EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-002-19

(UNFAIR LABOR PRACTICE)

PORTLAND PUBLIC SCHOOLS, Complainant, v. UNITED ASSOCIATION, PLUMBERS AND PIPEFITTERS LOCAL 290, Respondent.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Daniel L. Rowan, CDR Labor Law, Portland, Oregon represented Complainant.

Daniel Hutzenbiler, McKanna Bishop & Joffe, Portland, Oregon represented Respondent.

On February 19, 2021, Administrative Law Judge B. Carlton Grew issued a recommended order in this matter. The parties had 14 days from the date of service of the order to file objections. OAR 115-010-0090(1). No objections were filed, which means that the Board adopts the attached recommended order as the final order in the matter. OAR 115-010-0090(4).[1]

ORDER

1. The Union shall cease and desist from violating ORS 243.672(2)(a).

[1]This order should not be construed as precluding a union from investigating an allegation that one union member is discriminating against another, where the union's conduct of the investigation does not interfere with, restrain, or coerce, within the meaning of ORS 243.672(2)(a), employees' exercise of protected rights. Nor should this order be construed as precluding a union from disciplining a member for violating an anti-discrimination provision of a union constitution (whether by making false statements or engaging in other unprotected activity), where the union has sufficient cause and the union's actions do not interfere with, restrain, or coerce, within the meaning of ORS 243.672(2)(a), employees' exercise of protected rights.

2. The Union shall post a notice regarding its violation of ORS 243.672(2)(a) for 30 days in prominent places where the Union is permitted to post Union material.

3. The Union shall rescind the discipline of M and reimburse M for penalties paid.

4. We dismiss the remainder of the Complaint.

DATED: March 24, 2021.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

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Case No. UP-002-19

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PORTLAND PUBLIC SCHOOLS, Complainant, v. UNITED ASSOCIATION, PLUMBERS AND PIPEFITTERS LOCAL 290, Respondent.	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER

This case was submitted on stipulated facts before Administrative Law Judge (ALJ) B. Carlton Grew on October 23, 2020.

Daniel L. Rowan, CDR Labor Law, Portland, Oregon represented Complainant Portland Public Schools.

Daniel Hutzenbiler, McKanna Bishop & Joffe, Portland, Oregon represented Respondent United Association, Plumbers and Pipefitters Local 290.

On January 17, 2019, Complainant Portland Public Schools (PPS or District) filed this Complaint against United Association, Plumbers and Pipefitters Local 290 (Union). On October 23, 2020, the parties submitted their post-hearing briefs, and the record closed on that date.

The issues presented for hearing are:

1. Did the Union's conduct related to the internal disciplinary proceedings against M[2] and O violate ORS 243.672(2)(a)?

[2]Single capital letters, like this one, are pseudonyms.

2. Did the Union violate ORS 243.672(2)(b) when it conducted internal disciplinary proceedings against N?

3. Did the Union violate ORS 243.672(2)(d) when it conducted internal disciplinary proceedings against N?

This Board concludes that the Union violated ORS 243.672(2)(a), but not (b) or (d).

RULINGS

1. The ALJ correctly ruled that Joint Exhibits 38, 39, and 40, and Stipulation of Fact Nos. 42, 43, and 44 would not be received into evidence insofar as the exhibits and statements purport to be admissions by the Union regarding the strength of its legal position on the merits. ORS 40.190(1) specifically provides that evidence of settlement offers or conduct or statements made in compromise negotiations "is not admissible to prove liability for or invalidity of the claim or its amount." Exhibit 38 is the District's Settlement Proposal of March 13, 2020; Exhibit 39 is the District's Revised Settlement Proposal of June 23, 2020, and Exhibit 40 is the Union's approval of Settlement Agreement on June 25, 2020, attempts to resolve the issues raised by the Complaint. Therefore, Exhibits 38, 39, and 40 are inadmissible as evidence to prove that the Union violated the law. *See Gresham Police Officers Association v. City of Gresham*, Case No. UP-06/18-09 at 2-3, 24 PECBR 55, 56-7 (2010); *Michael Barkley and AFSCME, Local 2451 v. City of Klamath Falls*, Case No. UP-43-09, 24 PECBR 457, 458-59 (2011).

2. The ALJ's remaining rulings have been reviewed and are correct.

FINDINGS OF FACT[3]

The Parties

1. The District is a public employer as defined in ORS 243.650(20).

2. The Union is a labor organization as defined in ORS 243.650(13).

3. The Union is one of several affiliated trade unions representing PPS employees. These unions bargain together with the District as the District Council of Unions (DCU).

4. The District and the Union are parties to a collective bargaining agreement that expired December 31, 2019. Article 18 of that agreement addresses safety:

> "1. The District shall maintain safe working conditions in accordance with established federal and state regulations. The District and employees covered under this Agreement should work to avoid or minimize hazards.
>
> "2. The parties agree to comply with Oregon OSHA regulations.

[3]These Findings of Fact are derived from the parties' Stipulation of Facts and Joint Exhibits.

"B. PHYSICAL EXAMINATIONS

"1. In the interest of safety and the wellbeing of students, employees and the public, the District and the DCU and its affiliated unions agree to the objective of a substance free workplace." (Exh. J-1, p 17.)

5. The Union represents certain District employees employed in the District Maintenance Department, including M, O, F, and C.

6. PPS employee N is a Senior Program Manager in the Maintenance Department. N is excluded from the bargaining unit as a statutory supervisor. N has been a Union member since 1994.

7. The Union and its members are subject to the Constitution of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Constitution). The Constitution includes provisions governing the conduct of Union members. It also contains a process that permits union members or local unions to bring charges against a union member who allegedly violates the Constitution. The internal Union disciplinary process involves a trial before the Local Union Executive Board. Following the trial, the Local Union Executive Board issues a finding. If the union member is found guilty, the Executive Board may assess a fine, suspend, or expel the Union member. The decision of the Executive Board is subject to appeal to the International Union's General Executive Board. The Union also maintains its own Constitution and By-laws.

