EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-048-14

(UNFAIR LABOR PRACTICE)

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 503, OREGON PUBLIC EMPLOYEES UNION,	)	
Complainant,	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
v.	)	
LANE COUNCIL OF GOVERNMENTS,	)	
Respondent.	)	

On August 15, 2016, the Board heard oral argument on Complainant's objections to a recommended order issued by Administrative Law Judge (ALJ) Julie D. Reading on July 15, 2016, after a hearing was held on February 16, 2016, in Eugene, Oregon.[1] The record closed on March 25, 2016, following receipt of the parties' post-hearing briefs.

Marc Stefan, Supervising Attorney, Service Employees International Union, Local 503, Salem, Oregon, represented Complainant.

Dian Rubanoff, Attorney at Law, Peck, Rubanoff, and Hatfield, Lake Oswego, Oregon, represented Respondent.

On December 18, 2014, Service Employees International Union, Local 503, Oregon Public Employees Union (Union), filed a complaint, which was later amended, alleging that the Lane Council of Governments (Council) committed an unfair labor practice. Specifically, the Union alleged that the Council violated ORS 243.672(1)(a) by not providing employees with certain assurances before interviewing those employees in preparation for an unfair labor practice hearing. *See Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964), *enf den*, 344 F2d 617 (8th Cir 1965). The Council filed a timely answer stating that the Union had failed to state a claim and that ORS 243.672(1)(a) does not require such assurances.

[1]The Oregon Education Association, the Portland State University Chapter of the Association of American University Professors and the Oregon AFL-CIO submitted a joint *amicus* brief to the Board.

The issues are:

1. Did an advocate of the Council interview bargaining unit employees who were witnesses to events at issue in an unfair labor practice case without first telling the employees: (1) the purpose of the questioning; (2) that they were not required to speak to the advocate; and (3) that there would be no reprisals for refusing to speak to the advocate?

2. If so, did this conduct violate ORS 243.672(1)(a)?

We conclude that the Council did not violate ORS 243.672(1)(a) when it interviewed employees in preparation of its unfair labor practice defense.

RULINGS

The Union objected to the exclusion of Exhibit C-4, the Council's informal response to the second amended complaint.[2] That document, which included interviews that the Council had transcribed, was not admitted under OAR 115-010-0070(6)(e).

The exhibit should have been received. Under OAR 115-010-0070(6)(e), a party that seeks "to submit a transcript of an audio recording as an exhibit must also submit a notarized statement from the transcriptionist that the document is a verbatim transcript of the audio recording," and provide the opposing party with a copy of the recording and the transcript at least 14 days before the first day of hearing. Here, the Council had already submitted the document (including the transcribed audio recordings) to the Board Agent and the Union as part of the Council's assertion that the complaint should be dismissed. The Union then sought to have that document admitted in support of its case, without providing a notarized statement. We do not interpret our rule as requiring preclusion of that document in these circumstances, and the document is otherwise admissible. Therefore, we admit Exhibit C-4.[3]

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

FINDINGS OF FACT

1. The Union is a labor organization within the meaning of ORS 243.650(13).

2. The Council is a public employer within the meaning of ORS 243.650(20).

3. In December 2013, the Council hired employee "AGM" to work in its Aging and Disability Resources Center (ADRC), subject to a six-month trial period.

4. The parties were bargaining a successor agreement in early 2014, and AGM was selected for the bargaining team despite her status as a probationary employee.

[2]The Council provided the document to the Union; therefore, OAR 115-035-0005 does not apply.

[3]Chair Logan does not agree with this ruling regarding the transcripts.

5. AGM was a poor fit for the ADRC. She lacked interpersonal skills and was prone to outbursts with both colleagues and customers.

6. On approximately March 6, 2014, the Council terminated AGM due to her poor interpersonal skills. The Union filed an unfair labor practice complaint (UP-012-14), arguing that the termination was due to her participation on the bargaining team.

7. In preparation for the unfair labor practice hearing, Council attorney Steven Schuback interviewed AGM's colleagues, including managers. The non-supervisory employees interviewed were bargaining unit members. Before the interviews, employees received an email from Human Resources Manager Joshua Burstein that contained the following language:

> "You are a potential witness in an Unfair Labor Practice case for which a hearing will take place at Schaefer's on **Friday, September 30, 2014 starting at 9:00 am.** The case is SEIU Local 503 v. LCOG, Case No. UP-12-14, and involves [AGM].
>
> "LCOG's attorney will be here at Park Place Building on **Friday, September 5, from 9:00 – 10:30 am** and will need to speak with you for a few minutes during that time.
>
> "Please confirm that you will be able to make yourself available **this Friday** and on September 30. I will alert your manager to let her know that this will be done on, and will count as, work time.
>
> "Thanks, and please let me know if you have any questions." (Emphasis in original.)

