EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UP-24-09

(UNFAIR LABOR PRACTICE)

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

A hearing was held before Administrative Law Judge (ALJ) Wendy L. Greenwald on February 9, February 10, May 6, and May 7, 2010, in Salem, Oregon. The record closed on August 10, 2010, following receipt of the parties' post-hearing briefs.

Susan L. Stoner, General Counsel, Amalgamated Transit Union, Division 757, Portland, Oregon, represented Complainant.

Barbara A. Bloom and David M. Thompson, Attorneys at Law, Bullard Smith Jernstedt Wilson, Portland, Oregon, represented Respondent.

On May 7, 2009, the Amalgamated Transit Union, Division 757 (ATU), filed an unfair labor practice complaint (ULP) against the Tri-County Metropolitan Transportation District (District), which, as amended on November 3, 2009, alleges that the District (1) violated ORS 243.672(1)(e) by unilaterally changing its process for handling customer complaints; (2) violated ORS 243.672(1)(e) by bargaining in bad

faith in relation to the changes to the customer complaint process; and (3) violated ORS 243.672(1)(f) by failing to comply with the bargaining and interest arbitration requirements of ORS 243.698.

The District filed a timely answer to the complaint.

The issues presented for hearing are:

1. Did the District make unilateral changes to the *status quo* involving the handling of customer complaints in violation of ORS 243.672(1)(e) when it issued the Service Improvement Process (SIP) on May 4, 2009? If so, what is the appropriate remedy?

2. Did the District bargain in bad faith by engaging in surface bargaining involving the handling of customer complaints in relation to the SIP in violation of ORS 243.672(1)(e)? If so, what is the appropriate remedy?

3. Did the District fail to comply with the bargaining and interest arbitration requirements of ORS 243.698 in violation of ORS 243.672(1)(f)? If so, what is the appropriate remedy?

RULINGS

1. The ALJ deferred ruling on Exhibit C-3, which was an arbitration award issued in 1998. In the recommended order, after she determined that the *status quo* was based on a policy issued in 2005, the ALJ decided not to receive the exhibit because the arbitration decision was issued under a policy which existed prior to 2005. The ALJ properly excluded Exhibit C-3 from the record.

2. The ALJ also deferred ruling on Exhibit C-64, which ATU offered into evidence through the testimony of District witnesses Peggy Hanson and Sandra Vinci. ATU obtained the exhibit, which appears to be a draft of the SIP dated May 27, 2009, from the District. However, ATU failed to lay a sufficient foundation to authenticate the document since neither witness was able to clearly identify the exhibit. In addition, Exhibit C-64 was created after the complaint in this matter was filed. Therefore, the ALJ properly decided to exclude the exhibit from the record in her recommended order.

3. The other rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. ATU is a labor organization which represents a bargaining unit of employees who work for the District. The bargaining unit is prohibited from striking under ORS 243.738. ATU officers during the times relevant to this complaint included President/Business Representative Jonathan Hunt and Vice President Sam Schwarz. Schwarz has been Vice President since 2006. Prior to that, Schwarz worked for the District as an operator for 22 years and was an ATU Executive Board (E-Board) member between July 2000 and 2006.

2. The District is a local government transportation district and a public employer located in the Portland area. District managers during the events relevant to this complaint included General Manager Fred Hansen, Operations Manager Peggy Hanson (P. Hanson), Director of Workforce Development Evelyn Minor-Lawrence, Director of Organizational Development Sandi Vinci, Customer Service Manager Christopher Tucker, and prior Customer Service Manager Tim Ennis.

3. There are currently between 1,200 and 1,500 operators at the District. This includes bus operators, who work out of the Merlo, Powell, and Center Street garages; streetcar operators working out of a garage in the Northrup Street area; and rail operators working out of two garages, Elmonica in Beaverton and Ruby Junction in Gresham.

4. The District and ATU were parties to a "Working and Wage Agreement" (WWA or Agreement), effective from December 1, 2003 through November 30, 2009. (Exh. J-1.) Section 3 of this Agreement is a grievance and arbitration process, which applied to any alleged violations of the Agreement and the suspension, discharge, or discipline of employees.

5. Section 4 of the Agreement, entitled "DISCIPLINE," provided in part:

> "**Par. 1.** The maintenance of discipline and efficiency is the province of the District. Both parties agree that the District may post District rules and may discipline employees for violation of such rules, provided that each employee is made aware of each District rule. Any new rule, revision, or amendment may be grieved by the Association in accord with the terms of Article 1, Section 3. Rules shall not be in conflict with existing agreement.
>
> "**Par. 2.** Suspension or discharge of an employee who has been an employee of the District for a period in excess of 120 days shall be based on just and sufficient cause with full explanation given to the employee in

writing. The Association will be notified in writing of the suspension or discharge within thirty-six (36) hours of the action being taken.

"**Par. 3.** Where a suspension or discharge is considered necessary, the final decision will be deferred until after an opportunity has been given to an appropriate Association Representative to be present at a hearing between the Department Manager or his designee and the employee. This shall not apply when the employee is subject to immediate suspension or discharge.