8. On January 9, 2018[4], the District received a report that PPS employee F operated a PPS vehicle in an unsafe manner in the District's Benson High School parking lot.

9. M and O are F's coworkers in the Maintenance Department. They are also part of the bargaining unit represented by the Union. C is not in the Union bargaining unit.

10. The District investigated the incident and interviewed District employees M, O, and C as part of that investigation. Each of the three employees provided a written statement regarding the incident. Union Business Agent Dennis Mask interviewed C about the incident and prepared a written summary of that interview.

11. On March 26, the District sent F a letter titled, "Subject: Loudermill Notice of Proposed One Day Unpaid Suspension." The letter stated that the District was considering discipline based on three incidents, one which included the driving incident at Benson High School on January 9. (Exh. J-7.)

12. On May 9, the District issued F a written warning and one-day suspension based on the conduct described in the March 26 letter.

[4]All dates are in 2018 unless otherwise noted.

13. On May 14, F sent an email to Union Business Manager Lou Christian and Union Business Agent Dennis Mask, indicating a desire to file internal union disciplinary charges against District employees M and O.

14. On May 29, F filed charges with the Union against M and O for violating Constitutional provisions Sections 153 (the Pledge) and 197 (Discrimination against Members) by allegedly making false statements to the District..

15. On June 5, F filed charges against PPS Supervisor N for violating Constitutional provisions Sections 153 and 197.)

16. Section 153 of the Union Constitution provides:

> "Each applicant before becoming a member shall take the following pledge or oath of obligation:
>
> "I, (state name), in the presence of this Local Union, do truly promise and pledge my word of honor that I am familiar with the provisions and requirements of the Constitution and By-Laws of the United Association and that I will not perform any act in any way prejudicial to the best interest of the United Association, but will at all times endeavor to promote its prosperity and usefulness. I hereby agree to remain loyal and true to the principles and policies and to be governed by the Constitution and By-Laws and Ritual of United Association and the Local Union in any and all matters now or that may hereafter be included therein. I further pledge that I will faithfully attend all meetings of the Local Union unless prevented by sickness or other causes beyond my control. I will at all times assist members of the United Association to the extent of my ability, defend them when unjustly treated or slandered, and cultivate for each and every member the warmest friendship and brotherly love. I will assist unfortunate or distressed members to procure employment.
>
> "I do further promise and swear that I am not a member of any organization advocating the overthrow by force and violence of the Government of the United States or of Canada.
>
> "I take this obligation voluntarily, without any mental reservation, and bind myself until death under the penalty of scorn due to moral perjury and violated honor as one unworthy of trust or assistance." (Exh. J-2 at 100-1, emphasis deleted.)

17. Section 197 of the Constitution provides in part:

> "The United Association recognizes that every member is entitled to just treatment and as a matter of policy, the United Association embraces and supports the anti-discrimination laws of the United States and Canada." (Exh. J-2 at 121.)

18. On June 15, the Union held a meeting and voted to accept the charges filed against M and O. The charges were referred to the Local Executive Board and a trial was scheduled for July 11. M and O were sent notices of the trial and were ordered to attend.

19. On July 2, attorney Stephen H. Buckley provided a legal opinion to the Union President and Vice President stating that the Union could lawfully process the charge F filed against N.

20. On July 11, the Local Executive Board held a trial of M and O based on the charges filed by F.

21. The results of the trial were read at a meeting of the Executive Board on July 18, 2018. M was found guilty of violating Section 153 of the Union Constitution. O was found guilty of violating Sections 153 and 197 of the Union Constitution. M and O were each fined $250.

22. At that July 20 Union meeting, the Union also accepted the charges against N.

23. On July 26, M and O received written notice of the outcome of their trials.

24. Also on July 26, M and O met with the District Senior Manager of Employee and Labor Relations to complain about the Union charges brought against them. M and O voluntarily provided the manager with documentation related to their Union discipline. M and O also told the manager that they did not want to be involved in future District investigations.

25. On July 27, N sent an email to Union Business Manager Lou Christian requesting information about the charges filed against him.

26. Sometime after July 27, N received written notice that the charges against him had been accepted and that a trial had been scheduled for August 14.

27. On August 7, N emailed the Union and requested that the charges be dismissed. Union Business Manager Christian provided N with a copy of the legal opinion from Attorney Buckley.

28. On August 8, the Union denied N's request to dismiss the charges.

29. On August 9, N requested the trial be postponed.

30. On August 13, the Union granted an extension, rescheduling the trial for August 28.

31. On the morning of August 27, legal counsel for PPS, Daniel Rowan, contacted legal counsel for the Union, Stephen Buckley, via email to request that the Union stay disciplinary proceedings against N.

32. On August 27, Buckley replied via email and indicated that the Union would proceed with the trial of N.

33. On August 28, the Union held a trial based on F's internal Union charges against N.

34. On August 29, N emailed a representative of the International Union regarding the disciplinary charges brought against him.

35. On September 21, the Union informed N of the result of his trial. N was found not guilty.

36. On February 26, 2019, M testified at an arbitration hearing where the issue was whether the District had just cause to discipline F. O did not testify.

37. F testified at the arbitration hearing. Her testimony included the following:

> "Q. Was the basis of your Union charges against [M] and [O], that they had provided a statement to Portland Public Schools about the Benson parking lot incident?
>
> "A. That and conversations that I had with [C], yes." (Exh. J-31.)

38. On May 28, 2019, O received a letter from the International General Secretary-Treasurer, Patrick Kellett, stating that his appeal had been granted and the disciplinary charges against him were dismissed.

39. Also on May 28, 2019, M received a letter from the International General Secretary-Treasurer Patrick Kellett, stating that his fine had been reduced from $250 to $125.

40. On June 29, 2019, Arbitrator David Stiteler issued a decision regarding F's discipline. The Arbitrator concluded that F drove in an unsafe manner during the January 9, 2018 incident, but reduced the disciplinary penalty imposed.