8. Burstein attended the interviews with Schuback and the employees. At the interviews, Schuback advised the employees to be honest and told them the purpose of the questioning. However, he did not tell them that their participation was voluntary or that they would not be subject to discipline for any answers that they provided.

9. Schuback asked employees about AGM's behavior in the workplace, but he did not ask them about her participation on the bargaining team. Some employees had previously learned of her bargaining team participation from other sources. Schuback did not ask employees about AGM's union activities or about any of their own union activities.

10. Some interviewed employees were concerned about having to testify in front of AGM and expressed that concern to Schuback during the interviews. Otherwise, they generally did not exhibit any nervousness, fear, or discomfort during the interviews. Some employees expressed support of the Council's decision to terminate AGM.

11. Following a hearing in that case, an ALJ concluded in a Recommended Order that AGM had been terminated due to poor interpersonal skills and not due to her participation on a bargaining team. The Union did not challenge the ALJ's Recommended Order, which this Board subsequently adopted. *See Service Employees International Union Local 503, Oregon Public Employees Union v. Lane Council of Governments,* Case No. UP-012-14, 26 PECBR 454 (2015) (non-precedential order).

CONCLUSIONS OF LAW

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

2. The Council did not violate ORS 243.672(1)(a) when its attorney interviewed bargaining unit employees while preparing for an unfair labor practice hearing.

DISCUSSION

Legal Standards

Under ORS 243.672(1)(a), it is an unfair labor practice for a public employer or its designated representative to "[i]nterfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662." ORS 243.662 provides a list of these rights, stating that "[p]ublic employees have 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." Further, this Board has the "authority to determine the range of activities that are protected under ORS 243.662." *International Union of Operating Engineers, Local 701 v. Grant County,* Case No. UP-08-09, 23 PECBR 513, 545 (2010).

ORS 243.672(1)(a) includes "two distinct prohibitions: (1) restraint, interference, or coercion 'because of' the exercise of protected rights; and (2) restraint, interference, or coercion 'in' the exercise of protected rights." *Portland Assn. Teachers v. Mult. Sch. Dist No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000); *see also International Association of Firefighters, Local 890 v. Klamath County Fire District # 1*, Case No. UP-049-12, 25 PECBR 871, 887-88 (2013).

To determine if an employer violated the "because of" prong of subsection (1)(a), we examine the employer's reasons for the disputed action. *Portland Assn. Teachers*, 171 Or App at 623; *Klamath County Fire District #1,* 25 PECBR at 888. It is not necessary for a complainant to demonstrate that an employer acted with hostility or anti-union animus, or prove that the employer was subjectively motivated by an intent to restrain or interfere with protected rights in order to show a violation of the "because of" prong of subsection (1)(a). *Klamath County Fire District #1*, 25 PECBR at 888. A complainant need only show that the employer took the disputed action because an employee exercised a protected right. *Id.*

When we analyze an employer's actions under the "in" prong of subsection (1)(a), we focus on the effect of the employer's actions on the employees. *Id.* If the employer's conduct, when viewed objectively, has the natural and probable effect of deterring employees from engaging in activity protected by the Public Employee Collective Bargaining Act (PECBA), the employer commits an "in" violation. *Portland Assn. Teachers*, 171 Or App at 624. In an "in" claim, "neither motive nor the extent to which employees actually were coerced is controlling." *Id.* A derivative "in" violation may also be found when an employer commits a "because of" violation, as the natural and probable consequence of an employer taking actions because of protected activity is to deter protected activity. *Klamath County Fire District #1,* 25 PECBR at 888.

Analysis

The Union is asking this Board to adopt and apply National Labor Relations Board (NLRB) case law that requires certain safeguards to be given by an employer before questioning employees about Section 7 rights while preparing its defense to an unfair labor practice charge.[4] Under *Johnnie's Poultry,* when an employer questions employees about Section 7 (*i.e.*, protected) rights, the employer is required to: (1) communicate to the employee, before the interview begins, the purpose of the questioning; (2) assure the employee that no reprisals will take place for refusing to answer any question or for the substance of any answer given; and (3) obtain the employee's participation in the interview on a voluntary basis.

