

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-62-05

(UNFAIR LABOR PRACTICE)

AMALGAMATED TRANSIT UNION,)	
DIVISION 757,)	
)	
Complainant,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
TRI-COUNTY METROPOLITAN)	AND ORDER
TRANSPORTATION DISTRICT)	
OF OREGON,)	
)	
Respondent.)	
_____)	

This Board heard oral argument on July 24, 2008, on both parties' objections to the Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on May 27, 2008, following a hearing on November 27, 28, 29, 30, December 1, 4, and 6, 2006, in Portland, Oregon. The hearing record closed on September 4, 2007, with the receipt of the parties' post-hearing briefs.

Monica Smith, Attorney at Law, represented Complainant at oral argument. Susan L. Stoner, General Counsel, Amalgamated Transit Union, Division 757, 1801 N.E. Couch Street, Portland, Oregon 97232-3054, represented Complainant at hearing

Jana Toran, Director, Legal Services, Tri-County Metropolitan Transportation District of Oregon, 4012 S.E. 17th Avenue, Portland, Oregon 97202, represented Respondent.

On November 10, 2005, the Amalgamated Transit Union, Division 757, (ATU) filed this complaint against the Tri-County Metropolitan Transportation District of Oregon (TriMet). ATU filed several amended complaints—on January 13, February 3, April 5, June 21 and June 27, 2006. ATU's sixth amended complaint alleged that TriMet violated ORS 243.672(1)(a), (b), (c), (d), (e), (g), and (h).

On August 16, 2006, TriMet filed a timely answer that included a number of affirmative defenses

On October 5, 2006, ATU submitted a letter raising what it called "a few minor corrections and additions to make" to its sixth amended complaint, including allegations that some of ATU's actions, described in its previous complaints, violated ORS 243.672(1)(f).¹ On January 24, 2007, after the close of the hearing, ATU filed a motion for sanctions against TriMet which included notice that it was withdrawing one of its claims. TriMet filed a motion for sanctions against ATU on January 25, 2007

The issues in this case are:

1. Did TriMet fail to timely schedule Step 1 grievance conferences? If so, did this conduct violate ORS 243.672(1)(a), (c), and (e)?
2. Did TriMet fail to timely schedule Step 2 grievance meetings? If so, did this conduct violate ORS 243.672(1)(a), (c), and (e)?
3. Did TriMet fail to schedule more than one Step 3 Joint Grievance Committee meeting each month? If so, did this conduct violate ORS 243.672(1)(a), (c), and (e)?
4. Did TriMet appoint two officials to the parties' Joint Grievance Committee who lacked authority to reach agreement? If so, did this conduct violate ORS 243.672(1)(b) and (e)?
5. Did TriMet arbitrarily and capriciously deny ATU's requests to extend the 30-day deadline to send a grievance to arbitration? If so, did this conduct violate ORS 243.672(1)(e)?

¹The ALJ considered this letter as a motion by ATU to amend its complaint. The ALJ's ruling on this motion is discussed in the Rulings section of this Order.

6. Did TriMet violate an agreement with ATU regarding the use for disciplinary purposes of an ATU document concerning John Doe?² If so, did this conduct violate ORS 243.672(1)(e) and (g)?

7. Did TriMet violate a grievance settlement agreement with ATU regarding the reposting of a storeroom job? If so, did this conduct violate ORS 243.672(1)(e)?

8. Did TriMet base the amount it paid employee witnesses in the Doe arbitration on the content of their testimony? If so, did this conduct violate ORS 243.672(1)(a) and (d)?

9. Did TriMet refuse to hear grievances regarding family medical leave? If so, did this conduct violate ORS 243.672(1)(e)?

10. Did TriMet violate a Joint Grievance Committee decision barring TriMet's procurement department from doing the work of the purchasing department? If so, did this conduct violate ORS 243.672(1)(e)?

11. Did TriMet change the qualifications for the bargaining unit position of assistant storekeeper, and add duties to the position, without notice and an opportunity to bargain? If so, did this conduct violate ORS 243.672(1)(e)?

12. Did TriMet unilaterally change the customer service policy (CSI)? If so, did this conduct violate ORS 243.672(1)(e)?

13. Did a TriMet official direct Lorenzo Williams to attend a meeting in May 2006, tell Williams that no union representation was necessary because the meeting would not result in discipline, and then discipline Williams? If so, did this conduct violate ORS 243.672(1)(a)?

14. Did TriMet change the qualifications for the bargaining unit position of buyer? If so, did this conduct violate ORS 243.672(1)(e)?

²"John Doe" is a pseudonym.

15. Should TriMet be ordered to pay a civil penalty to ATU?³

RULINGS

I. ATU motion to amend complaint after answer was filed

ATU filed its original complaint on November 10, 2005. ATU filed a sixth amended complaint on June 29, 2006. After TriMet filed its answer to the sixth amended complaint, ATU Counsel Stoner wrote the ALJ on October 5, 2006, and stated that ATU had “a few minor corrections and additions” to make to its sixth amended complaint. In her letter, Stoner noted that several allegations in ATU’s sixth amended complaint stated claims for violations of ORS 243.672(1)(e). Stoner asserted that these allegations were also sufficient to state claims for violations of ORS 243.672(1)(f) because TriMet failed to comply with the notice requirements of ORS 243.698(2). Stoner stated that for these allegations, ATU “will therefore be alleging a [subsection] (1)(f) violation as well [as a subsection (1)(e) violation] although the evidence remains unchanged.”

TriMet objected to what it construed as ATU’s motion to again amend its complaint. At the start of the hearing, the ALJ announced that he would defer ruling on ATU’s request until his Recommended Order. In his Recommended Order, the ALJ considered ATU’s October 5 letter as a motion to amend its complaint for the seventh time and denied the motion.

Also at the start of the hearing, ATU moved to add an allegation that TriMet had changed its past practice of providing leave documents to ATU. TriMet objected and the ALJ denied the motion.

³Prior to issuance of the Recommended Order, ATU withdrew the following claims: that TriMet violated ORS 243.672(1)(e) by breaching a grievance settlement regarding assistant supervisor pay; that TriMet violated ORS 243.672(1)(e) and (h) by breaching a grievance settlement agreement regarding plant maintenance technician work; that TriMet changed a past practice regarding leaves of absence in violation of ORS 243.672(1)(e); that TriMet violated a grievance settlement regarding plant apprenticeship training pay in violation of ORS 243.672(1)(e); and that TriMet reassigned the buyer position duties to lower paid, non-bargaining unit members in violation of ORS 243.672(1)(e). Under OAR 115-035-0015, a party is permitted to withdraw a claim for any reason prior to issuance of a Recommended Order. Accordingly, these claims are not before us and we have not listed them in the statement of issues.

Under OAR 115-035-0010(2), a party may amend an unfair labor practice complaint on its own motion before the ALJ serves the complaint. After the complaint is served, an amendment may be made only with the ALJ's approval. Because ATU sent its October 5 letter and made its motion to amend at the hearing after TriMet filed its answer, these amendments needed the ALJ's approval. We recently clarified the standards we use to determine whether an ALJ properly exercises discretion in permitting or denying a late amendment. *Wy'East Education Association/East County Bargaining Council/Oregon Education Association, et al. v. Oregon Trail School District No. 46*, Case No. UP-16-06, 22 PECBR 668, 671 (2008). One important factor for the ALJ to consider is "the orderly presentation of evidence and other practical concerns that may arise if an amendment were to be allowed in a particular case." *Id.* Consistent with this principle, we recognize that at some point, in the interests of managing the litigation process and facilitating the orderly presentation of evidence and argument, it may be necessary to close the door on an ever-expanding series of controversies and legal theories. The amended complaint which ATU proposed in its October 5 letter would have been the seventh complaint filed by ATU in this case, a case which was already overburdened by the many issues raised in ATU's six other complaints. ATU did not explain why it delayed in asserting these claims. The ALJ properly exercised his discretion in denying ATU's motion to amend its complaint for the seventh time, 11 months after the original complaint was filed.

2. Motions for Sanctions

ATU alleges that TriMet violated the Public Employee Collective Bargaining Act (PECBA) by failing to timely schedule grievance meetings at Steps 1 and 2 of the grievance procedure. On October 17, 2006, TriMet subpoenaed calendars "for any union officer or representative, upon [which] grievance matters are scheduled." On November 15, 2006, ATU responded that "[t]he Union doesn't put grievance matters on calendars so no documents exist." However, on November 21, ATU gave TriMet a "partial unofficial calendar" which it said was recently discovered.

The record shows that from approximately 1988 through January or February 2006, ATU Executive Secretary Helen Nickum kept a monthly desk blotter calendar that recorded appointments for union officers. These appointments included grievance meetings. Most of the calendars were eventually discarded.⁴ Nickum's successor, Currie Reese, used a computer software program to track grievances and

⁴ It is not clear from this record when these calendars were discarded. There is, however, no evidence that ATU discarded the calendars after receiving TriMet's subpoena.

record the ATU president's appointments. ATU gave TriMet some of these computer calendars in its November 21 response to TriMet's subpoena.

In its January 25, 2007 motion for sanctions against ATU, TriMet asks that we infer that "had the calendars been produced, they would have been adverse to the complainant's position." TriMet argues that this inference is warranted by "the complainant's failure to produce the subpoenaed documents, first by failing to respond, then denying their existence, and then at hearing contending that they had been discarded without satisfactory explanation." TriMet does not state what the specifics of such an inference would be. The ALJ refused to make the evidentiary inference TriMet requested.

A party's unexplained failure to produce evidence in support of its position warrants an inference that the evidence is actually unfavorable to the party. *Wy'East Education Association v. Oregon Trail School District*, 22 PECBR at 675. We note, however, that ATU explained its failure to produce the calendars TriMet requested in its subpoena: ATU discarded them. In addition, ATU's allegations regarding grievance Step 1 conferences and grievance Step 2 meetings concern TriMet's alleged delays in *scheduling* these meetings. The calendars sought by TriMet would reveal the dates on which certain conferences or meetings were actually held, but would provide no relevant information about how and when these conferences and meetings were scheduled. Because the calendars TriMet sought through its subpoena are not relevant to the issues in ATU's complaint, and because ATU adequately explained its failure to produce them, we will not infer that the calendars ATU failed to produce would have been unfavorable to its case.

On January 24, 2007, ATU filed a motion for sanctions against TriMet. ATU stated that its counsel inspected many documents at TriMet's offices and marked the documents she wished to have copied. ATU alleges that TriMet failed to give ATU one of these marked documents—an e-mail in which a TriMet employee supposedly stated that ATU was always "bringing up junk." ATU asked that we infer, based on TriMet's unexplained failure to produce this e-mail, that the document would have been unfavorable to TriMet because it would demonstrate anti-union animus.

ATU also alleged that TriMet improperly withheld Exhibits R-56, R-60, and R-61 because it failed to produce these documents prior to the hearing and then subsequently offered them as exhibits at the hearing. ATU asked that the ALJ refuse to admit these three exhibits. We refuse to infer that the document TriMet allegedly withheld contained evidence favorable to ATU. Assuming *arguendo* that the document existed, ATU has failed to demonstrate that a complaint by a TriMet employee—that

ATU was always “bringing up junk”—has any particular relevance to the specific allegations in ATU’s complaint.

