

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-16-06

(UNFAIR LABOR PRACTICE)

WY'EAST EDUCATION ASSOCIATION/	)	
EAST COUNTY BARGAINING	)	
COUNCIL/OREGON EDUCATION	)	
ASSOCIATION, ET AL.,	)	
	)	
Complainants,	)	RULINGS,
	)	FINDINGS OF FACT,
v.	)	CONCLUSIONS OF LAW
	)	AND ORDER
OREGON TRAIL SCHOOL	)	
DISTRICT NO. 46,	)	
	)	
Respondent.	)	
_____	)	

This Board heard oral argument on April 25, 2008, on both parties' objections to the Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on February 22, 2008, following a hearing on November 20, 2006, and January 10 and 30, 2007, in Sandy, Oregon. The hearing record closed on June 5, 2007, with the receipt of the parties' post-hearing briefs.

John S. Bishop, Attorney at Law, McKanna, Bishop, Joffe & Sullivan, 1635 N.W. Johnson Street, Portland, Oregon 97209, represented Complainants.

Bruce Zagar, Attorney at Law, Garrett, Hemann, Robertson, P.O. Box 749, Salem, Oregon 97308-0749, represented Respondent.

On April 21, 2006, Wy'East Education Association/East County Bargaining Council/Oregon Education Association, et al. (Association) filed this complaint against

the Oregon Trail School District No. 46 (District) alleging that the District violated ORS 243.672(1)(a) and (b).

The District filed a timely answer on July 13, 2006. At the hearing, the Association moved to amend its complaint by adding an allegation that the District violated ORS 243.672(1)(e) when it deducted the cost of monthly fringe benefit premiums from bargaining unit members' salaries. The District objected, and the ALJ deferred ruling on the motion. The ALJ stated that the alleged violation of subsection (1)(e) would be an issue for the hearing.<sup>1</sup>

The issues in presented are:

1. Did District officials: openly photograph or pretend to photograph bargaining unit members engaged in Public Employee Collective Bargaining Act (PECBA)-protected activity; ban bargaining unit member Robert D'Aboy from District premises on pain of trespass charges; falsely accuse bargaining unit members Robert D'Aboy, Dottie Thorson, and Julann D'Aboy of stalking and harassing District Superintendent Clementina Salinas while she was on vacation, and threaten that there would be "consequences" for that alleged conduct; falsely claim that bargaining unit members Julann D'Aboy, Robert D'Aboy, and Dottie Thorson had picketed outside Salinas' home; take these actions in order to interfere with unit employees' PECBA-protected rights? If so, did this conduct violate ORS 243.672(1)(a)?

2. Did the District deny unit employees contractual "other paid leave" for December 21 and 22, 2005, because of bargaining unit members' exercise of rights under the PECBA? If so, did this conduct violate ORS 243.672(1)(a)?

3. Did the District deduct the cost of monthly fringe benefit premiums from bargaining unit members' paychecks and refuse Association offers to reimburse the District for these costs because of bargaining unit members' exercise of rights under the PECBA? If so, did this conduct violate ORS 243.672(1)(a) and (b)?

Each party asks us to impose a civil penalty on the another.

### RULINGS

1. The ALJ erred by dismissing the Association's motion to amend its complaint.

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<sup>1</sup>The ALJ's ruling on the Association's motion to amend is discussed in the Rulings section of this Order

At the start of the hearing on November 20, 2006, the Association moved to amend its complaint pursuant to OAR 115-035-0010(2). In its original complaint, the Association alleged that the District deducted the cost of one month's fringe benefit premium from the salary of each bargaining unit member in violation of ORS 243.672(1)(a) and (b). In its amended complaint, the Association alleged that these District actions violated ORS 243.672(1)(e). In support of this charge, the amended complaint added the following factual allegations: (1) The expired collective bargaining agreement and final implemented District offer provided that the District would pay up to certain amounts for fringe benefits for employees per month; and (2) the expired collective bargaining agreement and implemented final offer did not provide, directly or indirectly, that the District could withhold fringe benefit payments based on the number of days worked.

The District objected to the proposed amendment of the complaint as untimely, noting that counsel for the District received the amended complaint a half hour before the hearing. The Association argued that the amended complaint simply added a new legal theory based on the same allegations as the original complaint, and did not expand the evidence to be presented at hearing. The ALJ took the motion under advisement. He told the parties that he considered the subsection (1)(e) allegation as an issue for the hearing, and explained that he would rule on the Association's motion to amend its complaint in his Recommended Order. In his Recommended Order, the ALJ denied the Association's motion to amend its complaint.

Under OAR 115-035-0010(2), a complainant may amend a complaint on its own motion before the complaint is served. After the complaint is served, however, an amendment may be made only with the approval of the ALJ.

We usually uphold an ALJ's decision on motions to amend a complaint after a respondent has filed its answer. *E.g., Clackamas Community College v. Clackamas Community College Education Association*, Case No. C-123-77, 3 PECBR 1807, 1808, *aff'd per curiam*, 36 Or App 2, 583 P2d 36 (1978); *OPEU v. State of Oregon, Executive Department*, Case No. UP-64-87, 10 PECBR 51, 52 (1987); *Junction City Police Association v. Junction City*, Case Nos. UP-94/124-88, 11 PECBR 732, 733 (1989). *But see OACE v. Douglas School District*, Case No. UP-82-89, 12 PECBR 547, 548-49 (1990) (ALJ properly allowed one amendment at the hearing to add allegations about events that occurred within the 180-day limitation period under ORS 243.672(3), but erred in allowing another amendment concerning facts that occurred outside of the 180-day period).<sup>2</sup> We

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<sup>2</sup>In *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, *interim order*, 19 PECBR 590, 592, *Board order*, 19 PECBR 684 (2002), a case involving expedited consideration by this Board under OAR 115-035-0060, we denied complainant's motion to amend its complaint as untimely. The complaint was filed on January 7, 2002; the motion to

have never, however, clearly explained the criteria we use to determine when an ALJ properly exercises discretion in making such a decision. We find it appropriate to articulate our standards in this case.

Our cases describe a number of factors an ALJ should consider in deciding whether to allow a late amendment. One factor is the nature of the amendment. An ALJ may properly permit a late amendment to a complaint if the amendment alleges a new legal theory but does not greatly expand the evidence presented at the hearing. *See East County Bargaining Council v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9191 n 6 (1986); *Roseburg Education Association v. Roseburg School District*, Case No. UP-26-85, 8 PECBR 7938, 7939 (1985); *Silverton Education Association v. Silverton Elementary School District*, Case No. UP-100-94, 16 PECBR 98, 99 (1995). The respondent's position is another important consideration; an ALJ may properly allow a late amendment if the respondent does not object. *OPEU v. Marion County Juvenile Department*, Case No. C-78-81, 6 PECBR 5140, 5142 (1982); *Junction City Police Association v. Junction City*, 11 PECBR at 733; *AFSCME Local 2936 v. Coos County*, UP-72-03, 21 PECBR 256, 258 (2006). Surprise or prejudice to the respondent may not be an appropriate reason to deny a late amendment if these elements can be cured by scheduling additional hearing days or permitting the respondent to amend its answer. *OSEA v. Reynolds School District*, Case No. C-199-78, 5 PECBR 2898, 2899 (1980); *Roseburg Education Association v. Roseburg School District*, 8 PECBR at 7939; *AFSCME Local 2936 v. Coos County*, 21 PECBR at 258. Finally, the ALJ must consider the purpose of a late amendment. The parties may not use a last minute amendment as a litigation tactic. A late amendment that is frivolous, filed to harass the respondent, or made solely for the purpose of delaying a proceeding should be denied as contrary to the purposes and policies of the PECBA. *See* ORS 243 672(3) (this Board may order filing fee reimbursement to the prevailing party if we find that a complaint is frivolous or filed in bad faith). The ALJ may also consider the orderly presentation of evidence and other practical concerns that may arise if an amendment were to be allowed in a particular case.

Applying these considerations here, we conclude that the ALJ erred when he denied the Association's motion to amend its complaint. The Association's amendment proposes a new legal theory—that the District's deduction of fringe benefit costs from bargaining unit members' salaries violates subsection (1)(e)—but does not expand the evidence offered at the hearing. The facts alleged in support of the subsection (1)(e) violation concern past practice and the provisions regarding payment of fringe benefit costs in the expired contract and implemented offer. This evidence is

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amend was made on January 18, 2002. We gave no explanation as to why we considered the motion untimely; presumably, we reached this conclusion because of the expedited nature of the proceedings.

relevant to the charges in the original complaint—that the fringe benefit deductions and the way in which the District made these deductions violated subsections (1)(a) and (b). The hearing was scheduled to begin in November and continue for two more days in January, sufficient time for the District to amend its answer and present evidence and argument concerning the allegations in the amended complaint. The District has not demonstrated that it was surprised or prejudiced by the amendment. There is no evidence in the record to show that the Association deliberately filed the amendment late as part of its litigation strategy or acted with any improper motive, such as a desire to delay the proceedings or harass the District. Nor does the amendment appear to be frivolous. Accordingly, we will grant the Association’s motion to amend its complaint.

The ALJ’s denial of the Association’s motion to amend its complaint resulted in no prejudice to either the Association or the District, however. As noted above, the ALJ considered this alleged violation of subsection (1)(e) as one of the issues for the hearing. The parties presented evidence and argument regarding this allegation at the hearing and in their post-hearing briefs.

2. The ALJ properly denied the District’s motion to quash the Association’s subpoena duces tecum, but erred when he ordered the Association to pay the District the reasonable cost of complying with the subpoena.

On November 6, 2006, two weeks before the hearing was scheduled to begin, the Association served a subpoena duces tecum on the District. The subpoena ordered the District to produce documents at the hearing regarding the District’s asserted payroll practice that requires an employee to work more than one-half of a pay period in order to receive any District-paid insurance benefits. The District asserted this payroll practice as its defense against the charge that it changed its payroll policies in response to the labor dispute. The subpoena, in essence, required the District to provide evidence that it applied this purported policy in the past.

The subpoena duces tecum was the result of a contentious dispute over information requested by the Association. Beginning on October 24, 2006, Association counsel Bishop made numerous written requests for information about the number of employees who were affected by the District’s fringe benefit payroll policy. The District gave Bishop payroll records for five employees who allegedly were affected by this policy. It asserted, however, that gathering additional information about the total number of Association bargaining unit members affected by the District fringe benefit payroll policy would require a “time consuming and expensive” search that it would perform only if the Association agreed to pay the estimated cost of the search in advance.

On November 9, the District moved to quash the Association’s subpoena duces tecum, arguing that (1) the Association failed to comply with OAR 115-010-0055

by not filing a previous application to this Board showing general relevance and reasonable scope of the subpoena; and (2) the subpoena was unduly burdensome, unreasonable in scope, and would be unreasonably costly for the District. By letter dated November 14, the ALJ denied the motion to quash, ruling that (1) the application requirement in OAR 115-010-0055 applied to a party's request that this Board issue a subpoena, not to a subpoena issued by an attorney of record; (2) the subpoena was not unduly burdensome; and (3) "Complainants are required to pay Respondent the reasonable cost of complying with the subpoena."

By letter to District Business Manager Tim Belanger dated November 15, 2006, Bishop identified eight bargaining unit members who may have been affected by the District's fringe benefit payroll practices: Bishop asked Belanger to give him payroll records for these eight individuals.

By letter to Zagar dated December 8, Bishop asked the District to respond fully to the Association's subpoena. Bishop also objected to the District's insistence that the Association pay in advance the District's estimated cost of \$3,380 to comply with the subpoena. By letter to Bishop dated December 11, Zagar reiterated the District's position that it would not produce the subpoenaed documents unless the Association paid the District's estimated production costs in advance. Zagar refused to allow Association representatives to view confidential District personnel records, but suggested the Association could reduce costs by reviewing District board minutes for possible applications of the payroll fringe benefits policy

At or before the second day of hearing on January 10, 2007, Belanger gave Bishop payroll records for three of the eight individuals for whom Bishop had requested information in his November 15 letter.<sup>3</sup> On advice of counsel, Belanger did not investigate the District's practice in regard to the other five bargaining unit members about whom the Association sought information.

The Association never paid the District's estimated cost of obtaining the subpoenaed materials. Consequently, the District never provided the Association with any documents concerning its fringe benefit payroll practices other than those furnished to the Association before or at the hearing.