41. On December 3, 2019, the parties agreed to submit this unfair labor practice case to this Board based on a Stipulated Record and Closing Briefs.

42. On March 13, 2020, the District provided the Union with a written settlement proposal.[5]

[5]As noted in this Board's Rulings, we do not consider the content of these settlement discussions in this Recommended Order.

43. On March 23, 2020, counsel for the District provided an update to the ALJ regarding the due date for the Closing Brief, and of a potential settlement.

44. On May 11, 2020, counsel for the Union provided a status update to the ALJ, indicating that the District had provided a proposed settlement to the Union and the Union was considering it.

45. On June 23, 2020, the District provided a revised settlement agreement to the Union.

46. On June 25, 2020, counsel for the Union responded to the District in an email stating that a Settlement Agreement would need approval from the International Union.

47. On July 29, 2020, counsel for the Union informed the Administrative Law Judge that the parties had a tentative agreement on settlement, pending final approval from the International Union.

48. As of October 23, 2020, the date of the Parties' Stipulation, the International had not approved the Settlement Agreement and the Union has not executed the Settlement Agreement between the Parties.

CONCLUSIONS OF LAW

The District alleges that the Union violated ORS 243.672(2)(a) by holding disciplinary proceedings, and fining, M and O because of F's charge and Union officials' conclusion that M and O made false statements in the District safety investigation. The District also alleges that the Union violated ORS 243.672(2)(b) and (d) when it conducted internal disciplinary proceedings against District manager, and Union member, N. The Union argues that its conduct was consistent with the Public employees Collective Bargaining Act (PECBA).

We turn to our analysis.

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

2. The Union violated ORS 243.672(2)(a) by engaging in disciplinary proceedings, and fining, M and O because of F's charge and Union officials' conclusion that M and O made false statements in the District safety investigation.

Standards for Decision

ORS 243.672(2)(a) makes it an unfair labor practice for a public employee or for a labor organization or its designated representative to interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed by the PECBA, ORS 243.650 to 243.782, including "the right to form, join and participate in the activities of labor organizations of their

own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. This section is the labor organization analogue to ORS 243.672(1)(a), which prohibits like conduct by public employers. *Jefferson County v. Oregon Public Employees Union*, Case No. UP-16-99, 18 PECBR 285 (1999). Subsection 2(a), because it addresses the conduct of labor organizations, has also been interpreted to impose a duty on a labor organization to fairly represent all employees for whom it is the exclusive representative. *Chan v. Leach and Stubblefield, Clackamas Community College; McKeever and Brown, Clackamas Community College Association of Classified Employees, OEA/NEA*, Case No. UP-13-05 at 12, 21 PECBR 563, 574 (2006).

The Complaint at issue in this case, however, is not brought as a breach of a union's duty of fair representation, but by the employer in response to the Union's discipline of District employees and Union members under Union rules. As explained below, in this type of case, this Board has held that a union is free to enforce a rule against a member which: (a) reflects a legitimate union interest; (b) does not impair public policy under the labor laws; and (c) "is reasonably enforced against members who can avoid the rule by resigning their union membership." *Burkhart v. Oregon Public Employees Union Local 503*, UP-4-92, 10, 14 PECBR 150, 159 (1992).

We apply the *Burkhart* test while mindful of the standards of proof for claims under ORS 243.672(2)(a) as it mirrors ORS 243.672(1)(a).

The language of ORS 243.672(2)(a) provides two distinct prongs, one of which prohibits restraint, interference, or coercion "because of" the exercise of protected rights. The second prong of ORS 243.672(2)(a) prohibits actions that restrain, interfere with, or coerce employees "in the exercise" of their protected rights.

To determine if a union violated the "because of" prong, we ordinarily examine the union's motives or reasons for the disputed action. However, it is not necessary for a complainant to prove that the union was subjectively motivated by an intent to restrain or interfere with protected rights. *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000); *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06 at 29, 22 PECBR 323, 351 (2008). (Cases addressing ORS 243.672(1)(a).)

When analyzing "because of" claims, we typically examine the record as a whole to determine what motivated the union to act. *Portland Assn. Teachers*, 171 Or App at 626. We then decide whether the reasons were lawful or unlawful. *Portland Assn. Teachers*, 171 Or App at 639. Generally speaking, if all of the union's actions are lawful, the alleged "because of" claim must be dismissed. *Oregon AFSCME Council 75, Local 3742 v. Umatilla County*, Case No. UP-18-03 at 9, 20 PECBR 733, 741 (2004) (addressing ORS 243.672(1)(a)). An example of a violation of the "because of" prong is when an employer privatizes employees' jobs because they engaged in a strike. *AFSCME Council 75, Local 3694 v. Josephine County*, Case No. UP-26-06, 22 PECBR 61 (October 30, 2007, *aff'd,* 234 Or App 553 (2010) (addressing ORS 243.672(1)(a)).

To determine whether a union has violated the "in the exercise" prong of ORS 243.672(1)(a), we consider the likely effects of the union's actions on employees. A union commits an "in the exercise" violation if the union's conduct, when viewed objectively under the

totality of the circumstances, has the natural and probable effect of deterring employees in engaging in activity protected by the PECBA. *Portland Assn. Teachers*, 171 Or App at 623; *Service Employees International Union Local 503, Oregon Public Employees Union v. City of Tigard*, Case No. UP-040-13 at 8, 26 PECBR 131, 138 (2014) (addressing ORS 243.672(1)(a)). Put simply, our test for this prong is: Would a reasonable person be chilled from exercising PECBA rights by the union's conduct? *Oregon Public Employees Union v. Jefferson County*, Case No. UP-5-98 at 14, 18 PECBR 109, 122 (1999), recons, 18 PECBR 199 (1999) (addressing ORS 243.672(1)(a)).