The ALJ properly refused to admit Exhibits R-56, R-60, and R-61 which are relevant only to ATU’s claim that TriMet changed a past practice in regard to employee leaves of absence. As noted above, ATU withdrew this claim.

3. TriMet’s motion to reopen the record to admit a document regarding Wallace’s alleged embezzlement of ATU funds

On March 14, 2007, after the evidentiary record closed, TriMet moved to reopen the evidentiary record to receive a document which discussed alleged embezzlement by ATU witness Tom Wallace. During the events at issue in this case, and at the time he testified at the hearing, Wallace was ATU financial secretary/treasurer/recording secretary, one of ATU’s three full-time executive officers.

The document at issue, marked as Exhibit R-71,⁵ is a February 2007⁶ letter from ATU President Jonathan Hunt to ATU members which discusses Wallace’s alleged embezzlement of ATU funds. The letter’s statements about Wallace generally appear to be based on statements obtained from other, unnamed parties. The ALJ refused to reopen the record to admit Exhibit R-71.

After a hearing record has closed, we will reopen it to consider additional evidence

“only upon a showing that such evidence is material to the issues and was unavailable at the time of hearing, or there was some other good and substantial reason the evidence was not presented at hearing.” *Graduate Teaching Fellows Federation Local 3544, AFT, AFL-CIO v. Oregon University System*, Case No. UP-18-00, 19 PECBR 496, 498 (2001), citing *Cascade Bargaining Council v. Bend-LaPine School District No. 1*, Case No. UP-33-97, 17 PECBR 609, 610 (1998).

⁵The Respondent marked its exhibits with the prefix “E ” We have substituted “R” throughout.

⁶The letter itself bears no date. TriMet’s counsel attached contemporaneous copies of news reports from *The Oregonian* on the subject. An article dated February 21, 2007, quotes from Hunt’s letter.

ATU agrees that the February 2007 letter was unavailable at the time of the December 2006 hearing, but argues that it is inadmissible as “unreliable and immaterial impeachment evidence” and “unreliable hearsay.”

Under OAR 115-010-0050, we will admit “[e]vidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs” and exclude evidence that is irrelevant, immaterial, or unduly repetitious.

Rule 608 of the Oregon Evidence Code provides that for purposes of attacking the credibility of a witness, specific instances of the witness’ conduct, other than conviction of a crime, may not be proven by extrinsic evidence. Rule 609 of the Code limits admissibility of evidence of conviction to crimes “punishable by death or imprisonment in excess of one year” or involving “false statement or dishonesty.”

Based on these rules, we conclude that the February 7 letter is inappropriate impeachment evidence. The letter accuses Wallace of embezzling funds from ATU, but does not state that he was convicted of any crime. Thus, the letter is extrinsic evidence of Wallace’s conduct that does not involve conviction of any crime. In addition, the evidence in the letter is immaterial to the issues in this case. The ALJ appropriately declined to reopen the evidentiary record to accept Exhibit R-71.

4. TriMet’s motion to reopen the record to admit evidence of Wallace’s guilty plea

On July 18, 2008, after the Recommended Order had been issued and prior to oral argument before this Board, TriMet moved to reopen the record to receive R-72, which is a copy of ATU Treasurer Wallace’s guilty plea in U.S. District Court to the crime of forgery under 18 USC § 513.⁷

As discussed above, we will reopen a record to receive additional evidence only if a party can show that the evidence is material to the issues and was unavailable at the time of the hearing. ATU does not dispute that the evidence regarding Wallace’s guilty plea was unavailable at the time of the hearing, since Wallace entered his guilty plea on May 20, 2008, more than eight months after the record closed. ATU contends,

⁷Under 18 USC § 513(a), making, uttering, or possessing “a forged security of a State or political subdivision * * * or of an organization, with intent to deceive another person, organization, or government” is a crime punishable by a fine of up to \$250,000 or a prison sentence of up to 10 years, or both

however, that any evidence concerning Wallace's credibility is not material to the facts in this case.

As we noted in our previous discussion, Rule 609 of the Oregon Evidence Code limits the type of conviction that may be used to attack a witness's credibility: it must be a crime "punishable by death or imprisonment in excess of one year" or one involving a "false statement or dishonesty." Wallace testified extensively at the hearing. The crime to which he pled guilty involves dishonesty and is punishable by a prison sentence of more than one year. For these reasons, we conclude that the evidence concerning Wallace's guilty plea is appropriate impeachment evidence that is material to the issues in this case. We will reopen the evidentiary record and admit Exhibit R-72.

5. Withdrawal of claims

As noted in footnote 3, ATU withdrew several claims prior to issuance of the Recommended Order. However, as to each of these claims, ATU requested that "the facts underlying these claims be considered in relation to TriMet's affirmative defenses and ATU's request for a civil penalty."

ATU has not explained why these claims are relevant to TriMet's affirmative defenses. We will not consider the withdrawn claims in analyzing TriMet's affirmative defenses. We will also deny ATU's request that we consider the facts underlying these withdrawn claims as a basis for a civil penalty. Under ORS 243.676(4)(a), an award of a civil penalty must be based on an unfair labor practice complaint that has been "affirmed." Each of the claims that ATU withdrew alleges a separate unfair labor practice based on a discrete set of facts. Because we have not affirmed that the actions alleged in these dismissed claims constitute unfair labor practices, this conduct cannot be the basis for a civil penalty.

6. Dismissal of untimely claims

Under ORS 243.672(3), an unfair labor practice complaint must be filed "not later than 180 days following the occurrence of an unfair labor practice." A number of ATU's claims concern actions that occurred more than 180 days before November 10, 2005, the date on which the original unfair labor practice was filed. ATU alleges that TriMet unlawfully delayed processing grievances at the first three steps of the grievance procedure in violation of ORS 243.672(1)(a), (c) and (e); many of the alleged delays occurred outside of the 180-day period. ATU alleges that TriMet violated ORS 243.672(1)(e) by denying ATU's requests to extend the 30-day time limit to demand arbitration at Step 4 of the grievance process. TriMet first announced its refusal

to grant such extensions on February 9, 2005—more than 180 days before the unfair labor practice complaint was filed.

We begin our analysis with the plain wording of the statute, which provides that a complaint is timely if filed no later than 180 days after the “occurrence” of the unfair labor practice. ORS 243.672(3). *Rogue River Education Association/Southern Oregon Bargaining Council/OEA/NEA v. Rogue River School District No. 35*, Case No. UP-17-08, 22 PECBR 577, 580 (2008), *appeal pending*. In its claims concerning delays in the first three steps of the grievance procedure, and its claim that TriMet refused to extend the 30-day time limit to demand arbitration, ATU alleges that TriMet took a number of unlawful actions on or after May 14, 2005—within the 180-day limitation period. These allegations are timely.

In regard to TriMet’s allegedly unlawful conduct *before* May 14, 2005, in its claims concerning delays in the grievance procedure and TriMet’s refusal to extend the deadline to demand arbitration, we will consider these events as “background to explain the significance of an allegedly unlawful act occurring within the 180-day period.” *Oregon School Employees Association v. Port Orford-Langlois School District 2J*, Case No. UP-54-92, 13 PECBR 822, 823 (1992). As the Court of Appeals has stated, evidence of conduct outside of the 180-day period may “shed light on the state of mind of those responsible” for the unlawful activities occurring within the 180-day period. *Smith v. Employment Division*, 38 Or App 241, 245, 589 P2d 1184 (1979).

7. Contract violation claims brought under ORS 243.672(1)(e) instead of (1)(g)

ATU alleges that a number of TriMet’s actions violated ORS 243.672(1)(e) by breaching the provisions of various written agreements. Specifically, ATU asserts that TriMet violated subsection (1)(e) by: failing to promptly schedule grievance pre-filing conferences and Step 2 grievance meetings as required by the contract; failing to schedule enough Step 3 Joint Grievance Committee meetings in violation of the contract; violating an agreement that it would not use a document concerning Doe for disciplinary purposes; violating the collective bargaining agreement by refusing to hear grievances regarding family medical leave; violating a Joint Grievance Committee decision barring TriMet’s procurement department from doing the work of the purchasing department; and violating a grievance settlement agreement that applicants for the position of assistant storekeeper would not be required to have computer skills.

An employer that fails to comply with the provisions of a collective bargaining agreement or other written agreement violates ORS 243.672(1)(g), which makes it an unfair labor practice for an employer to violate the terms of a “written contract with respect to employment relations * * *.” See, e.g., *City of Athena v. Martin Ray*, Case No. UP-25-92, 13 PECBR 790, 794-95 (1992); *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-5-06, 22 PECBR 224, 231 (2008). ATU’s allegations, listed in the above paragraph, concern violations of various written agreements between ATU and TriMet. As such, they do not state a claim for relief for bad faith bargaining under ORS 243.672(1)(e). *Laborers’ International Union of North America, Local 483 v. City of Portland*, Case No. UP-12-06, 22 PECBR 12 (2007)

We will dismiss ATU’s claims that TriMet’s alleged delays in the first two steps of the grievance procedure, and alleged failure to schedule enough Joint Grievance Committee meetings, violated subsection (1)(e). We will, however, consider ATU’s allegations that these alleged delays violated other provisions of the PECBA. We will also dismiss TriMet’s claim that ATU violated subsection (1)(e) when it failed to comply with the terms of an agreement prohibiting it from using a document concerning Doe for disciplinary purposes. We will, however, consider TriMet’s allegations that breaching the Doe agreement violated subsection (1)(g).

Finally, we will dismiss the following claims in their entirety, since they allege only violations of subsection (1)(e): the claim that TriMet violated the collective bargaining agreement by refusing to hear family medical leave grievances; the claim that TriMet violated a Joint Grievance Committee decision concerning the procurement department; and the claim that TriMet violated an agreement about qualifications for the assistant storekeeper position.

8. Remaining rulings

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

9. Issues remaining for consideration

The allegations remaining for our decision are ATU’s claims that TriMet delayed grievances at Steps 1 and 2 of the contract grievance procedure in violation of ORS 243.672(1)(a) and (c) (issues 1 and 2);⁸ that TriMet failed to schedule enough Joint Grievance Committee meetings at Step 3 of the grievance procedure in violation

⁸These numbers correspond to those in the list of issues.

of ORS 243.672(1)(a) and (c) (issue 3); that TriMet appointed officials without authority to reach agreement to the parties Joint Grievance Committee in violation of ORS 243.672(b) and (e) (issue 4); that TriMet refused to extend the timeline for demanding arbitration at Step 4 of the grievance procedure in violation of ORS 243.672(1)(e) (issue 5); that TriMet used a document concerning Doe for disciplinary purposes in violation of a written agreement and ORS 243.672(1)(g) (issue 6); that TriMet based the amount it paid employee witnesses at the Doe arbitration on the content of their testimony in violation of ORS 243.672(1)(a) and (d) (issue 8); that TriMet changed the CSI policy in violation of ORS 243.672(1)(e) (issue 12); that a TriMet official denied Williams union representation at a meeting that resulted in discipline in violation of ORS 243.672(1)(a) (issue 13); and that TriMet changed the qualifications for the bargaining unit position of buyer in violation of ORS 243.672(1)(e) (issue 14).