"**Par. 4.** Cause for immediate suspension or discharge is as follows:

a. Reporting to work under the influence of intoxicating liquor or illegal drugs.
b. Consuming intoxicating liquor or illegal drugs while on duty.
c. Mishandling of District cash revenue.
d. Gross insubordination.
e. Deliberate destruction or removal of District's or another employee's property.
f. Posing an immediate or potential danger to public safety.

"**Par. 5.** Whenever the District suspends or discharges an employee under the terms of Paragraph 4 of this Section, the Association will be notified within twenty-four (24) hours." (Exh. J-1 at 9-10.)

1996 Policy

6. The District receives approximately 25,000 customer calls per year, including comments, commendations, and complaints. Approximately 25 to 30 calls per day are about an employee's behavior.

7. The District adopted its original policy to deal with customer calls in 1986. This policy was replaced by the Customer Service Information (CSI) Policy adopted on January 1, 1996, which was updated on May 24, 1996 (1996 Policy). The term CSI was also used to refer to the actual complaints, comments, or commendations which were entered into the database under the 1996 Policy. The 1996 Policy was not signed by the parties.[1] It was later revised on July 28, 1999.

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[1]The parties disagree over whether the 1996 Policy was a negotiated agreement. Since we find that the 1996 Policy was not the basis for the parties' *status quo*, resolution of this dispute is not critical to our decision.

8. ATU representatives were involved in committees which provided input into the development of the 1996 Policy and the 1999 revision. ATU and the District also negotiated a CSI side letter agreement, which was dated March 11, 2003, and signed on March 18, 2003.[2]

9. The 1996 Policy defined two categories of complaints, urgent and non-urgent, and provided for specific procedures regarding the processing of such complaints. The Policy also identified four possible findings in response to a complaint: (1) incomplete – insufficient information to verify the complaint; (2) resolved – no intentional wrongdoing occurred; (3) substantiated – sufficient information to verify the complaint; and (4) inconclusive – an unresolvable discrepancy between the customer's and employee's versions of the incident.

10. Regarding non-urgent complaints, the 1996 Policy provided for (1) notice to the employee of all substantiated or inconclusive complaints within five working days; (2) the supervisor to ensure that all complaints were investigated and determined to be substantiated, inconclusive, or resolved; (3) after three substantiated or inconclusive complaints, a meeting between the supervisor, employee, and an ATU representative to review the complaints, clarify expectations, and agree on a work improvement plan; (4) disciplinary action after a supervisor determined an employee had not made progress on a work improvement plan and the employee received an additional substantiated complaint within a 12-month period; (5) no discipline for anonymous, incomplete, or inconclusive complaints; (6) a presumption of innocence until complaints were substantiated; (7) an employee's right to present witnesses and evidence; (8) a complaint to be substantiated based on a preponderance of evidence standard; (9) a meeting with the employee and union representative prior to discipline being issued; and (10) discipline based on just cause and governed by Article 1, Sections 3 and 4 of the parties' Agreement.

11. Regarding urgent complaints, the 1996 Policy provided for (1) the customer satisfaction work unit to immediately notify the union representative about an urgent complaint at the same time it notified the District's General Counsel office and General Manager; (2) a determination of whether the employee would be removed from work and reassigned during the investigation; (3) notice to the employee about the complaint and the process; (4) a signed customer statement; (5) an investigation, which included a presumption of innocence, the employee's right to present witnesses and evidence, the use of a preponderance of evidence standard, an interview of the employee after substantial documentation was assembled, union representation during the

[2]Neither the 1999 revision or the 2003 side agreement are part of the record in this case.

interview, and the employee's signed statement; (6) a meeting with the employee and union representative in which the District notified the employee of its intended actions; and (7) discipline based on just cause and governed by Article 1, Sections 3 and 4 of the parties' Agreement

2005 CSI Policy

12. Effective August 2005, the District issued a revised CSI policy (2005 Policy), which specifically provided that it "replace[d] the Customer Service Policy adopted January 1, 1996, updated May 24, 1996, and updated again on July 28, 1999." (Exh. C-4 at 1.)

13. Under the 2005 Policy, customer's telephone calls were received by the District's Customer Service Department employees, who obtained sufficient information to identify the situation, the involved employee, and the customer contact information; documented and classified the call; coded and entered the call into the database; attempted to resolve the call and respond to the customers; forwarded any complaints to the appropriate manager; and monitored and tracked investigations.

14. The 2005 Policy identified six categories of complaints: (1) non-urgent – all complaints (including priority, public relations, rude, and service quality complaints) not categorized as urgent complaints; (2) priority – non-urgent complaints which had "an immediacy to the issue involved that potentially could affect safety standards, customer service standards, or community interests, which if left unaddressed for any period of time, could create a legal liability for the agency;" (3) public relations – complaints regarding discourtesy and communication style; (4) rude; (5) service quality – issues such as schedules, "no-shows," "pass-ups," etc.; and (6) urgent – any violations of law or endangerment to public safety. (Exh. C-4 at 4.) Complaints were also categorized as "general" or "ADA" (American with Disabilities Act). (Exh. C-4 at 2.)