The Union asks this Board to require that these safeguards be given any time employees are interviewed in preparation for an unfair labor practice hearing that involves protected-rights claims under the PECBA. According to the Union, because it alleged that AGM had been unlawfully terminated due to her protected activity, the assurances should have been given before interviewing the employees. The Council responds that we should follow our ORS 243.672(1)(a) precedent and analyze its conduct under a totality of the circumstances standard. Under this standard, the Council argues that it did not violate ORS 243.672(1)(a). The Council also argues that the Board need not decide whether the *Johnnie's Poultry* doctrine is applicable to cases under the PECBA because, under NLRB case law, *Johnnie's Poultry* would not apply in this case. For the following reasons, we agree with the Council that the *Johnnie's Poultry* doctrine is inapplicable in this case.[5]

The salient facts are undisputed. The parties agree that when the Council's advocate interviewed the employees in preparation for the unfair labor practice case involving AGM, he told the employees the purpose of his questioning, but not that their participation was voluntarily or that they would not be subject to reprisals for their participation, answers, or lack of either. In other words, assurances were not given to the employees as outlined in *Johnnie's Poultry.*

However, even under the NLRA, *Johnnie's Poultry* warnings would not be required in this case. That is so because the NLRB has determined that *Johnnie's Poultry* "applies only to situations where an employer interrogates employees about matters involving their [protected] rights." *Safelite Glass*, 283 NLRB 929, 929 n 4 (1987). Thus, even when an employer interviews an employee "in preparing a defense to [an] unfair labor practice charge," *Johnnie's Poultry* warnings need not be given so long as the questioning does "not pertain to the employees' involvement in [protected] conduct." *Id.* at 950-51. *See also Terry's Excavating, Inc.*, 334 NLRB 596, 596 (2001) (where the interrogation is not on a matter involving Section 7 rights, *Johnnie's Poultry* does not apply); *Mineola Ford Sales*, 258 NLRB 406, 406 (1981) (no *Johnnie's*

[4]Section 7 of the National Labor Relations Act (NLRA) guarantees employees certain rights that are similar in nature to the rights guaranteed in ORS 243.662. Because the PECBA was modeled after the NLRA, we may look to cases, and in particular cases decided before the PECBA was enacted in 1973, to assist us in interpreting the PECBA.

[5]Therefore, we leave for another day whether this Board will adopt the *Johnnie's Poultry* doctrine under the PECBA. Although the Union urges us to make that pronouncement even if the doctrine is inapplicable in the circumstances of this case, we believe that the more appropriate course is to make that determination when presented with a factual scenario that directly puts the question before us.

Poultry warnings needed to be given where the employee was "interrogated" not about his union or other concerted protected activities, but rather about matters of legitimate concern to the employer in connection with its possible back pay liability); *Ross Incineration Service*, Case No. 08-CA-36376, General Council Advice Memo (September 27, 2006) ("[w]here an employer's questions do not inquire into employees' Section 7 conduct," the requirement that *Johnnie's Poultry* safeguards be given "does not apply").

Here, the Union has not established that the employees were questioned about protected PECBA activity. Rather, they were asked about AGM's behavior in the workplace, but were not asked about her participation on the bargaining team or on other matters related to protected activity. Consequently, even if we were to endorse the NLRB's *Johnnie's Poultry* doctrine, that doctrine would not apply in this case. Therefore, we will dismiss the Union's allegation that the Council violated ORS 243.672(1)(a) by not giving *Johnnie's Poultry* assurances.

We do not understand the Union to argue that, applying a totality of the circumstances test, the Council's actions violated ORS 243.672(1)(a).[6] However, to the extent that the Union has preserved such an argument, we conclude that it has not met its burden to show that the Council interfered with, restrained or coerced employees in or because of their exercise of PECBA rights. Specifically, the facts do not establish that the employees were interviewed "because of" the exercise of any protected right. Likewise, the Union has not established that the type and circumstances of the Council's questioning would have the natural and probable effect of interfering with any protected rights. Therefore, we will dismiss the Union's claim.

ORDER

The complaint is dismissed.

DATED September 26, 2016.

Kathryn A. Logan, Chair

*Jason M. Weyand, Member

Adam L. Rhynard, Member

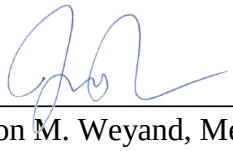
This Order may be appealed pursuant to ORS 183.482.

*Member Weyand Concurring

The issue in this case is whether the Council violated ORS 243.672(1)(a) by failing to provide bargaining unit members with *Johnnie's Poultry* assurances during its preparation for an unfair labor practice hearing. I agree with my colleagues generally that, based on the record before us, the Union has not met its burden of proof that a violation occurred. However, I write separately because I disagree with my colleagues' decision to avoid answering the most significant question before us: are *Johnnie's Poultry* assurances required under the PECBA?

[6]In other words, the Union's complaint and arguments are premised on our adoption and application of the NLRB's *Johnnie's Poultry* doctrine, and the Council's failure to give *Johnnie's Poultry* warnings.

Whether *Johnnie's Poultry* warnings are required under the PECBA is an important legal question that, if answered, would provide useful guidance to public employers and labor organizations across the state. The order above provides no such guidance, but rather leaves the question for another day. Instead of taking this approach, I would directly answer the question, and answer it in the affirmative, requiring Oregon public employers to provide *Johnnie's Poultry* assurances in a manner similar to the private sector.



Jason M. Weyand, Member