FINDINGS OF FACT

Parties

1. TriMet is a public employer under ORS 243.650(20) and a transit district under ORS Chapter 267. It operates a transit system in Portland and the surrounding tri-county area. TriMet is headed by a board of directors appointed by the governor. Fred Hansen has been TriMet's general manager for more than seven years; he reports to the board. Hansen's duties include the negotiation and execution of collective bargaining agreements with ATU.

2. ATU is a labor organization under ORS 243.650(13) representing a bargaining unit of approximately 2,000 TriMet employees.

3. ATU and TriMet are parties to a collective bargaining agreement effective December 1, 2003 through November 30, 2009. This agreement was signed on April 1, 2005. During the events at issue in this case, ATU President Al Zullo, Vice President Jon Hunt, and Treasurer Tom Wallace were full-time executive officers of ATU, and Sam Schwarz, Chad Mather, and Kevin Kinoshita were ATU executive board members.⁹

⁹On July 1, 2006, Zullo left ATU office, Hunt became president, and Schwarz became vice president.

Step I Grievance Process

4. The 2003-2009 collective bargaining agreement contains a grievance procedure. The grievance procedure covers contract disputes and employee discipline:

“It is hereby agreed that the properly accredited officers of the District shall meet and treat with the properly accredited officers of the Association on all grievances relating to any alleged violation of any provision of this Agreement or concerning the suspension, discharge, or other discipline of any employee covered by this Agreement (except during the employee’s probationary period). All such grievances when filed by the Association or an employee shall be processed through the procedures set out in Sections 3 and 4 of this Article.”

5. The grievance procedure has four steps. Step 1, a new addition in the 2003-2009 collective bargaining agreement, provides for an informal discussion between the grievant and the grievant’s supervisor:

“Before filing a grievance, the aggrieved employee and/or the Union will attempt to resolve the issue informally through the use of a pre-filing conference. A request for a pre-filing conference must be submitted within thirty (30) days from the date of the alleged violation. The pre-filing conference meeting shall include the grievant, the first-line, non-union supervisor of the grievant (“immediate supervisor”) and the Association’s representative assigned to the grievant’s work unit. *No grievance may advance to Step II without a pre-filing conference meeting first occurring.* The grievant, the grievant’s immediate supervisor, and the representative of the Association will meet to discuss the circumstances in an attempt to resolve the issue(s) raised by the grievant. The grievant shall describe the nature of the issue(s) and present relevant facts surrounding the issue(s) to the immediate supervisor and the Association’s representative. *The immediate supervisor will then attempt to resolve the grievant’s issues, render a decision, and memorialize this decision in a determination letter within 48 hours (two business days) from the time of the pre-filing conference.*” (Emphasis added)

If the employee is not satisfied with the supervisor's decision, he or she has 30 days from the date of the determination letter to file a "formal grievance" at Step 2 of the grievance procedure.¹⁰

6. The parties agreed to the new Step 1 process because they wanted to provide an opportunity to resolve employee problems before they became formal grievances; in this way, they hoped to reduce the time and resources devoted to grievance processing.

7. In December 2003, TriMet created the Workforce Development Department and hired its director, Evelyn Minor-Lawrence, to manage and oversee the grievance administration process.

Later in December 2003, TriMet hired Cynthia Wegesend to fill a newly added position in the Workforce Development Department. An important part of Wegesend's job was to improve the processing of grievances.

8. Although the parties intended that Step 1 grievance conferences be scheduled promptly, the parties' contract contained no express timeline and TriMet managers found it difficult to do so.

9. It took TriMet staff four to eight "person hours" to schedule one Step 1 grievance conference. This time was spent entering the request for a Step 1 conference in the database, notifying the appropriate supervisor and manager about the matter, providing research assistance and advice to them, and reviewing and assisting supervisors and managers in preparing the appropriate paperwork.

10. On January 20, 2004, ATU President Zullo wrote TriMet General Manager Hansen to complain about a particular manager's slowness in scheduling Step 1 conferences.

11. In May 2004, TriMet hired Christine Stevens to fill another newly added position in the Workforce Development Department. A major part of Stevens' job was grievance processing.

¹⁰The process is different for disciplinary grievances: "In cases where the District proposes to discipline an employee, the meeting of the employee, the Association's representative, and the District's management representative levying the discipline will take the place of the pre-filing conference, and the employee has fifteen (15) days from the date the discipline is levied to file a grievance."

12. On June 10, 2004, Zullo wrote Workforce Development Director Minor-Lawrence to complain about 26 Step 1 grievance conferences that had not been promptly scheduled

13. In October 2004, TriMet managers sent a memorandum to supervisors regarding the "Pre-Filing Conference Process." In the memo, the managers recommended that supervisors schedule Step 1 conferences within seven days of receiving a request for one. However, delays continued to occur in scheduling Step 1 conferences and on October 7, November 4, and December 30, 2004, ATU sent TriMet managers reminders of grievances for which no Step 1 conference had been scheduled.

14. On December 24, 2004, TriMet's Executive Director Robert T. Nelson responded to a letter from Zullo about delays in scheduling the Step 1 conferences. In his letter, Nelson acknowledged that the parties had met three times to discuss the Step 1 conferences. Nelson noted that ATU and TriMet continued to disagree about how the conferences were to be scheduled and how much documentation was needed for the conferences. Nelson offered to meet with Zullo to attempt to resolve these disagreements.

15. On January 3, 2005, Zullo wrote Hansen to complain that TriMet managers were failing to timely schedule Step 1 conferences. Zullo enclosed a bundle of 12 Step 1 reminder letters with his letter.

16. During March 2005, the members of the TriMet and ATU Joint Labor Relations Committee participated in discussions with Mediator Paul Stuckenschneider about problems with the grievance process. The discussions resulted in a March 2005 draft of guidelines for Step 1 meetings which stated that the Step 1 meetings could occur on the spot when the dispute arose, or later, and could be conducted without an ATU representative present. ATU did not agree to this procedure.

17. On September 6, 2005, ATU Executive Secretary Nickum complained to Wegesend about a TriMet manager's confusion in regard to scheduling Step 1 conferences. Nickum stated, "Perhaps [this] misunderstanding is shared by others, which may account for the lack of action on the 100-some [Step 1] requests that are outstanding. I don't think we've ever had so many that are just being ignored."

18. On November 8, 2005, Zullo informed Hansen that ATU intended to file an unfair labor practice on a number of issues, including TriMet's "Wholesale Failure to Perform" regarding Steps 1, 2, and 3 of the grievance process. Hansen responded that he was willing to discuss the issue

19. On November 10, 2005, Hansen wrote Zullo to address concerns “about some apparent lapses in the timely scheduling of grievances as called for by our labor agreement.” Hansen wrote, “I’ve consulted with Operations staff and am assured that you will see more complete compliance in the future. My understanding is that Cynthia Wegesend had already begun the follow-up and to arrange the scheduling with your office upon receipt of the individual letters.”

20. In January 2006, Zullo wrote Michael Ford, TriMet’s director of transportation, to request that TriMet schedule Step 2 grievance hearings in a number of cases where no Step 1 conference had been held or no Step 1 determination letter issued.

21. On February 10, 2006, ATU Counsel Susan Stoner faxed TriMet’s counsel some statistics compiled by the ATU staff that showed that the number of cases awaiting scheduling of Step 1 conferences had grown from 179 to 250.

22. On April 22, 2006, ATU Vice President Hunt wrote Hansen to complain that more than 257 cases had been awaiting a Step 1 conference for more than 10 days.

Hansen responded to Hunt’s letter, noting that the collective bargaining agreement imposed no deadline on TriMet managers to schedule Step 1 conferences. Hansen also stated that Step 1 and Step 2 meetings “need to and will be scheduled more promptly.”

23. On May 3, 2006, ATU Executive Secretary Reese complained to Work Force Development Director Minor-Lawrence about 236 Step 1 conference requests to which TriMet had not responded.

24. In response to TriMet managers’ failure to schedule Step 1 meetings, ATU began to attempt to move some grievances to Step 2 without a Step 1 meeting.

25. Prior to the implementation of the new Step 1, the number of first stage grievances filed was 137 in 2001, 183 in 2002, and 224 in 2003. After the new Step 1 was added to the collective bargaining agreement, the number of filings at that new step was 244 in 2004, 326 in 2005, and 257 between January 1 and November 15, 2006.

26. In 2005, it took an average of 51 days to schedule the Step 1 meeting. In 2006, it took an average of 27 days.

27. By October 2005, TriMet issued Step 1 determination letters as follows:

- 16.5 percent issued within 1-19 days of the Step 1 conference request;
- 28.3 percent issued within 20-99 days of the Step 1 conference request;
- 42.2 percent issued within 100-199 days of the Step 1 conference request;
- 12.8 percent issued within 200-249 days of the Step 1 conference request.

28. By October 2006, TriMet issued Step 1 determination letters as follows:

- 2.5 percent issued within 1-19 days of the Step 1 conference request;
- 50 percent issued within 20-99 days of the Step 1 conference request;
- 14.8 percent issued within 100-199 days of the Step 1 conference request;
- 22.4 percent issued within 200 or more days of the Step 1 conference request.¹¹

Step 2 Grievance Process

29. The parties' Step 2 procedure involves a meeting with TriMet, an ATU representative, and the grievant. The 2003-2009 collective bargaining agreement describes Step 2 of the process as follows:

“Such grievance shall be presented in writing to the appropriate Department Director specifying the date of submission. A representative of the Association shall accompany the employee. If the Department Director, or his designee, and the grievant are unable to arrive at a satisfactory settlement, the Department Director, or his designee, will provide a written answer to the Association within seven (7) days after the date the grievance was first presented.”

¹¹ All percentages in Findings of Fact 27 and 28 are approximate.

30. Between October 2004 and October 2005, ATU submitted an average of 22 Step 2 grievances per month. During the next twelve months, the number of Step 2 grievances increased to an average of 30 per month. Some of the increase was caused by ATU's decision to move grievances to Step 2 because TriMet had not scheduled the Step 1 conference. The increase was also caused by the backlog of grievances working through the system.

31. By October 2005, TriMet scheduled Step 2 grievance meetings as follows:

- 16 percent scheduled within 1-19 days of the request;
- 49.2 percent scheduled within 20-99 days of the request;
- 16.3 percent scheduled within 100-199 days of the request;
- 17.6 percent scheduled 200 days or more from the date of the request.

