

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-47-06

(UNFAIR LABOR PRACTICE)

OREGON AFSCME COUNCIL 75,	)	
LOCAL 3336,	)	
	)	
Complainant,	)	
	)	
v.	)	RULINGS,
	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
STATE OF OREGON,	)	AND ORDER
DEPARTMENT OF	)	
ENVIRONMENTAL QUALITY,	)	
	)	
Respondent.	)	
_____	)	

This matter was submitted directly to this Board on August 24, 2007 following a hearing before Administrative Law Judge (ALJ) Susan Rossiter on June 28 and 29, 2007 in Salem, Oregon. The record closed on August 2, 2007 upon receipt of the parties' briefs.

Allison Hassler, Legal Counsel, AFSCME Council 75, 688 Charnelton Street, Eugene, Oregon 97401, represented Complainant.

Linda J. Kessel, Senior Assistant Attorney General, Labor and Employment Section, Department of Justice, 1162 Court Street N.E., Salem, Oregon 97301-4096, represented Respondent.

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On October 2, 2006, Oregon AFSCME Counsel 75, Local 3336 (AFSCME) filed this complaint which alleges that the Department of Environmental Quality (DEQ) breached a grievance settlement agreement and thereby violated ORS 243.672(1)(g). On December 21, 2006, DEQ filed its answer which denies any wrongdoing, asserts as an

affirmative defense that AFSCME failed to exhaust its contract remedies, and requests a civil penalty.

The issue is: Did DEQ violate ORS 243.672(1)(g) by failing to comply with the terms of the agreement to settle Marcia Kirk's grievance?

### RULINGS

1. AFSCME offered into evidence its notes of the mediation sessions which led to the settlement agreement at issue here. DEQ objected on grounds that at least some of the evidence in the notes violates a confidentiality agreement the parties signed at the outset of mediation. The confidentiality agreement states in pertinent part that "*the mediator* may not disclose or be compelled to disclose mediation communications and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all parties and the mediator agree in writing." (Emphasis added.)

The plain language of this confidentiality agreement prohibits disclosure by the mediator only. The proffered evidence consists of notes taken by a party during mediation. It does not constitute disclosure by the mediator, so the confidentiality agreement does not apply. The ALJ did not err in admitting the notes into evidence.

2. All other rulings of the ALJ have been reviewed and are correct.

### FINDINGS OF FACT

1. AFSCME is a labor organization and the exclusive representative of a bargaining unit of DEQ classified employees. DEQ is an agency of the State of Oregon, a public employer.

2. AFSCME and DEQ were parties to a collective bargaining agreement in effect from August 1, 2005 through June 30, 2007.

Article 13 of the agreement establishes a four-step grievance procedure. It defines "grievances" as "acts, omissions, applications, meaning or interpretation alleged to be violations of the terms and conditions of this Agreement." To initiate a grievance, an employee must file a written grievance with the employee's immediate supervisor "within thirty (30) calendar days of the date of the alleged breach of this Agreement, or of the date the Union or employee knew or should have known of the alleged breach." A grievance that is unresolved at the first step can be appealed to the DEQ director and then to the state Department of Administrative Services, Labor Relations Division. The

final step of the grievance procedure is arbitration. Before arbitration, the parties can mutually agree to mediate the grievance.

Article 33, Section 3, of the agreement provides, in relevant part:

“Managers shall have a performance review discussion with each of their employees at the end of the employee’s trial service period, and at least annually thereafter. Team level reviews may be allowed in place of or in addition to individual reviews when appropriate and agreed upon between a manager and the employees functioning as a team. Managers shall strive to provide timely feedback to employees relating to employees’ professional performance. \* \* \*”

Article 57 of the agreement, Professional Differences of Opinion, provides:

“The Agency encourages staff to express their professional opinions and encourages an open and free exchange of ideas and opinions. Disagreements may be submitted to the next level of decision making for evaluation, up to and including the Director. A written response will be given, within a reasonable time period. Each employee is expected to perform work according to Agency policy, but no employee will be required to sign any report or recommendation, where he or she conscientiously objects to the opinion stated in such report or recommendation, but may be listed as designated contact person.

