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Kate Brown, Governor



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Colt Gill

Director of the Oregon Department of Education

January 3, 2022

BY EMAIL

REDACTED
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Superintendent Andy Dey
Eugene School District 4J
200 North Monroe Street
Eugene, OR 97402

RE: Case#2021-MM-08

Dear REDACTED and Superintendent Andy Dey:

This letter is the order on the May 4, 2022, appeal filed by REDACTED (Complainant) alleging that Eugene 4J School District violated ORS 659.850 (prohibiting discrimination in an education program or service financed in whole or in part by moneys appropriated by the Legislative Assembly) and OAR 581-021-0045 (prohibiting discrimination in certain educational agencies, programs, or services under the jurisdiction of the State Board of Education). To ensure compliance with these laws and rules, the Oregon Department of Education reviews school procedures and makes findings of fact to determine whether a violation occurred and what action, if any, should be taken.¹

Appellate Procedures for Complaints Alleging Discrimination

On appeal, Complainant alleges that Eugene 4J School District discriminated against them by unlawfully terminating his volunteer position with the district's radio station. Complainant

¹ The administrative rules governing the Oregon Department of Education's appeals process are OAR 581-002-0001 to 581-002-0023.

specifically alleges that the district retaliated against them for reporting that the district's programming was inequitable and discriminatory.

The Oregon Department of Education has jurisdiction to resolve this appeal under OAR 581-002-0003. When a person files with the department an appeal of a complaint alleging discrimination, the department will initiate an investigation to determine whether discrimination may have occurred.² If the department determines that a violation of a law or rule described in OAR 581-002-0003 occurred, the department must issue a preliminary order to the complainant and the educational entity alleged to have committed the discriminatory act.³ The preliminary order must include a reference to the decision of the educational entity that is on appeal, the procedural history of the appeal, the department's preliminary findings of fact, and the department's preliminary conclusions.⁴ If the department determines that a violation of law or rule described in OAR 581-002-0003 did not occur, the department must issue a final order as described in OAR 581-002-0017.⁵ The Director of the Oregon Department of Education may for good cause extend the time by which the department must issue an order.⁶

In this appeal, the department has completed its investigation to determine whether discrimination may have occurred. This letter constitutes the department's order as to whether discrimination may have occurred.

PROCEDURAL BACKGROUND

On March 9, 2021, Complainant filed a complaint alleging that Eugene 4J School District retaliated against them for reporting that the district's radio station had inequitable and discriminatory programming. On April 13, 2021, the district issued a written response to Complainant finding, in part, that the termination was not retaliatory. Complainant subsequently filed an appeal with the Oregon Department of Education. On August 24, 2021, the department accepted the appeal under OAR 581-002-0005(1)(a)(A) and (C). Under those provisions, the department will accept an appeal of a complaint if a complainant has exhausted a school district's complaint process or the district otherwise failed to resolve the complaint within 90 days.

PRELIMINARY FINDINGS OF FACT

After conducting its investigation, the Oregon Department of Education makes the following findings of fact:

1. Eugene 4J School District is a recipient of federal funds.

² OAR 581-002-0009.

³ OAR 581-002-0009(3)(a)(A).

⁴ *Id.*

⁵ OAR 581-002-0009(3)(a)(B).

⁶ OAR 581-002-0009(3)(b).

