BEFORE THE EMPLOYMENT RELATIONS BOARD
OF THE
STATE OF OREGON

KLAMATAH FALLS ASSOCIATION OF CLASSIFIED EMPLOYEES, Complainant, v. KLAMATH FALLS CITY SCHOOLS, Respondent.	Case No. UP-039-21 RESPONDENT'S MEMO IN AID OF ORAL ARGUMENT

Respondent Klamath Falls Schools has elected to submit no objections to ALJ Kehoe's Recommended Rulings, Findings of Fact, Conclusions of Law, and Proposed Order in this case, even though some of the rulings were contrary to the District's position. Very simply, the District does not view any erroneous or unsupported findings of the ALJ significant enough to merit the expenditure of more time and expense on the part of the District or the Employment Relations Board.

The objections filed by Klamath Falls Association of Classified Employees (KFACE) are not meritorious. The Board should adopt the Recommended Order as the Final Order in this case.

Because the District is not asking for any decision of the ALJ to be overturned or modified, this Memorandum will only deal with objections raised by KFACE.

I. OBJECTIONS TO A.L.J.'S FINDING OF FACTS

Complainant noted that its objections were primarily to the inferences and legal conclusions drawn by the Board Agent regarding the facts found after hearing, but objected specifically to these facts:

Paragraph 13: Complainant's objection to the ALJ's omission of information about HR Director Clark's prior experience interacting with unions representing public employees. That fact is not material to whether or not any of Complainant's actions constituted an unfair labor practice.

Paragraph 19: Complainant objects "to the suggestion that Clark had no involvement or awareness of the content of the November 4, 2020, letter of expectation." Evidence presented at hearing supports the ALJ's findings of fact in this paragraph that Clark was not involved in drafting the letter, which was authored by the Superintendent, and delivered to Thornton, an employee not under Clark's supervision, but rather under the supervision of Business Manager Morgan, who emailed and signed the letter. Further, Paragraph 19 deals with events months before the start of the 180-day maximum period covered by the ULP.

Paragraph 32: Complainant has objected "to the suggestion that Clark's decision to ask the IT department to search Thornton's email was unrelated to Thornton's protected activity." The facts, however, are undisputed that Clark asked the IT department to see if Thornton had ever shared information with "anyone else" on other occasions via a BCC. Complainant's counsel presumed that Clark was looking for evidence of Thornton's communication with the Union, specifically the Union president. But Complainant did not call any witness (such as the individual in the IT department who carried out the search) to produce any evidence to support such a presumption, or in any way to contradict Clark's testimony.

Complainant's counsel's repeated attempts during cross-examination to get Clark to agree with the presumed anti-union motive for the IT search did not shake Clark's

insistence that she was wanting to know if Thornton was sharing confidential HR information with anybody outside the department while attempting to keep that knowledge from Clark. Evidence of any breach in confidentiality by an employee with so much access to sensitive, private information about hundreds of employees would be a concern to any Human Resources Director.[1] Further, as the ALJ notes in Paragraph 32, as of March 2021, Clark was unaware that "[a]t that time, Clark was unaware that Thornton was an active KFACE supporter."

Paragraph 36. Complainant does not contest the fact that Thornton knew that the District had the right to monitor emails. The ALJ lists several sources of information, including the staff handbook and warnings "by the Uniserv/OEA tell[ing] the employees it represents that, when using a work email account, they 'run the risk' of those emails being searched." But Complainant states that "the District provided no evidence that it had ever conducted a similar search for others." The District was not obligated to prove what the Complainant apparently feels is a critical part of its argument.

Further, Thornton's "feelings" about being "targeted" by a Letter of Expectation issued in the fall (outside the 180-day time period) are unconvincing, since that Letter was issued by her actual supervisor, Morgan. Once again, the Complainant is striving to come up with evidence of anti-union animus, but doesn't present any evidence proving such a motivation.

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[1]Clark testified as to her concern about "not knowing . . .who's getting my responses and who's being included in this work," and "as much at times as I do talk with Tanya, is that happening on a regular basis? Like, I, you know, we have confidentiality in our positions, even a pararpro has confidentiality with a, a student information. So with though an employee might not be labeled confidential in a, in their group. We all have confidentiality within our jobs." [06:22:12]

Paragraphs 40, 43. Contrary to Complainant's assertions, nothing in these paragraphs suggests that activities by the UniServ Council are not protected activities under PECBA.

Paragraph 54. Complaint admits this Paragraph is accurate. Complainant submitted the KFACE-Klamath Falls City Schools collective bargaining agreement as Exhibit C-1. It is a relevant fact that the parties had negotiated an agreement that forbade the Association from using school buildings, bulletin board, and mail facilities "including e-mail. . . to espouse a political candidate . . ."