“No retaliation or discrimination shall occur against any employee for expressing a differing professional opinion.”

3. DEQ is an environmental regulatory agency that is governed by the five-member Environmental Quality Commission (EQC). The EQC is responsible for issuing permits for disposal of hazardous waste. A company seeking a permit for hazardous waste disposal or renewal of a previously issued permit works with DEQ staff in preparing its application. The application is then submitted to DEQ, and DEQ issues a draft permit. Members of the public and the federal Environmental Protection Agency (EPA) have 60 days to comment on the draft permit. After the period for public comment has ended, DEQ makes whatever changes may be appropriate in the draft permit and presents the final permit to the EQC for consideration. Throughout the

entire permit application and renewal process, DEQ attempts to identify and resolve differences of opinion among community members, the EPA, the permit applicant, and DEQ regarding the provisions of the permit. Once a permit is issued, DEQ staff monitor the disposal of hazardous waste and provide technical assistance to ensure compliance with the applicable laws and the terms and conditions of the permit.

4. In 1989, the EQC issued a permit to Chemical Waste Management (CWM) for disposal of hazardous waste at a toxic waste landfill located in Arlington, Oregon. CWM accepts most of the hazardous waste in the Northwest at its Arlington facility, and the fees charged for hazardous waste disposal provide a significant amount of the funding for DEQ's hazardous waste and cleanup program.

### Marcia Kirk Grievance

5. Marcia Kirk, a member of the AFSCME bargaining unit, is a hydrogeologist who works for DEQ as a Natural Resources Specialist 4. In 2002, Kirk was the lead member of a DEQ team assigned to monitor CWM's compliance with the terms of its permit for hazardous waste disposal at the Arlington site. Kirk and her team members oversaw CWM's regular testing of the groundwater near the Arlington facility to insure that no toxic substances from the landfill contaminated drinking water supplies.

6. CWM managers at the Arlington site found Kirk difficult to work with. They felt she had a "hidden agenda" and did not trust her. In the fall of 2002 and spring of 2003, CWM managers complained about Kirk to her supervisor, Brett McKnight, the manager of DEQ's Hazardous Waste and Spills Division. In June 2003, McKnight removed Kirk from her assignment as lead hydrogeologist for the team working at CWM's Arlington facility and transferred Kirk to another assignment.

7. CWM submitted an application to DEQ to renew its permit for hazardous waste disposal at its Arlington site. On January 23, 2004, DEQ and CWM signed a "Receipts Authority Agreement" (RAA) in which CWM agreed to pay DEQ up to \$75,000 per year for DEQ staff assistance and an expedited procedure to resolve certain hydrogeologic problems related to the renewal of CWM's hazardous waste disposal permit. The RAA specified that the money paid by CWM to DEQ would cover the salaries and other related expenses for two DEQ hydrogeologists, Toby Scott and Cliff Walkey. It further specified that Scott and Walkey could be assisted by other DEQ staff. Under the terms of the RAA, CWM would work under DEQ oversight to evaluate hydrogeologic conditions at the Arlington site and to make any revisions in the facilities' groundwater program necessary to comply with state and federal law. The RAA listed six specific areas in which work would be performed. The agreement became effective on

September 1, 2003 and terminated when DEQ completed the work specified in the agreement, or on June 1, 2007, whichever occurred first. In addition, either party could terminate the agreement with 30 days notice to the other party.

8. On February 19, 2004, AFSCME filed a grievance on behalf of Kirk. It alleged that DEQ violated Article 47 of the collective bargaining agreement (Professional Differences of Opinion) when it removed Kirk from her assignment as the lead member of the hydrogeology team at CWM's Arlington facility. As a remedy for the grievance, AFSCME requested that Kirk be restored to her assignment as the team's lead hydrogeologist.

9. After the grievance was denied at the first three levels of the grievance procedure, AFSCME and DEQ agreed to mediate the grievance.