A party's attorney may issue, or may request this Board to issue, a subpoena for production of documents in hearings before this Board. OAR 115-010-0055; ORS 183.440(1). A subpoena is subject to a motion to quash on the grounds that the documents sought are not "generally relevant" or that the scope of

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<sup>3</sup>At the hearing, Belanger testified that the investigation into the District's payroll practices for these three individuals cost a "few hundred dollars."

the evidence sought is not reasonable. *OSEA v. Klamath County School District*, Case No. C-127-84, 9 PECBR 8832, 8834 n 2 (1986). A properly issued subpoena should be enforced unless the objecting party shows that the subpoena is overbroad or unduly burdensome. *See, e.g., FDIC v. Garner*, 126 F3d 1138 (9<sup>th</sup> Cir 1997), citing *NLRB v. North Bay Plumbing*, 102 F3d 1005, 1007 (9<sup>th</sup> Cir 1996). A subpoena is considered unduly burdensome only if the objector demonstrates that producing the information sought would cause serious disruption in its normal business operations. *CNN America, Inc.*, 352 NLRB No. 85 (05/30/08).

Here, Association counsel issued a subpoena duces tecum ordering the District to produce documents concerning its fringe benefit payroll practices. The District argues that the subpoena should be quashed because it would be unduly burdensome and expensive to obtain the materials sought by the Association. According to the District, compliance with the subpoena would require it to examine payroll records for each bargaining unit member, beginning in 1997 and continuing through November 2006.

The ALJ correctly denied the District's motion to quash. The documents sought were clearly relevant to the Association's charge that the District unlawfully changed its payroll practices in violation of subsection (1)(a), (b), and (e). Compliance with the subpoena was not unduly burdensome to the District. The District readily and without objection gave the Association information about five people who were affected by the District fringe benefit payroll practices. When the Association identified eight additional bargaining unit members who may have been affected by the District's payroll policy, the District researched payroll records for three of these individuals at a cost of "a few hundred dollars." The District failed to demonstrate that the cost of complying with the subpoena was excessive.

The ALJ erred, however, when he ordered the Association to pay the cost of producing the records necessary to respond to the Association's subpoena. There is no authority under Oregon law for requiring a party to pay the cost of responding to its own subpoena. Nor does federal law require a requesting party to pay the cost of the other party's compliance with a subpoena.<sup>4</sup> It would not further the purposes and policies of the PECBA to require that a party pay for relevant information that it subpoenas for a hearing before this Board.

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<sup>4</sup>We note that our ruling is based on information that was not available to the ALJ on November 14, 2006, when he ruled on the District's motion to quash. At that time, the District asserted it would be extremely expensive to comply with the subpoena. District Business Manager Belanger's subsequent clarification—that it cost a "few hundred dollars" to provide some of the information sought by the Association—was made at the second day of hearing in January 2007.

The District's unwillingness to comply with the Association's subpoena was based on the Association's refusal to pay the District for the cost of producing the information sought by the subpoena. However, the ruling made by the ALJ did not prejudice the Association.

The Association's subpoena sought evidence relevant to the District's defense against the alleged violations of subsections (1)(a), (b), and (e): that it had a long-standing past practice of deducting the total monthly cost of fringe benefits premiums from the salary of a bargaining unit member who worked one-half or less of the days in a pay period. As the Association correctly noted in its brief, the subpoena did nothing more than require the District to produce the documents needed to prove its own defense. The District had control over and access to the documents. The District's unexplained failure to produce evidence in support of its position warrants an inference that the documents would have been unfavorable to the District. *See Sandy Education Association and Davey v. Sandy Union High School District No. 2 and Heaton*, Case No. UP-42-87, 10 PECBR 389, 396 n 5, *amended*, 10 PECBR 437 (1988); *IAFF Local #1489, and Brown v. The City of Roseburg*, Case No. C-53-84, 8 PECBR 7805, 7817, AWOP, 76 Or App 402, 708 P2d 1210 (1985); *Oregon School Employees Association v. Camas Valley School District 21J*, Case No. UP-104-88, 11 PECBR 820, 832 (1989). Because we make this inference, any error regarding the subpoena was harmless.

3. District's motion to add witnesses and exhibits not listed prior to hearing

On December 13, 2006, after completing the first day of hearing, the District stated that it sought to call three additional witnesses and submit an audio recording as an exhibit during its case-in-chief. The Association objected, stating that the deadline for parties to list their witnesses and exchange exhibits had passed (on November 13, 2006). *See* OAR 115-010-0068(4). The ALJ directed the District to raise its motion on the record at the close of the Association's case. If the Association maintained its objection, the ALJ stated that he would ask that the District make a specific showing of good cause to justify receipt of the additional evidence.<sup>5</sup> The District

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<sup>5</sup>The prehearing order of July 10, 2006, stated, in part:

"You are to do the following prior to the hearing:

"\* \* \* \* \*

- "By seven days prior to the hearing date, mail or deliver to each other all exhibits and exhibit lists regarding your cases-in-chief (exhibits offered at hearing that were not mailed or delivered seven days before hearing will be received only upon a showing of good cause under OAR 115-10-068(4));

raised the issue at the close of the Association's case. The Association maintained its objection. The District argued that it had good cause for the late request because the Association had unexpectedly mischaracterized the strikers' behavior as peaceful. The District stated that the additional evidence would demonstrate that the strikers were violent.

A party seeking to add witnesses or exhibits to its case-in-chief after the date set by the ALJ must show good cause. The District's answer alleged that misconduct by strikers was a basis for some of the District's actions, and it should have been prepared to put on evidence to support those allegations if necessary. The ALJ correctly ruled that the District did not establish good cause to introduce testimony and evidence which was not identified on its pre-hearing witness and exhibit lists.<sup>6</sup>

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

### FINDINGS OF FACT

#### Parties

1. The District is a public employer under ORS 243.650(20). It operates a school district in Sandy created by a 1997 merger of the Sandy Union High and Elementary school districts.<sup>7</sup> The District is governed by a board of directors. During the relevant events, members of the District board included chair Terry Lenchitsky and members Wayne Kuechler, Dave Isbell, and Dan Thompson. Clementina Salinas was superintendent of the District and reported to the board. Her assistant superintendent was Russ Hasegawa. Tim Belanger was the District business manager, and Julia Monteith was the District communications director. The District's main administrative

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- "By seven days prior to the hearing date, mail or deliver to each other lists of witnesses who will testify in your cases-in-chief and provide a copy to me (witnesses called at hearing whose names were not included on the calling party's witness list will be permitted to testify only upon a showing of good cause under OAR 115-10-068(4))."

<sup>6</sup>The ALJ properly allowed the District to make an offer of proof regarding the excluded testimony and evidence.

<sup>7</sup>See *Sandy Union High School District UH2 and Sandy Elementary School District 46 v. East County Bargaining Council/SEA/SEIA*, Case Nos. UP-8/DR-1-97, 17 PECBR 151 (1997).

office (District Office), where Salinas and Monteith worked, was located in two adjacent buildings on Industrial Way in Sandy.

2. The Association is a labor organization under ORS 243 650(13), representing a bargaining unit of approximately 215 District full-time and part-time teachers. During the relevant events, Sena Norton was the president and Lanning Russell was the vice-president of the Wy'East Education Association. Debbie Hagan was a UniServ consultant employed by the Oregon Education Association (OEA) to assist the Association in its labor relations with the District.<sup>8</sup> David Fiore, Martin Pavlik, and Judy Casper were OEA UniServ consultants who assisted the Association with the strike.

3. The District and the Association were parties to a collective bargaining agreement which expired in June 2004.<sup>9</sup>

4. The Association and the District reached impasse in bargaining for a successor collective bargaining agreement in June 2005. *Oregon Trail School District*, 21 PECBR at 161. The District unilaterally implemented its final offer on August 26, 2005. On October 14, 2005, the Association notified the District that it intended to go on strike on October 25. The Association began its strike at 6:00 a.m. on October 25, 2005. *Id.*

5. The Association members were on strike from October 25, 2005 until November 16, 2005. The District closed its schools during the strike.

6. During the strike, unit members picketed the District Office and the District schools. They also picketed the home of District Superintendent Salinas.

7. The Association organized its picketers into teams led by picket captains. Association officials consulted with local law enforcement officials regarding relevant laws, and Fiore and other OEA UniServ consultants provided training for picket captains regarding the laws and rules that governed their activities. These included the

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<sup>8</sup>The Wy'East Education Association/East County Bargaining Council is the local union OEA is the statewide organization providing staff and other support to the local. We refer to these entities collectively as the Association

<sup>9</sup>Two prior cases before this Board arose from this labor dispute: *Oregon Trail School District No. 46 v East Education Association/East County Bargaining Council*, OEA/NEA, Case No. DR-01-05, 21 PECBR 157 (2005); *Wy'East Education Association/East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108 (2007) In its post-hearing brief, the Association requests that this Board take notice of the Findings of Fact in these cases (Complainant's Post-Hearing Brief at 3 n 3.) The District did not respond to this request. We refer to the Findings of Fact in the prior cases as noted.

terms of a court ruling regarding picketing during a 1997 strike between the Association and the District's predecessors.<sup>10</sup>

The District's October 27 ban of Robert D'Aboy from District property

8. During the events at issue, Robert D'Aboy and Julann D'Aboy (spouse of Robert) were bargaining unit members working as teachers.

9. The District Office picket team included picket captain Byron Ball and approximately 10 other teachers, including Robert D'Aboy and Bill Evans. They picketed the District Office from approximately 6:00 a.m. until approximately 5:00 p.m. almost every business day during the strike.

10. Association officials informed the District Office picket team members of the terms of a court ruling regarding picketing during a 1997 strike between the Association and the District's predecessors. The terms of the ruling were that picketers should (1) remain on public property while picketing; (2) not impede the passage of District Office employees and others; and (3) have no more than three picketers in the District Office parking lot at one time (who were permitted to carry signs and leaflets).

11. Ball, Robert D'Aboy, and several other teachers on the District Office picket team had participated in the 1997 strike.

12. Robert D'Aboy, who had been an athletic coach, was the most aggressive of the District Office picketers. He yelled louder, and more often, than the others. He frequently yelled at administrators crossing the picket lines. D'Aboy was also more comfortable with the press than other picketers. As a result, D'Aboy often appeared in televised news stories during the initial days of the strike. In at least one instance, D'Aboy's shouted remarks could be heard in the background of a televised outdoor interview of Superintendent Salinas.

13. On October 25, 2005, the first day of the strike, the District Office picketing team and most of the other Association picketers spent the day picketing at the Cottrell school building. Members of the media were present as well, including those with television cameras.

14. While picketing at Cottrell, D'Aboy walked back and forth in front of the school building on the public roadway and did not enter District property. During

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<sup>10</sup>*Sandy Education Association, et al. v. Sandy Union High School District 2, et al.*, Clackamas County Circuit Court, Case Nos. 97-01-191, 97-01-505.

the picketing, Assistant Superintendent Hasegawa began to leave the school parking lot driving a Ford F-150 pickup truck with Superintendent Salinas as a passenger. The truck's windows were rolled up. D'Aboy walked in front of the truck and stopped briefly holding a picket sign. He shouted statements such as: "This needs to be settled;" "this is ridiculous;" and "come back to the table." Salinas raised a disposable camera and fired the flash three or four times as if she was taking a photograph. In fact, Salinas knew that the camera had no film exposures left.<sup>11</sup>

15. Hasegawa drove Salinas past D'Aboy and the other picketers. As the truck drove down the street, Salinas fired the camera flash again. Other picketers besides D'Aboy could see Salinas using her camera as if to take pictures.

16. Salinas directed her camera flash towards picketers on at least one other occasion.

17. Association picketers were photographed, filmed, and in some cases interviewed by news organizations. Martin Pavlik, an OEA UniServ consultant, took hundreds of photographs and made many video recordings to document the strike. He photographed and filmed picketers, District board and administrative staff members, and security officials.

18. The District has surveillance cameras in all of its schools and on all of its buses.<sup>12</sup> District employees wear picture identification badges. Photographs of District employees appear on the District web site. The District had no policy regarding

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<sup>11</sup>In her testimony, Salinas repeatedly described her state of mind and that of other District officials as "terrified" in connection with the conduct of picketers. She testified that the "most terrifying time" and when she was "scared to death" was when D'Aboy ran up and yelled at her when she parked in an adjacent lot and walked onto the District Office parking lot. She testified that she was "terrified" when D'Aboy yelled into the closed driver's side window of the truck she was a passenger in on October 26. She also stated that she was "terrified" when she was in the passenger seat of a large pickup truck exiting a parking lot and Robert D'Aboy walked in front of it, or when a picketer in a gray hooded sweatshirt stepped in front of her pickup truck. She testified that she was "very shaken" when Thorson accosted her at the casino, and "terrified" when a teacher hit the window of her truck with an umbrella. She testified that Kuechler was "terrified" when his car was surrounded by angry Association supporters on November 10, and that Monteith was "terrified" by D'Aboy on the morning of October 27. However, her actions were not consistent with her testimony. Salinas walked through picket lines and down the street to visit a coffee shop a quarter mile away. We conclude that, throughout the events described in these Findings of Fact, Salinas was, at most, uncomfortable.