Paragraph 55. The fact that Union officer Danskin continued to use her work email account to conduct some union business is relevant because it demonstrates that Danskin's alleged "feelings" of apprehension did not inhibit her use of the District's email for non-prohibited Union communications. This Finding of Fact does not suggest that her feelings were unreasonable, irrelevant, or somehow invalid, as claimed by Complainant.

Paragraph 58. Complainant objects that the ALJ did not include mention that the District knew who filed the complaint, when the Association did not. There is no assertion of why this has any relevance to the ULP charge.

Summary of Complainant's Objections to Findings of Fact

In summary , the Complainant has not identified any actual error in the Findings of Fact set forth by the ALJ that demands any correction by the Board, nor any omission of possible but unincluded Findings of Fact that would have any impact on the ultimate Conclusions of Law.

II. COMPLAINANT'S OBJECTIONS TO CONCLUSIONS OF LAW

Conclusion of Law 2 – ORS 243.672(1)(a)

Complainant contends that "it is clear that the District violated both the 'in the exercise of' and 'because of' prong of the ORS 243.672(1)(a) when it searched Thornton's email because of her protected activity." [Complainant's Objections, p. 5].

But the ALJ found no violation of (1)(a) in the District's actions of searching Thornton's email. The ALJ has set forth concrete reasons, based on actual evidence in the record, for coming to that conclusion:

> "[W]e are ultimately unconvinced that director Clark initiated the search because the BCC was union-related, or that Clark was specifically seeking to discover 'union communications' (as specifically alleged in the complaint). Put differently, we do not conclude that Clark was subjectively or otherwise improperly motivated by Thornton's protected activity to have the search done. Instead, the evidence presented suggests that Clark was centrally concerned with the possibility of what she viewed as additional breaches of confidentiality – including in particular the possible sharing of confidential personnel-related or 'student information' – via other BCCs. As a result, we do not conclude that the District violated the "because of" prong of ORS 243.672(1)(a) by searching Thornton's emails.
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> "We also cannot conclude that the District's search violated the 'in the exercise' prong of ORS 243.672(1)(a). Again, the record suggests that District employees are generally well aware that any of their District emails may be searched. Additionally, we recognize that the search at issue did not result in any actual discipline or other adverse employment action. After the search, Thornton did choose not to run to become an elected KFACE officer. However, it is ultimately unclear whether it was the search in particular that led to that result, and the District generally had the right to perform that search." [Recommended Order, p. 19].

Complainant offers only suppositions or suspicions of improper motives on the part of Clark when she ordered IT to search Thornton's email for other instances when Thornton used a "bcc" function. Despite considerable "grilling" by the Association counsel, Clark continually denied any such motivation and asserted her concern to find out that one of the Business Department employees working closely with the HR office was "BCCing" anyone. Unproven allegations of improper motives are not enough to find

a "because of" or "in the exercise of" ORS 243.672(1)(a), regarding Clark's direction to search Thornton's emails for evidence of any other BCCs (which were not found).[2]

Conclusion of Law 2 – ORS 243.672(1)(b)

Complainant objects to the ALJ's conclusion that the District did not violate ORS 243.672(1)(b), citing little of the ALJ's rationale. But Complainant ignores the opening paragraphs of this section of the Recommended Order, which sets forth the criteria for finding a (1)(b) violation, and much of the reasoning that follows. As the RO notes, a (1)(b) violation is an employer action, that it had no right to take, that creates actual interference with the union's existence or administration. As the ALJ concluded in the final sentence, "KFACE cannot be adversely affected by such a search [of emails sent by any employee, using the District system], given that the District has always made it clear that it has the right to search employees' District emails." [RO, p. 21; see also FOF 36, noting that employees were warned that communications they put on the District's email '"are not private and may be subjected to monitoring' and that electronic communications may be reviewed by school administrators."].

[2] The ALJ did find both an "in the exercise" and "because of" violation of ORS 43.672(1)(a) in statements Clark made during the investigatory meeting on March 24, 2021. By foregoing any objections to the ALJ's Recommended Order, the District is not challenging that conclusion. The conversation on March 24, 2021, with Thornton and Association representative, was Clark's way of addressing a difficult situation, in which a critical staff member (Thornton) who had access to extensive confidential personnel information was sharing that information with another employee, without Clark's knowledge. In most school districts, the employee with Thornton's duties would have been excluded from the bargaining unit as a "confidential" employee. Clark's conversation on March 24, 2021, was her way of recognizing that information personal to Thornton's own employment certainly could be shared with the Association president. Nevertheless, if an employee chooses to use the District's email to communicate with Association officers or Uniserv, the District is entitled to review any such communications, because the District owns the system.