On September 14, 2005, Kirk, McKnight, and other DEQ and AFSCME representatives participated in a mediation session. The parties reached a written settlement of Kirk's grievance that provided in relevant part:

- "1. Management will allow Marcia Kirk to participate as an equal team member with Cliff Walkey and Toby Scott on all Chemical Waste Management, Inc. (Chem Waste) Receipts Authority (RA) work. Such participation will include but not be limited to: attending meetings, participating in joint decision making, and work plan and report review and approval.
- "2. Management will evaluate the team's success at accomplishing the objectives of the RA work at least semi-annually with a team level performance review. Management may include as part of that review individual assessments of each team member's project management, negotiation, and solution finding skills. Such individual skill assessment will be based on objective, agreed-upon criteria with the appropriate individual team member.

- “3. Marcia Kirk will participate as an equal team member, rather than lead hydrogeologist, on RA work
- “4. Marcia Kirk will use a survey agreed to by her manager to survey co-workers and stakeholders regarding her ability to clearly communicate technical information and, where appropriate, to offer several options for attaining regulatory requirements, no later than October 31, 2005 and again as part of her performance review. If communication issues are identified, Marcia Kirk will work with her manager to develop objectives, activities and success indicators to address the issues.
- “5. Marcia Kirk will check in with her manager to update him on potentially contentious issues and her proposed solutions and actions as they arise, but no less often than every other week.”

The parties met face-to-face to review the terms of and sign this agreement. They never discussed whether the performance review specified in the agreement would be in writing.

#### Work under the RAA at CWM's Arlington Site

10. After her grievance was resolved, Kirk began working with Walkey and Scott at CWM's Arlington facility. Fredrick Moore was also assigned to work with the team as permit writer, with responsibility for assisting CWM in preparing the permit renewal application that would be submitted to the EQC. Walkey and Scott's salaries were paid by CWM under the terms of the RAA. Kirk and Moore's salaries were paid out of the DEQ budget or from disposal fees CWM paid to DEQ. CWM hired an engineering firm, CH2MHill, to perform some of the work required under the RAA.

11. On October 24, 2005, McKnight sent a survey regarding Kirk's communication skills to Kirk's DEQ coworkers and to employees of the companies that received permits from DEQ. The majority of surveys that were returned gave a positive rating to Kirk's communication abilities. Among the individuals surveyed was Samir Jiries, a manager at CWM's Arlington facility. In the e-mail in which Jiries returned his

completed survey, Jiries told McKnight: "I agree that we made good progress on the permit and we are heading in the right direction."

12. On November 22, 2005, Walkey, Scott, and Kirk gave McKnight a written report on the progress they were making under the RAA. In their report, the three hydrogeologists indicated that a teleconference with CH2MHill regarding a review they made of CWM's operations was "contentious" and that they did not approve of some of the work produced by CH2MHill and CWM.

13. On March 9, 2006, McKnight exchanged e-mails with Walkey, Scott, and Kirk about work under the RAA. In one of his e-mails, McKnight thanked the three for their "excellent work on this [the RAA] project."

14. In March 2006, McKnight's supervisor, Joni Hammond, assigned herself the job of temporarily supervising DEQ's chemical demilitarization project at Umatilla. McKnight was appointed to fill Hammond's position on a temporary basis and became acting eastern regional administrator for DEQ. Rich Duval was assigned to temporarily fill McKnight's position. In their new assignments, Hammond and McKnight maintained some oversight of the work under the RAA.

15. During the spring of 2006, McKnight talked regularly with Walkey, Scott, and Kirk about their work under the RAA. The team told McKnight that they did not feel they had been successful in creating a cooperative working relationship with CWM and accomplishing the tasks specified in the RAA. McKnight suggested that the team present CWM and CH2MHill with their "vision" of the RAA project so that there would be a better understanding of all the work that needed to be done. On April 13, 2006, Walkey, Scott, and Kirk met with CH2MHill and CWM representatives and explained DEQ's "integrated vision" of the tasks to be accomplished under the RAA. The DEQ team asked the CH2MHill and CWM representatives to identify specific disagreements they had with DEQ's position.