15. The 2005 Policy made the Transportation Operations Department (TOD) responsible for performing "thorough and timely investigations" and designating the appropriate finding regarding each complaint. The policy established seven possible findings after the investigation: (1) cleared – no wrongdoing found; (2) confirmed – "[s]ufficient information has been obtained to justify the complaint as valid and true;" (3) incomplete – cannot be cleared or confirmed due to insufficient information; (4) inconclusive – the information obtained results in an unresolvable discrepancy; (5) reviewed – an employee's first five non-urgent complaints in a rolling 12-month period; (6) system – the operator followed a supervisor's instructions or a standard policy

or practice; and (7) multiple – more than one complaint filed about a single incident resulted in a single finding. (Exh. C-4 at 3.)

16. Under the 2005 Policy, the following relevant pre-disciplinary procedures were followed for non-urgent complaints: (1) anonymous complaints were recorded, but any investigation was limited or deemed unnecessary; (2) complaints were forwarded to the employee's supervisor within a goal of five working days; (3) the supervisor was not required to notify or discuss the first five complaints in a rolling 12-month period with the employee, unless three of the complaints were about the same category or, in rare cases, when information was needed to respond to the customer; (4) the operator could chose to be notified about the first five complaints; (5) the first five complaints were entered into the CSI database as reviewed and maintained for a rolling 12 months, but were not used for disciplinary purposes; (6) after the fifth complaint, a non-disciplinary meeting was held during which the supervisor provided copies of the complaints to the employee and an ATU representative, clarified expectations, provided support necessary to improve performance, and either designed a training strategy or, with the agreement of the employee and ATU representative, developed a formal non-disciplinary work improvement plan, which included coaching, training, counseling, or other assistance; and (7) the supervisor pursued appropriate steps if the employee did not meet the agreed upon expectations.

17. Procedures related to discipline for non-urgent complaints were addressed in the 2005 Policy as follows:

> "• It is the supervisor's responsibility to provide support for performance improvement and to assure that employees understand rules and rule violation consequences.
>
> "• Any disciplinary action will follow terms of the Working Wage Agreement and will be in accordance with the relevant guides, policies and procedures.
>
> "• Unless a finding assigned to a CSI results in discipline, the finding is not grievable." (Exh. C-4 at 7.)

18. The 2005 Policy provided for the following relevant procedures to be followed for urgent complaints: (1) the Customer Service Department immediately secured and documented information about the incident and the customer, coded the complaint, routed the complaint to the TOD Director and supervisor, and arranged for any video/audio recording to be retrieved, if necessary; (2) the supervisor immediately

notified the employee about the complaint and the investigation process; (3) the TOD Director decided whether to reassign or place the employee on paid administrative leave during the investigation; (4) the TOD Director directed the station manager to conduct a thorough investigation, which included an interview and signed statement from the customer, interviews of identified witnesses, the collection of additional background and information, a presumption of innocence during the investigation, an opportunity for the employee to provide a written statement and present witnesses or evidence, and an employee interview and signed written statement; (5) the TOD Director prepared written documentation, findings, and a recommendation; and (6) the union was informed of the recommended action.

19. Once the TOD Director reached a conclusion about an urgent complaint, the 2005 Policy provided that

> "a. The TOD Director or designee and the employee's union representative will meet with the employee to present written conclusions about the complaint. If the allegations are deemed to be well-founded by the TOD Director or designee, corresponding corrective action will be taken, up to and including termination. If the allegations are not deemed well founded by the TOD Director or designee, no disciplinary action will be taken.
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> "b. All disciplinary actions will be in accordance with the Working Wage Agreement and applicable to the relevant guides, policies and standard operating procedures.
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> "c. Unless a finding assigned to an Urgent CSI results in discipline, the finding is not grievable." (Exh. C-4 at 10.)

20. All complaints under the 2005 Policy were coded and entered into an electronic tracking database.

21. On November 10, 2005, ATU filed a ULP against the District.[3] One of the allegations in the complaint was that the District unilaterally changed the *status quo* regarding its customer service policy in violation of ORS 243.672(1)(e) when it adopted the 2005 Policy.

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[3] *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05, 22 PECBR 911, 955-56 (2009), *appeal pending*.

22. By e-mail dated February 21, 2006, Operations Director Shelly Lomax notified station managers that the District had adopted the 2005 Policy, provided them a copy, and directed them to replace the earlier CSI versions with the 2005 Policy for use in distribution to employees.

23. On March 17, 2006, General Manager Fred Hansen sent prior ATU President Albert Zullo a letter, which stated in part:

> "In response to your March 10, 2006 letter, nothing in the Customer Service Policy and Procedures ('CSI Policy'), including the August 2005 revisions, affects our Working & Wage Agreement (WWA) or control matters such as the grievance procedure or other conditions of employment covered by our collective bargaining. Ron and I did not negotiate the CSI Policy.
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> "The August 2005 revisions clarify the functional roles in TriMet's internal processing of CSI's among the Operations, Legal/Human Resources, and Customer Service Divisions, make clarifications and tighten the definitions in the policy, omit repetitive detail regarding discipline by specifically referencing the WWA as the authority regarding the disciplinary process, and integrates the terms of the March 11, 2003 side letter agreement." (Exh. C-5.)