2. A radio station (KRVM) is located on district property and uses certain district services, including the district's Human Resources Department.
3. During times relevant to this appeal, Complainant volunteered at KRVM.
4. During times relevant to this appeal, the district's student population was 68% white students and 32% minority race and ethnicity students and roughly half male students and half female students.
5. Before November 23, 2020, the General Operations Manager for KRVM (Manager) had held that position for approximately three months. Previously, Manager had held the position of Program Manager for approximately five years.
6. Before November 23, 2020, the Program Director for KRVM (Director) had held that position for approximately one month.
7. During times relevant to this appeal, volunteers at KRVM were not allowed in the radio station's studio because of protocols related to the Coronavirus pandemic. To the extent possible, volunteers pre-recorded their shows at home. If a volunteer did not have the equipment to pre-record their show at home, another volunteer would assist them. Complainant assisted recording multiple shows.
8. Before November 23, 2020, Complainant hosted four programs that aired on KRVM. The programs were: (1) Routes and Branches, which aired on Saturdays from 3 pm to 5 pm; (2) Miles of Bluegrass, which aired on Mondays from 7 pm to 9 pm; (3) Island Earth Radio, which aired on Sundays at 6 am and on Thursdays at 11 pm; and (4) Music that Matters, which aired on Tuesdays from 7 pm to 9 pm. Complainant was filling in for two of these programs, Routes and Branches and Miles of Bluegrass.
9. During times relevant to this appeal, Island Earth Radio was promoted as a program that "weaves songs of nature with nature sounds and poems in a one-hour radio show hosted by [Complainant]. This pioneering music program animates the natural world with international, Native American, folk, popular, and instrumental songs of our environment."
10. On November 23, 2020, Complainant emailed Manager and Director with a proposal to cut the program Routes and Branches from two hours to one hour and replace the first hour of the program with the program Island Earth Radio. In pertinent part, Complainant wrote:

I would like to ask for Island Earth Radio to begin airing Saturdays at 3 pm to 4 pm in 2021. Among the reasons include:

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- Innovative programming
- Diversity on a day that is now overwhelmingly and near-completely culturally biased to white male artists 9 am to 9 pm
- Diversity in programming overall for the station and its genres. For Americana music there was only one female performer per 25 during the previous 2 other Americana shows . . .
- Two one-hour shows rather than one-two hour show shown to increase listener response per NPR/OPB study
- Topical programming that is positive and affirming
- Support for my broadcasting development
- Ability to share with other stations
- Proven quality that has strong initial response

11. Manager and Director contacted Complainant following Complainant’s November 23rd proposal and informed Complainant that they were rejecting it. During the district’s investigation of the complaint, Manager and Director reported that the Coronavirus pandemic made it difficult for volunteers to prepare their shows. For that reason, they did not want to change the schedule. Manager and Director also reported that Routes and Branches was one of KRVM’s more popular Saturday afternoon programs.

12. On December 10, 2020, Complainant wrote back to Manager and Director, expressing dissatisfaction with their decision and questioning KRVM’s dedication to diverse programming. Complaint also resigned from hosting the two programs for which they were filling in: Routes and Branches and Miles of Bluegrass.

Thank you for getting back to me. I appreciate that you value success and consistency.

* * * * *

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I did not know success and consistency was KRVM's mission and thought variety, diversity, and education were primary. But I admit I don't know the mission statement and was hoping you could perhaps forward one to me? I don't see it online.

As I've apparently misunderstood KRVM's mission, I need to rethink my involvement. In 2021 I have been in radio 40 years and I would have hoped I'd have more of a voice by now. You have taken a hard line on a one hour programming change that will serve public/community radio values and improve success, diversity, and creativity of Saturday programming for that minimal investment. I find the rejection of one hour of change based on my experience and passion hard to understand and feel personally disrespected and undervalued.

I am planning to discontinue Routes and Branches January 2 and Miles of Bluegrass January 5. I've enjoyed and appreciated the opportunity to share music on these programs.

13. Manager, Director, and Complainant met in person on December 17, 2020.

14. On December 18, 2020, Complainant emailed the district their notes from the December 17th meeting:

- KRVM will not allow a trial run of a culturally diverse hour to replace one hour of Saturday programming. Among the reasons given are the fast pace of Saturday, presumed expectations, and that Saturday programming is "successful."
- There was no counterproposal to add diversity to Saturdays.
- Bringing up this issue was appreciated.
- Success is measured by money raised. Saturday is the most successful day of the week.
- Diversity is KRVM's only mission statement.

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- Diversity is not measured or quantified in any way currently, including an absence of specific or stated goals.
- Saturday’s individual and collective programs are culturally skewed to white male voices from 9 to 5 and afterwards.
- Management does not know how the mission statement was created and showed interest in changing it.
- “Escape from reality,” “success,” and “consistency” are among current guidelines that decide program value and placement.
- Quote: “It’s okay for one day a week to be white male programming.”
- “Diversity within programming” is not considered as diversity currently. Non-specific perceptions of “overall diversity” is currently its only criteria.
- Program blocs on KRVM do not proactively change to meet changing community needs.
- Island Earth Radio’s placement is “perfect” for its content at 6 am Sunday and 11 pm Thursdays.