16. On April 19, 2006, Walkey, Scott, and Kirk sent Duval a written report on progress under the RAA. In their report, the team described the monthly meetings they held with CWM and CH2MHill staff to try "to work through the many problematic hydrogeologic issues of the RAA," and the weekly conference calls they conducted in an attempt to resolve issues related to DEQ approval of CWM's operations.

17. On May 8, 2006, Kirk asked McKnight about the semi-annual performance review specified in the settlement agreement for her grievance. McKnight told Kirk that he was not required to evaluate her in writing, that he believed that the

RAA project was working and nothing more was required of him, and that if he saw a problem with Kirk's work, he would tell Kirk about it.

Kirk then asked AFSCME Chief Steward Karen Williams what she thought of McKnight's response. Williams responded that "[t]he settlement is in writing and both sides must comply with the requirements in the settlement." Williams also asked AFSCME Representative Issa Simpson to assist her in reminding McKnight of the need to perform a team level performance review in accordance with the provisions of the grievance settlement.

18. On June 1, 2006, McKnight participated in a meeting that included Walkey, Scott, Kirk, and representatives from CWM and CH2MHill. McKnight concluded that the DEQ team was not telling the CWM and CH2MHill representatives all of their concerns. McKnight spoke to Walkey, Scott, and Kirk after the meeting and urged them to strongly and clearly tell CWM and CH2MHill about any problems in the RAA work.

19. On June 15, 2006, Walkey, Scott, and Kirk sent Duval and McKnight a report regarding the status of the RAA work. In their report, the team members noted:

"\* \* \* [T]he intended collaborative nature of the RAA project is not functioning as originally proposed. The current process appears to be one of CWM submitting draft reports, DEQ commenting on the reports with little time for resolution/discussion before the final deliverables are due, and/or not agreeing with the report's findings. It was intended that the collaborative approach would consist of defining issues that needed resolution, narrowing the focus of data acquisition to avoid unnecessary expenditure of resources, and facilitating the preparation and submittal of final work plans and reports that DEQ could readily approve."

The team members concluded that "DEQ and CWM appear to have some major disagreements over the interpretation of hydrogeologic conditions and applicability of regulations and guidance at the CWM facility, as outlined in this status report."

## Renewal of CWM's Permit for Hazardous Waste Disposal

20. On February 22, 2006, DEQ issued a draft hazardous waste permit renewal for CWM's Arlington facility for public comment. On April 10, 2006, the EPA submitted seven comments to DEQ on the draft permit. On June 15, 2006, DEQ responded to the EPA's comments and proposed modifications in the draft permit that would solve the problems identified by the EPA.

21. In a letter to DEQ dated July 5, 2006, the EPA said it appeared that the proposed modifications for the permit adequately addressed the EPA's concerns, and the EPA anticipated withdrawing its comments.

22. On July 24, 2006, the EPA sent DEQ a letter which indicated that the EPA would not withdraw five of its comments to CWM's hazardous waste disposal permit unless DEQ made further changes in the terms and conditions of the permit.

23. On July 25, 2006, DEQ Director Stephanie Hallock<sup>1</sup> received a copy of the staff report and supporting documentation for the renewal of CWM's hazardous waste disposal permit. In accordance with her customary procedure, Hallock reviewed the staff report in preparation for the August 10 meeting at which EQC would consider renewal of the permit. Hallock found that the staff report was of very poor quality and concluded it was unacceptable. The report itself was incomprehensible, and some of the supporting documents were not attached. Hallock and other DEQ staff members completely rewrote the staff report so that it would be ready for presentation to the EQC.

24. After Hallock and her staff rewrote the report, it was made available to the public. The report included a copy of the EPA's July 24, 2006 letter which expressed concerns about the terms of the CWM permit. Don Haagensen, an attorney who represented CWM, contacted Hallock and told her that he was surprised and concerned about the EPA's position. According to Haagensen, the EPA's position in its July 24 letter—that there had to be further changes in the conditions of the permit before the EPA would withdraw its comments—contradicted the EPA's position in its July 5 letter.