For an "in the exercise" claim, neither the union's motive nor the extent to which employees actually were coerced are controlling. Therefore, a complainant need not prove a causal connection between the union's action and the exercise of protected rights. While it generally has no impact on the resolution of a particular case, we have also recognized that a derivative "in the exercise" violation naturally occurs when a party violates the "because of" prong of the statute. *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11 at 28, 25 PECBR 525, 552, recons, 25 PECBR 764 (2013); *Oregon Public Employes Union and Juanita Termine v. Malheur County, Commissioner Don B. Cox, Commissioner W.L. Hammack and Sheriff Ronald K. Mallea*, Case No. UP-47-87 at 7-8, 10 PECBR 514, 520-21 (1988) (cases addressing ORS 243.672(1)(a)). An example of a violation of the "in the exercise" prong is when an employer terminates an employee during the grievance process as additional punishment for the discipline grieved. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan District of Oregon*, Case No. UP-48-97, 17 PECBR 780 (1998).

Finally, the burden of proof is on the Complainant to prove its claims by a preponderance of the evidence. ORS 183.450(2); OAR 115-010-0070(5)(b).

Discussion

In this case, District employee and Union member F was seen by coworkers driving in an unsafe manner, a perception which was later upheld through an arbitration. A coworker notified the employer of the unsafe driving. The District investigated the incident. District officials interviewed several employee witnesses, including M and O, and directed them to provide statements. The District concluded that F had committed a safety violation and disciplined F. The Union grieved the discipline, and ultimately an arbitrator concluded that F had driven in an unsafe manner that warranted discipline.

After F was disciplined, but before the arbitration, F filed disciplinary charges with the Union against M and O. The Union held internal disciplinary proceedings (called "trials"), regarding both employees. The conduct at issue was the content of the statements M and O had provided to the District about F's driving incident, and whether that content violated Union Constitution Sections 153 (the Union's loyalty oath) and 197 (discrimination). Both employees were found guilty and were fined. Both employees appealed their fines to the International Union. While the appeal was pending, the District and Union arbitrated the grievance over the F's discipline. The District called M as a witness at the hearing and he testified. O did not testify. The International Union reduced the fine against M, and dismissed the discipline against O. The

Union's actions caused M and O to tell the District that they did not wish to be involved in future workplace investigations.

Burkhart was the first case in which this Board considered a Subsection 2(a) case brought by an employer based on union discipline of its employee union members. In *Burkhart*, a union suspended a bargaining unit member from union membership for 60 days because he filed a decertification petition against the union without resigning his union membership, as union bylaws required. The union member challenged the suspension as unlawful under (2)(a). This Board reviewed relevant case law under the PECBA and the federal counterpart to ORS 243.672(2)(a), Section 8(b)(l)(A)[6] of the National Labor Relations Act (NLRA).[7]

In particular, this Board discussed *Scofield v. NLRB*, 394 U.S. 423, 70 LRRM 3105 (1969). That case addressed whether a union acted lawfully in fining and suspending members who required immediate payment from the employer for piecework completed above a production ceiling, when the union believed that the members should have allowed the employer to bank the wages for payment on days that the production ceiling was not met. In reaching that decision, the *Scofield* court set out a test for evaluating such section 8(b)(l)(A) claims: A union is "free to enforce a properly adopted rule which [1] reflects a legitimate union interest, [2] impairs no policy Congress has imbedded in the labor laws, and [3] is reasonably enforced against union members who are free to leave the union and escape the rule." *Id.* at 3108.

In *Burkhart*, this board adopted the *Scofield* test as tailored to the PECBA: "We conclude that a union is free to enforce a rule which: (a) reflects a legitimate union interest (b) does not impair public policy under the labor laws, and (c) is reasonably enforced against members who can avoid the rule by resigning their union membership." *Burkhart* at 10. Applying this test to the facts in *Burkhart*, this Board first concluded that the union's rule regarding decertification addressed a legitimate union interest: "OPEU is concerned about member involvement in decertification proceedings. A member who circulates a petition may become, by virtue of that membership, privy to the union's strategy for responding to the attack. OPEU's rule clearly reflects a legitimate union interest." *Burkhart* at 10.

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[6]Section 8(b)(l)(A) states:

> "It shall be an unfair labor practice for a labor organization or its agents—
> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided. That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein * * *."

[7]Those cases included *NLRB v. Allis-Chalmers Mfg Co*., 388 U. S. 1 75, 65 LRRM 2449 (1967) (A union did not violate section 8(b)(1)(A) by obtaining judgments on fines imposed on union members who crossed picket lines during an authorized strike); and *NLRB v. Marine & Shipbuilding Workers*1 391 U.S. 418, 68 LRRM 2257 (1968) (A union violated the statute by expelling a union member for failing to follow the union's rule requiring that a member exhaust an internal union appeal procedure before filing an unfair labor practice charge with the NLRB. The Court determined that unless "plainly internal affairs of the union are involved, "public policy requires" "unimpeded access to the Board." *Id.* at 2259. The court held that the union's internal rule was contrary to public policy.)

Second, this Board determined that OPEU's rule did not impair public policy under the labor laws. This Board reasoned that Burkhart was gathering signatures for a decertification petition, a necessary step precedent to the filing of a decertification petition. Under the PECBA, employees have a right to file a decertification petition which must be accompanied by an adequate showing of interest. ORS 243.682; OAR 115-25-010(3)(c). This Board determined that it was not necessary for Burkhart to file a petition before gaining protection under the PECBA. Rather, because an employee was required to submit an adequate showing of interest at the time of filing, the gathering of signatures is a protected activity under the PECBA. *Burkhart* at 10. This Board also determined that, while ORS 243.672(2)(a) does not contain the proviso language in Section 8(b)(l)(A),

> "[U]nions have the inherent ability to expel members. We agree that it is anomalous to require a union to maintain the membership of an individual who wants to eliminate the union's existence. The policy considerations involved in the cases discussed above are equally applicable to cases arising under the PECBA." *Burkhart* at 11.

Third, this Board determined that the rule was reasonably enforced by the union, because the rule could have been avoided by Burkhart if he had resigned from the union. "We do not find that such a forced resignation impinges on Burkhart's PECBA right to circulate a petition. There is nothing in this record which shows that [the union] took any other action against Burkhart. His suspension was based solely on his failure to resign before circulating the petition." *Burkhart* at 10.