15. On December 21, 2020, Complainant emailed another volunteer at KRVM (Volunteer) to solicit information about the diversity of the station’s staff. That same day, Volunteer replied, writing:

I wonder if you’re going about this in a way that will get you what you want. Please don’t take offense, but it looks like you may be more in “attack” mode than in “problem solving” mode. If I understand correctly, your bottom line is that your Island Earth Radio show should air on Saturday afternoons.

I’m having a hard time drawing a direct connection between your issues about cultural diversity and the question of when to air Island Earth Radio. Is there a middle ground?

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Maybe you could explore with [Director] the idea of some other time slot that would be more appealing to you than the show's current two slots. Maybe you could explore the idea of simply incorporating the music that you play on Island Earth Radio into other shows – on Saturday afternoon or elsewhere.

Bear in mind that I am a firm believer in the role of the Program Director as the ultimate arbiter of the air schedule and the content of all shows. [Director] is new in [their] job. Why not give [them] a chance to show what [they] can do? [They] may be more willing to collaborate than you think, especially if you were obviously in a collaborative frame of mind. Top-down management is the norm for any radio station, and a gazillion other profit and not-for-profit organizations. In the best-managed of these organizations, the folks at the top welcome productive input from staff. I just don't see you effecting a change if you go in guns-a-blazing.

* * * * *

I'm NOT recommending that you un-volunteer yourself. You are a valuable and talented volunteer at KRVM, and the station has justifiably relied on you for a lot of quality programming, especially in these covid times. I am, however, suggesting that you take a step back, take a deep breath, and ask yourself what you really want to do. Your goal of enhancing cultural diversity may be a reasonable goal. You want to go about it in a reasonable way.

Later that day, Complainant responded to Volunteer's email, writing:

Yes, fair points[.] I have explored other times for over a year and as you might imagine it's a non-starter. As you know[,] they will not change the schedule proactively. Even a commercial radio station shouldn't be this rigid. Diversity really matters, especially now in this culture. To create something with a theme that's musically rich and diverse without a peep of understanding of it gets old. Yes, I already am networking and broadcasting with other stations, and each one is *much* more supportive, communicative, and diverse than KRVM. I would love to work with [Director] and

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see no opening for that unless I'm missing something. She told me [Island Earth Radio] is for tea drinkers . . . a colonized statement if there ever was one. But I did not oppose or question the comment at all and stayed respectful. In the meantime I did withdraw from [Miles of Bluegrass] and [Routes and Branches].

* * * * *

There is a stakeholder in this that most stations don't have. [Eugene] 4J [School District] must be and is all about diversity. For all we know they may believe the mission statement [of KRMV] is being met and suits them. So if you have any ideas please let me know. I am going to meet with [Manager and Director] again. I am extremely flexible on solutions, but maintaining white male Saturday 9 to 5 is not right for the community, especially when some other voices want to be heard (that's the connection . . . [Island Earth Radio] and diversity . . . the show is multicultural). Any slight variation in any direction shows good will even though not enough, and I can accept and support that[.]

16. On December 25, 2020, Volunteer responded to Complainant's December 21st email:

Miles of Bluegrass might be more limiting, as it promises a very specific style of music. But why withdraw from Routes and Branches? It seems you might be able to use that as a platform to play much of the music that you feel so strongly needs to be played.

I am still not grasping or understanding your fixation on Saturdays. What is it about Saturdays 9 to 5 that makes it "white male?" And don't you think it's hard to argue that it's "not right for the community" when it is likely our most listened-to time? That, to me, implies that it IS right for the community.

Later that day, Complainant responded to Volunteer's email. In that response, Complainant made several points. Complainant proposed that diversity serves community better than pop music. Complainant stated that they were frustrated with the content of Routes and Branches, that "I am disgusted with a genre I loved and grew up on. It too has become so sanitized and whitebread that 'Americana' . . . now means white male guys on the charts. 45+ of the top 50 week to week are now white,

and the vast majority of those male.” Complainant again posited that KRVM staff lacked “interest in diversity.” Complainant made additional statements about the number of white males featured during Routes and Branches. “My question to you,” Complainant wrote, “is what is our responsibility to diversity/other cultures, and how should we organize/structure to deliver on it?”