25. At Hallock's direction, Hammond contacted the EPA and asked why the agency changed its position on the CWM hazardous waste disposal permit. After

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<sup>1</sup>At the beginning of her testimony, the Director stated her name as Stephanie Hallock-Cummins. She is generally identified as Hallock in the exhibits, and the parties referred to her as Hallock in their briefs and in the transcript. We will also refer to her as Hallock.

discussions with McKnight and Hammond, the EPA agreed to withdraw all comments to the renewal of CWM's hazardous waste disposal permit.

26. At its August 10, 2006 meeting, the EQC approved renewal of CWM's hazardous waste disposal permit.

#### Removal of Kirk from Her Assignment to the RAA Team

27. On August 21, 2006, Haagensen and other CWM representatives met with Director Hallock and the deputy director of DEQ to discuss problems between CWM and the DEQ hydrogeologic team assigned to CWM's Arlington facility. Haagensen said that CWM had never before encountered such serious problems in working with DEQ and that he was concerned about a lack of trust between DEQ and CWM staff.

28. Hallock told Hammond about the difficulties between CWM and DEQ staff at CWM's Arlington facility and instructed Hammond to solve the problem.

29. On August 16, 2006, McKnight sent Hammond a copy of Scott, Walkey, and Kirk's June 15 report on the status of work under the RAA. McKnight told Hammond:

"Attached is a copy of the last progress report submitted by the Hydro team on the CW project. \* \* \* I believe it provides some insight as to why we are having trouble with the hydro issues at CW.

"\* \* \* \* \*

"One thing I think the report is lacking would be recommendations which I think the team is very reluctant to provide. I have sensed that the team would rather put that on management so that they don't have any ownership should something go south. I think this report is the team's way of saying 'well we informed management that there were problems and management did not act.' (just my guess)

"If I were to write my evaluation of the Team's efforts from this report, I'd conclude that the team approach has not been effective in establishing effective dialogue, nor have they been effective in developing a course of action for resolving

significant issues. The overall tone of the report suggests to me that we might have problems solving these issues under the current structure.”

30. In August 2006, Kirk reminded McKnight that under the terms of the settlement to her grievance, DEQ was required to make a semi-annual review of the RAA team’s work. On August 15, 2006, McKnight asked Walkey and Kirk to identify objective criteria that could be used in the evaluation.

31. After discussions with McKnight and Duval about the problems with CWM, Hammond decided that the best solution was to remove the current DEQ staff from work under the RAA and replace them with other DEQ staff. Hammond told Haagensen what she planned to do, and Haagensen similarly agreed to change the CH2MHill staff members assigned to work at CWM’s Arlington facility

32. On September 13, 2006, Hammond removed Kirk from her assignment on the RAA team and transferred her to another assignment as a Natural Resources Specialist 4. Kirk lost no salary or benefits as a result of this transfer, and she retained her status as a permanent, full-time employee. Walkey and Scott were also removed from their positions on the RAA team.

33. On September 21, 2006, CWM notified DEQ that it wished to terminate the RAA. By letter dated September 22, 2006, DEQ agreed to terminate the RAA effective September 21, 2006.

### CONCLUSIONS OF LAW

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

2. DEQ breached the Kirk grievance settlement agreement and thereby violated ORS 243.672(1)(g).

ORS 243.672(1)(g) makes it an unfair labor practice for a public employer to “[v]iolate the provisions of any written contract with respect to employment relations \* \* \*.” AFSCME asserts that DEQ breached the written agreement that settled Marcia Kirk’s grievance. A written grievance settlement is a “contract with respect to employment relations” within the meaning of subsection (1)(g). *Oregon Public Employees Union, SEIU Local 503 v. Wallowa County*, Case No. UP-77-96, 17 PECBR 451, 462 (1997), *adhered to on reconsideration*, 17 PECBR 536 (1998). Thus, a breach of the settlement agreement would constitute a violation of subsection (1)(g).