With this precedent in mind, we apply the *Burkhart* test to the facts of this case.

Legitimate Union Interest

This case concerns workplace safety and discipline of employees for violation of workplace safety rules. Workplace safety is explicitly included in the PECBA definitions of mandatory subjects of bargaining. ORS 243.650(7)(h) provides, "For all other employee bargaining except school district bargaining and except as provided in paragraph (f) of this subsection, "employment relations" excludes staffing levels and safety issues (except those staffing levels and safety issues that have a direct and substantial effect on the on-the-job safety of public employees)." ORS 243.650(7)(f) provides, "For employee bargaining involving employees covered by ORS 243.736 and employees of the Department of Corrections who have direct contact with adults in custody, "employment relations" includes safety issues that have an impact on the on-the-job safety of the employees or staffing levels that have a significant impact on the on-the-job safety of the employees."

Employer discipline of employees is a primary interest of labor organizations as well. For example, this Board has "generally held that proposals regarding just cause standards for discipline are mandatory for bargaining." *Association Of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services*, Case No. UP-043-11, 25 PECBR 525, recons, 25 PECBR 764 (2013), citing *Multnomah County Corrections Officers' Association v. Multnomah County*, Case No. UP-21-86, 9 PECBR 9529, 9557-58 (1987). This includes not only the just cause standard itself, but also the procedures and guidelines for discipline. *Id.*; *Portland Fire Fighters*

Association, Local 43, IAFF v. City of Portland, Case No. UP-99-94, 16 PECBR 245, 252 (1995), AWOP, 142 Or App 206, 920 P2d 181 (1996); ORS 243.650(7)(a).

The District argues,

> "[T]he Union had no legitimate interest in impeding District investigations under the guise of enforcing its loyalty oath or nondiscrimination rule. Simply put, providing factual information to one's employer in the context of a safety investigation does not show a lack of loyalty to a union or coworkers. Any interest in trying to shield a union member from discipline through coercion or deception is not a legitimate interest. The Union was not faced with any threat as in *Burkhart,* nor was it trying to advance any legitimate bargaining interests as in *Scofield* or *Allis-Chalmers* (*NLRB v. Allis-Chalmers Mfg Co.*, 388 U. S. 175, 65 LRRM 2449 (1967))" Complainant's Post-Hearing Brief at 11-12.

This District argument focuses on the specific conduct at issue, not the subject matter or Union rule and their relationship to public policy. The key question under this element of the test is whether the Union has a legitimate interest in the subjects of employee safety and in discipline. We conclude that there is a legitimate union interest in workplace safety, and in the employer's discipline of its members by the employer regarding workplace safety issues.

Impairment of Public Policy Under the Labor Laws

We turn to whether the application of union rules regarding honesty and union loyalty impair public policy under the labor laws.[8] To determine those policies, we look to laws and regulations which concern workplace safety in Oregon.

Workplace safety is highly regulated under the Federal Occupational Safety and Health Act of 1970, 29 USC 651 *et seq*., and the Oregon Safe Employment Act, ORS 654.001 *et seq*. ORS 654.176 states that "To promote health and safety in places of employment in this state, every public or private employer shall, in accordance with rules adopted pursuant to ORS 654.182, establish and administer a safety committee or hold safety meetings." ORS 654.182(1)(a) provides that the relevant agency adopt rules that include "Prescribing the membership of the committees to ensure equal numbers of employees, who are volunteers or are elected by their peers, and employer representatives * * * ." The required agency rules are also to establish procedures for workplace safety inspections by the committee; establishing procedures for investigating all safety incidents, accidents, illnesses and deaths; evaluate accident and illness prevention programs, and prescribe guidelines for the training of safety committee members. ORS 654.182(1)(d, e). In addition, the statute releases labor organizations from liability for "the discussion or furnishing, or failure to discuss or furnish, or failure to enforce any safety or health provision to protect

[8]The *Scofield* court chose the term "labor laws" instead of naming or citing the NLRA or the Taft-Hartley Act; similarly, this Board used the term "labor laws" instead of naming or citing the PECBA. Given that workplace safety is an identified concern or subject of Oregon workplace safety law, workers' compensation law, the PECBA, and is at the heart of the dispute in this case, it is appropriate to determine the public policies relevant to this case by reviewing all the major statutory schemes governing workplace safety and discipline.

employees against work injuries, in any collective bargaining agreement or negotiations thereon." ORS 654.192.

Injuries to workers caused by unsafe working conditions and other causes are also highly regulated, under the Oregon Workers' Compensation statutes, ORS 656.001 to 656.990. As noted above, the PECBA also identifies significant safety issues as mandatory subjects of bargaining, and a public employer has the right to discipline employees who violate safety rules. Accordingly, we conclude that Oregon has significant and far-reaching public policies concerning workplace safety reflected in its labor laws.

Those policies are also reflected in the parties' collective bargaining agreement. That agreement provides:

> "1. The District shall maintain safe working conditions in accordance with established federal and state regulations. The District *and employees covered under this Agreement should work to avoid or minimize hazards*.
>
> "2. The parties agree to comply with Oregon OSHA regulations.
>
> "B. PHYSICAL EXAMINATIONS
>
> "1. In the interest of safety and the wellbeing of students, employees and the public, the District and the DCU and its affiliated unions agree to the objective of a substance free workplace." (Finding of Fact 4, emphasis added.)

M and O were District employees covered under the labor laws and the collective bargaining agreement. It is reasonable to conclude their contractual obligation to "work to avoid or minimize hazards" included reporting safety issues to the District and providing statements about safety incidents. (Finding of Fact 4.)