32. Between October 2005 and October 2006, TriMet scheduled Step 2 grievance meetings as follows:

- 17.8 percent were scheduled within 1-19 days of the request for a Step 2 hearing;
- 62 percent were scheduled within 20-99 days of the request for a Step 2 hearing;
- 12.8 percent were scheduled within 100-199 days of the request for a Step 2 hearing;
- 7.2 percent were scheduled 200 or more days from the date of the request for a Step 2 hearing.¹²

33. In a number of letters—dated January 3, 2005, February 3, 2005, March 24, 2005, November 4, 2005, February 6, 2006, April 14, 2006, April 20, 2006, and May 3, 2006—ATU complained about TriMet's delays in processing Step 2 grievances.

TriMet generally failed to respond to these letters of complaint. Sometimes ATU would place the unscheduled Step 2 grievance onto the Step 3 panel schedule. TriMet would then decline to allow the panel to consider the grievance and instead scheduled a Step 2 grievance hearing.

¹²All percentages in Findings of Fact 31 and 32 are approximate

Step 3 Grievance Process

34. The 2003-2009 collective bargaining agreement describes the Step 3 grievance process as follows:

“To be timely, the Association must,

“Refer the grievance to the Grievance Committee within seven (7) days.

“a. Within seven (7) days after the date of receipt of such written grievance, the Grievance Committee shall convene and consider the grievance.

“b. The Grievance Committee shall be composed equally of no less than two (2) bargaining unit members designated by the Association and two (2) non-bargaining unit persons designated by the employer. The Grievance Committee shall decide, by majority vote, whether to sustain or reject the grievance, and its decision shall be binding. Grievance Committee members will be paid by the District

“c. If the Grievance Committee is deadlocked, to be timely, the Association must,

“STEP IV

“Submit the grievance to the appropriate agencies created by law to mediate, conciliate, or adjust labor disputes, as provided in Paragraph 4 of this section within thirty (30) days.”

35. From January 2004 to late 2006, ATU Executive Board Officers Mather, Conner, Schwarz, and Kinoshita, as well as ATU members, Greg McGrew, Shirley Black and Michel Oliver served on the Step 3 Joint Grievance Committee for ATU. ATU's Step 3 representatives had full authority to make grievance decisions and were not instructed how to decide particular grievances.

36. From January 2004 through May 2005, TriMet Directors Sexton and Ford represented TriMet on the Step 3 Grievance Committee. They exercised full authority to settle the grievances that were presented to the panel.

37. On January 10, 2005, ATU President Zullo faxed a request to Hansen asking TriMet to agree to hold more than one Step 3 Grievance Committee meeting per month. Zullo stated that it was “necessary to hold two Step 3 hearing days a month until we get caught up.” In March 2005, the parties met to discuss this issue, among others. As a result of these meetings, TriMet officials concluded that ATU had agreed to engage in a six-month trial period of changes in the grievance procedure. The changes included requiring that full-time ATU officers sit on the panel, refusing to allow the grievant to participate, and imposing a one-hour time limit on each hearing. TriMet expressed a willingness to meet every other week and also offered to meet for a longer period of time during their monthly Step 3 grievance meetings.

However, on April 29, 2005, ATU President Zullo wrote TriMet and denied agreeing to any changes in the grievance process and refused to accept any of the proposed terms. ATU refused to meet for a longer time, stating that full-time officers could not be available. During discussions about changes in the grievance process, ATU and TriMet agreed to cancel the Step 3 meetings. In late April 2005, ATU told TriMet that it expected the Step 3 Grievance Committee to return to a regular meeting schedule in May to address the backlog.

38. TriMet Transportation Director Ford and Human Resources Director Sexton left the panel shortly after negotiations to change the Step 3 procedure failed. Their last Step 3 hearing was on May 26, 2005.

TriMet replaced Ford and Sexton with lower-level managers who were far less experienced in Step 3 grievance resolution. On one occasion, a new TriMet representative expressed reluctance to overrule higher ranking managers. On at least six occasions, the TriMet panel members heard grievances which were based on their own supervisor’s decision, or one that was appealed from that supervisor’s Step 2 decision. On at least one occasion, a new panel member said he could not overturn his direct supervisor’s Step 2 decision.

39. When Directors Sexton and Ford were members, panel deliberations sometimes lasted hours. With the new panelists, discussion over some grievances ended in 10 minutes. ATU Executive Board Member Mather believed that the new TriMet panel members had been given instructions from TriMet regarding how they were to decide the grievances, leaving no room for compromise.

40. ATU Executive Board Members Conner and Mather left the panel in late 2006. Mather left because of frustration over the panel's inability to reach resolutions.

41. On October 20, 2004, there were 23 Step 3 grievances for which no Grievance Committee hearing had been scheduled. On November 9, 2005, there were 34 Step 3 grievances for which no Grievance Committee hearing had been scheduled. On September 13, 2006, there were 58 Step 3 grievances for which no Grievance Committee hearing had been scheduled. ATU believed that this back log of Step 3 grievances was unacceptable, and periodically sent TriMet a list of grievances waiting to be heard at Step 3.

42. Before Ford and Sexton left the Step 3 panel, 70.3 percent of the grievances submitted at Step 3 were resolved. After Ford and Sexton left the Step 3 panel, 47.5 percent of the grievances submitted at Step 3 were resolved. As a result, ATU took more grievances to arbitration, where its success rate improved.

43. ATU members regularly complained to ATU executive board members about delays in the grievance procedure. ATU members told ATU Executive Board Member Jim Fowler that they were frustrated with the process.¹³ Members told Vice President Hunt that they were angry about a grievance that had not been resolved after two years and that Hunt and President Zullo had not done a very good job.

ATU members complained to Executive Board Member Schwarz, saying such things as "What good does it do to file a grievance? It's not going to be heard in a timely manner anyway. By the time I get this settled, I'll be retired."

44. TriMet's delay in grievance processing became an issue in the ATU's internal elections. ATU's elections were held in 2005, when the grievance process had substantially broken down.¹⁴

¹³ATU Executive Board Member Fowler testified that unnamed members reported that TriMet managers had said that the problem with the grievance process lay with ATU. We do not find this second-level hearsay about unnamed TriMet managers to be sufficient to find that such statements were made.

¹⁴Hunt claimed, without referring to any specific evidence, that TriMet was trying to keep him from being elected president. We find that the record does not support Hunt's claim.

45. During the crisis in grievance processing, ATU did not engage in grievance screening or prioritizing, member education, or any form of triage in order to reduce delay and mitigate its damages.

Step 4 Grievance Process

46. Under Article 1, Section 3, paragraph 2 of the 2003-2009 collective bargaining agreement, ATU may submit grievances unresolved at Step 3 of the grievance procedure “to the appropriate agencies created by law to mediate, conciliate, or adjust labor disputes, as provided in paragraph 4 of this section within thirty (30) days [of the Step 3 decision].” Paragraphs 3 through 5 of the agreement describe the procedures for requesting arbitration for a grievance.

47. Prior to 2005, TriMet routinely granted ATU requests to extend the 30-day deadline to request arbitration in a grievance.

48. In an e-mail dated February 9, 2005, TriMet manager Tony Bryant told ATU President Zullo and Treasurer Wallace that he would agree to extensions of the deadline to demand arbitration in two grievances. Bryant warned, however, that “from this day forward there will be no extension requests granted for arbitration decisions from ATU.”

49. By letter dated August 15, 2005, TriMet Transportation Director Ford denied Zullo’s request for an extension of the 30 day deadline to demand arbitration for a grievance.

Agreement regarding use of Doe document in discipline

50. In 2003, the parties learned of allegations that bargaining unit member Doe was harassing and intimidating other bargaining unit member employees, in part by claiming influence in ATU. ATU and TriMet each agreed to investigate the matter. They orally agreed that a report of the ATU investigation would be provided to TriMet, but only upon the condition that TriMet not use the report for discipline.

51. On May 30, 2003, TriMet Labor Relations Director Mike Savage sent an e-mail to TriMet Counsel John Acosta in which he stated that he was moving forward on the Doe matter, and that he and Zullo agreed that “we [TriMet] will use nothing from the ATU investigation.” In his reply to Savage, Acosta said “I know that we agreed not to use the ATU investigation and we won’t.”

52. On June 17, Savage forwarded the May 30 e-mails he exchanged with Acosta to Zullo with the message, "Al, per your request. Please let me know that you received this." Zullo replied,

"Mike,

"Thank you. *I was glad to see your word was good on this.* Just for the record and to be crystal clear, the Union's 'investigation' found no evidence of any wrongdoing by [Doe]. Thanks again, Al" (Emphasis added.)

53. An ATU official investigated the Doe matter and provided Zullo with a two-page report, which noted at its beginning that it was submitted "as per the agreement reached with Mike Savage, Tom Neilson and yourself." Zullo forwarded the memo to TriMet. In the end, Doe was not disciplined for the matters investigated in 2003.

54. In late 2004 or early 2005, TriMet considered disciplining Doe for later conduct similar to that raised in the 2003 allegations. Acosta evaluated Doe's situation and advised TriMet's Director of Maintenance Tony Bryant regarding the level of discipline that TriMet should impose on Doe. In evaluating the level of discipline, Acosta considered the 2003 ATU investigation report as relevant to Doe's "credibility."

55. Acosta did not mention the 2003 Doe report in his conversation with Bryant about the proposed discipline of Doe, and Bryant did not use the report in his evaluation of the appropriate discipline. Bryant decided that Doe should be suspended. ATU pursued a grievance over the suspension to arbitration.

56. While testifying at the Doe arbitration, Acosta discussed the 2003 ATU investigation report in response to a question from TriMet's counsel. The document was then produced by TriMet at the request of ATU's counsel, and used by ATU counsel in their cross-examination of Acosta. The arbitrator ultimately reduced Doe's suspension to a written warning.

Payment for witness testimony

57. TriMet had a longstanding policy of paying applicable wages to employee witnesses who testified favorably on TriMet's behalf in any civil proceeding, regardless of whether the proceeding involved ATU. TriMet paid its employee witnesses time and a half for "travel time," "wait time," and time they spent testifying.

58. When TriMet subpoenaed employee witnesses whose testimony was adverse to TriMet it paid only the statutorily required witness fees.¹⁵ For example, when TriMet subpoenaed a TriMet employee to appear at a deposition in a Multnomah County Circuit Court case in which TriMet was a defendant, and the witness was adverse to TriMet, it paid the witness \$5.00, and the witness was required to take leave from work at TriMet to attend the deposition.

59. In June 2005, at an arbitration involving grievant Doe, TriMet paid six bargaining unit witnesses who testified against Doe according to the terms of the policy identified above. Each of these six bargaining unit members received \$276 in salary; this represented eight hours at time-and-a-half pay. TriMet did not pay witnesses for ATU. ATU paid its subpoenaed TriMet employee witnesses the statutory rate plus lost time from TriMet work.

60. The collective bargaining agreement between the parties does not address payment for witnesses in arbitrations.

Buyer qualifications

61. In 1997, TriMet posted an opening for a buyer position in its Stores Department. The job description attached to the posting stated in part:

“Prerequisites:

“* * * * *

“* * * *Within 60 days, achieve proficiency in the use of Tri-Met’s computerized purchasing and inventory control system.*

“Selection Criteria:

“ * * * * *

“5. Basic knowledge of *and/or the ability to learn and apply* skills in PC operation including Windows 95/NT, word processing and spreadsheet basics.” (Emphasis added.)