The ALJ is also correct in noting that Clark's conversation with Thornton on March 24, 2022, occurred at a time when Clark was unaware that Thornton was ever interested in becoming more active in the union. There is thus no evidence that any of Clark's discussion with Thornton was aimed at diminishing the ability of the Union to function, nor, as the ALJ found, was there any "evidence to support the conclusion that some actual interference with its [the Union's] existence or administration occurred as a result of the employer's actions." [RO, p. 20]

Conclusion of Law 2 – ORS 243.672(1)(c)

Complainant makes the same assertions regarding ORS 243.672(1)(c) as (1)(a) [Complainant's Objections, p. 6]. As argued above, the ALJ's determination was correct, particularly the ALJ's finding that Clark's search of Thornton's emails for other BCCs was not focused on finding Thornton's use of BCCs to communicate to Union officials, but rather on Thornton's BBCing to anyone on the memos she sent to Thornton regarding confidential personnel matters.

Conclusion of Law 2 – ORS 243.672(1)(a), (b), and (c) regarding political activity

Complainant objects to the ALJ's analysis of this claim because "[e]mployees clearly have the right to engage in political activities on public property during non-work time." [Complainant's Objections, p. 6]. This objection misstates the District's position as well as the ALJ's decision.

The ALJ properly concludes that "if Danskin's activity did violate ORS 260.432 or some other law, it cannot also be considered PECBA-protected activity." Further, the

ALJ properly decided that ORS 243.804(5)'s language allowing unions to use a public employer's electronic email systems to communicate to members about "[m]atters involving the governance or business of the labor organization" does not include a union's political endorsement. Nor do ORS 243.804(5)'s general provisions trump the specific provisions regarding political campaigning as ORS 260.432 does [FO, p. 23].

Most specific, in fact, are the prohibitions that KFACE agreed to in bargaining its CBA with the District. Article 4, Section G explicitly states that "Use of school buildings, bulletin board, and main facilities *including e-mail* shall be limited to Association business and *shall not be [used] to espouse a political candidate*, cause, measure, or any religious point of view."

Had KFACE really believed that ORS 243.804(5)'s general provisions required public employers to allow their email systems to carry the union's political endorsements, why would KFACE have agreed to continue to include the Article 4, Section G prohibitions when it re-bargained the CBA in 2021-2022?

Conclusion of Law 4 and 5 – Civil Penalty and Posting

The ALJ has specifically and accurately described why the sole instance of violation of ORS 243.672(1)(a) and (c) is not "egregious" and why it is not "repetitive" conduct, and thus the criteria for a civil penalty are not met. Contrary to Complainant's contention that there is "no excuse" for Clark's statements during a single meeting in March 2021, Clark was obviously attempting to construct what she felt was a reasonable compromise that would protect Thornton's individual rights but allow Clark to be the direct contact with the Association president on matters of contract interpretation. As the

only HR administrator for an employer with 400-450 employees, with three different bargaining units and three different contracts to negotiate and administer, without a single confidential employee in her department, in the midst of the pandemic, Clark was obviously overloaded. Clark's past service in Human Resources, prior to her employment by Klamath Falls City Schools was in the private sector, tribal and county government. She was not employed by the District prior to 2019. [Testimony on direct, 5:49:06].

Also pertinent is the fact that no disciplinary action was taken by the District against Thornton for sending emails to Clark regarding individual personnel matters but not disclosing that she was also blind carbon-copying messages. Although Union counsel attempted to attribute anti-union motivation to the conversation held on March 24, 2021, between Thornton, Clark and Wisener-South, Clark simply told Thornton that she (Clark) needed to be the one to deal with questions about interpretation of the CBA.

Clark was concerned that by Thornton blind carbon copying the messages she was sending to Clark, Clark was left in the dark as to whether information about Human Resources issues were being disclosed to unknown parties. Given the confidentiality of personnel-related information, Clark had legitimate reason to be concerned. Clark did not respond with discipline but by explaining to Thornton what she saw as the role of the Human Resources Director in such situations, whereas the job description for Payroll Lead did not include resolving disagreements with the Union about the <u>interpretation</u> of CBA provisions.

Likewise, the ALJ has appropriately declined to order a posting, given the criteria for posting defined in the Board's past decisions.

Conclusion

Please accept this Memorandum in Aid of Oral Argument, in addition to the District's Post-Hearing Brief, as support for the ALJ's Recommended Order, which should be upheld in total.

Sincerely,

Nancy J. Hungerford

The Hungerford Law Firm

Cc: Margaret Olney, Attorney for Complainants

CERTFICATE OF SERVICE

I hereby certify that I served upon the following named individual the foregoing RESPONDENT'S MEMORANDUM IN AID OF ORAL ARGUMENT by sending a true, complete and correct copy thereof by email to:

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DATED this 31st day of March, 2023.

s/ *Nancy J Hungerford*

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