<sup>12</sup>During the events at issue, the District Office did not have surveillance cameras.

photographing or filming picketers and, with the exception of televised news stories, did not collect such photographs or films during the strike.<sup>13</sup>

19. On October 26, the second day of the strike, Superintendent Salinas parked her vehicle in the lot of a neighboring business. As Salinas walked into the District Office parking lot, D'Aboy approached and shouted to her. Salinas twisted her ankle trying to reach the office before D'Aboy reached her.

20. Between 6:30 a.m. and 7:00 a.m. on October 27, while it was still dark, District Communications Director Monteith drove into the District Office parking lot.<sup>14</sup> She was the first to arrive at the District administration building, although someone had already arrived at the adjacent business office. Ball, D'Aboy, and Bill Evans, at least, were present on the picket line. D'Aboy entered the parking lot carrying a sign as Monteith parked her car.

21. D'Aboy approached Monteith from behind, and Monteith did not see or hear D'Aboy approaching her. She learned of his presence when D'Aboy shouted that she needed to "quit misleading the public" and that her "press releases are not the truth." Monteith was startled and scared. She walked quickly to the District Office door, unlocked it, and entered without looking back. It took Monteith approximately 30 seconds to get from her car to her office.

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<sup>13</sup>District officials obtained a copy of some news footage regarding the November 10 parking lot incident with Kuechler, described below, which they provided to police; the footage was ultimately lost.

<sup>14</sup>Several eyewitnesses testified about this interaction: Association bargaining unit members D'Aboy, Byron Ball, and Bill Evans, as well as Monteith. D'Aboy testified that he saw Monteith's car enter the parking lot and checked with Ball to see if it was still lawful to enter the parking lot. Ball thought so, but called strike headquarters to confirm this. Then D'Aboy entered the parking lot to yell to Monteith, never approaching closer than 35-40 feet. Ball testified that the picketers saw Monteith arrive and D'Aboy asked if it was lawful to enter the lot. Ball said yes and D'Aboy entered the lot to yell to Monteith, never approaching closer than 30 feet. Evans testified that D'Aboy walked down to the end of the driveway to yell to Monteith, and was no closer than 25 feet to her. Monteith testified that D'Aboy was lurking in the shadows between the District's buildings when she arrived, approached her after she got out of her car, and followed her to the District office door. While she did not turn around, Monteith estimated that D'Aboy approached within 18 inches of her at one point. We conclude that D'Aboy was initially hidden from Monteith's view by darkness; D'Aboy came closer to Monteith than necessary to communicate his message, but not close enough to physically touch Monteith; and that Monteith was scared by the encounter.

22. D'Aboy also shouted at Salinas and Business Manager Belanger on October 27, but did not enter the parking lot when he did so. D'Aboy yelled that they should settle the strike and that their actions were ridiculous. On or before October 27, D'Aboy told Hasegawa, "You're a loser "

23. Later on October 27, D'Aboy was picketing outside the high school when he received a call on his cell phone. The caller stated that a uniformed police officer had appeared at the Association's strike headquarters with a letter for D'Aboy. Shortly afterwards, a uniformed City of Sandy police officer delivered a letter to D'Aboy on the picket line, in front of a dozen or more other picketers.

24. The letter, from Superintendent Salinas, stated that its subject was "Harassment of a Public School Officials [*sic*]." The letter stated:

"Mr. D'Aboy,

"The purpose of this letter is to inform you that the District will no longer tolerate your conduct of harassment of Public Officials and aggression and its disruptive effect upon the District's business. By this letter, I am notifying you that the District is denying you the privilege of visiting all Oregon Trail School premises at any time. Please be advised that I, Superintendent Salinas represent the Oregon Trail School District with respect to the matters addressed in this letter.

"You have recently engaged in the display of inappropriate behavior towards Public School Officials on School District Office property. Your behavior is most disruptive to the conduct of the District, therefore this administration demand [*sic*] that your presence on district premises be banned.

"Should you violate the directive that is contained in this letter, you will be subject to being charged with criminal trespass and law enforcement authorities will be called, ORS 164-245, defines criminal trespass in the second degree. [*sic*] That statute [*sic*] provides that 'a person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully in or upon premises.' ORS 164-205 provides in part, that to 'enter at the time of such entry or remaining, are not open to the public or

when the entrant is not otherwise licensed or privileged to do so. [*sic*]'”<sup>15</sup>

The letter contained no language limiting the period during which the ban would be in effect.

25. After receiving the October 27 letter, D’Aboy participated less frequently in picketing, shouted more quietly than he had before the letter, and avoided District property. Robert D’Aboy’s wife, Julann D’Aboy, a bargaining unit member and picket captain, became fearful that her husband was at risk of going to jail.

26. On one occasion during the strike, after Robert D’Aboy received the letter banning him from District property, he and another picketer were removed from a District parking lot by Sandy police.

27. Ball, Fiore, and the rest of the District Office picketing team began to take special efforts to make sure that D’Aboy did not do anything to put himself in jeopardy of being charged with trespass. The other striking employees learned of the letter, and it affected their picketing behavior and reinforced second thoughts some had about the strike. Other picketers became concerned that they might be doing things that could result in similar threats or possible arrest. As a result, Association officials received more questions from picketers as to what they could or could not do while picketing.

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<sup>15</sup>By letter to the District dated October 27, 2005, Association counsel objected to the ban of D’Aboy and told the District that it believed that the ban was an unfair labor practice. On October 31, District counsel responded:

“[O]n October 27, 2005, Mr. D’Aboy entered on to the District’s property and while carrying a picket sign, did accost Public Information Officer Julia Monteith by engaging in threatening, intimidating, and harassing behavior directed to her. He physically came into close proximity to Ms. Monteith and his actions caused her fear for immediate bodily harm.

“Mr. D’Aboy was guilty of similar conduct which was directed at Superintendent Clementina Salinas \* \* \* [and] Business Manager Tim Belanger and not only engaged in intimating [*sic*], threatening, and harassing behavior but also threatened to actually physically strike Mr. Belanger. Mr. Belanger was fearful for his safety.”

There was no testimony at hearing from District witnesses regarding the alleged D’Aboy/Belanger incident, and no credible evidence that D’Aboy caused Belanger to fear bodily harm.

28. On November 10, 2005, the parties met for a mediation session. Association unit supporters picketed outside of the building where the meeting was taking place. District board member Kuechler, a Portland police officer, had to leave the session early to attend a class. Kuechler left the building and entered his car, which was parked in the building's parking lot. Some of the picketers, believing that Kuechler's early exit illustrated a District board intransigence, became enraged. They surrounded Kuechler's car and began rocking it. Kuechler, who had a firearm, used his cell phone to call another District board member (who was still in the building) and asked him to call 9-1-1. District officials made the call, but no Sandy police officers were immediately available. Salinas asked her administrative staff to go outside and help Kuechler. They did so, trying to "push the teachers away" from the car. While attempting to help Kuechler, District Administrator Kimberly Ball ended up on the ground with the wind knocked out of her. After that, the group of strikers moved away and Kuechler drove off. No one was injured in this incident.

29. When Salinas drove out of the parking lot later that evening, a picketing Association unit member hit her car window with an umbrella.

#### Bargaining unit members' interactions with Superintendent Salinas on the Oregon Coast

30. A group of women, including bargaining unit members Julann D'Aboy and Dottie Thorson, had a 10-year tradition of vacationing on the Oregon coast on Veteran's Day weekend. Before the Association's strike began, they had made reservations for their 2005 trip to take place on November 10 through 13. The group chose Lincoln City for the 2005 trip because Thorson planned to watch her son play a football game in Monmouth.

31. Salinas, her husband, sister, and brother-in-law also went to Lincoln City for a vacation on Veteran's Day weekend.

32. On Friday, November 11, Julann D'Aboy and some other members of the group (but not Thorson) were shopping at the Country Clutter store in the Lincoln City Outlet Mall when Superintendent Salinas and her sister entered the same store.

33. One of Julann D'Aboy's friends recognized Salinas, approached her, and asked her why the District had not accepted a contract settlement proposed by Governor Kulongoski. After Salinas replied, D'Aboy's friend called D'Aboy over, telling Salinas that D'Aboy was a teacher who disagreed with Salinas. D'Aboy looked familiar to Salinas, but Salinas did not know her name. After D'Aboy joined the conversation, Salinas offered to show D'Aboy the text of the latest tentative agreements, a copy of which was in her purse. D'Aboy said she was not interested in seeing it, and the

conversation ended. At her sister's urging, Salinas immediately left the store. D'Aboy and her friends continued to shop for a time. No one participating in this conversation raised her voice.

34. Before leaving the store, D'Aboy saw Salinas walk past the door. Salinas saw D'Aboy as well.

35. Later that evening, Julann D'Aboy, Thorson, and other members of their group went to the Chinook Winds Casino in Lincoln City. One of the women saw Salinas sitting in front of a slot machine and reported this to the group. Julann D'Aboy walked over and sat in front of the slot machine next to Salinas. D'Aboy began playing the machine and talking to Salinas. D'Aboy asked Salinas questions such as: "What's it going to take for us to get this settled; we need to get this taken care of and get the kids back in school." Salinas, who continued to play her machine, tried to ignore D'Aboy. D'Aboy's voice was audible to the woman sitting on the other side of Salinas. The woman next to Salinas told her that someone was taking her picture, but Salinas did not turn around. After several minutes, D'Aboy left the area. Salinas continued to play her slot machine.

36. A few minutes later, Thorson sat down to play the slot machine next to Salinas. Salinas knew Thorson's name. Thorson and Salinas acknowledged each other and continued to play their respective machines. Thorson joked that she was at the casino trying to win back some of the money that she lost while she was on strike. Thorson stated that she couldn't believe Salinas was at the casino instead of back in Sandy, trying to get the strike settled. Thorson's tone was emotional. The woman next to Salinas stood up and demanded that Thorson leave, saying that she was "sick and tired of listening to you and stop antagonizing her." Thorson left the area.

37. After Thorson left, the woman sitting on the other side of Salinas urged Salinas to contact casino security.

38. After this conversation, Salinas spoke with casino security and walked around looking for D'Aboy and Thorson. During her search, Salinas saw Sharon Ulrich playing a slot machine. Ulrich worked as a secretary at the same school where Julann D'Aboy and Thorson taught. Ulrich was also visiting the Lincoln City area on vacation with three other District employees from the classified unit. They were not members of either the Salinas or D'Aboy parties. Salinas told Ulrich that she had been harassed by Thorson and another woman, described D'Aboy, and asked for D'Aboy's name, which Ulrich provided. Security officials then paged Thorson, who did not respond to the page, and Salinas continued to look for the two women. Salinas spotted another District teacher, also at the coast but not with the other parties, and asked if he had seen Thorson, but he had not.

39. After their last encounter with Salinas, Thorson, D'Aboy, and their friends played the slot machines for another 15 to 20 minutes and then left the casino to have dinner elsewhere. They had no other conversations or encounters of any sort with Salinas.

40. OEA UniServ Consultant Casper was also vacationing in Lincoln City on Veteran's Day weekend. Casper had been organizing community support for the Association and the strike. While at the coast, Casper met two parents who had children in District schools. One parent was a member of the District classified staff union and knew Salinas from that role. One of the parents told Casper that Salinas was visiting in Lincoln City and staying at a beach house. Casper telephoned Julann D'Aboy and asked if she wanted to picket at Salinas' vacation home. D'Aboy declined.

41. On Saturday, November 12, 2005, at approximately 2:30 p.m., Casper, the two parents, and their children began picketing outside of Salinas' vacation home. A female adult picketer knocked on the door. When Salinas' husband opened the door, the picketer asked to speak to Salinas. Salinas' husband told the picketer that Salinas was not available. Salinas did not see this picketer and never tried to determine the identity of the picketers. She thought, however, that the voice she heard sounded like Julann D'Aboy. At some point during the picketing, one picketer placed a picket sign next to Salinas' front door.

42. At 3:00 p.m. on November 12, Salinas or her husband contacted the Lincoln City Police to complain that there were picketers in front of the house and on the property. The responding police officers reported that the picketers were walking up and down the street, and that they were cooperative when the officers advised them to stay off of private property and to stay out of the way of cars driving down the street. One picketer admitted to the police that he or she had put the picket sign by Salinas' door. The police took no action in response to the complaint. After the police left, Salinas and her husband left Lincoln City for home.

43. Salinas, who spoke to reporters every day during the strike, was contacted by reporters before she reached home. On Saturday or Sunday, November 12 or 13, Salinas spoke to news reporters, District administrative staff, and District board members about her encounters at the shop, casino, and her home. Salinas told the reporters she had been "stalked by teachers" and "a parent." Salinas told District Communications Director Monteith, who was also in regular contact with the press, that she thought, but was not sure, that Robert D'Aboy was one of the picketers at her vacation home. Salinas or another District official identified the teachers involved

as Julann D'Aboy, Robert D'Aboy, and Dottie Thorson.<sup>16</sup> By Monday morning, members of the press, some District board members, at least one District principal, and some members of the public knew about the alleged stalking and believed that Robert D'Aboy, Julann D'Aboy, and Dottie Thorson were the identified stalkers.