24. In December 2006, Customer Service Manager Ennis testified in the hearing in Case No. UP-62-05 about some differences between the 1996 Policy and the 2005 Policy. Ennis testified that certain procedures that were specified in the 1996 Policy, but eliminated from the 2005 Policy, continued to exist based on employees' rights under the parties' Agreement. Some of these procedures included the 1996 Policy requirements that substantiated complaints be supported by credible witnesses, physical evidence, or field rides; a supervisor weigh the public and business necessity; incomplete or inconclusive complaints not be used for discipline; the executive director or designee meet with the employee and a union representative prior to imposing discipline; discipline be progressive; employees be presumed innocent during the investigation; the employee be able to present witnesses and evidence during the investigation; the employee be given detailed reasons for the employer's actions; and there be no disciplinary action without just cause.

In regard to other relevant changes, Ennis testified that (1) the District had previously only required two witnesses to an incident before a confirmed finding was made where discipline was pending, but that such a confirmation had also occurred

based on one witness and other evidence, such as a video recording; (2) the language that a complaint was "killed" if the supporting information was inadequate or inaccurate was removed in the May 1996 revision; (3) the District had added a new category called "reviewed," under which the employee's manager or supervisor reviewed the first five complaints, the complaints were never used in discipline, and the employee was only notified about the complaints at the employee's option; (4) the category of "priority" had existed since July 1999 and the 2005 Policy simply expanded the category; (5) the requirement that the District immediately respond to urgent complaints had not changed; (6) the operator would still be notified of any complaint that had a possibility of being confirmed; (7) all complaints, including reviewed complaints, would be entered into the database and always had been; (8) a new option had been added for the supervisor to provide training to the employee after the first five non-urgent complaints so a work improvement plan might not be necessary; (9) the employee and Union still had to agree on a work improvement plan; (10) although the preponderance of evidence standard had been removed, a confirmed complaint required sufficient evidence; (11) language was added that findings could not be grieved unless discipline was pending; (12) the creation of a new ADA code had not really changed how complaints were tracked or treated, since ADA complaints had been reported to upper management regularly since 2003; (13) the prior right of the Union to be immediately notified about urgent complaints had been limited by the past practice or language that notice would occur as appropriate; and (13) an employee's right to representation had not changed. (Exh. C-11 at 13-16.)

25. Operators have always taken customer complaints about their work very seriously and personally. Operators almost always find the District's processing and investigation of customer complaints to be very stressful. Upon being notified of customer complaints, some operators even get sick to their stomach or cry. Under the 1996 and 2005 Policies, operators were generally notified of complaints either at the beginning or end of their work day. Operators found it very stressful to start their work day by being informed about a complaint and then being expected to go drive a bus.

26. In the past, customer complaints had been considered in decisions related to promotion, rehiring, and admission to the Master Operator Program. The Master Operator Program provides a financial bonus to operators with good attendance, who have worked 1,960 hours with no accidents, complaints, or write ups. Employees have been disqualified from the Master Operator Program in part due to customer complaints.

27. Under the 2005 Policy, the station manager was responsible for the initial meeting with an operator and ATU representative regarding customer complaints. These managers were supervised by Operations Director Minor-Lawrence, who was generally

apprised of and/or involved in such processes if discipline or a grievance could occur as a result of a complaint. After the adoption of the 2005 Policy, ATU continued to rely on the 1996 Policy during these meetings. For example, ATU Vice President Schwarz relied on the 1996 Policy and/or the procedural safeguards that had been included in that policy in representing members on grievances related to customer complaints in hundreds of meetings with station managers, including Mickey Young, Ken Larson, and Cornelius Booker. Even after the hearing in Case No. UP-62-05, these managers did not tell Schwarz he could not rely on the 1996 Policy. Schwarz was not successful in arguing that the District could not rely on third-party complaints under the 2005 Policy.

28. An infraction letter is issued by a supervisor when an employee has violated a supervisor observation policy. The District does not consider infraction letters to be discipline. Some infraction letters issued during 2007 and 2008 included references to different CSI policies, including the 1996 Policy, the 1999 revision, and the 2005 Policy.

29. After the 2005 Policy was adopted, some station managers continued to refer to the 1996 Policy in letters issued to operators after meeting with the employee to discuss whether a work improvement plan would be established. For example, in a letter dated September 14, 2005, Assistant Station Manager Young began a letter to an operator by stating:

> "TriMet adopted a customer service policy on January 1, 1996. The policy defines customer service as the 'ability of TriMet employees to deliver safe, dependable and reliable service by being cordial and treating customers with courtesy and respect'. It also states, 'Good public relations skills are a critical and expected part of each employees duties'. TriMet management is also responsible to these principles and has set criteria and procedures to assist operators in meeting the customer service standards.
>
> "Part of these procedures is the Work Improvement Plan. According to this policy, you have met the criteria to be entered into such a plan." (Exh. C-8 at 1.)