17. On January 7, 2021, Volunteer forwarded their and Complainant’s December 21st and December 25th emails to Manager and Director.
18. Manager, Director, and Complainant met in person January 7, 2021.
19. On January 21, 2021, a second volunteer at KRVM (Volunteer A) emailed Manager and Director. In that email, Volunteer A wrote:

[Manager], I didn’t realize that during the conversation that you and [Director] had with [Complainant] that [Complainant] was using my name as if I was an ally of [Complainant’s] in [their] pursuit of [their] perception of needed changes at the station.

I just want to say that while I did have an email back and forth with [Complainant] which basically started with [Complainant] contacting me to “go on the warpath” with him (JUST my words, MY assessment of his passionate approach), I spent much of the back and forth asking [Complainant] to clarify what [they] meant, as I found it hard to follow [their] train of thought much of the time.

I am most definitely NOT allied with [Complainant] nor [their] approach nor [their] method of communication, which I find unclear and confrontational. In my experience, that is not how things are best approached.

I would love for other programmers to be more conscious of their gender mix in their programming . . . and I also realize that now is not the time, for many reasons, to try and address that with the mostly male programmers. (We have talked about this before, [Manger], so at least these thoughts of mine are nothing new . . . :))

As I did to [Director], I will apologize on behalf of [Complainant] for that potentially unpleasant encounter

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with [Complainant] and also just want to clarify that I feel that I was misrepresented by [them] in your meeting.

20. After receiving the January 21st email, Manager and Director decided to dismiss Complainant. During the district's investigation, Manager and Director stated that they decided to terminate Complainant because Complainant continued to demand that Island Earth Radio air from 3 pm to 4 pm on Saturdays. The district's investigative report summarized Manager and Director's position as follows: "They viewed [Complainant's] advocacy for diversity was predominantly [used] to leverage moving . . . Island Earth Radio . . . to Saturdays. Giving in to [Complainant's] programming demands appeared to be the only solution [Complainant] was willing to accept to demonstrate [KRVM's] commitment to diversity." Manager and Director further stated that they became concerned about what Complainant might say while broadcasting.

21. On January 27, 2021, Manager wrote Complainant to inform them of the decision to terminate them:

As you know, KRVM strongly values and depends on volunteers to provide high quality programming to our audience. As an educational radio station, we are held to standards beyond typical radio stations. To support the station's mission, we have to assign timeslots and make programming decisions with which not everyone might agree. However, we do expect professional behavior and acceptance of these decisions from all volunteers.

Your conduct in response to your program's timeslot does not meet our expectations for a positive work environment or professionalism. As a result of your unwillingness to accept the programming decisions of KRVM and your direct contact with other volunteers in an effort to undermine those decisions your status as a volunteer at KRVM is terminated effective immediately.

22. On January 28, 2021, Complainant emailed KRVM's staff. In pertinent part, Complainant wrote:

2021 began my 40th year of public radio broadcasting, and yesterday I was fired by KRVM with minimal, vague explanation. Most likely reason: I was sharing diversity concerns with the station and other DJs. I'm deeply hurt by this personal action and what this says to our community.

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This 4J school district station accused me, without details, of “undermining,” being unprofessional, and disagreeing with a decision . . . all while ignoring in my firing letter the actual topic of diversity we actually discussed (and the topic I discussed with others).

Later that day, a third volunteer for KRVM (Volunteer B) emailed the radio station’s staff:

As one of a minority of female DJs at KRVM, and a friend of [Complainant’s], I have been a witness to the process of bringing up a valid concern about diversity with KRVM staff. I want to say that what has unfolded has taken place over several months of attempts to have an open dialog[ue]. I too have asked for this and have not received a response. [Complainant] has been dismissed for [their] efforts to speak up for more marginalized people, it is not about [their] own personal gain for [their] own show. [Complainant] can take [their] show elsewhere. But the bigger question remains . . . if [Complainant’s] kind of diverse show does not meet standards for prime time radio[,] what are those standards, and who sets them?

* * * * *

[Complainant] has been accused of being unprofessional by privately having conversations with other DJs about [their] concerns. This is one of the reasons given for [Complainant’s] dismissal.