We turn to the relationship of union rules to these laws and the collective bargaining agreement. The Union's rationale for disciplining M and O was that it concluded, after a trial, that M and O had given false statements to the representatives of the District who were investigating a safety issue. While these employees, on this occasion, may not have contemplated F's charge or the Union's actions, the Union's discipline of M and O put any future employees giving statements about safety violations in an untenable position – they must either resign their Union position prior to making a safety report or bear the risk that Union officials may consider their statements to be untruthful.[9] Unlike the situation where an employee seeks to eliminate their bargaining unit through decertification, the option of resigning appears to be far out of proportion to the option of an employee acting in the course of their employment to describe safety-related conduct of another

[9]The question of whether the District was correct that M and O were truthful, or whether the Union was correct that they were untruthful, was resolved through the dispute resolution process of the collective bargaining agreement created for this very purpose. Here, that resolution came through an arbitration of the discipline imposed on F, and the arbitrator upheld the employer's conclusion that F's conduct warranted discipline, thus crediting M's and O's statements about the events.

employee. The more reasonable, and most likely, step an employee could take in the face of potential union discipline would be to avoid participating in safety reports and investigations. That is what M and O seek to do in the future.

Employees are subject to discipline by an employer if they provide false statements in an employer's safety investigation. They are also likely subject to discipline for refusing to report safety issues or refusal to provide information about safety issues. Such conduct would also appear to violate the collective bargaining agreement, which directs employees to "work to avoid or minimize hazards." (Finding of Fact 4.)

While, in the future, Union member employees would be aware of their option to resign from the Union prior to giving statements about the conduct of fellow employees, there is no evidence that the employees in this case had any reason to suspect that they would be disciplined by the Union if Union officials believed their statements were false. There is no evidence that these employees were aware of the Union rule, that it ever had been exercised in this workplace before, or that they would be put on trial for allegedly violating it.

Absent punishing its own members, the Union is not without recourse to challenge and correct false statements of its members that were used to discipline another member. It may file a grievance over the discipline, and pursue that grievance to arbitration, where a neutral fact-finder will determine the truthfulness of witnesses relevant to the discipline.

The only argument offered by the Union regarding the analysis above is that this Board should not adopt or follow cases on similar issues arising under the NLRA. The Union does not provide this Board with an alternative, relying on *Burkhart* instead. However, as noted above, *Burkhart* itself adopted a version of the relevant NLRA standard.

We conclude that the imposition of fines for allegedly false testimony in a disciplinary matter regarding workplace safety impairs public policy under the labor laws.[10]

Reasonably Enforced Against Union Members Free to Leave the Union and Escape the Rule

In reaching its decision in *Burkhart*, this Board discussed other cases decided under Section 8(b)(1)(A) of the NLRA. In *Allis-Chalmers*, the US Supreme Court held that a union did not violate Section 8(b)(1)(A) by obtaining judgments on fines imposed on union members who crossed picket lines during an authorized strike. This Board quoted several sections of that opinion, including the following:

> "Integral to this federal labor policy [of permitting union organizing and collective bargaining] has been the power in the chosen union to protect against erosion of its status under that policy through reasonable discipline of members who violate rules

[10]The facts in this case, including the disparate penalties imposed on M and O by the International Union, suggest that the Union's penalties for allegedly false statements could influence the content of employee reports of safety violations, and undercut the credibility of Union witnesses in disputes about such violations.

and regulations governing membership. That power is particularly vital when the members engage in strikes." *Burkhart* at 7, quoting *Allis-Chalmers* at 2450-51.)

This Board also reviewed *NLRB v. Marine & Shipbuilding Workers*, 391 US 418, 68 LRRM 2257 (1968). In that case, the Supreme Court held that a union member could not be expelled for failing to exhaust an internal union appeal procedure before filing an unfair labor practice charge with the NLRB. The Court determined that unless plainly internal affairs of the union were involved, public policy requires unimpeded access to the NLRB. Therefore, the union's internal rule was contrary to public policy, and the union violated section 8(b)(l)(A).

Applying this element of the *Burkhart* test, this Board stated in that case that the rule was reasonably enforced by the union, because the rule could have been avoided by Burkhart if he had resigned from the union. Regarding such a resignation, this Board stated,

> "We do not find that such a forced resignation impinges on Burkhart's PECBA right to circulate a petition. There is nothing in this record which shows that [the union] took any other action against Burkhart. His suspension was based solely on *his failure to resign before circulating the petition*." *Burkhart* at 10, emphasis added.

Burkhart and the cases it discusses all involved situations in which a union member takes an affirmative step of their own volition, outside the scope of their regular work, such as crossing a picket line; requiring an employer to pay for work exceeding a piecework ceiling on a daily basis instead of banking that surplus and using it for days where the ceiling was not met; and filing an unfair labor practice complaint against the union.

Here, however, the employees were summoned by the employer, in the course of their work, to provide evidence regarding a workplace safety issue. There is no evidence that the employees were permitted to refuse to provide statements, or that the employer did not care whether the statements were truthful or not. In the normal course of their employment, pursuant to Federal and State law, and the collective bargaining agreement, M and O's statements were given under pain of discipline. They were required to provide truthful information by their employer, and providing that information was consistent with specific language in the collective bargaining agreement that the union and its members would work to avoid or minimize safety hazards in their workplace.

The District argues, correctly, that

> "Using internal discipline against members in this way interferes with a public employer's workplace investigations or its ability to issue corrective action. The natural and probable effect of this conduct is that employees who want to be honest and forthright with their employer without fear of reprisals from the Union must resign their union membership. Employees who wish to remain in the Union may choose to avoid providing information to their employers to avoid Union discipline. The negative policy implications of employees withholding information during workplace investigations is obvious. Public employers would have a much more difficult time investigating all manner of potential workplace misconduct, including

discrimination, sexual harassment, and unsafe working conditions." District Post-Hearing Brief at 12.

For purposes of our discussion here, it does not matter whether the employees were truthful, as the employer apparently believed, and the arbitrator found, or not truthful, as the Union concluded. The relevant facts are simply that the Union concluded that the employees were untruthful in statements to the employer on a safety issue, and that as a result the Union threatened and then took punitive action against the employees.