30. Young included this same language referencing the 1996 Policy in CSI work improvement plan letters to employees dated March 15, 2006; April 27, 2006; May 16, 2006; June 9, 2006; June 16, 2006; August 15, 2006; October 27, 2006; October 31, 2006; November 22, 2006; January 2, 2007; February 12, 2007; May 4, 2007; October 5, 2007; November 16, 2007; March 28, 2008; and October 14, 2008. Young generally copied Operations Director Lomax and/or Workforce Development Director Minor-Lawrence on these letters.

31. In April 2006 and December 2006 respectively, Assistant Station Managers Dick Garvin and Ruth Tillson each included the same language Young used, which referenced the 1996 Policy, in CSI work improvement plan letters to operators.

32. Step one of the grievance process under the parties' Agreement is a pre-filing conference. To initiate the conference, the employee or ATU submit a written request. After the conference, at which the parties attempt to informally resolve the matter, the supervisor issues their response on a form entitled "Pre-Filing Conference Meeting And Determination Letter." (Exh. C-8 at 39.) After the adoption of the 2005 Policy, in the section on the determination letter stating which contract/policy references applied, the following determination letters provided as follows:

(a) in an April 19, 2007 determination letter, the supervisor referenced the 2005 Policy and agreed to remove a warning letter resulting from an urgent complaint due to the inability to reach the customer to confirm the complaint as required by the policy;[4]

(b) in an April 18, 2007 determination letter, the supervisor referenced the 2005 Policy and found that the complaint was correctly coded as a confirmed urgent complaint under the policy;

(c) in a May 13, 2008 determination letter, the supervisor stated: "(As presented by the ATU): TriMet Customer Service Policy Effective January 1, 1996; Updated May 24, 1996, and July 28, 1999 CSI Policy Side Letter Dated March 11, 2003 signed March 18, 2003, " and found that the policies quoted by ATU were not the policies recognized by the District and that the District had complied with the notification process in the 2005 Policy; and

(d) in an April 3, 2008 determination letter, Assistant Station Manager Young referenced the "CSI policy: (Updated July 28, 1999) E 2.d 'No discipline is authorized for incomplete or inconclusive complaints, and such complaints may not be used as a justification for discipline'" and decided to remove three complaints from an operator's list due to inconclusive proof, resulting in the operator not being in violation of the Master Operator criteria. (Exh. C-13 at 3; Exh. C-8 at 39.)

33. On June 16, 2006, Schwarz submitted a step two grievance form asserting that an employee had been denied his *Weingarten* rights because he was not allowed to

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[4]The name of the supervisors who sent the first three determination letters referred to in this finding are undecipherable.

have an ATU representative in a meeting about an urgent complaint that resulted in a written warning.[5] Under the contract reference section, Schwarz stated "all that apply CSI policy dated 1996." (Exh. R-36 at 10.) On August 23, 2006, ATU Representative Hunt submitted a request for a hearing relying on Schwarz's grievance form. After the hearing, Station Manager Talbot sent a written response to Hunt dated September 5, 2006, in which he included the same reference to the 1996 Policy that Schwarz had included and found that the employee's *Weingarten* rights had not been violated. At the step three grievance hearing, as a compromise, the written warning was downgraded to a counseling because, although the supervisor believed she had told the operator the meeting was about an urgent complaint, the operator did not believe he had been clearly told that the meeting was about an urgent complaint.

34. In the following three letters, which did not reference any CSI policy, operators' urgent complaints were closed as cleared:

(a) on February 22, 2006, Assistant Station Manager Evelyn Warren cleared a complaint asserting an operator failed to stop for a school bus based on the operator's explanation and knowledge of the law;

(b) on September 19, 2006, Assistant Station Manager Debra Goodling cleared a complaint asserting an operator failed to assist a passenger who fell outside the bus because the complaint had been filed by someone other than the passenger, the operator explained that he had seen the passenger get up, and the video recording did not show the fall; and

(c) on April 4, 2007, Assistant Station Manager Garvin cleared a complaint asserting that an operator had grabbed a customer's wrist based on a review of the video/audio recording.

35. Under the 2005 Policy and prior policies, field supervisors sometimes observed operators in field locations. If operators were running late or early, or passing up stops, the supervisor sometimes talked about these issues with the operator on the bus or through the operator's window.

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[5] *Weingarten* rights refer to an employee's right to have a union representative present in investigatory interviews the employee reasonably believes might lead to discipline under *NLRB v. Weingarten, Inc.*, 420 US 251, 95 S Ct 959, 43 L Ed2d 171 (1975), which was followed by this Board in *AFSCME, Local 328 v. Oregon Health Sciences University*, Case No. UP-119-87, 10 PECBR 922, 928-29 (1988).