At the outset, DEQ asserts that we should dismiss the complaint without reaching the merits because AFSCME failed to exhaust the contractual grievance procedure. See *West Linn Education Association v. West Linn School District No. 3JT*, Case No. C-151-77, 3 PECBR 1864, 1868-71 (1978) (discussing the exhaustion requirement). We disagree.

A party is obligated to resolve a particular dispute through the grievance process only if it has agreed to do so. AFSCME never agreed to use a grievance process to resolve disputes over the settlement agreement. The settlement agreement itself neither contains nor refers to a grievance process. The collective bargaining agreement contains a grievance process, but on its face, it does not apply here. It specifically defines grievances as “acts, omissions, applications, meaning or interpretation alleged to be violations of the terms and conditions of *this Agreement*.” (Emphasis added.) The parties did not make the settlement part of “*this Agreement*” (*i.e.*, the collective bargaining agreement), so the grievance process does not cover this dispute.

Exhaustion of contract remedies is an affirmative defense, *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District*, Case Nos. UP-58/112-88, 11 PECBR 370, 380 (1989), and DEQ, as the party asserting it, has the burden of proving it. See OAR 115-035-0035(1). DEQ has failed to carry its burden, and we will proceed to consider the merits of the complaint.

AFSCME asserts that DEQ breached the settlement agreement in two ways: (1) it removed Kirk from the CWM project, and (2) it failed to conduct a performance review of the hydrogeology team. This requires us to interpret the settlement agreement.

A labor-management agreement is generally interpreted in the same manner as any other contract. *OSEA v. Rainier School District No. 13*, 311 Or 188, 194, 808 P2d 83 (1991). The goal in interpreting a contract is to determine the intent of the contracting parties. ORS 42.240; *Oregon School Employees Association v. Athena-Weston School District*, Case No. UP-2-97, 17 PECBR 586, 590 (1998) (citing *Miller v. Miller*, 276 Or 639, 647, 555 P2d 1246 (1976)). To determine the parties’ intent, we follow a three-part analysis which we described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005):

“\* \* \* We first examine the text of the disputed provision in the context of the document as a whole. If the provision is clear, the analysis ends. If the provision is ambiguous, we proceed to the second step which is to examine extrinsic evidence of the contracting parties’ intent. Finally, if the provision remains ambiguous after applying the

second step, we resort to the use of appropriate maxims of contract construction. *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997).”

AFSCME first contends that DEQ violated the settlement agreement when it removed Kirk from the CWM project. We begin the analysis, as we must, by examining the language of the settlement agreement. As pertinent, the agreement states: “Management will allow Marcia Kirk to participate as an equal team member with Cliff Walkey and Toby Scott on all Chemical Waste Management, Inc. (Chem Waste) Receipts Authority (RA) work.” It also states: “Marcia Kirk will participate as an equal team member, rather than lead hydrogeologist, on RA work.”

We resolve any ambiguity in the terms of the settlement by considering the context of the agreement. The dispute originated when DEQ removed Kirk from the position of lead hydrogeologist on the CWM project. AFSCME filed a grievance challenging Kirk’s removal. The parties, with the assistance of a mediator, settled the grievance by agreeing to put Kirk back on the CWM project, but as an “equal team member” rather than as a lead worker. It seems highly unlikely that Kirk would relinquish her claim to lead work in return for a position on the CWM project if DEQ could arbitrarily remove her from that project the very next day or at any other time. This conclusion is supported by the fact that the settlement agreement contained several performance goals for Kirk concerning her communications with coworkers, stakeholders, and her supervisor. Kirk met those goals. The inclusion of such goals in the agreement reveals an intent to keep Kirk in the position so long as she performed as expected.

DEQ argues that it treated Kirk “as an equal team member” because it removed the other two team members at the same time it removed Kirk. This misses the point. Unlike Kirk, the other team members did not have a settlement agreement that controlled their employment. In addition, the settlement focused on performing the RA work as part of the team. A change in team members would not impact Kirk’s employment so long as the RA work continued. We conclude that DEQ violated the settlement agreement when it removed Marcia Kirk from her position as a team member on the CWM project before the RAA was complete.