¹⁵See ORS 44.415(2)

62. On May 2, 2006, TriMet Human Resources Director Sexton e-mailed ATU Treasurer/Recording Secretary Wallace the following:¹⁶

“We will soon be posting for a buyer and wanted to give you a courtesy heads-up regarding computer skills. The old description listed the need for CRT skills and of course no one has used CRT’s [*sic*] for years, using Microsoft products instead. Therefore we will be screening for the Microsoft skills and they are now listed in the selection criteria. I’ve attached a copy of the job description for your convenience.”

63. The job description attached to Sexton’s e-mail included the following:

“Prerequisites:

“High school graduate or equivalent.

“Minimum one year *experience* in the TriMet Purchasing Department or comparable purchasing employment. *Successful completion of course work* in an introduction to public purchasing type class may be substituted for part of the purchasing experience requirement. *Successful completion of Oracle Purchasing Module training* relating to purchasing methods of inquiry and system maintenance.

“Or any equivalent combination of training and experience.

“Selection Criteria:

“* * * * *

“7. *Ability to use Excel spreadsheets* to track and report on price quotes and to track order history and other purchasing related statistical data.

¹⁶The record does not reveal whether ATU had received any other versions of this job description between 1997 and May 2, 2006.

“8. Ability to use WORD for producing agency and vendor correspondence and to create purchasing reports and other word processing documents related to the purchasing function.

“9. Skill in PC operation with knowledge of web based ordering systems and internet research. Ability to quickly obtain skills in operating a web based purchasing module and basic inquiry into the accounts payable system.” (Emphasis added.)

64. Wallace forwarded the e-mail to ATU Vice President Hunt. Wallace and Hunt also had a telephone conversation about the matter.

65. On May 12, 2006, TriMet posted an opening for a buyer. The posting included the job description supplied to ATU on May 2, 2006, and additional information excerpted below:

“This position is open to current TriMet Stores employees ONLY.

“* * * * *

“Position Requirements (to be considered for this position, you **must** meet the following minimum requirements): High school graduate or equivalent. Minimum one year experience in the TriMet Purchasing or Stores department or comparable purchasing employment. Completion of course work in an introduction to public purchasing type class may be substituted for part of the purchasing experience requirement. Successful completion of Oracle Purchasing Module training relating to purchasing methods of inquiry and system maintenance. Or any equivalent combination of training and experience.

“* * * * *

“Selection Process — Candidates will be selected to advance in the process based on the results of the following screening processes:

- “1. Application Review/Work Record Review
- “2 Supplemental Test—Passing Score of 70% or more
- “3. Panel Interview
- “4. Reference Checks” (Emphasis in original)

66. On May 25, 2006, ATU Vice President Hunt requested that the posting be removed “until the Union and the District negotiate the changes that have been made since this position was last posted.”

TriMet responded that it did not have to bargain over the issue, and would not do so.

67. Stores employees considered the buyer position to be a desirable promotion because the job pays more and involves less physical labor than other Stores positions. Stores employees also considered the ability to learn some of the skills on the job during the 60-day probationary period to be critical to their ability to obtain the job.

68. Two bargaining unit Stores employees, Mike Rushfeldt and Gloria Peterson, applied for the buyer position. On July 6, 2006, TriMet told Peterson that the other applicant had the “highest overall score” from the interview and had been offered the position. Peterson’s supervisor informed her that the other candidate had been selected because of greater purchasing experience, which may have been used in scoring him higher.

69. On July 6, 2006, ATU filed a grievance over the issue of “Buyer’s job posted with changes to job duties, pre-requisites and selection process without negotiating changes with Union.” The record contains no information about the disposition of the grievance

Assistant Storekeeper Position

70. In September or October 2005, TriMet posted a job opening for an assistant storekeeper position. The position required that applicants have the ability to use computer programs such as Oracle, Access, and Excel, and also specified that one of the duties of the position would be ordering critical fluids.

ATU requested a Step 1 grievance conference regarding this job posting, contending that the computer skills had never been a requirement of the position in the past and that ordering critical fluids was a new duty added to the position. The parties were unsuccessful in resolving this grievance.

71. In April 2006, ATU Treasurer Wallace continued his discussion about the assistant storekeeper position with TriMet Manager Greg Haley. In an exchange of e-mails, Haley and Wallace agreed that TriMet would re-post the assistant storekeeper position and eliminate computer skills as a prerequisite for the job. Instead, TriMet would consider applicants who possessed these skills as having an advantage over other applicants.

72. On April 14, 2006, TriMet re-posted the opening for the assistant storekeeper position. The posting stated, in relevant part:

“Note: This position is open to current Stores employees only. Additional computer skills assessment to be conducted and used for informational purposes only – not intended for use as a selection tool.”

Williams disciplinary meeting

73. TriMet has an extensive customer service (CSI) policy. Under the relevant provisions of that policy, customer complaints fall into two categories: “urgent” and “non-urgent.” An “urgent” customer complaint alleges that the operator has engaged in unlawful conduct. The complaint may lead to disciplinary action including termination, criminal charges, or other legal action against the operator. Operators receive written notice of urgent complaints from their supervisors; the supervisor then meets with the operator to investigate the complaint and makes a determination regarding possible discipline.

74. A non-urgent complaint typically does not result in disciplinary proceedings against an operator. Although an operator can choose to receive notice of non-urgent complaints, supervisors are typically not required to notify operators about non-urgent complaints until the operator has accumulated five.

75. At the time of the events at issue, Lorenzo Williams was a TriMet bus operator. His supervisor was Evelyn Warren.

76. On May 19, 2006, while Williams was driving a TriMet bus, a woman passenger stood near the yellow safety line, blocking the narrow aisle and making it difficult for boarding passengers to get to seats.¹⁷ Williams repeatedly asked the woman to take a seat, but each time he did, the woman claimed that she was getting off at the next stop. When the next stop was reached, the woman would remain on the bus. Williams eventually stopped the bus and said he would not proceed until the woman moved. When the woman still would not move, Williams stepped off the bus to get control of his emotions. While he was off the bus, another passenger forced the woman to get off the bus. Williams and the other passenger reboarded the bus, and Williams continued on his route without reporting the incident. The incident was recorded by the bus camera.

77. Williams received an urgent complaint related to the incident and called the ATU office. Williams knew that an urgent complaint could lead to discipline. ATU Executive Board Member Schwarz told Williams not to discuss the urgent complaint with management without ATU representation. Schwarz also told Williams that he should tell TriMet managers that he wished to have his ATU representative present for discussions with them.

78. Warren asked Williams to meet with her on May 30, 2006, to investigate the urgent complaint against Williams. When Williams arrived at the meeting, he asked Warren if Schwarz had contacted her. Warren responded that he had not. Williams told Warren that he should wait for Schwarz, but he just wanted to “get it over” and was willing to discuss the complaint. Warren then proceeded to take Williams’ statements about the May 19 events.¹⁸

¹⁷The evidence in the record is in conflict regarding whether the passenger was in front of or behind the yellow safety line. We need not resolve that issue.

¹⁸At the hearing, Williams testified that Warren began their May 30 meeting by assuring him that she only wanted to get Williams’ version of what happened, and that union representation was not needed. Warren, on the other hand, testified that Williams told her that he should wait for Schwarz, but that he just wanted to “get it over” and was willing to talk with Warren about the urgent complaint. For the following reasons, we find Warren’s testimony to be more credible.

Williams’ testimony regarding the May 30 meeting was somewhat confused. He had difficulty directly answering questions and could remember few details about his meeting with Warren. Williams acknowledged that Schwarz warned him not to discuss the urgent complaint with a TriMet manager unless he had union representation. Williams insisted that he had received two non-urgent complaints around the time of the May 30 meeting, and that he

79. On June 6, Warren issued Williams a written warning regarding the May 19 incident. Williams filed a grievance over the warning, contending in part that Warren had violated his contractual *Weingarten*¹⁹ rights.

80. TriMet Station Manager Hayden Talbot denied Williams' grievance at Step 2 on the basis that Williams chose to disregard the advice of his ATU representative and proceed with the May 30 meeting without an ATU representative present.

81. After the second step, ATU advanced the Williams grievance to Step 3. The grievance was unresolved at the time of hearing.

CSI Policy

82. In 1995, as a result of a highly publicized incident involving a bus operator's misconduct, TriMet sought input from ATU and members of the community to develop a new customer service policy. As a result of this process, TriMet adopted a "Customer Service Policy for Routine Comments and Urgent Complaints" (CSI policy) in 1996.

83. In 1999, TriMet and ATU formed a workgroup to review the CSI policy. The CSI Workgroup included representatives from both parties and recommended a number of changes in the policy.

intended to discuss only these non-urgent complaints with Warren. Williams never described these non-urgent complaints, however, and ATU provided no other evidence of these complaints. (We note that under the terms of the relevant CSI policy, TriMet logs *all* complaints, including non-urgent ones) Warren denied that Williams received any complaints other than the urgent one around the time of the May 30 meeting.

In contrast to Williams, we find that Warren's testimony was clear, consistent and therefore credible. Accordingly, we adopt her version of the May 30 meeting.

¹⁹ We have adopted the U.S. Supreme Court's holding in *NLRB v. Weingarten, Inc.*, 420 US 251 (1975) which provides that a public employee has a right to union representation upon request in an interview with management that the employee reasonably believes could be the basis for discipline. *Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections, Snake River Correctional Institution*, Case No. UP-9-01, 20 PECBR 1, 16 (2002), quoting *Riffle v. City of Portland*, Case No. UP-98-94, 16 PECBR 406 (1996).

Also in 1999, TriMet made changes in the CSI policy. ATU representatives were not consulted or notified about these changes.

84. The parties reactivated the workgroup in 2001, but were unable to agree upon any changes in the CSI policy

85. In 2003, the workgroup met again to consider revisions to the CSI policy. On March 11, 2003, the parties reached agreement on a "CSI Policy Side Letter" that described a one-year pilot program regarding non-urgent complaints. Although ATU asked that TriMet meet to discuss extending the side-letter agreement, TriMet refused to do so.

86. In February or March 2005, ATU Executive Director Schwarz realized that TriMet was no longer notifying ATU about urgent complaints. Although Schwarz considered this to be a major change in the CSI policy and its implementation, he took no action regarding this matter.

87. In August 2005, TriMet made a number of changes to the CSI policy. TriMet did not consult with ATU about these changes, and did not notify ATU that they had been made.

88. In March 2006, a TriMet manager showed Schwarz a copy of the August 2005 CSI policy marked "Draft." Schwarz told ATU President Zullo about the policy. By letter dated March 10, 2006, Zullo wrote Hansen and demanded that TriMet negotiate about changes in the CSI policy.

By letter dated March 17, 2006, Hansen responded to Zullo. Hansen claimed that TriMet had no duty to negotiate about the August 2005 changes in the CSI policy because they did not affect "our Working and Wage Agreement (WWA) or control matters such as the grievance procedure or other conditions of employment covered by our collective bargaining."