Later that day, a fourth volunteer for KRVM (Volunteer C) emailed the radio station’s staff, drawing into question the ability of Island Earth Radio to elicit donations from listeners. Volunteer C also wrote that they appreciated Complainant “pushing [their] point,” but also asserted that Complainant had “become undermining, unprofessional, and continue[d] to disagree when decisions are made[.]”

23. On March 9, 2021, Complainant filed a complaint with the district alleging that KRVM retaliated against them for reporting that the radio station had inequitable and discriminatory programming.
24. On August 18, 2022, the department interviewed Complainant. During that interview, Complainant stated that the disparity between programming featuring white male artists and programming featuring minority race and ethnicity and female artists was

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discriminatory. Complainant also stated that KRVM did not have any minority race or ethnic volunteers except for one or two Latinx programmers and one Native American programmer. Complainant stated that he had multiple discussions with the program director about the disparity in programming prior to contacting other volunteers. Complainant stated that he perceived some volunteers were uncomfortable with his approach to requesting a change in programming. Some told Complainant to “let it go.” Some told Complainant that in the “long term” there would be a “shift” in programming. Complainant stated that they did not receive a warning before being dismissed on January 27, 2021. Complainant stated that the district’s Human Resources department did not have a process by which they could contest the decision to dismiss. The only process afforded Complainant was the district’s discrimination complaint process following the dismissal.

25. On August 26, 2022, the department interviewed Manager. During that interview, Manager stated that during the COVID-19 pandemic, KRVM’s programming provided its listeners with “one of the only normal things in [their] lives.” Manager also stated that KRVM relies on listener donations to remain operational, that Saturday afternoon time slots are the most listened to time slots, and that the programs airing during Saturday afternoon were very popular. Manager stated that they and Director were worried about Complainant disparaging KRVM while on the air, which could result in fewer listeners and reduced donations. Manager stated that since Complainant’s dismissal, KRVM “brought in a more diverse program to [air on] Saturday afternoon.” With respect to Complainant’s interactions with other volunteers, Manager stated that at least four volunteers approached them to complain about Complainant’s behavior. Manager stated that only one volunteer approached them in support of Complainant’s behavior. Manager corroborated Complainant’s statement that Complainant did not receive a warning before being dismissed. Manager stated that they did consult an attorney for the district and the district’s Human Resources Department to verify that they could legally dismiss Complainant.
26. On August 31, 2022, the department interviewed Volunteer B. Volunteer B left KRVM because of KRVM’s lack of diverse programming and treatment of Complainant. Volunteer B corroborated the information provided by Complainant during Complainant’s August 18th interview.

ANALYSIS

A. Oregon’s Anti-Discrimination Statute

Under Oregon’s anti-discrimination statute,

A person may not be subjected to discrimination in any public elementary, secondary or community college education program

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or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service, school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly.⁷

For purposes of this prohibition, “discrimination” is defined to mean “any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.”⁸

The question on appeal is whether Eugene 4J School District, under the circumstances at hand, violated ORS 659.850 by subjecting Complainant to discrimination by retaliating against them for making complaints alleging that KRVM’s programming was inequitable and discriminatory. Importantly, that is the only question on appeal. This order does not rule on whether KRVM’s programming lacks diversity or is otherwise inequitable and discriminatory. This order does not comment on whether Complainant’s termination was, aside from whether it was discriminatory, otherwise unjustified. The scope of this order is narrow: did Complainant make a complaint of discrimination and did KRVM terminate Complainant for making that complaint?

B. Applicability of Federal Law

In analyzing Eugene 4J School District’s duties with respect to complaints alleging discrimination, the Oregon Department of Education relies on the federal anti-discrimination law known as Title VI⁹ and the interpretation of that law by federal courts and the United States Department of Education’s Office for Civil Rights (Office for Civil Rights). Because Title VI has the same intent as ORS 659.850, and because the text of ORS 659.850 allows the statute to be applied broadly, the interpretation of Title VI by federal courts and the Office for Civil Rights is an important tool for the Oregon Department of Education to use in adjudging the application of ORS 659.850.