44. During the Veteran's Day weekend, Robert D'Aboy traveled to Tacoma, Washington, to take his son to visit Pacific Lutheran University. After he returned home on Sunday, November 13, an angry community member called D'Aboy. The caller asked D'Aboy why he harassed Superintendent Salinas on the coast and picketed her vacation home. D'Aboy told the caller the accusations were untrue. When Julann D'Aboy and Thorson returned home later that evening, they also spoke with the same community member who accused them of "stalking" Salinas at the coast. A reporter also contacted Julann D'Aboy and Thorson and asked to interview them about allegations that they had been stalking Salinas at the coast. The reporter told Thorson that Salinas had named her as someone who had been stalking her and picketing at her house.

45. On Sunday, November 13, bargaining unit member Ulrich called her principal, Kimberly Braunberger. Ulrich called to make sure that Braunberger knew that Ulrich was not connected with D'Aboy or Thorson or their alleged stalking activities.

46. On Monday morning, November 14, Julann D'Aboy attended a picket captains' meeting. Other picket captains had heard that Robert and Julann D'Aboy and Thorson had been accused of picketing outside Salinas' vacation home. More than one bargaining unit member told Julann D'Aboy that they had learned of her alleged harassment of Salinas from administrators. The Cottrell picket captain told D'Aboy that an administrator said there would be "repercussions" for the teachers who had allegedly stalked Salinas and picketed outside her vacation home.

47. Thorson's husband, Gregory Thorson, is a pastor at the Sandy Community Presbyterian Church. Gregory Thorson had been talking with District and Association officials to see if he could help settle the strike. On Monday morning, November 14, board member Kuechler told Gregory Thorson, "It would really help if you were to rein in some of your church members." When Thorson asked Kuechler what

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<sup>16</sup>Salinas denied giving the press the names of the teachers, but Dottie Thorson testified that a reporter named Salinas as her source, and Greg Thorson testified that a principal told him that Salinas had named Dottie Thorson as one of those involved. The police reports did not name the individuals who accosted Salinas at the casino or who picketed at Salinas' vacation home, and did not identify their role as striking teacher or parent. We conclude that the reporters obtained the names from Salinas, Monteith, or another District official

he meant, Kuechler replied: “Well, you know, the D’Aboys and your wife, to be specifically. [sic] They’re stalking the superintendent.”

48. Gregory Thorson became concerned for his wife’s reputation in the community and at their church. He contacted at least two other District board members, Thompson and Lenchitsky. They were familiar with the accusations against Dottie Thorson.

49. Gregory Thorson also heard that District officials had stated that Dottie Thorson and Julann D’Aboy would suffer “repercussions” when the strike ended. Gregory Thorson asked his wife’s principal, Braunberger, if she had said that there would be repercussions for his wife after the strike because of the stalking allegations. Braunberger responded “no,” but added, “Well, you know, if something like this happened there should be consequences, but I don’t mean about Dotty’s job.” Thorson then spoke with some other District principals. Principal Rayburn Mitchell told Thorson that Salinas told him about the alleged stalking on Sunday afternoon.

50. After Ulrich called Braunberger on November 13, a community member called Ulrich and asked if Ulrich had been with the group of teachers who accosted Salinas at the casino. The parent named Thorson as her source of information about Ulrich’s involvement. Ulrich told the caller that she was not part of the group of teachers who supposedly accosted Salinas. Ulrich then called Thorson, who told Ulrich that she had provided that information in jest to the community member. On Monday, November 14, while at work, Ulrich told Braunberger about her conversations with the community member and Thorson, and emphasized that she (Ulrich) was not part of the group of teachers who had contacted Salinas.

51. On Sunday, November 13, or the following day, private security firm Garnett & Associates/Oregon State Protection Services (Garnett) sent Salinas quotes for security services to the District, to start Monday, November 14. Garnett’s quote provided that a video camera would be used at the District office and would record all activities. The District hired the security firm.

52. On Monday, November 14, six uniformed and armed private security officers were posted around the District Office building and parking lot for 10 hours. The officers were instructed to make sure cars were able to enter and leave the parking lot. The guards were also present for 18 hours on November 15. The security guards took some photographs of the picketers, but did not provide any of these photographs to the District.

53. On the evening of November 15, District and Association representatives met to attempt to resolve the labor dispute. During those discussions, the Association proposed a non-reprisal agreement containing the following language:

“The District agrees that it will not engage in any retaliatory, disciplinary, or other adverse actions against the Association for any action or non-action pertaining to the Association’s strike activities.”

54. The Association’s proposed non-reprisal agreement also provided that the District would purge “any document” from “the file of any District employee” if the document “refers in any way to employee actions or non-actions related in any way to the Association’s strike activities.”

55. The District rejected the Association proposal. It maintained that the parties already had a binding tentative agreement that did not refer to amnesty or non-reprisal for the strikers.

56. The settlement discussions continued into the early morning hours of November 16. At 12:50 a.m., the District and the Association reached a strike settlement agreement. The agreement included the following “District Response to Post-Tentative Agreement Amnesty Request”:

- “1. The District maintains that there is a binding Tentative Agreement between the parties that does not include ‘amnesty’ or ‘non-reprisal’ as an included term.
- “2. The District is willing to lift the ‘no trespass order’ against Bob D’Aboy, and seal the document presented from the Superintendent to Mr. D’Aboy dated October 27, 2005.
- “3. The District agrees that it will not take any disciplinary action against any unit member for engaging in lawful pursuit of protected activity.”

57. Business Manager Belanger began working for the District in 1997. His duties included administering District financial and payroll activities. District Payroll Specialist Cathee Brown worked in the District’s business office and reported to Belanger. Brown had overseen the payroll functions for the District and its predecessor since 1994.

58. Between 1996 and 2004, the District notified three Association bargaining unit members that because they would be in paid status for one-half or fewer of the days in a pay period, they would lose District-paid fringe benefits for the next pay period.<sup>17</sup> One bargaining unit member chose to self-pay fringe benefit costs, another elected to drop District insurance coverage, and the third person changed the dates of her planned leave to avoid any loss in benefits.

The practice used on these three occasions was not written down in any document. The parties never addressed it at the bargaining table or in other discussions between the parties prior to this labor dispute. Association officials were unaware of this practice.

59. It was rare for a District employee to fail to work sufficient days in the pay period to obtain coverage.

60. Article 22, section C from the parties' 2001-2004 collective bargaining agreement provided that the District would contribute up to \$680 per month for fringe benefits for each full-time teacher. It also stated in part:

“In the event the amount paid by the district for the premiums for insurance for each eligible employee is less than the actual cost of that insurance then each affected employee shall pay the difference through payroll deduction.”

The District insisted on inclusion of this contract provision so that it would have authority to deduct money from employee paychecks and obviate the need for employees to write checks to the District. The contract does not define when an employee becomes “eligible” for insurance premium contributions

The District's implemented final offer retained this language, but increased the amount of the District contribution for health insurance premiums to a maximum amount of \$720 per month for the 2005-2006 school year.

61. On October 19, 2005, the District sent each bargaining unit member a letter in which it stated that if the strike occurred and continued through November 7, the bargaining unit member would be “ineligible to receive district fringe benefits for November.” The District advised that, if this occurred, “employees will receive notice

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<sup>17</sup>During the school year, the District pay period generally begins the workday after the second Friday of the month and ends with the second Friday of the following month. The October-2005 pay period began on October 14 and ended on November 10. The November 2005 pay period began on November 11 and ended on December 2.

from the district and may self pay premium balances to continue health insurance coverage.”

62. On November 8, the District sent each of the 215 Association bargaining unit members a written notice. It stated:

“Under current circumstances of the strike, it is necessary to update you on the status of your payroll and benefits. As communicated to you on October 19, 2005, those licensed staff that had not returned to work by 11/7/2005 would not earn district fringe benefits for November. By our records, you fall in the group that did not meet this requirement. In order to continue health insurance coverage, an amount equal to the premium due will be withheld from your November payroll check. This amount will then be applied to pay your December premium (October benefit was used to pay your November premium). If your payroll check is insufficient to cover the premium, you will be billed the difference. Payment for the billing must be received in the district business office by 11/23/05 in order to continue your insurance coverage for December.

“In addition to medical premium deductions, the November salary will include a deduction for each strike day not worked. The daily amount is 1/190<sup>th</sup> of your annual salary. To avoid hardships, rather than deducting all of these days in November, the district has elected to spread the deduction over the balance of the year. By our records this is a 14-day deduction through the November 11, 2005 payroll cut-off.

“Please understand that these health insurance and absence deductions occur prior to your ordinary voluntary deductions. For insurance type voluntary deductions (cancer, life, AD&D, etc.) you will be notified and provided an opportunity to make payment in order to continue coverage if payroll is insufficient to cover your deductions. Voluntary deductions for TSAs and Portland Teacher Credit Union (PTCU) may be reduced or eliminated if there is insufficient payroll to deduct from.

“Fringe benefits may be of issue for the next month as well. In order to earn your December fringe benefits, you must

resume work no later than November 28, 2005. In the absence of your return to work, the district will be required to follow the same deduction process applied to the November payroll.

“If you have any questions please contact the payroll department at [phone number].”

63. The District was scheduled to issue the first post-strike paychecks to bargaining unit members on Thursday, November 23, 2005. It planned to post the payments for those checks on Thursday, November 17. November 10 was the deadline for submitting changes in payroll for the November 23 paychecks. It took the District approximately seven workdays to process the payroll and issue employee paychecks.

64. OEA had informed striking employees that it would cover the cost of their fringe benefits throughout the strike through its strike-relief fund. When the bargaining unit members received the District’s November 8 letter, many of them became anxious about whether their fringe benefits would continue and, if so, how that would be done. Many unit members were more concerned about losing insurance coverage than about losing salary during the strike.

65. On Wednesday, November 9, after receiving the District’s November 8 letter, bargaining unit member Kathleen McDougall telephoned District Payroll Specialist Brown. McDougall was an Association building representative and a strike picket captain. Brown told McDougall that she was processing the payroll that day and the next. Brown also told McDougall that she (Brown) needed to hear from the OEA by November 10, or she would deduct fringe benefit costs from bargaining unit salaries. McDougall passed this information on to Association officials.

66. On Thursday, November 10, 2005, at 2:14 p.m., Association counsel Bishop faxed a letter to Belanger (with a copy to Zagar, the District’s attorney). The letter stated, in part:

“Please be advised that the [OEA] intends to make direct payment of any unpaid health insurance premiums on behalf of striking teachers which are necessary to guarantee that the teachers will have continued coverage during the ongoing strike. \* \* \* We would appreciate it, however, if you would let us know when and if payments are due on behalf of teachers and how best to make payments for any amounts due. We expect that we may be able to obtain the same information from representatives of the insurance

provider(s), but your cooperation in this regard would also be helpful.”

67. Belanger was out of the office at a conference on November 10, and was not scheduled to return until Monday, November 14. District staff took Bishop’s fax and put it in a file with other documents for Belanger to review upon his return. The District office was closed for the Veteran’s Day holiday on Friday, November 11.

68. Belanger reviewed Bishop’s November 10 fax upon his November 14 return to the office. Belanger believed that in order to accept OEA payment and not withhold funds from employee paychecks, the District would have had to redo the entire payroll for all 215 bargaining unit employees. Belanger believed that it was too late to redo the payroll and that OEA payment of the unit members’ premiums might be taxable income to the members. That same day, Belanger mailed a response to Bishop with a copy to Zagar.<sup>18</sup> Belanger stated:

“At the [*sic*] point the payroll department has completed the steps necessary to deduct these insurance premiums from [unit member] salaries payable November 23, 2005.”

69. Bishop’s office did not receive Belanger’s letter until Wednesday, November 16.

70. On November 22, Bishop wrote Belanger (with a copy to Zagar) requesting a list of the District’s planned deductions so it could reimburse teachers directly. Later that day, Belanger faxed Bishop a list of fringe benefit amounts “normally paid” by the District for individual bargaining unit members.

71. Later that day, Bishop faxed Belanger seeking more information about the proportion of insurance premiums the District planned to deduct from employee paychecks for November, since employees would be working a portion of that month. Bishop stated in part:

“While your fax shows what the District ‘normally’ pays for fringes, it does not reveal how much the District has deducted this month from each individual employee’s paycheck to cover what the District believes the employees,

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<sup>18</sup>The record does not include an explanation of Belanger’s decision to mail his response instead of faxing it. Belanger did fax other documents to Association counsel and staff during this time period

themselves, owe for insurance costs as a result of the strike. It seems clear that the District will be obligated to pay at least a portion of the 'fringe amounts' it normally pays for licensed employees for the month of November, since the strike ceased and employees returned to work on November 17, 2005, approximately half-way through the month." (Emphasis in original.)