Facts Leading Up To the Implementation of the SIP

36. In early 2008, P. Hanson became the District's Operations Director. In this role, P. Hanson frequently met with ATU representatives Hunt and Schwarz. Hunt and P. Hanson also talked or exchanged e-mails daily regarding discipline and operations issues related to bargaining unit members. Part of P. Hanson's responsibility was providing training to field operations managers on the District's Employee Support Model, the premise of which was for managers to provide direct support for front-line operators, including coaching, assistance, and training. P. Hanson invited ATU E-Board members to the Employee Support Model training.

37. Hunt believed that miscommunications often occurred between ATU and the District because, although ATU representatives often came away from meetings with P. Hanson, or her predecessors, believing that an agreement had been reached, after P. Hanson, or her predecessors, discussed the agreement with their supervisors, their position about whether an agreement had been reached, and the events or notes related to such agreements, appeared to change.

38. Sometime in 2007, the District's Organizational Development Director Vinci, Customer Service Director Jean Gruenewald, and Operations Manager Josh Collins began looking at how the District obtained its customer information. They determined that the District was not operating under the most effective process and decided to look for a better model, which became known as the Service Improvement Process (SIP). In February 2008, they sent a report to Executive Director of Operations Banta and Vinci's supervisor, Executive Director of Communication and Technology Carolyn Young, explaining that they had worked with the Customer Service Department (CSD) and Information Technology (IT) unit to develop a method which would provide better access to customer information and feedback; automate current manual processes to streamline intake; clearly define issues which require immediate action in the field; reduce codes for non-immediate actions; improve reporting procedures; and help supervisors understand employees' behaviors and provide assistance under the Employee Support Model.

39. In approximately March 2008, the team working on the SIP expanded to include other managers equipped to address specific issues in implementing the SIP, including P. Hanson. The team met approximately every two to three weeks and focused on developing SIP standard operating procedures (SOPs). The team's intent was to dismantle what it saw as a bureaucratic, administrative-laden system which pitted employees against front-line managers; to create a new system designed to provide the customer with timely and proactive responses; and to provide managers with information

about their employees that could be used to assist the operator under the Employee Support Model.

40. The SIP team interacted with a number of, what they referred to as, stakeholders in designing the SOPs. As part of this process, P. Hanson was designated to interact with ATU about the change to the SIP. The team's intent was that she would partner and have discussions with ATU about the SIP similar to those held with other stakeholders.

41. On April 23, 2008, Vinci distributed to the SIP team a revised version of a document entitled "Service Improvement Process Update," that had been prepared for a April 24 meeting with Young and Banta. (Exh. R-6 at 2.) The document summarized the SIP goals, process, and next steps, which included "[d]evelop next steps for engaging ATU support including immediate attention to operators who currently have excessive complaints -- *in progress*." (Exh. R-8 at 2.)

42. On June 9, 2008, Vinci sent Banta and Young an e-mail, which was copied to the team, with the SIP summary and SOP drafts stating that the SOPs were ready to share with ATU.

43. By letter dated July 17, 2008, P. Hanson notified ATU Business Representative Hunt that some operators were still failing to comply with ADA mandates to announce stops, also referred to as call-outs. The letter stated that this failure would no longer be tolerated; the District would be monitoring ADA compliance on routes; employees who failed to announce stops as required would first receive counseling and reinstruction; and further failure would result in progressive discipline, up to and including termination.

44. On September 10, 2008, Hunt attended a Community for Accessible Transportation (CAT) meeting at which P. Hanson talked about the use of progressive discipline regarding ADA call-outs. On September 11, 2008, Hunt sent General Manager Fred Hansen a letter with a regarding line that stated: "**Demand to Bargain – Change in Disciplinary Scheme Related to Failure to Make ADA Callouts.**" Hunt notified Fred Hansen that ATU had become aware at a recent meeting that the District had "abandoned the parties negotiated CSI policy and past practice with regard to ADA call-outs" and "has unilaterally and greatly enhanced the discipline associated with ADA call-out failure." (Exh. C-20 at 1.) Hunt demanded "to bargain over any and [*sic*] changes to the disciplinary action to be taken against operators who fail to make appropriate ADA call-outs." (*Id.*)

45. During September and early October 2008, Fred Hansen and Hunt exchanged letters regarding Hunt's demand to bargain the ADA call-outs. On September 15, Fred Hansen responded that ATU's demand to bargain was not timely because the District had notified ATU of its intent to use appropriate progressive discipline for operators failing to call out stops in P. Hanson's July 17, 2008 letter. On September 22, Hunt reasserted ATU's demand to bargain over the change in the disciplinary process regarding the ADA call-outs on the basis that the July 17 letter did not satisfy ORS 243.698(2) notice requirements. On September 24, Fred Hansen responded that the demand to bargain was untimely and Hunt's reference to ORS 243.698 was not applicable. On September 30, Hunt asserted that the demand was timely because P. Hanson's verbal notice to ATU during the CAT meeting did not meet the requirements of ORS 243.698(2). On October 8, Fred Hansen responded to Hunt that the District was not implementing a new disciplinary "scheme," but was applying progressive discipline to operators who did not comply with ADA law, and suggested that he and Hunt discuss the matter after the October 14 Joint Labor Relations Committee (JLRC) meeting. (Exh. C-20 at 11.) On October 9, Hunt told Fred Hansen that the parties need not bargain if the District only intended to use "the CSI policy disciplinary scheme" to address ADA call-out issues. (*Id.* at 13.)