CONCLUSIONS OF LAW

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

2. TriMet did not violate ORS 243.672(1)(a) or (c) by failing to timely schedule Step 1 grievance conferences and Step 2 grievance meetings, or by failing to schedule an adequate number of Step 3 Grievance Committee meetings.

In their 2003-2009 collective bargaining agreement, TriMet and ATU added a new step to the grievance procedure—the Step 1 pre-filing grievance conference. The new step requires that the employee, the employee’s supervisor and an ATU representative meet to discuss the employee’s concerns. The parties anticipated that the Step 1 conference would be promptly scheduled in an attempt to resolve the employee’s problem before it became a formal grievance. The contract language, however, places no timelines on the scheduling of the Step 1 conferences.

The contract requires that the employee’s supervisor issue a decision within two business days of the Step 1 conference. If the employee is unhappy with this decision, the employee and an ATU representative then present the matter to the Department Director at Step 2 of the grievance procedure. The Department Director must respond to the grievant within seven days of this Step 2 meeting. The contract does not specify how soon the Step 2 meeting must be held.

A grievant who is dissatisfied with the response at Step 2 of the grievance procedure may refer the grievance to the Joint Grievance Committee at Step 3 of the contract procedure. The Grievance Committee is composed of two ATU representatives and two TriMet representatives, and decides whether to sustain or deny the grievance by majority vote. The contract does not state when or how often the committee must meet.

ATU alleges that TriMet failed to promptly schedule Step 1 grievance conferences and Step 2 grievance meetings. In addition, ATU contends that TriMet refused to hold enough Grievance Committee meetings at Step 3 to hear all pending grievances. As a result, ATU asserts that these grievances were not heard promptly and a serious backlog developed. ATU contends that by delaying the grievance process, TriMet violated ORS 243.672(1)(a), which makes it an unfair labor practice for the employer to “[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662.” The statute creates two violations. An employer violates the statute if it: (1) takes action “because of” employees’ exercise of PECBA-protected rights or (2) takes action that interferes with employees “in” their exercise of protected rights. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03, 20 PECBR 733 (2004). ATU alleges that TriMet violated only the “in the exercise” prong of subsection (1)(a) by unreasonably delaying Step 1 grievance conferences and Step 2 grievance meetings, and by failing to schedule sufficient Step 3 Grievance Committee meetings.

To determine whether an employer violated the “in the exercise” portion of subsection (1)(a), we examine the effects of the employer’s actions. The motive for the employer’s conduct is irrelevant, and a complainant need not prove any actual interference with employees’ protected activity. Instead, we examine the natural and probable effect of the employer’s actions. If the employer’s conduct, when viewed objectively, would tend to interfere with, restrain, or coerce employees in the exercise of their PECBA rights, we will conclude that the employer violated subsection (1)(a). *Wy’East Education Association v. Oregon Trail School District*, 22 PECBR at 698 (2008); *Teamsters Local 206 v. City of Coquille*, Case No UP-66-03, 20 PECBR 767, 776 (2004). A violation of the “in the exercise” prong of subsection (1)(a) may be either derivative or independent. An employer that violates the “because of” portion of subsection (1)(a) also violates the “in the exercise” part of the statute. An employer may also independently violate the “in the exercise” prong; typically this occurs when an employer representative makes coercive or threatening statements. *Wy’East Education Association v. Oregon Trail School District*, 22 PECBR at 705-706. ATU does not allege that TriMet violated the “because of” portion of subsection (1)(a), so there can be no derivative violation. We consider only whether TriMet’s actions independently violated the “in the exercise” prong of subsection (1)(a).

ATU contends that TriMet unreasonably delayed processing grievances at Steps 1, 2, and 3 of the procedure, and that these delays had the natural and probable effect of discouraging members from filing grievances. We disagree.

In *Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon*, Case No. UP-32-01, 20 PECBR 87 (2002), *order on recons*, 20 PECBR 185 (2003), we concluded that a district attorney independently violated the “in the exercise” portion of subsection (1)(a) when the district attorney refused to obey a grievance settlement in which the county, a joint employer, ordered the district attorney to reinstate an employee. We stated:

“The natural and probable result of the DA’s refusal to comply with the County’s grievance order was interference with and restraint of employees in their use of the grievance procedure: when an employer repudiates a grievance resolution, a reasonable employee would tend to be inhibited from filing grievances. *Compare ATU v. Tri-Met*, 17 PECBR at 789 (employer’s conversion of suspension to termination, during review of employee’s grievance, violated subsection (1)(a)).” 20 PECBR at 101.

Here, ATU bargaining unit members might reasonably (and understandably) be annoyed by the manner in which TriMet processed their grievances. Unlike the employer in *Coos County*, however, TriMet did not repudiate the grievance procedure. We conclude that TriMet's delays in responding to *some* of the grievances at Steps 1 and 2, and its refusal to hold more Step 3 Grievance Committee meetings, are not the type of actions that would discourage a reasonable ATU bargaining unit member from filing a grievance.²⁰ We will dismiss ATU's claims that TriMet violated the "in the exercise" portion of subsection (1)(a) by delays in processing grievances at Steps 1, 2, and 3 of the contractual procedure.

ATU also contends that by delaying grievances at Steps 1, 2, and 3, TriMet violated ORS 243.672(1)(c), which makes it an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization." In a case alleging a violation of subsection (1)(c), we examine the reasons for the employer's conduct. We will find a violation of this statutory provision only if the employer acted with a discriminatory motive, intending to undermine employees' exercise of PECBA-protected rights. *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 352, *order on recons*, 20 PECBR 388 (2003).

Here, ATU asserts that TriMet had two unlawful motives for delaying grievances at Steps 1, 2, and 3 of the procedure. First, ATU alleges that TriMet sought to discourage members from using the grievance process by making it unworkable. Second, ATU contends that TriMet attempted to "turn the membership against" the union by making it appear that ATU could not successfully resolve members' grievances.

The record contains virtually no evidence to support ATU's charges, however. To the contrary, the record shows that TriMet made several attempts to deal with delays in grievance processing. TriMet hired additional staff to assist with grievances, urged its managers to promptly schedule Step 1 grievance conferences, negotiated with ATU about possible solutions to the delays, and used a mediator to facilitate these discussions. Although TriMet was unsuccessful in resolving problems with the grievance procedure, its efforts appear well-intentioned. There is no indication in this record that TriMet wanted to undermine ATU members' rights or impair ATU's position

²⁰We note that in 2005 and 2006, TriMet responded to more than 50 percent of grievances filed at Step 1 and more than 60 percent of the grievances filed at Step 2 within three months of the date on which the grievances were filed. The exact nature and extent of delays in scheduling Step 3 Grievance Committee hearings is not clear from this record.

as a union. We conclude that TriMet did not violate subsection (1)(c) by delaying grievances at Steps 1, 2, and 3 of the procedure.²¹

3. TriMet did not violate ORS 243.672(1)(b) or (e) by appointing low-level managers to the Step 3 Grievance Committee.

The parties' collective bargaining agreement establishes a Joint Grievance Committee to consider grievances at Step 3 of the procedure. The committee is composed of two TriMet representatives and two ATU representatives. Until May 26, 2005, Human Resource Director Sexton and Transportation Director Ford represented TriMet on the Grievance Committee. Some time after that date, TriMet replaced Ford and Sexton with lower level managers who had little experience in Step 3 hearings. ATU asserts that these Grievance Committee members had no authority to settle grievances, and at times, considered grievances involving their own supervisors. According to ATU, these new Grievance Committee representatives were unable or unwilling to make effective decisions. ATU contends that TriMet's actions in appointing low level managers to the Grievance Committee violated ORS 243.672(1)(b) and (e).

ORS 243.672(1)(b) provides that it is an unfair labor practice for a public employer or its designated representative to "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." In order to establish a violation of subsection (1)(b), a complainant must prove "actual domination, interference, or assistance that has a direct effect on a labor organization." *Lane County Public Works Association, Local 626 v. Lane County*, Case No. UP-15-03, 20 PECBR 596, 608 (2004). *See also OPEU v. Jefferson County*, Case No. UP-9-99, 18 PECBR 128, 140 (1999). We have inferred actual interference when the employer's actions had the "natural consequence" of interfering with the union's relationship with its members. *AFSCME Council 75, Local 328 v. Oregon Health Sciences University*, Case No. UP-37-96, 17 PECBR 343 (1997).

According to ATU, TriMet made the grievance procedure "meaningless" by appointing unqualified individuals to represent it on the Step 3 Grievance Committee. ATU contends that substantially fewer grievances were resolved at this level and that ATU bargaining unit members lost confidence in the union's ability to effectively represent them. ATU has failed to establish that TriMet's conduct violated subsection (1)(b), however.

²¹We do not enforce the contractual deadline of seven days for the Step 2 meeting because such enforcement can be obtained only through a grievance or an action for breach of contract under ORS 243.672(1)(g). ATU has not brought such a claim.

Although ATU presented evidence regarding problems the grievance process caused ATU members and officers, it presented no evidence concerning any actual, negative effects of the Step 3 changes on ATU's ability to represent its members. In addition, ATU was not merely the innocent victim of TriMet's conduct. Some members—not unfairly—assigned blame to ATU for the grievance situation. ATU agreed to the new Step 1 language which had no deadline for scheduling the Step 1 conference. ATU refused to agree to temporary changes TriMet requested to speed up the process; ATU refused to extend the length of Step 3 meeting times; ATU apparently took no steps on its own to prioritize or manage grievances; and ATU refused to grieve failures to meet contractual grievance deadlines. We conclude that ATU failed in its burden to show that the Step 3 changes represented “actual domination, interference, or assistance that has a direct effect on a labor organization.” *Lane County*, 20 PECBR at 608. We will dismiss this claim.

ATU also contends that TriMet unilaterally changed the *status quo* in violation of ORS 243.672(1)(e) when it changed its representatives on the Step 3 Grievance Committee. Under subsection (1)(e), an employer's good faith bargaining obligation includes the duty to negotiate to completion before changing the *status quo* in regard to a mandatory subject. *Milwaukie Police Employees Association v. City of Milwaukie*, Case No. UP-63-05, 22 PECBR 168, 178 (2007), *appeal pending*. According to ATU, the *status quo* was established by TriMet's past practice of appointing only high-level managers to the Grievance Committee who had authority to review and resolve grievances when appropriate. ATU alleges that TriMet changed the *status quo* in violation of subsection (1)(e) when it replaced Directors Ford and Sexton with lower-level managers. We disagree.