72. In a telephone call later that day, Belanger told Association counsel Adam Arms that the District would deduct the total amount of the usual District fringe benefit premium payments for November. After the call, Arms wrote Belanger that the Association "adamantly disagrees" with the District's position that it would not pro-rate its payments for bargaining unit members' fringe benefit premiums.

73. OEA issued checks for the insurance premium payments directly to unit members.

74. Beginning on October 24, 2006, Association counsel Bishop sent information requests to the District seeking evidence of the District's fringe benefit premium policy.

75. On November 7, 2006, Belanger provided Bishop with the names of five former District employees who allegedly had been affected by the District's premium policy. The District obtained these names, which it called "exemplars," by asking its staff if they recalled any such circumstances. Through its attorney, Zagar, the District advised Bishop that the District would search the files relating to any employee the Association identified that it believed had been in a position to be affected by the policy. Zagar also stated that, in order to determine the total number of employees affected by the policy, the District would have to search files regarding each individual employee. Zagar stated that this search process would require extensive District staff time.

76. On November 6, Zagar wrote Bishop that the District would conduct the "time consuming and expensive" search if the Association were willing to pay the District's "good faith estimate" for the costs of the search in advance, to be adjusted after actual costs were determined. On November 8, the Association, through Bishop, demanded that the District conduct that search, but did not agree to pay for the search costs in advance.

77. On November 9, 2006, District counsel Zagar sent a letter to Bishop in response to the Association's subpoena duces tecum. Zagar stated, in part: (a) "a diligent and thorough review of [District] records" revealed no documents

describing the establishment of the District's payroll fringe benefit policy; (b) no documents explaining or describing the District's pay periods or pay cycles (although two documents referred to them); and (c) no documents reflecting decisions of the District board or administrators to establish District pay periods or pay cycles.

78. Zagar stated that a "very expensive and exhaustive search" would be required for the District to locate all employees affected by the payroll fringe benefit policy, and noted that the Association had not responded to the District's request for payment prior to conducting the search. The stalemate was never resolved.

79. On November 15, 2006, five days before the first day of hearing, Bishop wrote Zagar with a list of eight names of unit members that the Association believed should have been previously affected by the payroll fringe benefit policy but were not.

80. By the first day of hearing, November 20, 2006, Bellanger had completed review of three of the eight names, and he testified regarding their circumstances at hearing.

81. On December 8, 2006, after the first days of hearing but 33 days before the hearing was to continue, Bishop wrote Zagar and asked the District to complete its response to the Association's subpoena. Bishop objected to the District's continued insistence on the Association prepaying the District's estimated cost of \$3,380 to comply with the subpoena and to investigate the Association's list of employee names. Bishop also suggested that Association representatives be allowed to search District payroll records themselves, to avoid the alleged costs.

82. On December 11, 2006, Zagar replied to Bishop. He reiterated the District's position that prepayment of the District's estimated costs was necessary before the District would produce the subpoenaed documents. The District refused to allow Association officials to review confidential District personnel records, but suggested that the Association could reduce costs by reviewing each monthly District board report for personnel changes that could have triggered the District's payroll fringe benefits policy.

#### The District's denial of contractual "other paid leave"

83. On November 16, 2005, the District and the Association settled the strike through a written agreement which included the terms of the new collective bargaining agreement as well as provisions specific to the strike. The agreement provided that eight "student contact days" would be restored for the teachers' work year. It specified that three restored days would be obtained through conversion of three staff development days to regular school days. The remaining five restored days were to be

“added to [the] school calendar,” that is, to be taken from time when the schools had been scheduled to be closed. The parties agreed that the District would select the dates of these five additional days.

84. After the teachers returned to work, the District board decided that two of the days added to the school calendar would be December 21 and 22. Those days were previously scheduled to be part of the winter break.

85. Prior to the strike vote, approximately 11 unit members had made vacation plans for December 21 or 22 that included travel away from the District. At least some of these employees stood to lose money if they were forced to change those travel plans.

86. The post-strike collective bargaining agreement included language from previous agreements providing that employees could obtain up to five days of “other paid leave” per year upon an appropriate request:

“1. \* \* \* The District and the Council also recognize that there are times when personal circumstances require an employee to be away from the workplace. Consequently, each member of the bargaining unit will be allowed to take up to five days of leave per year upon submission of a request for such leave.

“2. The District will not require the employee to state the reason for the leave, but the parties recognize that these days are to be used for such circumstances as personal business, routine medical/dental appointments, family illness, legal leave, major family events (birth, wedding, funeral), and personal emergencies. Employees will make every effort to schedule appointments outside the workday, but will have this time available as they deem necessary. *Paid leave will not be used for vacation purposes, or to extend a vacation or holiday.* Leave credit under this paragraph shall not accumulate from one year to the next.

“The District and the Council will meet in June of each year to discuss this section, and to make any mutually determined changes that may be necessary after analysis of leave usage.

“3. Bargaining unit members will make every reasonable effort to schedule personal business in such a manner so as not to extend a vacation (i.e., winter break and spring break or a holiday). Whenever this is not possible, the bargaining unit member will supply the District with the reason for the absence if the absence extends a vacation or a holiday. As with the other paid leaves, the reasons given must be consistent with the examples listed in Section 2 above, subject to District office review.” (Emphasis added )

87. Some unit employees with December 21 and 22 travel plans sought to take those two days off and requested “other paid leave” under the agreement. District officials denied these requests and told employees that they could use unpaid leave under the collective bargaining agreement.

88. On February 14, 2006, Association Grievance Representative Russell filed a grievance alleging that the District’s refusal to grant “other paid leave” to the affected unit members violated the collective bargaining agreement. The grievance alleged that the District’s denial of paid leave “can be construed as an act of reprisal” which the District had “pledged to avoid” in settling the strike. The District denied the grievance at the lower levels, and it proceeded to a hearing before the District board.

89. On March 13, 2006, Russell presented the grievance to the District board. During the hearing, one board member told Russell that the teachers were “ingrates” since the District had added days back to the school calendar to make up for days they had lost due to the strike and the teachers were still “asking for recompense.” On March 17, the District board denied the grievance.

90. Association UniServ Consultant Hagan contacted District board chair Terry Lenchitsky in an attempt to settle the grievance before arbitration. She urged him to settle the grievance by entering a non-precedential agreement to provide “other paid leave” to the grievants. Lenchitsky rejected the proposal and told Hagan: “These employees chose to go on strike, Debbie; they chose to take a strike vote.”

91. On May 10, 2006, the parties settled the grievance. The parties agreed that the circumstances were “unprecedented,” and that the District would pay 11 grievants for 8 or 16 hours of work to compensate for any financial hardship. The grievants would work an equivalent number of additional hours during the rest of the school year. The agreement did not explicitly settle or release any claims of the parties besides the grievance.

## CONCLUSIONS OF LAW

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

2. District officials violated ORS 243.672(1)(a) by: banning bargaining unit member Robert D’Aboy from District premises on pain of trespass charges; openly photographing, or pretending to photograph, bargaining unit members engaged in PECBA-protected activity; falsely accusing bargaining unit members Robert D’Aboy, Dottie Thorson, and Julann D’Aboy of stalking and harassing District Superintendent Clementina Salinas while she was on vacation, and threatening “repercussions” for that alleged conduct; and falsely claiming that bargaining unit members Julann and Robert D’Aboy and Dottie Thorson had picketed outside Salinas’ home.

On October 25, 2005, Association bargaining unit members went on strike. The strike ended on November 16, 2005, when the parties reached a tentative agreement on a new contract. The Association contends that several actions taken by District representatives during the strike—banning bargaining unit member Robert D’Aboy from District premises; photographing, or pretending to photograph, striking bargaining unit members; falsely accusing bargaining unit members of stalking Superintendent Salinas; and falsely claiming that bargaining unit members picketed outside of Salinas’ home—violated ORS 243.672(1)(a). This statutory provision 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.”

Subsection (1)(a) prohibits two types of employer actions: those that interfere with, restrain, or coerce employees “because of” their exercise of rights protected under the PECBA and those that interfere with, restrain, or coerce employees “in the exercise” of protected rights. *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 350 (2008). The Association asserts the District violated both prongs of subsection (1)(a).

To determine whether an employer violated the “because of” prong of subsection (1)(a), we analyze the reasons for the employer’s conduct. If the employer acted “because of” the employees’ exercise of their PECBA rights, we will find those actions unlawful. A complainant does not have to establish that an employer acted with hostility or anti-union animus to prove a violation of the “because of” part of subsection (1)(a). *Oregon AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, Case No. UP-51-05, 22 PECBR 372, 393 (2008). A complainant must only show that the employer was motivated to take action

by the protected right. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61, 92 (2007), *appeal pending*.

In deciding if an employer violated the “in” prong of subsection (1)(a), we do not consider the employer’s motive. Instead, we examine the effects of the employer’s actions. A complainant need not prove actual employer interference with employees’ protected activity. The complainant must prove only that the employer’s actions, when viewed objectively, have the “natural and probable effect of deterring a reasonable employee from engaging in protected activity.” *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168, 186 (2007), *appeal pending*, citing *Portland Association of Teachers and Poole v. Multnomah County School District No. 1*, 171 Or App 616, 624, 16 P3d 1189 (2000). A violation of the “in the exercise” prong of subsection (1)(a) may be either derivative or independent. If an employer violates the “because of” portion of subsection (1)(a), it also violates the “in the exercise” portion. An employer may also independently violate the “in the exercise” prong, usually by making coercive or threatening statements. *Id.*

Here, the Association contends that District officials took several actions during the strike that violated one or both parts of subsection (1)(a). We will consider each of these actions in turn.

#### Banning Robert D’Aboy from District Property

Bargaining unit member Robert D’Aboy was an active participant in picket-line activities during the first three days of the strike. On October 25, 2005, D’Aboy was part of a group that picketed the Cottrell school building. When Assistant Superintendent Hasegawa and Superintendent Salinas drove out of the school parking lot, D’Aboy briefly stopped the truck in which they were traveling and shouted statements at the two administrators such as “This needs to be settled,” and “[C]ome back to the table.” On October 26, D’Aboy shouted at Salinas as she walked from her car to the District office. Early in the morning on October 27, D’Aboy and other teachers were picketing the District office. As District Communications Director Monteith walked from her car to the District office, D’Aboy approached Monteith and shouted at her, telling Monteith that she should “quit misleading the public” and that her “press releases are not the truth.”

Later in the day on October 27, a uniformed police officer delivered a letter from Superintendent Salinas to D’Aboy as he picketed outside of the District high school. In the letter, Salinas told D’Aboy that the District would no longer tolerate his “harassment” of, and “aggression” toward, District officials. Salinas prohibited D’Aboy from “visiting all Oregon Trail School premises at any time” and told him he would be charged with criminal trespass if he disobeyed this ban.

The Association contends that the ban the District imposed on D'Aboy violated both parts of subsection (1)(a). According to the Association, the District prohibited D'Aboy from entering District facilities and property "because of" D'Aboy's picketing, activity protected by the PECBA. In addition, the Association asserts that the ban restrained bargaining unit members "in the exercise" of rights guaranteed by the PECBA. We first consider the District's alleged violation of the "because of" prong of subsection (1)(a).

The parties agree that the ban imposed by the District on D'Aboy resulted from his activities during the first three days of the strike. The parties differ, however, in their respective characterizations of D'Aboy's behavior. According to the Association, D'Aboy did nothing more than peacefully (if somewhat forcefully) participate in protected activity—picketing during a lawful strike. According to the District, D'Aboy harassed and frightened District administrators. The District contends that the PECBA affords no protection for the type of intimidating behavior in which it alleges that D'Aboy engaged. The District argues that the ban it placed on D'Aboy resulted from concern about strike-related misconduct and was not caused by D'Aboy's exercise of PECBA-guaranteed rights.

This Board has not had occasion to consider the extent to which activity on a strike picket line is protected under the PECBA. Based on precedent under the National Labor Relations Act (NLRA), and the underlying purposes and policies of the PECBA, we find that ORS 243 662 protects bargaining unit members' rights to participate in peaceful picketing during a lawful strike.

Under Section 7 of the NLRA, an employee who engages in strike misconduct or violence on the picket line is not engaged in protected activity. *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1045 (1984). In deciding if strikers' behavior on a picket line constitutes misconduct serious enough to remove the activity from the protection of the Act, the National Labor Relations Board (NLRB) applies an objective test. The NLRB decides whether the strikers' conduct, under the circumstances, reasonably tends to coerce or intimidate employees in the exercise of rights protected under the NLRA. *Clear Pine Mouldings*, 268 NLRB at 1046. The NLRB uses an analogous standard in evaluating strikers' conduct directed at individuals, such as supervisors, who do not have the protection of Section 7. *General Chemical Corp.*, 290 NLRB 76 (1988).