The record does not reveal whether M and O were aware that the Union would put them on trial if their statements to the employer were suspected of being untruthful; there is no evidence regarding whether such trials had happened before, or the actions challenged in any such trials. In any event, the obvious message to their successors is to resign from the Union every time they have a duty to report, or to respond to questions, about a safety violation by a fellow Union member. Here, M and O have already stated that they will avoid giving such statements in the future, at least voluntarily. Imposing disincentives to report regarding safety issues and unsafe employee conduct is fundamentally inconsistent with the public policies contained in the statues and regulations governing safety in the workplace. It is not a consequence that one can reasonably expect an employee to ignore. Indeed, the employee's obligations to the employer are likely triggered upon merely seeing an unsafe action, not simply when the employee reports it. Under the facts of this case, it appears that the Union's system of incentives seem to favor employees involved in a safety violation not being truthful or responsibly coming forward if the person creating the unsafe situation is a fellow union member.

This Board concludes that the Union rules at issue are not reasonably enforced against union members, because those members are neither entirely free to leave the union and escape the rule, nor are those rules, as enforced here, consistent with the employees' obligations regarding safety under labor laws and the collective bargaining agreement.

We conclude that the District has proven that the imposition of fines for allegedly false testimony in a disciplinary matter regarding workplace safety impairs public policy under the labor laws, and that therefore the Union has violated ORS 243.672(2)(a). We will order the Union to cease and desist from this conduct.

3. The Union did not violate ORS 243.672(2)(b) when it conducted internal disciplinary proceedings against N.

Under ORS 243.672(2)(b), it is an unfair labor practice for a labor organization or its designated representative to refuse to bargain collectively in good faith with a public employer if the labor organization is an exclusive representative. It is the mirror provision to ORS 243.672(1)(e), which sets bargaining obligations on the employer.

Claims of bad faith bargaining typically arise out of traditional collective bargaining activities, where a party allegedly presents regressive or permissive proposals, or engages in surface bargaining. Other types of bad faith bargaining include an employer making a unilateral change in the status quo concerning a mandatory subject of bargaining. *See Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575, 294 P3d 547 (2013). Bad faith bargaining also

includes alleged failures to provide relevant information to the other party upon request if the information sought is of probable or potential relevance to a grievance or other contract administration issue, or if the information sought is reasonably necessary to allow meaningful bargaining on a contract proposal. *See Union-Baker ESD Association v. Union-Baker Education Service District*, Case No. UP-2-05, 21 PECBR 286 (2006). Finally, this Board has recognized certain types of actions as being so destructive of the bargaining relationship or so inconsistent with the good faith required by the statute that those actions per se violate (2)(b) or (1)(e), regardless of whether subjective bad faith is proven. *See Medford School District # 549C*, 25 PECBR at 515.

Citing no authority under the PECBA, the District urges this Board to follow NLRA precedent in this area. Section 8(b)(1)(B) of that Act provides: "It shall be an unfair labor practice for a labor organization or its agents * * * to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining *or the adjustment of grievances*" (emphasis added).

There are many cases which have determined whether particular actions taken by a union against a union member supervisor have violated Section 8(b)(1)(B). Many of those cases concern whether the union member supervisor under the union's threat of sanctions was engaged in collective bargaining or the adjustment of grievances. Supervisory work deemed to be covered by the "adjustment of grievances" clause has come to be called "Section 8(b)(1)(B) duties." *See Podewils v. NLRB*, 274 F3d 536 (DC Cir 2001); *Writers Guild of America, West, Inc. and Universal Network Television, LLC. and NBC Studios, Inc.,* NLRB 393 (2007).

The PECBA does not contain the language in 8(b)(1)(B) that vexes the courts analyzing cases under the NLRA. While the 8(b)(1)(B) term "collective bargaining" could possibly be interpreted to include the handling of grievances, cases under the NLRA have not done so. In any event, there is no evidence that N was involved in collective bargaining activity. His sole role in F's discipline was to investigate and report the circumstances, including by seeking statements from M and O, and provide notice of discipline as directed. Further, there is no evidence that the Union's contemplated punishment would impose a cognizable harm on N,[11] nor is there any evidence that the union's sanction would affect N's work for the District in the future. We conclude that the Union did not violate ORS 243.672(2)(b), and we will dismiss this claim.

4. The Union did not violate ORS 243.672(2)(d) when it conducted internal disciplinary proceedings against N.

Under ORS 243.682(2)(d), it is an unfair labor practice to violate the provisions of any written contract with respect to employment relations, where previously the parties have agreed to accept arbitration awards as final and binding upon them. It is the mirror provision to ORS 243.672(1)(g).

[11]The record does not establish that N would suffer any personal losses due to expulsion or resignation from the Union such as loss of life insurance, health benefits, legal insurance, or ability to work in the private sector in his field.

In analyzing a violation of contract claim under either provision, we first determine whether the language is ambiguous. Unambiguous collective bargaining agreements are enforced according to their terms. A contract is ambiguous if it can reasonably be given more than one plausible interpretation. When that is the case, we ascertain the intent of the parties and construe the contract consistent with that intent. In order to do this, we examine any available extrinsic evidence of the contracting parties' intent. If after that, the ambiguity persists, we resolve it by using the appropriate maxims of contractual construction. *Jackson County School District # 9 v. Eagle Point Education Association/OEA/NEA*, Case No. UP-26-12, 25 PECBR 746 (2013).

The District contends that, in acting to determine whether to impose discipline on N, the Union violated the parties' collective bargaining agreement.

The District points to the agreement's Article 12, which provides,

> "In administering the terms and conditions of this Agreement, the parties agree to comply with applicable State and/or Federal Statutes and/or regulations regarding nondiscrimination, i.e., on the basis of age, sex, religion, race, physical handicap, marital status, political activity and association. It is the expressed intent of the [Union], in executing this Agreement, that the Board and its designees shall retain sole control and direction over the District's compliance with such laws and/or regulations and that this Article shall in no way be interpreted as affecting the application thereof. *The [Union] shall use its best efforts to direct employees complaining of such discrimination to appropriate District administrative remedies.* It is the intention of the parties that the interpretation given to this Article shall be consistent with the proper interpretation of the provision of the Oregon Fair Employment Practices Law contained in ORS 659.028 and 659.030." (Emphasis added.)