Under federal law, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁰ Under federal regulations implementing that law for the United States Department of Education, this prohibition includes retaliatory acts: “No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or

⁷ ORS 659.850(2). OAR 581-021-0045(2) applies this prohibition specifically to the types of schools regulated by the Department: “No person in Oregon shall be subjected to discrimination in any public elementary or secondary school, educational program or service, or interschool activity where the program, service, school, or activity is financed in whole or part by monies appropriated by the Legislative Assembly.”

⁸ ORS 659.850(1). OAR 581-021-0045(1)(a) uses an identical definition for “discrimination” for purposes of the Department’s regulatory authority over public elementary and secondary schools.

⁹ See Public Law No. 88-352, Title VI, §2000d (codified at 42 U.S.C. §2000d *et seq.*).

¹⁰ 42 U.S.C. §2000d *et seq.* The federal regulation implementing Title VI for recipients of Federal financial assistance from the United States Department of Education uses substantially similar language. See 34 C.F.R. 100.3(a).

privilege secured” by federal anti-discrimination law “because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing.”¹¹

In applying Title VI’s prohibition against retaliation to alleged acts of retaliation, the Office for Civil Rights examines whether a recipient of federal financial assistance “takes an adverse action against an individual either in response to the exercise of a protected activity or to deter or prevent protected activity in the future.”¹² In order to substantiate that a recipient meets that standard, the Office for Civil Rights further explains that making a finding of retaliation requires establishing three elements:

1. The individual or someone on behalf of the individual engaged in a protected activity or the recipient believed the individual or someone on behalf of the individual might engage in a protected activity in the future;
2. An individual experienced an adverse action caused by the recipient; and
3. There is some evidence of a causal connection between the protected activity and the adverse action.¹³

A protected activity is any act protected by Title VI, i.e. making a complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing.¹⁴

An act is an adverse action if it is likely to dissuade a reasonable person in the person’s position from making or supporting an allegation of discrimination.¹⁵ “Petty slights, minor annoyances, and lack of good manners are not normally adverse actions.”¹⁶

To determine whether a recipient of federal financial assistance took the adverse action because the person engaged in a protected activity, the Office for Civil Rights considers whether there is some evidence of a causal connection between the two.¹⁷

The evidence may include changes in the treatment of the individual after [the] protected activity occurred, the proximity in

¹¹ 34 C.F.R. 100.7(e).

¹² United States Department of Education Office for Civil Rights, *OCR Case No. 08-21-1171, Natrona County School District 1*, 9 (August 16, 2021).

¹³ *Id.* at 9 and 10.

¹⁴ *Id.* at 10; 34 C.F.R. 100.7(e).

¹⁵ United States Department of Education Office for Civil Rights, *OCR Case No. 08-21-1171, Natrona County School District* at 10.

¹⁶ *Id.*

¹⁷ *Id.*

time between [the] protected activity and [the] adverse action, the recipient’s treatment of the individual compared to similarly situated individuals, or the recipient’s deviation from established policies or practices.¹⁸

If these three elements are established, the Office for Civil Rights then examines “whether the recipient has presented a facially legitimate, non-retaliatory reason for taking the adverse action.”¹⁹ If the recipient has presented such a reason, then the Office for Civil Rights determines whether the reason is “genuine” or a “pretext for retaliation.”²⁰

In applying these standards for the purpose of adjudicating this case, the Oregon Department of Education must determine (1) whether Complainant made a complaint of discrimination, (2) whether Complainant experienced an adverse action, (3) if so, whether there is evidence that the adverse action occurred because Complainant made the complaint, and (4) if evidence exists that the adverse action occurred because Complainant made the complaint, whether the district has a non-retaliatory reason for terminating Complainant’s volunteer status and whether that reason is genuine or a pretext for retaliatory behavior.

C. Whether Eugene 4J School District retaliated against Complainant by dismissing them

In consideration of the evidence, the Oregon Department of Education finds that there is insufficient evidence to find that Eugene 4J School District retaliated against Complainant because there is insufficient evidence that the district’s reason for dismissing Complainant is a pretext for retaliatory behavior.

Complainant reported what they reasonably believed to be a discriminatory practice on November 23, 2020, writing that KRVM’s Saturday programming was “overwhelmingly and near-completely culturally biased to white male artists 9 am to 9 pm.” There also is evidence that Complainant reported the practice prior to that date and continued to report the practice after that date. Specifically, Complainant made similar reports on December 10, 2020, December 17, 2020, December 18, 2020, and January 7, 2021.