In applying the *Clear Pine Mouldings* test, the NLRB acknowledges that the strong feelings engendered by a strike require that picket-line misconduct be evaluated by a standard different from the one used to assess behavior in a work environment. Because so much is at stake for striking employees, picket line settings are often tense, "with strikers normally viewing those going to work as threats to the success of the strike and, potentially to their future employment." *Airo Die Casting*, 347 NLRB No. 75

(July 31, 2006). The NLRB will disqualify striking employees from protection of the Act only if their behavior on the picket line involves violence or an actual, credible threat of violence. Consistent with this standard, strikers who use abusive, vulgar, or obscene language are not denied reinstatement or back pay. *General Chemical Corp.*, 290 NLRB 76 (1988) (a striker who yelled at a supervisor, called the supervisor a “thief,” “liar,” and “crook,” did not engage in serious strike misconduct); *Airo Die Casting* (strikers’ use of vulgar words, profanity, and racial epithets did not deprive the strikers of the protections of the NLRA, since the employees’ actions were not threatening)

In determining whether striking employees’ actions or statements are seriously threatening, the context of the conduct is important. For example, in *Briar Crest Nursing Home*, 333 NLRB 935, 937 (2001), the NLRB did not deny reinstatement to a striker who said she was going to “get” a non-striking employee “on her tail.” The NLRB concluded that the striker’s statement was too ambiguous to constitute a serious threat of bodily harm, and the surrounding circumstances—lack of any strike-related violence—provided no context in which to find that the striker intended to harm the other employee. See also *Midwest Solvents, Inc.*, 251 NLRB 1282 (1980), *enfd*, 696 F2d 763 (10<sup>th</sup> Cir 1982) (a striker’s statement to a nonstriking employee to “watch” himself because “some of the boys might get rowdy” was “nothing more than the type of impulsive, trivial misdeed” which has been found insufficient to warrant a denial of reinstatement ) Similarly, strikers who briefly delay employees’ or supervisors’ entry to the employer’s parking lot do not unlawfully restrain other employees in violation of Section 8(b)(1)(A) (the analog of ORS 243 672(2)(a)), which makes it an unfair labor practice for a labor organization or its agents to restrain or coerce employees in their exercise of protected rights. *TKB International Corp.*, 240 NLRB 1082, 1099 (1979).

We find the rationale of these cases persuasive and apply it to the facts here. D’Aboy used no threatening language when he yelled at District Communications Director Monteith and Superintendent Salinas during the first three days of the strike. Instead, D’Aboy forcefully urged District officials to negotiate and settle the strike. Nor did the context in which D’Aboy made these statements indicate any intent to harm District administrators. D’Aboy’s remarks were not accompanied by threatening gestures or other violent behavior. Undoubtedly, D’Aboy’s early-morning confrontation with Monteith startled and upset her. In a normal work environment, D’Aboy’s behavior might be considered inappropriate. However, the parties were not in a normal work environment—they were involved in a bitter strike where feelings on both sides were strong. Vital economic interests were at stake and the strikers engaged in behavior and used language that might not have been suitable in a normal workplace. D’Aboy and other bargaining unit members were fighting for their livelihood. District administrators could reasonably expect that they would encounter picketers at District schools and

offices. Given these circumstances, we conclude that D'Aboy's behavior did not remove his activities from the protection of the PECBA.

In regard to the incident where D'Aboy confronted the truck in which Salinas and another administrator rode, we note that D'Aboy only briefly impeded the vehicle's ability to exit District property. Under the standard articulated in *TKB International Corp.*, D'Aboy's conduct was not unlawfully coercive.

We conclude that D'Aboy's behavior during the first three days of the strike was lawful picketing protected under the PECBA. Accordingly, the District violated subsection (1)(a) when it banned D'Aboy from District premises "because of" this conduct.

We now consider whether the District's actions in banning D'Aboy from District property also violated the "in the exercise" portion of subsection (1)(a). An employer that violates the "because of" portion of subsection (1)(a) usually commits a derivative violation of the "in the exercise" prong of the statute. Unlawful employer action that is caused by employees' union activity will inevitably have the natural and probable effect of interfering with employees' exercise of protected rights. *Portland Association of Teachers and Bailey v. Multnomah County School District #1*, Case No. C-68-84, 9 PECBR 8635, 8650 (1986). An employer may also independently violate the "in the exercise" portion of subsection (1)(a) if its actions have the natural and probable effect of discouraging employees from exercising their PECBA rights. *State Teachers Education Association v. Willamette Education Service District*, Case No. UP-14-99, 19 PECBR 228, 249 (2001), *AWOP*, 188 Or App 112, 70 P3d 903 (2003), *rev den*, 336 Or 509, 87 P3d 1136 (2004).

Because we find the District ban imposed on D'Aboy violated the "because of" prong of subsection (1)(a), we find that it also constituted a derivative violation of the "in the exercise" prong of subsection (1)(a).<sup>19</sup> We do not, however, reach the issue of whether the District's ban on D'Aboy also independently violated the "in the exercise" portion of subsection (1)(a). We found that the District committed two violations of subsection (1)(a) when it imposed a ban on D'Aboy, and will fashion a remedy to address these unfair labor practices. It would add nothing to our remedy to

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<sup>19</sup>We note that the manner in which the District chose to deliver the letter banning D'Aboy from District property would have the natural and probable effect of increasing bargaining unit members' fears about engaging in strike activity. The District caused a uniformed law enforcement officer to give D'Aboy the letter while D'Aboy was picketing, in full view of other picketing teachers, at the District high school. These circumstances gave the impression that D'Aboy's activities as an active and vocal picketer were somehow unlawful.

find a third violation of this statutory provision. *Milwaukie Police Employees Association v. City of Milwaukie*, 22 PECBR at 187.

### Photographing and pretending to photograph striking employees

On at least two occasions, Superintendent Salinas pretended to photograph Association picketers by firing the flash of a camera with no exposures remaining. Uniformed, armed security guards hired by the District appeared to photograph picketers, but did not provide copies of those photos to the District. The Association alleges that these actions by District representatives violate the “in the exercise” prong of subsection (1)(a).

None of the events which the District photographed or pretended to photograph involved unit members engaging in unlawful activity. All of them, in fact, involved picketing activity protected under the PECBA. An employer independently violates the “in the exercise” portion of subsection (1)(a) when it takes an action that has the natural and probable effect of interfering with employees’ exercise of PECBA-guaranteed rights. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR 780, 789 (1998). This Board has not addressed the issue of whether a public employer may lawfully photograph or film bargaining unit members engaged in protected activity during a labor dispute.<sup>20</sup> Accordingly, we turn to the NLRA to examine applicable precedent. Under Section 8(a)(1) of the NLRA (the analog of ORS 243.672(1)(a)), an employer that photographs employees while they are engaged in protected activity generally commits an unfair labor practice.

The NLRB has “long held that absent proper justification, the photographing of employees engaged in protected concerted activities violates [NLRA Section 8(a)(1)] because it has a tendency to intimidate.” *F. W. Woolworth Co.*,

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<sup>20</sup>Although we have not had occasion to consider an employer’s photography of employees engaged in protected activity, we have concluded that other types of employer surveillance of union activity is unlawful. See *Oregon School Employees Association v Medford School District 549C*, Case No. UP-60-86, 10 PECBR 402 (1988), *AWOP*, 94 Or App 781, 767 P2d 934 (1989) (employer surveillance of union official was part of course of conduct demonstrating that the employer violated subsection (1)(a)). See also *Oregon School Employees Association, Chapter 89 v. Rainier School District No 13*, Case No. UP-85-85, 9 PECBR 9254 (1986), *rev’d and rem’d*, 100 Or App 513, 786 P2d 1311 (1990), *decision of the Court appeals rev’d and Employment Relations Board order after remand aff’d* 311 Or 188, 808 P2d 83 (1991) (although union alleged that employer violated subsection (1)(a) by engaging in surveillance of employees, union failed to establish that alleged surveillance occurred).

310 NLRB 1197 (1993) (footnote omitted) (citing *Waco, Inc.*, 273 NLRB 746, 747 (1984)); See also *Kallmann v. NLRB*, 640 F2d 1094, 1098 n 5 (9<sup>th</sup> Cir 1981). Photographing protected activity is a “plain violation” whether or not it is “coercive in actual fact.” *NLRB v. Associated Naval Architects, Inc.*, 355 F2d 788, 791 (4th Cir 1966). Where an employer claims it photographed employees engaged in protected activity, the NLRB may properly require that the employer provide “solid justification” for that photography. *NLRB v. Colonial Haven Nursing Home, Inc.* 542 F2d 691, 701 (7<sup>th</sup> Cir 1976). An employer cannot photograph protected activity simply because it fears that “something ‘might’ happen.” *F. W. Woolworth*, 310 NLRB at 1197. We find these standards persuasive and apply them to this case.

Salinas’ pretense of photographing strikers and the security guards’ actual photographing of strikers discouraged employees from participating in PECBA-protected activity by implying that their union activity was under surveillance and there could be consequences for their actions. Bargaining unit members would understandably be reluctant to picket if they believed District administrators or representatives were recording their actions. Employees might reasonably fear that the photographs could become the basis of disciplinary action or post-strike reprisal.

The District argues that its photography does not violate subsection (1)(a) because Association picketers were also photographed by the news media and Association members, and because Salinas had no film exposures left in her camera. In addition, the District notes that it was not provided, and did not retain, any photographs taken by security guards. These arguments have been rejected under the NLRA.

An employer’s possession and potential future use of its photographs places it in a different position from other parties who may take photographs. *John Ascuaga’s Nugget*, 298 NLRB 524, 554 and n 105 (1990) (employer’s picture taking violated Section 8(a)(1) despite coverage of union activities by news reporters and photographers), *enfd in relevant part*, 968 F2d 991 (9th Cir 1992); *F. W. Woolworth*, 310 NLRB at 1197-98 (finding a Section 8(a)(1) violation when employer photographed and videotaped employee handbillers, even though the handbillers contacted media and agreed to on-camera media interviews); *California Acrylic Industries, Inc. v. NLRB*, 150 F3d 1095, 1099-1100 (9th Cir 1998) (photographing allegedly trespassing picketers unlawful when photos showed picketers on public road).

The fact that Salinas had no exposures left on her camera, and that the District security guards did not provide pictures to the District, does not make the

District's actions lawful.<sup>21</sup> Instead, it deprives the District of the defense that the photographs were intended to document unlawful conduct, and supports the Association's claim that those acts were meant to discourage employees from engaging in protected activity. *Larand Leisurelies, Inc. v. NLRB*, 523 F2d 814, 819 (6th Cir 1975) (if photographs are not introduced into evidence, it may be inferred that the photographing was intended to interfere with the activity secured by Section 7 of the NLRA); *NLRB v. Rybold Heater Co.*, 408 F2d 888, 891 (6th Cir 1969) (enforcing NLRB order for employer "to cease and desist from photographing or pretending to photograph protected activity for the purpose of interfering with it" (emphasis added)); *Waco*, 273 NLRB at 747 (issue is whether employer's actions to document protected activity "reasonably tended to coerce and restrain the picketers by 'creating a fear among them that the record of their concerted activities might be used for some future reprisals'").

We conclude that the District's actions in photographing, or pretending to photograph, picketing bargaining unit members violated the "in the exercise" portion of subsection (1)(a), and will order a remedy to address this violation of the PECBA. We will not determine whether the District's photography also violated the "because of" prong of subsection (1)(a). Since we have already found one violation of this statutory provision, it will add nothing to our remedy to find another one.

#### Accusing Robert D'Aboy, Julann D'Aboy, and Dottie Thorson of stalking and harassing Superintendent Salinas

During Veteran's Day weekend, November 10 through 13, 2005, in the midst of the strike, bargaining unit members Julann D'Aboy and Dottie Thorson vacationed with a group of friends in Lincoln City. Robert D'Aboy spent the Veteran's Day weekend in Tacoma, Washington with his son. On November 11, Julann D'Aboy encountered Superintendent Salinas in a store in Lincoln City. D'Aboy talked briefly with Salinas about contract negotiations. Later that evening, D'Aboy and Thorson saw Salinas in a casino. Both D'Aboy and Thorson attempted to talk to Salinas about the strike, but Salinas ignored them.

OEA UniServ Consultant Casper also vacationed in Lincoln City during the Veteran's Day weekend. On November 12, Casper and two parents who were residents of the District, and their children, picketed outside of Salinas' vacation home while she

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<sup>21</sup>The District does not argue that it should not be held responsible for the conduct of the security guards it hired. See *Poly-America, Inc v. NLRB*, 260 F3d 465, 486-87 (5th Cir 2001) (employer violated Section 8(a)(1) when security guards videotaped union activities although there was no direct evidence that the employer authorized the taping).

and her husband were inside. Salinas complained to the police about the picketers, but the police took no action.