The District contends that, when F filed a discrimination charge against N with the Union, this language required the Union to refer F to the District's administrative processes, and not to conduct an internal disciplinary process. This contract provision, however, is plainly unambiguous. It refers to State and Federal statutes and regulations regarding discrimination, not discrimination regarding Union members under the Union Constitution.

The District also refers to Article 18 of the agreement, which states that "the parties agree to comply with Oregon OSHA regulations." The District refers us to Oregon OSHA ORS 654.010, which provides:

> "Every employer shall furnish employment and a place of employment which are safe and healthful for employees therein, and shall furnish and use such devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably necessary to render such employment and place of employment safe and healthful, and shall do every other thing reasonably necessary to protect the life, safety and health of such employees."

We see no basis upon which we could determine that the Union violated this provision of the collective bargaining agreement and one of the laws it refers to. Unions routinely bring pressure

upon employers and their supervisors in disciplinary matters. They routinely file grievances, and go to arbitration, regarding discipline relevant to safety issues in the workplace. The District has provided no basis for this Board to conclude that such conduct, even as targeted as that in this case, violates the Oregon OSHA statute or regulations or any other labor law. We will dismiss this claim of the Complaint.

5. Remedy

This Board generally orders notice posting if we determine that a party's violation of PECBA (1) was calculated or flagrant; (2) was part of a continuing course of illegal conduct; (3) was committed by a significant number of the respondent's personnel; (4) affected a significant number of bargaining unit employees; (5) significantly (or potentially) impacted the designated bargaining representative's functioning; or (6) involved a strike, lockout, or discharge. *Oregon School Employees Association, Chapter 35 v. Fern Ridge School District 28J*, Case No. C-19-82 at 12, 6 PECBR 5590, 5601, *aff'd without opinion*, 65 Or App 568, 671 P2d 1210 (1983), *rev den*, 296 Or 536 (1984). In this case, a notice posting is warranted because the Union's conduct potentially affected all bargaining unit employees who are members of the Union. In addition to the traditional physical posting of the notice, this Board requires a respondent electronically notify employees of its wrongdoing when the record indicates that electronic communication is the customary and preferred method that the respondent uses to communicate with employees. *See Southwestern Oregon Community College Federation of Teachers, Local 3190, American Federation of Teachers v. Southwestern Oregon Community College*, Case No. UP-032-14 at 9, 26 PECBR 254, 262 (2014). In this case, it appears that the relevant information about the trial and discipline of M and O were distributed to members with its reports of Union board meetings, by email. In that case, email is the common method of communication between the Union and its members. Accordingly, we will order the Union to post the notice and distribute it to bargaining unit employees by email.

PROPOSED ORDER

5. The Union shall cease and desist from violating ORS 243.672(2)(a).

6. The Union shall post a notice regarding its violation of ORS 243.672(2)(a) for 30 days in prominent places where the Union is permitted to post Union material.

7. The Union shall rescind the discipline of M and reimburse M for penalties paid.

8. We dismiss the remainder of the Complaint.

SIGNED AND ISSUED 19 February 2021.

B. Carlton Grew

Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date that objections are received by the Board; "the date of service" of a recommended order means the date that the Board sends or personally serves the recommended order on the parties.) If one party has filed timely objections, but the other party has not, the party that has not objected may file cross-objections within 7 days of the service of the objections. Upon good cause shown, the Board may extend the time for filing objections and cross-objections. Objections and cross-objections must be simultaneously served on all parties of record in the case and proof of such service must be filed with this Board. Objections and cross-objections may be filed by uploading a PDF of the filing through the agency's Case Management System (preferred), which may be accessed at https://apps.oregon.gov/erb/cms/auth. Objections and cross-objections may also be filed by email by attaching the filing as a PDF and sending it to ERB.Filings@Oregon.gov. Objections and cross-objections may also be mailed, faxed, or hand-delivered to the Board. Objections and cross-objections that fail to comply with these requirements shall be deemed invalid and disregarded by the Board in making a final determination in the case. (*See* Board Rules 115-010-0010(10) and (11); 115-010-0090; 115-035-0040; and 115-070-0055.)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
STATE OF OREGON
EMPLOYMENT RELATIONS BOARD

PURSUANT TO AN ORDER of the Employment Relations Board (Board) in Case No. UP-002-19, Portland Public Schools v. United Association, Plumbers and Pipefitters Local 290, and in order to effectuate the policies of the Public Employee Collective Bargaining Act (PECBA), we hereby notify our members that the Board found that United Association, Plumbers and Pipefitters Local 290, (Local 290) committed unfair labor practices in violation of ORS 243.672(2)(a), which prohibits a labor organization from interfering with, restraining or coercing any employee in or because of the exercise of any right guaranteed by PECBA, ORS 243.650 to 243.782.

The Board concluded that Local 290 violated (2)(a) when it engaged in disciplinary proceedings against two members for allegedly making false statements during an employer investigation of another member.

To remedy this violation, the Board ordered Local 290 to:

1. Cease and desist from violating ORS 243.672(2)(a).

2. Post this notice for 30 days in prominent places where the Union is permitted to post Union material.

3. Rescind the remaining discipline and reimburse the member for the fine imposed.

LOCAL 290

Dated: _____, 2021

By:_____

Title:_____

****

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED

This notice must remain posted for 30 consecutive days from the date of posting in each employer facility in which bargaining unit personnel are likely to see it. This notice must not be altered, defaced, or covered by any other materials. Any questions concerning this notice or compliance with its provisions may be directed to the Employment Relations Board, 528 Cottage Street N.E., Suite 400, Salem, Oregon, 97301-3807, phone 503-378-3807.