Complainant also experienced an adverse action when KRVM terminated Complainant’s volunteer status.

There is some evidence that the dismissal occurred because Complainant reported what they reasonably believed to be a discriminatory practice. Although it is difficult to determine whether KRVM treated Complainant differently after they reported the practice – because Manager recently had been promoted and Director recently had been hired – there is evidence that Complainant’s reporting of such conduct was better received by KRVM prior to November 23,

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

2020. And although KRVM did not deviate from policies and processes in dismissing Complainant – because the radio station did not have established policies and processes for dismissing volunteers – KRVM did not provide Complainant with due process *before* dismissing them. Complainant did not receive a warning before being dismissed and the district’s Human Resources department did not have a process by which Complainant could contest the decision to dismiss. Instead, KRVM merely consulted an attorney for the district and the district’s Human Resources Department to verify that they could legally dismiss Complainant. Finally, the proximity in time between the date on which Complainant reported the discriminatory practice and the date on which the district dismissed Complainant was brief. Complainant reported the discriminatory practice on November 23, 2020, December 10, 2020, December 17, 2020, December 18, 2020, and January 7, 2021. Complainant was dismissed on January 27, 2021.

With the above analysis in mind, the department now must determine whether the district’s reason for dismissing Complainant is genuine or a pretext for retaliatory behavior.

KRVM has articulated three reasons for dismissing Complainant. First, that Complainant’s advocacy for diversity was predominantly used to leverage moving Island Earth Radio to a Saturday afternoon time slot. Second, that Manager and Director were concerned about what Complainant might say while broadcasting. Third, that Complainant’s interactions with other volunteers was unprofessional, unwanted, and undermined Manager’s and Director’s decisions.

The department finds the first two reasons unpersuasive. It is true that in each communication with Manager and Director, Complainant raised the issue of moving Island Earth Radio to a Saturday afternoon time slot. However, Complainant made it clear, in each communication, that he believed KRVM’s programming was inequitable and discriminatory. The facts demonstrate that Complainant did not advocate diversity to leverage moving Island Earth Radio. Rather, the facts demonstrate that Complainant requested to move Island Earth Radio as a mechanism to create diversity.

Furthermore, there is no evidence that Complainant would have disparaged KRVM while on the air prior to being dismissed. There is evidence that Complainant discussed KRVM’s programming with fellow volunteers. However, evidence that Complainant did the latter does not necessarily constitute evidence that Complainant would disparage KRVM while on the air.

There *is* evidence that Manager and Director had reason to believe that Complainant’s interactions with other volunteers was unprofessional, unwanted, and undermining. It is important to point out that the department is not making a determination about whether Complainant’s actions *actually were* unprofessional, unwanted, and undermining. That is not the subject of this order. The subject of this order is whether Complainant was dismissed because they reported a discriminatory practice. If there is a genuine alternate reason for dismissing Complainant, such as having reason to believe that Complainant acted improperly, then the department cannot find that the district retaliated against Complainant.

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In their December 21st email to Complainant, Volunteer described Complainant as being in “‘attack’ mode.” Volunteer wrote, “I just don’t see you effecting a change if you go in guns-a-blazing.” In their January 21st email to Manager and Director, Volunteer A described Complainant as approaching them to “‘go on the warpath.’” Volunteer A specifically wrote,

[Manager], I didn’t realize that during the conversation that you and [Director] had with [Complainant] that [Complainant] was using my name as if I was an ally of [Complainant’s] in [their] pursuit of [their] perception of needed changes at the station.

I just want to say that while I did have an email back and forth with [Complainant] which basically started with [Complainant] contacting me to “go on the warpath” with him (JUST my words, MY assessment of his passionate approach), I spent much of the back and forth asking [Complainant] to clarify what [they] meant, as I found it hard to follow [their] train of thought much of the time.

Volunteer A also wrote that

I am most definitely NOT allied with [Complainant] nor [their] approach nor [their] method of communication, which I find unclear and confrontational. In my experience, that is not how things are best approached.

On January 28, 2021, Volunteer C wrote to KRVM’s staff, asserting that Complainant had “‘become undermining, unprofessional, and continue[d] to disagree when decisions are made[.]’”