Subsequently, Salinas (or another District official) told reporters that District teachers “stalked” Salinas while she was in Lincoln City, and incorrectly identified the teachers involved as Julann D’Aboy, Robert D’Aboy, and Dottie Thorson. When Dottie Thorson’s husband, Gregory Thorson, learned about the accusations against his wife, he contacted his wife’s supervisor, Principal Braunberger. Braunberger told Gregory Thorson that there “should be consequences” for Dottie Thorson’s actions in allegedly stalking Salinas.

The Association contends that the actions taken by Salinas and Braunberger—accusing Julann D’Aboy, Robert D’Aboy, and Dottie Thorson of stalking Salinas, and commenting that Thorson should suffer “consequences” for these actions—violated both prongs of subsection (1)(a). The Association asserts that these actions were taken “because of” Thorson and the D’Aboy’s involvement in the strike. In addition, the Association alleges that Salinas’ accusations and Braunberger’s statement violated the “in the exercise” part of subsection (1)(a), since they had the natural and probable effect of deterring bargaining unit members from participating in the strike.

At issue here is a threat of adverse action by an employer’s representative based on inaccurate reports of strike-related misconduct. An employer who threatens employees with reprisals for engaging in protected activity may violate the “in the exercise” portion of subsection (1)(a). *ATU v. Tri-County Metropolitan Transit District*, 17 PECBR at 789. For this reason, it is most appropriate to analyze the District’s actions as an independent violation of this portion of subsection (1)(a).

We find that the natural and probable effect of Salinas and Braunberger’s statements is to discourage bargaining unit members in their exercise of protected rights. The fact that Salinas acted with reckless indifference to the truth in describing the activities of the D’Aboys and Thorson to the press increases the chilling effect of her comments. Salinas had no basis in fact for accusing Julann D’Aboy, Robert D’Aboy, and Thorson of picketing her house: she never saw the picketers and made no other efforts to find out who they were. Nor did Salinas have any reason to claim that she had been “stalked” by bargaining unit members during her Veteran’s Day vacation. In their brief encounters with Salinas in Lincoln City, Julann D’Aboy and Thorson attempted to discuss contract negotiations and to forcefully urge Salinas to settle the bargaining dispute. These discussions undoubtedly annoyed Salinas, but they constitute protected activity under the PECBA. Fundamental to an individual’s right to “participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining” under ORS 243.662 is the individual’s ability to express his

or her views about these subjects to employer representatives. *Milwaukie Police Employees Association v. City of Milwaukie*, 22 PECBR at 185.

Given the statements that Salinas or another District representative made to the press, bargaining unit members could reasonably fear that participation in PECBA-protected activities related to the strike could result in wrongful and highly publicized accusations of misconduct.<sup>22</sup> Based on Braunberger's comment that reports of strike misconduct would result in some "consequences," strikers could then become concerned that erroneous charges of inappropriate activities could lead to disciplinary action or reprisals. Accordingly, we conclude that Salinas and Braunberger's statements violated the "in the exercise" prong of subsection (1)(a), and will order a remedy designed to address this violation of the PECBA. It would add nothing to our remedy to proceed further and consider whether these District actions also violated the "because of" portion of subsection (1)(a). For this reason, we will not address these Association allegations.

3. District officials did not deny "other paid leave" to unit employees because of their exercise of rights under the PECBA in violation of ORS 243.672(1)(a).<sup>23</sup>

As part of the agreement that ended the strike, the parties agreed that bargaining unit employees would work five additional days during the 2005-2006 school year. The agreement left it to the District to select the additional dates of work. The agreement placed no restrictions on the dates that the District could choose, and also included language from the previous collective bargaining agreement regarding "other paid leave" available to bargaining unit members. One of the restrictions placed on the use of "other paid leave" was that it could not be used to extend a vacation or holiday, such as winter or spring break.

When teachers returned to work after the strike, the District school board chose to add December 21 and 22 to the calendar as work days. Those days were previously scheduled to be part of the winter break. Some bargaining unit employees had plans to travel on December 21 and 22 and asked to take these days off as "other paid leave" under the collective bargaining agreement. The District denied leave to these teachers. The Association contends that the District refused to allow employees to use

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<sup>22</sup>We note that stalking can be a crime. ORS 163.732

<sup>23</sup>The District states that it understood that this issue was resolved with the parties' settlement of the grievance regarding this issue. Under the settlement, the teachers were compensated for the time they sought to take as "other paid leave," but had to work to make up that time later in the academic year. Nothing in the grievance settlement agreement suggests that the Association waived a potential unfair labor practice claim over the District's actions.

“other paid leave” because it was angry about the strike. According to the Association, the District’s denial violated the “because of” prong of ORS 243.672(1)(a). We disagree.

The Association presented no evidence that the District had granted other paid leave in similar or analogous circumstances, or that the parties intended that such leave would be granted when the District implemented the strike settlement agreement. To the contrary, the parties’ agreement specifically prohibits bargaining unit members from doing what they sought to do: use “other paid leave” to extend the winter break holiday. Based on language in the collective bargaining agreement, we find that the District had a legitimate reason to deny the leave requests.

The Association notes, however, that during the negotiations over a grievance filed concerning the use of other paid leave, the District board chair told Association UniServ Consultant Hagan that “[t]hese employees chose to go on strike, Debbie; they chose to take a strike vote,” and another board member referred to the affected employees as “ingrates.” The Association contends that these statements indicate hostility toward the Association and the strikers, and suggest that the board’s decision to deny teachers use of “other paid leave” was motivated by anti-union animus.<sup>24</sup>

Based on the District board members’ comments, we find that one of the reasons that the District refused to allow teachers the use of “other paid leave” was because board members disliked the strike. As we have discussed above, the employees’ right to strike is guaranteed under ORS 243.662. Thus, one of the District’s reasons for denying employees’ use of “other paid leave” was unlawful.

Since we have found that the District had both lawful and unlawful motives in denying “other paid leave” to teachers, we must apply a mixed motive analysis to decide if the District violated the “because of” prong of subsection (1)(a). We must decide if the employer would have taken the same action even if the employees had not engaged in protected activity. *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 221-22 (2007).

Here, we note that the comments by the District board members did not indicate a great deal of hostility toward the striking teachers. Instead, the board members’ statements reflected a harsh, but not unreasonable, assessment of the situation: that teachers did not want to comply with the terms of the agreement they

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<sup>24</sup>Although evidence of hostility toward the union is not necessary to establishing a violation of the “because of” prong of subsection (1)(a), it is relevant as evidence of an unlawful motive. *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 219 n 2 (2007).

had made. As discussed above, the parties agreed that the District would have sole discretion to select the additional days teachers would work during the 2005-2006 school year. In addition, the agreement expressly prohibited teachers from using “other paid leave” to extend a holiday. Thus, although the tone of the board members’ comments was accusatory, they had some factual basis for making the statements that they did. Considering the totality of the circumstances, we conclude that the District would have denied “other paid leave” to bargaining unit members even if they had not gone on strike. The District did not violate the “because of” prong of subsection (1)(a) by denying teachers “other paid leave.”

Nor do we find that the District’s actions violate the “in the exercise” portion of subsection (1)(a). Because we find no violation of the “because of” prong of subsection (1)(a), there can be no derivative violation of this provision. We also find no independent violation of the “in the exercise” portion of the statute. In refusing to allow teachers to take “other paid leave” to extend their Christmas vacation, the District complied with the terms of the agreement reached by the parties. An employer’s compliance with a collective bargaining agreement would not naturally or probably discourage bargaining unit members from exercising their PECBA-protected rights. *Wy’East Education Association/ East County Bargaining Council v. Oregon Trail School District No. 46*, Case No. UP-32-05, 22 PECBR 108, 147 (2007).

We conclude that the District’s conduct regarding other paid leave did not violate ORS 243.672(1)(a) and will dismiss this claim.

4. The District did not violate ORS 243.672(1)(a), (b), or (e) by deducting the monthly cost of fringe benefit premiums from bargaining unit members’ salaries.

On October 14, 2005, the Association notified the District that it planned to go on strike on October 25. On October 19, the District told bargaining unit members that if the strike occurred and continued through November 7, they would be ineligible to receive District-paid fringe benefits for November but could self-pay their benefits to maintain coverage. The strike began on October 25 and continued through November 17. On November 8, the District notified each bargaining unit member that an amount equal to the cost of the monthly fringe benefit premium would be withheld from each person’s November paycheck. The Association protested the District’s planned action, contending that the appropriate method for dealing with fringe benefit premiums was to prorate these costs and make deductions based on a proration appropriate for the number of days that teachers were on strike. The Association asserts that the District’s refusal to prorate fringe benefit costs, and its insistence on deducting the cost of an entire month’s premium from each teacher’s salary, violated ORS

243.672(1)(a), (b), and (e). We begin by analyzing the Association's contention that the District's actions violated subsection (1)(e).

Under ORS 243.672(1)(e), an employer's obligation to bargain in good faith includes the duty to maintain the *status quo* by making no unilateral changes in employment relations after a contract has expired. *Wy'East v. Oregon Trail School District*, 22 PECBR at 139. We begin our analysis in any unilateral change case by identifying the *status quo* and then deciding whether the employer unilaterally changed it. The *status quo* may be established by the terms of the parties' expired collective bargaining agreement, past practice, or District work rules and policies. *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 279, 285, *recons*, 22 PECBR 444 (2008).

Here, the Association failed to establish the *status quo* it claimed existed before the strike: that teachers who were in paid status for less than a full pay period paid a prorated share of their fringe benefit premium costs if they wished to continue coverage. The expired contract does not address this subject, and the District has no written policy or rule regarding this matter. The Association relies on past practice to establish the *status quo*. A past practice must be clear, consistent, and repeated over a long period of time. *Id.* The record demonstrates no consistent past practice in regard to the amount that teachers were required to pay for insurance premiums if they were in paid status for less than a full pay period. To the contrary, the practice is mixed. Based on the District's failure to produce payroll records, evidence it would naturally wish to produce if it was favorable to the District's position, we have inferred that this evidence supports the Association's position: that the District prorated fringe benefit premium costs for teachers who were in paid status for less than a full pay period. However, actual examples in the record are contrary to this inference. On three occasions between 1996 and 2004, the District warned teachers that they would lose District-paid fringe benefits for a full pay period if they did not remain in paid status for more than one-half of the days in the preceding pay period.

The Association has not shown a long-standing, consistent District practice of requiring a teacher to pay a prorated share of the teacher's health insurance premium costs if the teacher was in paid status for less than a full pay period. Because the Association has failed to establish that District proration of fringe benefit premium costs was the *status quo*, we do not find that the District unlawfully changed it in violation of subsection (1)(e) when it required bargaining unit members to pay the full monthly cost of their premiums in November. We will dismiss this allegation.

Next, we turn to the Association's contention that the District violated subsection (1)(a) when it deducted monthly health insurance premium costs from bargaining unit members' salaries. The Association contends that the District refused to

use the fairest method of dealing with the absence resulting from the strike—requiring teachers to pay a prorated share of their fringe benefit premium costs—because it was angry about the strike. According to the Association, the District deducted the cost of an entire month’s fringe benefit premiums “because of” the teachers’ participation in a lawful strike, an activity protected under the PECBA. We disagree.

As discussed above, the record shows that prior to the October 2005 strike, the District used two methods of calculating health insurance premium costs for teachers who were in unpaid status for one-half or more of the days in a pay period. One method, established by three examples in the record, was to require these teachers to pay the cost of an entire month’s health insurance premium. A second method, which we discussed in our ruling section, is based on the District’s failure to produce evidence in support of its case. As discussed above, we inferred that the documents that the District would have produced would have been unfavorable to its position, and would have demonstrated that the District had prorated fringe benefit premium costs and required teachers to pay a portion of these costs that was based on the number of days teachers were in unpaid status. On October 19, after the District learned that teachers planned to go on strike on October 25, the District chose the first method to deal with any work days lost due to the strike. The District notified teachers that they would have to pay the costs of monthly health insurance premiums if they were on strike—and in unpaid status—for one-half or more of the days in the October pay period.

On October 19, the date that the District notified teachers about the consequences the strike would have on their health insurance premiums, the District did not know if the method chosen would adversely affect bargaining unit members. If the planned strike lasted 9 days or less, bargaining unit members would have paid *no* fringe benefit premium costs. Had this occurred, they would have been in a better position than if the District had adopted the method advocated by the Association—prorating premium costs. If the planned strike lasted 10 days or more, then bargaining unit members would have to pay the costs of their monthly fringe benefit premiums. Thus, the approach to payment for fringe benefits the District adopted on October 19 was neutral on its face. Whether it helped or hurt teachers depended on the length of the strike, a fact of which the District obviously had no knowledge on October 19. Thus, we find that the District’s choice to require that bargaining unit members pay the cost of their monthly fringe benefit premiums if their strike lasted 10 days or more did not result from anti-union animus caused by the strike. We conclude that the District’s actions did not violate the “because of” prong of subsection (1)(a) and dismiss this allegation.