In a case alleging a unilateral change, we begin by determining the *status quo*. The *status quo* may be established by past practice, work rule, or policy. As the party asserting a past practice, ATU bears the burden of establishing its existence. *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 279, 285, *order on recons*, 22 PECBR 444 (2008). We will find that a past practice exists if it is clearly established. To be clearly established, the practice must be

“clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties. We must also consider the circumstances under which the past practice was created, and the existence of mutuality. Mutuality concerns the question of whether practice arose from a joint understanding by the employer and the union, either in their inception or their execution, or whether the practice arose

from choices made by the employer in the exercise of its managerial discretion without any intention of future commitment. *Redmond School District, supra.*” *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993 (2005)

Here, we conclude that ATU failed to demonstrate the existence of any past practice in regard to the rank of TriMet’s Step 3 panel members. ATU did not establish the critical element of mutuality in creating such a practice. Under the collective bargaining agreement, each party had the right to select its representatives on the Step 3 Grievance Committee.²² Therefore, TriMet properly exercised its discretion when it selected its members of the committee. There is no evidence that TriMet abused that discretion. ATU failed to establish a past practice as defined by our cases. Accordingly, we will dismiss this claim.

4. TriMet did not violate ORS 243.672(1)(e) by denying ATU’s request to extend the 30-day timeline for sending a grievance to arbitration.

The parties’ 2003-2009 collective bargaining agreement provides that if a grievance is not resolved at Step 3 of the procedure, ATU may request arbitration within 30 days of the date of the Step 3 decision. In the past, ATU often asked that TriMet extend this 30-day timeline and TriMet routinely granted these requests. On February 9, 2005, TriMet told ATU officers that it would no longer grant these extensions. On August 15, 2005, TriMet refused to grant ATU President Zullo’s request to extend the 30-day deadline to submit a grievance to arbitration.

ATU contends that TriMet had routinely granted its requests to extend the deadline to submit a grievance to arbitration. According to ATU, TriMet’s August 2005 refusal to grant such an extension was a unilateral change in the *status quo* and violated ORS 243.672(1)(e). We disagree.

As we discussed above, an employer violates subsection (1)(e) if it changes the *status quo* in regard to conditions of employment that are mandatory for negotiations before it bargains to completion about the change. However, in any case alleging an unlawful unilateral change, our inquiry must include an analysis of language in the parties’ collective bargaining agreement. A public employer does not violate subsection

²²The “Grievance Committee shall be composed equally of no less than two (2) bargaining unit members designated by the Association and two (2) non-bargaining unit persons designated by the employer ”

(1)(e) when it takes action that the collective bargaining agreement authorizes it to take. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, 209 Or App 761, 770, 149 P3d 319 (2006) (whether a collective bargaining agreement authorizes a public employer to make a unilateral change in employee work schedules “is a question for ERB to address in the first instance”); *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 366 (2008) (where a public employer asserts that a collective bargaining agreement permits it to unilaterally change working conditions, “we must interpret the contract language to determine whether the contract does in fact authorize the [employer’s] action.”)

Here, the contract language clearly and unambiguously permits TriMet to require that ATU file any request for arbitration within 30 days of the decision at Step 3 of the grievance procedure. TriMet did not unilaterally change the *status quo* in violation of subsection (1)(e) when it insisted that ATU comply with this contractual requirement and refused to waive this time limit. We will dismiss this charge.

5. TriMet violated ORS 243.672(1)(g) by using a document for disciplinary purposes in violation of a written agreement with ATU.

In 2003, ATU and TriMet became aware of allegations that ATU bargaining unit member Doe was harassing and intimidating other bargaining unit members, in part through claims that Doe had influence in ATU. The parties agreed to investigate the matter. They further agreed that ATU would give TriMet its investigation report and that TriMet would not use the report to discipline Doe.

In late 2004 or early 2005, TriMet considered disciplining Doe for conduct similar to that alleged in 2003. TriMet Counsel Acosta used the 2003 investigation report to counsel TriMet manager Bryant on what level of discipline to impose on Doe. TriMet eventually suspended Doe, and ATU grieved the suspension to arbitration. Acosta testified at the arbitration hearing and referred to the 2003 investigation report in his testimony.

ATU contends that by considering the 2003 investigation report when it disciplined Doe in 2004-2005, TriMet breached the parties’ agreement that the report would not be used for disciplinary purposes. According to ATU, TriMet’s actions violated ORS 243.672(1)(g), which makes it an unfair labor practice for a public employer to “[v]iolate the provisions of any written contract with respect to employment relations * * *.”

TriMet argues, however, that its agreement with ATU was an oral contract that cannot be enforced under the express language of subsection (1)(g).

We conclude that the oral agreement between the parties was subsequently reduced to writing through the exchange of e-mails on the subject between ATU President Savage and TriMet Counsel Acosta. *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-5-06, 22 PECBR 224, 232 (2008) (employer and union created a written agreement enforceable under subsection (1)(g) by exchanging e-mails). ATU has appropriately brought this action under subsection (1)(g). Therefore, we consider whether TriMet adhered to the agreement. We conclude that TriMet did not.

The parties' agreement prohibited TriMet from using ATU's 2003 investigation report in disciplining Doe. TriMet breached that agreement and violated subsection (1)(g) when it considered this report in determining an appropriate level of discipline for Doe in 2004-2005, and again when it brought the report to the arbitrator's attention in the arbitration concerning Doe's discipline. Accordingly, we will order TriMet to remove the 2003 investigation report from any of Doe's personnel files and will further order TriMet not to use that document in any disciplinary matter. Because TriMet considered the 2003 investigation report in disciplining Doe in 2004-2005, we will also order that the written warning TriMet gave to Doe be rescinded, and will order that TriMet not use or refer to this document in any future disciplinary action.

6. TriMet violated ORS 243.672(1)(a) when it based the amount it paid employee witnesses in the Doe arbitration on whether their testimony was favorable or unfavorable to TriMet.

In 2005, TriMet and ATU participated in an arbitration involving bargaining unit member Doe. Six bargaining unit members testified for TriMet and against Doe. Consistent with its policy, TriMet paid these witnesses time-and-a-half for the time they spent traveling to and waiting for the arbitration hearing, and for the time they spent testifying. Witnesses who testified for ATU and for Doe, however, received only the statutorily required \$5 per day and mileage. They were also required to take leave or use unpaid time from work in order to testify at the arbitration.

ATU alleges the policy TriMet used to compensate witnesses at the Doe arbitration violates ORS 243.672(1)(a). ATU contends this policy rewarded witnesses who testified for TriMet and penalized those who testified against TriMet. According to ATU, TriMet's actions chill bargaining unit members "in the exercise" of their protected rights in violation of subsection (1)(a).

In hearings involving testimony before this Board, we have held that an employer's payment of disparate witness fees violates the "in the exercise" prong of subsection (1)(a). In *Federation of Oregon Parole and Probation Officers v. Polk County*, Case No. UP-32-86, 9 PECBR 8958 (1986), the union subpoenaed a bargaining unit member to testify at a hearing before this Board on the union's representation petition. In violation of its own policy, the employer told the bargaining unit member to take vacation time for the time she was under subpoena. The employer called a manager to testify at the hearing, and, in accordance with its policy, paid the manager his full salary for the time spent testifying. We held that testifying at a Board hearing was a form of activity protected by ORS 243.662, and concluded that the employer's failure to pay the bargaining unit member her full salary for the time under subpoena "tends to interfere with, restrain, or coerce employees in the exercise of rights protected by ORS 243.662" and violated subsection (1)(a). 9 PECBR at 8961.

Although the circumstances in *Polk County* are different from those presented here, we conclude that the principle involved is the same. Just as employees have a PECBA-guaranteed right to participate in a hearing before this Board, they also have a PECBA-guaranteed right to participate in a contractual grievance arbitration. See *Central Education Association and Vilches v. Central School District 13J*, UP-74-95, 17 PECBR 54 (1996), *order modified on recons*, 17 PECBR 93 (1997), *aff'd* 155 Or App 92, 962 P2d 763 (1998) (asserting rights under a collective bargaining agreement is protected activity). Essential to exercising this right is the ability to testify freely. An employer policy that pays bargaining unit members a different amount depending on whether their testimony is favorable to the employer has the natural and probable effect of unduly interfering with the employees' testimony. Both an employee's decision to testify and the content of the testimony will reasonably be influenced by the realization that the employee may pay a price for his or her testimony. An employee whose testimony supports the employer's position receives overtime pay, while an employee whose testimony is contrary to the employer's position loses leave (or salary, if the employee has no paid leave available.) We conclude that the disparate payments TriMet made to witnesses at the Doe arbitration violate the "in the exercise" prong of subsection (1)(a).

We will order TriMet to cease and desist from paying wages to bargaining unit employee witnesses based on whether their testimony is adverse to TriMet in litigation subject to the PECBA. In addition, in order to make whole witnesses whose testimony at the Doe arbitration was unfavorable to TriMet, we will order TriMet to pay them the same salary it paid witnesses whose testimony was favorable to TriMet at the Doe arbitration.

7. TriMet did not violate ORS 243.672(1)(d) when it based the amount it paid witnesses in the Doe arbitration on the content of their testimony

ATU alleges that TriMet violated ORS 243.672(1)(d) by paying witnesses at the Doe arbitration more if their testimony was favorable to the employer. Subsection (1)(d) prohibits an employer from discriminating against an employee because the employee “has given information or testimony under ORS 243.650 to 243.782.” Because subsection (1)(d) applies only to testimony in proceedings before this Board, it is inapplicable to the grievance arbitration hearing here. *International Association of Firefighters, Local 1817 v. Jackson County Fire District #3*, Case No. UP-130-91, 14 PECBR 111, 124 (1992). We will dismiss this claim.

8. TriMet violated ORS 243.672(1)(e) when it failed to bargain over the impact of its changes in the qualifications for the bargaining unit position of buyer.

Prior to 2006, applicants for the position of buyer in TriMet’s Stores department were not required to have actual knowledge of or experience with computers. Instead, applicants were allowed to apply for the job if they could acquire the necessary computer skills within 60 days of their date of hire. On May 2, 2006, TriMet notified ATU that it proposed to change the qualifications for the buyer position. Applicants would be required to have certain computer skills at the time of hire. They would no longer be given 60 days from their date of hire to acquire these skills. On May 12, 2006, TriMet posted an opening for a buyer that included these new requirements.

By letter dated May 25, 2006, ATU Vice President Hunt demanded that TriMet remove the posting for the buyer position until ATU and TriMet completed bargaining over changes in the position. TriMet refused to negotiate about any changes in the job qualifications. ATU alleges that TriMet’s refusal to bargain about changes in the buyer position violates its duty to bargain in good faith under ORS 243.672(1)(e).

Subsection (1)(e) prohibits a public employer from unilaterally altering conditions of employment that are mandatory subjects for negotiations and are not addressed in the parties’ collective bargaining agreement. *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 89, *supplemental order*, 19 PECBR 317 (2001). During the life of a collective bargaining agreement, an employer must notify the exclusive bargaining representative of any proposed changes in working conditions about which it is obligated to bargain. The exclusive representative then has 14 days to request bargaining. ORS 243.698(2) and (3).

ATU contends that TriMet failed to comply with the requirements of the law when it changed the qualifications for the buyer position. ATU notes that although TriMet notified the union of the changes in the buyer job description on May 2, 2006, it failed to give ATU 14 days to demand bargaining and failed to wait 90 days before implementing the changes. According to ATU, TriMet's failure to comply with the requirements of ORS 243.698(2) and (3) constituted bad faith bargaining in violation of subsection (1)(e).

