities do not lose protection under the PECBA simply because they are exercised in a way that fails to meet the employer's expectation of proper decorum and diplomacy); *Lane Unified Bargaining Council v. McKenzie School District # 68*, Case No. UP-14-85, 8 PECBR 8160, 8198 (1985) ("Emily Post-approved deportment is not a requirement of good-faith bargaining \* \* \*"). No matter how ill-advised we might find

Morales' demeanor, this Board should not be in the business of policing the manner in which parties choose to express themselves, so long as they do not cross the line to violence or threats of violence, and do not interfere with the exercise of protected rights.

The next question is whether the DA interfered with the exercise of the protected right. In my view, it does. The DA's threat would have the natural and probable effect of suppressing Morales' right to express himself on behalf of a bargaining unit member. Indeed, that was clearly the DA's intent—he wanted to suppress Morales' expression about the topic under discussion.

The majority characterizes the DA's threat as "vague" and "nebulous." I disagree. The threat was concrete and blunt. It specified the precise protected activity the DA objected to, and it informed Morales of the precise consequences he would suffer if he engaged in that protected activity. The DA, as the lead law enforcement officer in the County, had the apparent ability to remove Morales from the meeting and permanently ban him from the office. Given the circumstances, a person of normal sensibilities would naturally and probably comply with the DA's demand.<sup>6</sup>

In addition, the DA interfered with Acton's rights. Her job was on the line and she was understandably emotional. In these circumstances, an employee may be too fearful or inarticulate to present her position, and a union representative could be of great assistance. *AFSCME, Local 28 v. Oregon Health Sciences University*, Case No. UP-119-87, 10 PECBR 922, 928 (1988) (quoting *National Labor Relations Board v. J. Weingarten, Inc.*, 420 US 276 (1975)). The DA's threats naturally and probably denied Acton the full support of her union representative.

The majority offers four reasons for dismissing the complaint. (Slip op. at 10) None are convincing. First, it notes that the DA's statements were brief. The coercive effect of the statements, not their length, is the relevant legal inquiry. Extremely brief statements can be highly coercive (*e.g.*, "Stop or I'll shoot.").

Second, the majority excuses the DA's comments because they were impulsive. This observation, even if accurate, is entirely irrelevant. This Board has never required an employer's acts to be premeditated under the "in" prong of subsection (1)(a). To the contrary, the employer's motive is irrelevant. *Portland Association of Teachers v. Multnomah School District No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000). The only relevant

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<sup>6</sup>It is irrelevant whether Morales was, in fact, coerced by the DA's ultimatum. Under the "in the exercise" prong of subsection (1)(a), a complainant does not need to prove actual interference with the protected activity. *Wy'East Education Association*, 22 PECBR at 698. The only issue is whether the DA's actions would naturally and probably tend to deter union activity.

inquiry is the impact of the statements on the employee. *Id.* If they tend to chill the employee's exercise of protected rights, the statements are unlawful. The employer's mind set does not further this inquiry, and the majority erred in considering it.

Third, the majority notes that the DA did not threaten Morales with employment-related consequences. The DA's threats certainly could have been worse, but again, that is not the relevant legal inquiry. The question is whether the threats were coercive. For the reasons discussed above, I view the threats as coercive.

Fourth, the majority notes that the DA "promptly disavowed any intent to bar Morales from the District Attorney's office." There is both a factual and a legal problem with this reason. Factually, the DA told his staff to extend courtesies to Morales, but he never told Morales. For all Morales knew, the DA still intended to remove him if he expressed himself in a manner the DA disliked. This lingering threat naturally and probably would deter Morales from expressing himself freely in future meetings for fear of being removed if he said or did something that displeased the DA. More significantly, as a matter of law, this Board has held that an employer's subsequent remedial conduct or admission of fault does not cure a violation, although it may be relevant to determining the appropriate remedy. *Washington County Police Officers Association v. Washington County*, Case No. UP-99-89, 12 PECBR 910, 915 (1991) (citing *OSEA Chapter 35 v. Fern Ridge School District*, Case No. C-19-82, 6 PECBR 5590 (1983), *AWOP 65 Or App 568 (1983)*, *rev den 296 Or 536 (1984)*). Under these guidelines, the DA's disavowal does not cure the violation, but the remedy should be limited to a cease and desist order.

I view the County's violation as relatively minor. The underlying principles at issue, however, are anything but minor. They go to the very heart of the PECBA—protecting the right of employees to act collectively. In my view, the County interfered with those rights. I therefore respectfully dissent.



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Paul B. Gamson, Chair