Because we have found that the District’s requirement that teachers pay the cost of their monthly insurance premiums did not violate the “because of” portion of subsection (1)(a), we also find no derivative violation of the “in the exercise” prong

of the statute. Nor do we conclude that the District's actions independently violated the "in the exercise" portion of subsection (1)(a). As we have discussed above, a lawful employer action does not have the natural and probable effect of discouraging bargaining unit members from exercising their PECBA-protected rights.

Finally, we consider the Association contention that the District violated ORS 243.672(1)(b) by deducting the cost of monthly health insurance premiums from bargaining unit members' salaries. Under this statutory provision, it is an unfair labor practice for an employer or its representative to "dominate, interfere with or assist in the formation, existence or administration of any employee organization." To prove a violation of subsection (1)(b), a complainant must show that the employer's actions actually, directly, and adversely affected a labor organization's ability to fulfill its duties as an exclusive representative. *AFSCME Council 75, Local #3943 v. State of Oregon, Department of Corrections, Santiam Correctional Institution*, 22 PECBR at 396. See also *Lane County Peace Officers Association v. Lane County Sheriff's Office*, Case No UP-32-02, 20 PECBR 444, 461 (2003) (labor organization failed to establish a subsection (1)(b) violation when it provided no proof that the employer's conduct "was the sole, primary, or predominant reason for any change in member participation [in Association activities] or that the County's conduct had a *substantial* effect on the Association" (emphasis in the original, footnote omitted)). In addition, we have held that an employer's conduct does not violate subsection (1)(b) when the employer has legitimate, lawful reasons for its actions. *911 Professional Communications Employees Association v. City of Salem*, Case No UP-62-00, 19 PECBR 871 (2002) (employer's action in disciplining an employee on leave who attended a union meeting did not violate subsection (1)(b) when the reason for the discipline was the employee's misuse of leave); *OPEU v. Department of Insurance and Finance*, Case No. UP-6-92, 13 PECBR 470 (1992) (employer's failure to appoint union representatives to a safety committee did not violate subsection (1)(b) because the employer had the right to make these appointments).

Here, the Association has failed to demonstrate that the District's actions actually and adversely affected its ability to represent its members. Although the Association alleges that the District's requirement that teachers pay monthly fringe premium costs caused members to doubt the Association's ability to represent its members, its claims were purely speculative, since it presented no evidence in support of this contention.<sup>25</sup> In addition, we have found that the District's choice to require each

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<sup>25</sup>We observe that the Association's own actions contributed significantly to any doubts bargaining unit members may have had about the Association's ability to represent its members. The Association told teachers that it would pay the cost of their fringe benefit premiums during a strike. On October 19, after the Association had notified the District of its intended strike and before the strike was scheduled to begin, teachers learned that they would not receive District-paid fringe benefits for November if their strike lasted past November 7. On that date,

bargaining unit member to pay the cost of an entire month's fringe benefit premium was lawful and based on legitimate considerations. Accordingly, the District's action did not violate subsection (1)(b). We will dismiss this allegation.

5. The District did not violate ORS 243.672(1)(a) or (b) by refusing the Association's offer to reimburse it for the costs of bargaining unit members' fringe benefit premiums.

No later than October 19, the Association learned that the District planned to withhold the costs of monthly fringe benefit premiums from teachers' salaries. On November 10, Association counsel Bishop faxed a letter to District Business Manager Belanger about these payroll deductions. This was the last day of the District-imposed deadline for submitting changes for November paychecks. Bishop told Belanger that the Association wanted to pay the District for the teachers' health insurance premiums rather than have them deducted from employee paychecks, and asked Belanger when and how the Association could make these payments. Belanger refused to allow the Association to pay the District for the cost of bargaining unit members' health insurance premiums. The Association ultimately paid teachers directly for fringe benefit premium costs they incurred because of the strike. The Association contends that the District's refusal to accept payment from the Association for these expenses violates subsections (1)(a) and (b).

We begin by considering the Association's allegation that the District's actions violated the "because of" portion of subsection (1)(a). According to the Association, the District denied the Association's request to pay the District for bargaining unit members' fringe benefit costs in retaliation for the Association strike. We disagree.

The District offered legitimate reasons for denying the Association's offer to reimburse it for the cost of bargaining unit members' health insurance premiums. The District was under no obligation to accept the Association's proposal for direct reimbursement. The Association made its request that the District accept payment for fringe benefit premium costs on the afternoon of the last day on which the District agreed to accept changes for November paychecks. Accepting the Association offer would

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the Association knew, or should have known, that teachers would be liable for some portion of their fringe benefit costs. In spite of this notice from the District, the Association made no attempt to clarify the extent of the teachers' liability for premium costs and also made no attempt to arrange to pay these costs to the District before the strike began. Instead, the Association waited until November 10—the last day to request changes to be included in November paychecks and the thirteenth day of the strike—to ask the District to accept payment for teachers' insurance premiums.

have been expensive and disruptive for the District, since the District would have been required to make last-minute changes in the payroll records of all 215 bargaining unit members.<sup>26</sup> In addition, Belanger believed that the Association's proposal would have unfavorable tax consequences for teachers, since any payments received for fringe benefits would be taxed as income. We find that the District's refusal of Association payments for fringe benefit costs was based on reasonable considerations and was not in retaliation for the Association strike. We conclude that the District's actions did not violate the "because of" prong of subsection (1)(a).

Since we have found no violation of the "because of" portion of subsection (1)(a), we find no derivative violation of the "in the exercise" prong of the statute. Nor do we find an independent violation of the "in the exercise" portion, since a lawful employer action does not have the natural and probable effect of discouraging bargaining unit members' in their exercise of protected activity.

The Association also alleges that the District's refusal to accept Association payment for fringe payment premium costs violated subsection (1)(b) because it caused bargaining unit members to lose confidence in the Association. The Association contends that members began to doubt the Association's ability to represent them after they realized they would have a substantial amount deducted from their November paychecks to cover the cost of their fringe benefits. As we discussed above, a labor organization must show that an employer's actions had an actual adverse effect on a labor organization's ability to effectively represent its members in order to establish a violation of subsection (1)(b). In addition, a labor organization must also show that the employer had no legitimate basis for taking an action that allegedly violates subsection (1)(b). Here, the Association failed to provide proof of any actual loss of confidence in the Association that resulted from the District's conduct. The evidence shows that the District had valid reasons for refusing the Association offer of payment. We will dismiss the subsection (1)(b) allegation.

### Remedy

Under ORS 243.676(2), we must enter a cease and desist order if we determine that a party has committed an unfair labor practice. We will order the District to cease and desist from its unlawful conduct. The statute also allows us to order affirmative relief to effectuate the purposes and policies of the PECBA. In order to address the unlawful actions the District took against Robert D'Aboy, Julann D'Aboy, and Dottie Thorson, we will order the following: the District will remove any documents

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<sup>26</sup>There is no evidence in the record showing that the deadline the District established for making payroll changes was arbitrary, unreasonable, or motivated by dislike of the Association's strike.

from the personnel files of Robert D'Aboy, Julann D'Aboy, and Dottie Thorson which address their conduct during the strike while picketing District offices and schools, confronting Communications Director Monteith, approaching Salinas at the Lincoln City Country Clutter store or Chinook Wind Casino, or picketing at Salinas' Lincoln City home. The District will not use such material in connection with any disciplinary or counseling action regarding Robert D'Aboy, Julann D'Aboy, or Thorson.

The Association requests that we order the District to post a notice regarding the unfair labor practices it committed. We require an employer to post a notice if its unlawful actions (1) were calculated or flagrant; (2) were part of a continuing course of illegal conduct; (3) were perpetrated by a significant number of the employer's personnel; (4) affected a significant portion of bargaining unit members; (5) had a significant potential or actual impact on the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge. Not all of these criteria need be met to warrant posting of a notice. *Josephine County*, 22 PECBR at 105. Here, an insufficient number of these criteria were met, and we will not order the District to post a notice.

The Association also asks that we order the District to apologize, in writing, to Robert D'Aboy, Julann D'Aboy, and Dottie Thorson. We find such a remedy to be unnecessary and will not order the District to do so.

#### Civil penalty

Both parties requested a civil penalty. This Board may award a civil penalty of up to \$1,000 to a prevailing party when:

“(a) The Board finds that the party committing an unfair labor practice did so repetitively, knowing that the action taken was an unfair labor practice and took such action disregarding that knowledge; or that the action constituting an unfair practice was egregious; or

“(b) The Board dismisses a complaint and finds that the complaint was frivolously filed or was filed with the intent to harass the prevailing party.” OAR 115-035-0075.

In this case, we have upheld the Association's allegations that the District violated ORS 243.672(1)(a) when District officials and representatives pretended to photograph and photographed bargaining unit members engaged in PECBA-protected activity; falsely accused Robert D'Aboy, Julann D'Aboy, and Dottie Thorson of stalking and harassing Superintendent Salinas, and threatened them with “consequences” for

these actions; and banned unit member Robert D'Aboy from District premises on pain of trespass charges. We dismissed the Association's other claims. A claim is frivolous only if every argument asserted in its support is one which a reasonable lawyer would know is not well-grounded in fact or law, or warranted by a reasonable argument for an extension of the law. *Josephine County*, 22 PECBR at 104. We do not find that any of the Association claims that we dismissed were frivolous or were filed with the intent to harass the District. The County is not entitled to an award of civil penalties.

We turn to the Association's claim for an award of civil penalties against the District. The District's conduct in violating subsection (1)(a) was not repetitive, and there is no evidence in the record to demonstrate that the actions it took were taken with the knowledge that they were in violation of the law. However, we do find that certain of the District's actions were egregious.

"[E]gregious" violations of the law are those that undermine the nature of the collective bargaining process. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-27-902, 20 PECBR 571, 594 (2004). "[E]gregious" means "conspicuously bad" and "flagrant." *East County Bargaining Council v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986). Here, the District's actions in banning Robert D'Aboy from District premises; falsely accusing Julann D'Aboy, Robert D'Aboy, and Dottie Thorson of "stalking" Superintendent Salinas; and threatening "consequences" for these actions, were egregious. The District's conduct discouraged bargaining unit members' from participating in lawful strike activities, a right which is fundamental to the PECBA collective bargaining process.

In addition, the manner in which the District acted against Thorson and Robert and Julann D'Aboy was particularly harsh and unduly punitive. The District caused a uniformed law enforcement officer to deliver a letter in which it banned D'Aboy from District property while D'Aboy and other teachers were picketing the District high school. The District's conduct unnecessarily humiliated D'Aboy and intimidated bargaining unit members by erroneously suggesting that D'Aboy's activities might be unlawful. Concerning the false charges that Robert D'Aboy, Julann D'Aboy, and Thorson "stalked" Superintendent Salinas by picketing her Lincoln City vacation home, Salinas showed reckless disregard for the truth when she made these accusations. Salinas never saw who picketed her house and made no other efforts to find out the identity of the picketers.

In sum, the District's unlawful actions were egregious both because they chilled bargaining unit members' participation in the strike, an activity central to the PECBA collective bargaining process, and because they were flagrant and conspicuously bad. We will order the District to pay the Association a \$500 civil penalty.

In regard to the District's unlawful photographing and pretense of photographing striking teachers, we note that this is the first time we have considered charges concerning surveillance of picketers during a strike. We normally do not award a civil penalty in cases of first impression. *Oregon Nurses Association v. Oregon Health & Science University*, Case No. UP-3-02, *interim order*, 19 PECBR 590, *Board order* 19 PECBR 684, 688 (2002). Accordingly, we will not consider this violation of subsection (1)(a) as a basis for the award of a civil penalty.

ORDER

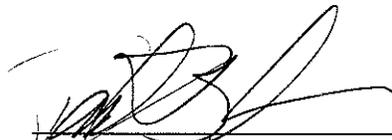
1. The District shall cease and desist from violating ORS 243.672(1)(a).

2. The District shall remove any documents from the personnel files of Robert D'Aboy, Julann D'Aboy, and Dottie Thorson which address their conduct during the strike while picketing District offices and schools, approaching Salinas at the Lincoln City Country Clutter store or Chinook Wind Casino, or picketing at Salinas' Lincoln City home. The District is ordered not to use such material in connection with any disciplinary or counseling action regarding Robert D'Aboy, Julann D'Aboy, and Dottie Thorson.

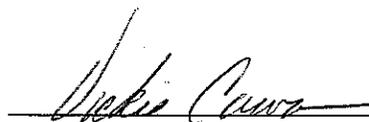
3. Within 30 days of the date of this Order, the District will pay the Association a civil penalty of \$500.

4. The remainder of the complaint is dismissed.

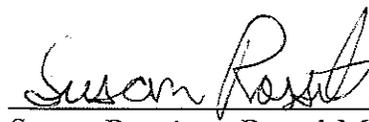
DATED this 23<sup>rd</sup> day of October 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.