AFSCME also asserts that DEQ violated the settlement agreement by failing to conduct a team performance review. The settlement agreement states: “Management will evaluate the team’s success at accomplishing the objectives of the RA work at least semi-annually with a team level performance review.” The parties spent considerable time arguing about whether the evaluation required by the settlement agreement must be in writing. We need not resolve that ambiguity because we conclude that DEQ did not provide any evaluation, written or otherwise.

DEQ points to two different circumstances as proof that it complied with the evaluation provision. It notes that the team met a number of times with supervisors who provided feedback on their progress. The record of these discussions is largely conclusory and does not provide enough detail to allow us to determine whether they constituted an evaluation of the team sufficient to satisfy the settlement. DEQ could have avoided this dispute by putting the evaluation in writing.

Further, DEQ appears to have purposely ignored the evaluation requirement. Kirk specifically asked her supervisor, Brett McKnight, for the evaluation required by the agreement. McKnight responded that the project was working and that nothing more was required of him. He assured Kirk he would tell her if he saw a problem with her work. McKnight never did so even though he was aware of problems with the RA work as early as June 2006.

DEQ also asserts that it met the evaluation requirement when management reviewed the RA team's own periodic reports on its progress. The settlement requires management to evaluate the team. The team's own evaluation of itself fails to satisfy this requirement.

We conclude that DEQ violated the settlement agreement when it failed to evaluate the CWM team's success in accomplishing the RA work.

### *REMEDY*

We have determined that DEQ breached the settlement agreement, and thus violated ORS 243.672(1)(g). We are required by statute to order DEQ to cease and desist from the violation. ORS 243.676(2)(b).

We may also take other affirmative action necessary to remedy the violation and effectuate the policies of the Public Employee Collective Bargaining Act (PECBA). ORS 243.676(2)(c). In a breach of contract case, we normally order a make-whole remedy. *See Mapleton Education Association v. Mapleton School District 32*, UP-142-93, 15 PECBR 476, 495 (1994). That is, we attempt to restore the non-breaching party to the position it would have occupied if no breach had occurred. In cases such as this where an employee is wrongfully removed from a job, we generally award reinstatement with back pay. *E.g., Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20 (2005). Here, however, neither of these remedies is appropriate. As to back pay, Kirk did not suffer any loss because of the breach. Kirk was transferred from the CWM project to a position where she received the same salary and benefits and retained the same permanent full-time status.

Similarly, we cannot order DEQ to reinstate Kirk to the CWM project because the position to which Kirk was entitled under the settlement agreement no longer exists. Just eight days after DEQ removed Kirk from the project, CWM and DEQ terminated the RAA. AFSCME argues that Kirk's right to continue working on the CWM project is not dependent on the RAA. Based on the language of the settlement agreement, we disagree. The agreement states that "[m]anagement will allow Marcia Kirk to participate as an equal team member with Cliff Walkey and Toby Scott *on all Chemical Waste Management, Inc. (Chem Waste) Receipts Authority (RA) work,*" and that "Marcia Kirk will participate as an equal team member, rather than lead hydrogeologist, *on RA work.*" (Emphasis added.) Because there is no longer any RA work on the CWM project, there is no position that Kirk is entitled to under the settlement. Her work on the team would have ended on September 21, 2006, even if DEQ had not transferred her.<sup>2</sup>

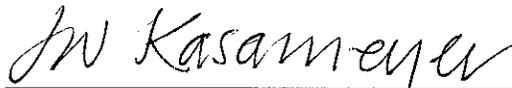
### ORDER

DEQ will cease and desist from violating the Kirk grievance settlement agreement.

DATED this 7<sup>th</sup> day of September 2007.



Paul B. Gamson, Chair



James W. Kasameyer, Board Member

\*

Vickie Cowan, Board Member

This Order may be appealed pursuant to ORS 183 482

\*Board Member Cowan has recused herself.

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<sup>2</sup>DEQ did not prevail, and we accordingly deny its request for a civil penalty.