TriMet, however, asserts that it had no duty to bargain about the subject. It contends that the "minimum qualifications necessary for any position" are permissive subjects for negotiation under ORS 243.650(7)(g).

We conclude that the changes in the buyer position were indeed "minimum qualifications necessary for any position" and that TriMet was not required to bargain about its determination of these minimum qualifications under the law. This does not, however, end our analysis. Although TriMet is not obligated to bargain about its *decision* to change the minimum qualifications for the buyer job, it was required to bargain about the mandatory *impacts* of that decision. *Federation of Oregon Parole and Probation Officers v. Corrections Division*, Case No. C-57-82, 7 PECBR 5649, 5654, *recons*, 7 PECBR 5664 (1983). An employer must usually exhaust its duty to bargain over such impacts before implementing its decision. *Beaverton Police Association v. City of Beaverton*, Case No. UP-10-01, 19 PECBR 925, 932 (2002), *aff'd*, 194 Or App 531, 95 P3d 1160 (2004).

In *Beaverton*, the city changed the qualifications for promotion to the position of police sergeant. We agreed with the city that it need not bargain its decision to make these changes. We noted, however, that the issue of promotions directly affected salary and benefits, working conditions that are mandatory subjects for negotiations. We held that the city was obligated to negotiate about the mandatory impacts of its changes: "[t]he language of [ORS 243.672](7)(f) speaks expressly to the determination of minimum qualifications; nothing more or less. It does not address mandatory impacts. Furthermore, as previously set forth, ORS 243.698 expressly recognizes the potential obligation to impact bargain." 19 PECBR at 932. The Court of Appeals affirmed our decision.

Here, as in *Beaverton*, the change TriMet implemented in the qualifications for the buyer position affects salary, because the job pays higher wages than other positions in the Stores department. Since salary is a mandatory subject for negotiations, ORS 243.650(7)(a), TriMet had a duty to bargain about this, and any other mandatory impacts, of its changes to the requirements for the buyer position. Because TriMet's obligation to bargain the mandatory impacts of its changes in the buyer position

qualifications arose during the life of the parties' collective agreement, TriMet was required to comply with the procedure described in ORS 243.698. By failing to do so, TriMet violated its duty to bargain in good faith under subsection (1)(e). See *Multnomah County Correction Deputies Association v. Multnomah County*, Case No. UP-58-05, 22 PECBR 422, 438 (2008) (employer's failure to notify union of a transfer of bargaining unit work and to bargain over this transfer for at least 90 days violated ORS 243.698 and subsection (1)(e)). TriMet asserts, however, that any duty it had to bargain the impacts of the changes in the qualifications for the buyer position is excused by the fact that the impacts of these changes on bargaining unit members are *de minimis*. We disagree. In *Beaverton*, we rejected the city's argument that changes in the requirements for police officers' promotion to sergeant had a *de minimis* impact on the bargaining unit. Previously, the city required sergeants to have an associate's degree but specified that two years of additional experience could be substituted for one year of college. The city then dropped the experience exception to the associate's degree requirement without first bargaining the impact of the change in policy. We stated:

“Lastly, the City claims that it should not be required to impact bargain because any impacts on mandatory subjects that occurred as a result of its change were insubstantial or *de minimis*. ORS 243.650(7)(d). We disagree. The evidence established that senior bargaining unit members were directly affected by this change. *Some individuals previously deemed qualified to compete for sergeant were excluded as a result of the City's change to minimum qualifications. The evidence also established substantial differences between the wages and benefits received by sergeants and police officers.*” *City of Beaverton*, 19 PECBR at 934 (Emphasis added).

Here, as in *Beaverton*, ATU bargaining unit members are directly affected by the change in qualifications for the buyer position. Employees who previously could have qualified for the job through on-the-job experience lost the right to compete for a desirable position that pays higher wages and makes fewer physical demands on them. Accordingly, the effects of the change in the job description are not *de minimis*. We conclude that TriMet had a duty to bargain with ATU over the mandatory impacts of the changes in the promotion requirements for the buyer position, and that TriMet violated subsection (1)(e) when it failed to do so.

As a remedy, ATU asks that we order TriMet to cease and desist from imposing the new qualifications for the buyer position, make bargaining unit members whole for promotional opportunities lost because of TriMet's unlawful action, and bargain over the impact of its decision to change the buyer position qualifications.

In *Beaverton*, we rejected the union's request to rescind promotions made under the new policy and refused to reinstate the previous minimum qualifications. We reasoned:

“The City had the right to change the minimum qualifications. Only those individuals who met those minimum qualifications had the right to be considered for promotion. This Board's decision has no affect on the ability of individuals, who *did not* meet the minimum qualifications in January 2001, to participate in that recruitment.

“Generally, when an employer violates the duty to bargain in good faith by refusing to engage in impact bargaining, we order a return to the status quo. However, a return to the status quo in this case—rescinding promotions that occurred over a year ago—would accomplish little, because this Board's decision does not alter the pool of applicants who were eligible for promotion. Under the circumstances of this case, this Board will not order the City to rescind its February 2001 promotions.” *Id.* at 934.

We ordered the city to bargain with the union about “the impacts of the minimum qualifications change on the employment relations of those bargaining unit members who, due to the change, no longer qualified for promotion. That bargaining will not involve the determination of minimum qualifications necessary for promotion. Under the circumstances, the terms of ORS 243.698 will govern the parties' negotiations.” *Id.* at 935.

We will order the same remedy here as we did in *Beaverton*.

9. TriMet did not violate ORS 243.672(1)(a) by refusing to allow Lorenzo Williams to have union representation at a meeting with management on an issue that resulted in discipline.

In May 2006, ATU bargaining unit member and bus operator Williams received an urgent complaint about an incident involving an uncooperative bus passenger. Williams talked with ATU Executive Board Member Schwarz about the complaint, and Schwarz warned Williams not to talk to a TriMet manager unless he was accompanied by an ATU representative. In spite of Schwarz's warning, Williams met with Warren, his supervisor, without an ATU representative and talked with her about the incident that resulted in the urgent complaint. Based on information obtained at this meeting, Williams' supervisor gave him a written warning.

An employee has a PECBA-protected right to union representation at any interview "1) the employee reasonably believes that disciplinary action [against the employee] is being contemplated or may result; 2) the employer insists on the interview; and 3) the employee requests representation." *Amalgamated Transit Union, Division 757, AFL-CIO v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-21-88, 11 PECBR 480, 488 (1989). ATU alleges that TriMet imposed discipline on Williams after obtaining information from him in a meeting during which his supervisor denied that ATU representation was necessary. ATU alleges that this conduct violated Williams' *Weingarten* rights under ORS 243.672(1)(a).

Williams had a right to have an ATU representative present at his meeting with Warren, since he reasonably believed that the interview with Warren concerned an urgent complaint which could (and did) result in disciplinary action. *See Oregon AFSCME Council 75, Local 3940 v. State of Oregon, Department of Corrections, Snake River Correctional Institution*, Case No. UP-9-01, 20 PECBR 1, 15-17 (2002). However, Williams failed to request a representative. Instead, Williams insisted on proceeding *without* a union representative, even though Schwarz warned him not to do so. We conclude that Williams knowingly waived his right to a representative at his meeting with Warren when he did not request one. Accordingly, TriMet did not violate subsection (1)(a) by denying Williams representation. We will dismiss this claim.

10. TriMet did not violate ORS 243.672(1)(e) by changing the CSI policy in 2005.

In 1995-1996, TriMet invited community and union input in formulating a new customer complaint (CSI) policy. TriMet made numerous changes in the policy between 1996 and 2005. At times, ATU representatives were part of a joint labor-management committee that reviewed the policy and recommended changes in it. Other times—in 1999 and 2005—TriMet altered the policy without consulting with the union. ATU alleges that TriMet unilaterally changed the *status quo* in violation of subsection (1)(e) when it altered the CSI policy in 2005.

As discussed above, an employer's good faith bargaining duty includes the obligation to negotiate with a labor organization before changing the *status quo* in regard to a mandatory subject for bargaining. *AFSCME Local 88 v. Multnomah County*, 22 PECBR at 284-85. We begin our inquiry in any unilateral change case by determining the *status quo*. Here, ATU failed to meet its burden to demonstrate the *status quo* that existed prior to the 2005 changes.

The record includes a copy of the complete CSI policy adopted in 1995-1996 and a copy of the complete policy in effect in 2005. The record also contains evidence of some changes in the CSI policy over the years, although the nature and extent of these changes is not clear. However, the record contains no complete copy of the pertinent provisions of the 1999 CSI policy, the policy in effect prior to the 2005 changes. We cannot tell from this record whether the changes about which ATU now complains occurred in 2005 or at some earlier time. If they occurred at an earlier time, TriMet did not change the *status quo* in 2005 as alleged. Thus, ATU failed to prove that TriMet changed the CSI policy as alleged. TriMet did not violate ORS 243.672(1)(e) when it adopted the 2005 changes to the CSI policy.

11. We will not order TriMet to pay a civil penalty to ATU.

ATU asks that we award a civil penalty against TriMet. We may award a civil penalty if we find

“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.”
OAR 115-035-0075; ORS 243.676(4). (Emphasis added.)

In order to prove that a violation was repetitive, we generally require that a complainant show “the existence of a prior Board order involving the same parties that establishes that prior, similar activity was unlawful.” *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-56-04, 21 PECBR 206 (2005), citing *AOCE v. Oregon Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 74 (1999). ATU failed to demonstrate that TriMet's conduct violated a prior Board order involving the same party's similar unlawful activity.

Egregious “means ‘conspicuously bad and flagrant.’” *Lincoln County*, 21 PECBR at 223, citing *East County Bargaining Council v. David Douglas School District*, Case No. UP-84-86, 9 PECBR 9184, 9194 (1986), *supplemental order*, 9 PECBR 9354

(1987). ATU failed to prove that TriMet's conduct was egregious. Accordingly, we do not award ATU a civil penalty against TriMet.

ORDER

1. TriMet shall cease and desist from using ATU's 2003 investigation report in disciplining John Doe. TriMet will remove the 2003 report from all of Doe's personnel files and will not use or refer to this report in any future discipline. TriMet will also rescind the written warning it gave Doe in 2004-2005, and will not use or refer to this warning in any future discipline.

2. TriMet shall cease and desist from refusing to bargain in good faith about the impacts of the changes in the minimum qualifications for the position of buyer. TriMet will bargain with ATU about the impacts of these changes in accordance with ORS 243.698.

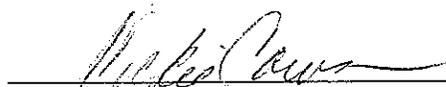
3. TriMet shall cease and desist from paying wages to ATU bargaining unit members in litigation under the PECBA based on whether the witnesses' testimony is adverse to TriMet. TriMet will make whole all employee witnesses in the Doe arbitration hearing whose testimony was adverse to TriMet for the salary they would have received if their testimony had been favorable to TriMet, with interest at nine (9) percent per annum.

4. The remainder of the complaint is dismissed.

DATED this 16th day of January 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.