46. On October 31, 2008, Operations Director P. Hanson met with ATU President Hunt, Vice President Schwarz, and E-Board members Rose Jordan-Fairley, Bruce Hansen, Michael Oliver, Sandy Guengerich, and Jim Fowler. At the time of the meeting, Bruce Hansen was considering running as a candidate for office against Hunt, and Oliver was Bruce Hansen's campaign manager. During the meeting, P. Hanson presented and reviewed three documents, including (1) a one-page explanation of the immediate action, direct access, and priority incident code structure; (2) a three-page summary of the SIP process, definitions, and protocols; and (3) a five-page draft of the SIP SOPs. The information provided showed that the SIP priority incident customer calls would be defined as any potential violation of the ADA, including a failure to make ADA call-outs; and would require an in-field assessment and follow-up with the employee, would result in further investigation if such complaints continued, and if confirmed, could result in progressive discipline under Article I, Section 2, of the parties' Agreement. P. Hanson also raised an issue about how the 30 employees who currently had the most customer complaints would be treated under the SIP. She further stated that the District would like ATU to sign off on the change to the SIP.[6]

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[6]ATU argues that we should find that P. Hanson was not a credible witness, relying on the contradictions between her testimony and ATU's witnesses about what occurred at the SIP meetings; her failure to produce anything other than her notes from the April 9 and May 7 (continued...)

47. In response to P. Hanson's presentation, ATU representatives stated that they would need the CSI procedural safeguards included in the SIP. Schwarz identified some of the 1996 Policy protections they would need and what ATU expected to get out of the policy change.[7] Some of the protections discussed included a five-day notice to employees about non-urgent complaints, the 12-month rolling sunset clause, a clean slate for the 30 operators, and that discipline could not occur based on a SIP alone. P. Hanson did not raise any problems with what the ATU representatives said because she believed that most of the protections ATU was asking for were already provided for

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(...[6]continued)
meetings to support her statement that she had excellent records of the SIP meetings; her later contradicted testimony that she had not seen the ULP on May 6; her testimony that she met with Hunt prior to the April 9 meeting, which was not observed by others who were present; and the fact that she received a significant payment from the District as part of her separation agreement. However, we do not find P. Hanson's testimony to be entirely lacking in credibility based on the record before us.

First, although P. Hanson did receive a separation payment from the District, she also was terminated by the District and there was no evidence that the separation payment was related to or contingent on her testimony at the hearing. There was also evidence that other managers had received payments upon separation from the District. In addition, as explained in more detail throughout this decision, much of the evidence presented by ATU was confusing at best. Several witnesses contradicted themselves and each other, and often relied on exhibits which contradicted their own testimony. Such widespread confusion was likely due in part to the passage of time and the failure of any of those involved to keep a clear written record of their discussions. In addition, these parties entered into the discussions about the SIP with totally different perspectives and were generally talking at cross purposes. For example, ATU continued to rely on the 1996 Policy during these discussions, while the District was operating under the 2005 Policy. ATU also assumed these were bargaining meetings, while the District never believed it was bargaining. Therefore, to the extent necessary, we will address specific contradictions in the evidence throughout these findings.

[7]There is some testimony that Schwarz made copies of the 1996 Policy during the October 31 meeting, which he provided to the ATU representatives and P. Hanson before he reviewed the protections. P. Hanson recalled discussing those protections, but did not recall being given a copy of the 1996 Policy at the October 31 meeting. While not critical to our decision, we find it more likely that the 1996 Policy was passed out and reviewed with P. Hanson during the subsequent April 1 meeting. First, Hunt's notes of the April 1 meeting were a highlighted copy of the 1996 Policy (Exh. C-31), which he had identified as the protections ATU needed to review with P. Hanson during that meeting. In addition, P. Hanson's later conversation with Guengerich indicates that she did not clearly understand that ATU was talking about protections under the 1996 Policy during the October 31 meeting.

under the parties' Agreement. She indicated her agreement that these protections would exist under the SIP. The ATU representatives left the meeting expecting that the safeguards they requested would be incorporated into the SIP and presented to them at the next meeting.[8]