Finally, during their interview with the department, Complainant admitted that some volunteers were uncomfortable with Complainant’s approach to requesting a change in programming. Complainant stated that some volunteers told Complainant to “let it go.”

On the basis of statements made by other volunteers, the department finds that there is insufficient evidence to find that the district retaliated against Complainant because there is insufficient evidence that the district’s reason for dismissing Complainant is a pretext for retaliatory behavior. In making this finding, the department is not adjudging whether Complainant’s dismissal was appropriate. The department is only adjudging whether the stated reason for the dismissal is a pretext.

Importantly, the department *does not* find that KRVM did not engage in discriminatory conduct. For purposes of this appeal, the department is only ruling on whether KRVM *retaliated* against Complainant. Complainant only alleged retaliation in their complaint to the district and in their appeal to the department. However, there is evidence of other discriminatory conduct that the department finds significant enough to merit mention.

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First, the disparity in programming featuring white male artists and programming featuring minority race and ethnicity and female artists was not proportional to the district's student population. Whereas the district's student population was 68% white students and 32% minority race and ethnicity students and roughly half male students and half female students, KRVM's programming *overwhelmingly* featured white male artists. That disparity is inequitable and may be discriminatory insofar as it subjects minority race and ethnicity students and female students to different treatment than white male students. Manager justified this disparate treatment by explaining that KRVM relies on listener donations to remain operational and that KRVM's programming reflected what its listener's wanted to hear. Manager also stated that during the COVID-19 pandemic, KRVM's programming provided its listeners with "one of the only normal things in [their] lives." However, in the department's view, the habits of KRVM's listeners do not justify any disparate treatment of minority race and ethnicity students and female students. For purposes of discrimination law, the question is whether programming choices were made on the basis of race, ethnicity, and sex, of which there is some evidence. At the December 17th meeting between Complainant, Manager, and Director, certain statements were made by Manager and Director that demonstrate a discriminatory posture, including "'It's okay for one day a week to be white male programming'" and "'Diversity within programming' is not considered as diversity currently."

The department acknowledges that since Complainant's dismissal, KRVM "brought in a more diverse program to [air on] Saturday afternoon." Whether that program sufficiently eliminates the disparity in programming is not a matter on appeal. However, the department encourages KRVM to further evaluate its programming in consideration of the district's student populations. The department also encourages the district to contact the department for technical assistance in revisiting its relationship with and policies related to KRVM. This issue presents a complex question of discrimination law and departmental assistance will be useful to the district.

The department also finds that not warning Complainant that they were going to be dismissed, or, alternatively, not giving Complainant an opportunity to appeal the decision to dismiss through the district's Human Resources department, is likely discriminatory because the district did not afford Complainant due process *before* dismissal.²¹ The only process afforded Complainant was the district's discrimination complaint process *following* the dismissal, which provides an inadequate level of relief *with respect to dismissal*. Further, neither Manager – when discussing the disparity in programming with Complainant – nor the district – when Manager asked an attorney for the district and the district's Human Resources whether they legally could dismiss Complainant – appeared to be aware that Complainant's original report should have been afforded the due process of being treated like a complaint alleging discrimination. At some point, KRVM or the district should have directed Complainant to file a complaint with the district alleging discrimination *prior* to dismissing them.

²¹ It should be noted that when the central issue does not involve allegations of discriminatory conduct, the district may dismiss a volunteer as it did in this case. However, when the central issue does involve allegations of discriminatory conduct, a measure of due process – though not as great as that required for employees – is required.

Again, even though this issue is not a part of Complainant's appeal, the department believes that it presents an issue significant enough to mention. The department encourages the district to revisit its policies with respect to dismissing volunteers who allege discrimination. The department further encourages the district to contact the department for technical assistance in revisiting its policies. As with the disparity in programming, the issue presents a complex question of discrimination law and departmental assistance will be useful to the district.

CONCLUSION

In conclusion, the Oregon Department of Education finds that Eugene 4J School District did not retaliate against Complainant. Case#2021-MM-08 is closed.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Mayer', is centered within a light gray rectangular box.

Mark Mayer, Complaint and Appeals Specialist
Office of the Director
Oregon Department of Education
Mark.Mayer@state.or.us