48. After the October 31 meeting with ATU, P. Hanson sent the SIP team the following e-mail:

> "I met with ATU Leadership and Transportation E-Board Officers today. Vetting final comments on SIP proposal and elimination of current CSI Policy. ATU requested the following adds – summary of our discussion:
>
> "• Clean Slate for every operator. (I agree)
> "• 'Top 30' list of operators scheduled to meet with me will include the E-Board Officer. Outcome of those sessions may include: disciplinary action imposed, document expectations, individualized training, work achievement plan with timelines achievable, conditions for continued employment, or, nothing at all. (I agree)
> "• Requirement for Immediate Action/Direct Access contacts or direct contact with an operator in service include language that alerts the manager/supervisor to be sensitive of the operating condition the employee is in (do not embarrass the operator in front of the customers, do not enter the train cab while in revenue service and inquire about cell phone...) (I agree)
> "• Greater emphasis in the SOPs that states clearly managers will have early contact with the ATU Officer using Employee Support model – before intervention or when the manager is alerted to an Operator's performance pattern. (I agree)
> "• District to provide Employee Support training module to ATU Leadership. (I do not agree..not a show stopper)
> "• Question from Fowler – will ERCs entries be used in discipline or arbitration? Answer: Yes, if appropriate and associated with the issue.
> "• Add language from existing CSI policy that preserves the right of the employee to grieve disciplinary action imposed. (Language already exists in the CBA – I do not agree. Not a show stopper)

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[8]There is no evidence that ATU raised the issue of the District's 90-day bargaining obligation during the October 31 meeting.

"We are very, very close to agreement with signatures on the dotted line. I meet with ATU with today's changes for a review of what we think will be a final proposal 11/17. This is a big step for ATU...not much trust and they wanted assurance the District will continue working to get out of what they call 'gotcha thinking by TriMet management.' I gave them my word and commitment. Concurrently, ATU acknowledged they can and would do more in early intervention and supporting performance expectations. The E-Board Officers expressed repeatedly today they want to be a part of early intervention with the ATM."[9] (Exh. C-22.)

49. On November 5, 2008, Hunt sent General Manger Fred Hansen a letter with the following regarding line: **"Demand to Bargain – Change in Disciplinary Scheme Related to Failure to Make ADA Callouts."** (Exh. C-23 at 1.) The letter stated:

"On October 31, 2008, Peggy Hansen [*sic*] presented the Union with TriMet's proposed changes to the parties' negotiated customer complaint disciplinary scheme. Those proposed changes referenced ADA callouts.

"Unless, you inform me differently, I will assume Ms. Hanson's presentation to the Union initiated the bargaining required by ORS 243.698. You will recall that the parties are statutorily required to bargain 90-days from that date before anything can be implemented. Should we not reach agreement within that time frame, the Union can thereafter move the matter to binding arbitration.

"Please provide the Union with notice should TriMet decide it wants to move to implement any changes to the disciplinary scheme." (*Id.*)

50. During the hearing, Hunt was not clear about which of his letters included a demand to bargain over the SIP. On direct examination, he testified that, although he had previously demanded to bargain over the ADA call-outs in October, he sent the November 5 letter because "[w]e wanted to make sure they understood exactly where we were at." (Tr. I at 80, 17-18.) On cross-examination, Hunt had difficulty identifying which letter was his demand to bargain over the SIP until his counsel referred him to the November 5 letter. He then testified that

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[9]There is no evidence regarding a meeting on November 17 and P. Hanson testified that she did not know what her reference to "11/17" meant. (Exh. C-22.)

"I think there's a series of demand-to-bargains under the ADA callout. And I believe as we move through that, it then incorporates our CSI as well. So the -- yes, C23. And I think there's some subsequent demand-to-bargains that are contained in the body of -- although in the, what it's referencing calls, ADA callout, I believe the body of the document references CSIs." (Hunt testimony, Tr. I at 173.)

51. By letter dated November 20, 2008, Fred Hansen responded to Hunt's letter:

"Thank you for your November 5, 2008 letter. The assumption that you make in the letter is not correct. On July 17, 2008 Peggy Hanson notified the ATU that the District would use progressive discipline with operators who refused to make ADA callouts required by federal law. With respect to the October 31, 2008 date, Peggy's communications referencing the utilization of progressive discipline pursuant to the W&WA for failure to make ADA callouts is completely consistent with the notice the District first provided to the ATU in July 2008."[10] (Exh. R-38.)

52. In late November, during a Thanksgiving dinner at the Merlo garage, Bruce Hansen told P. Hanson and Banta that ATU wasn't signing off on the SIP because it did not have all of the policy protections in it.

53. At some point after the October 31 meeting, P. Hanson, who had the 2005 Policy with her, asked ATU E-Board member Guengerich to show her what ATU wanted her to do with the policy in relation to the SIP. Guengerich told Hanson that she had the wrong policy and that ATU wanted her to put the protections from the 1996 Policy into the SIP.

54. On December 1, 2008, Vinci prepared a draft of a SIP transition checklist. Included in the list under P. Hanson' responsibilities was "reach agreement with ATU." (Exh. R-16 at 2.) Vinci did not intend to use this phrase in the sense of collective bargaining, but as reaching agreement with ATU as had been done with the other stakeholders with whom the team was consulting over the change to the SIP.

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[10]While Hunt testified that he did not recall receiving Fred Hansen's November 20 letter, we find that he did. Hunt did not testify that he did not receive the letter, only that he did not recall receiving it. P. Hanson did recall receiving a copy of the letter. She also recalled that Fred Hansen responded to Hunt's letter, rather than her, because it was addressed to him and he had dealt with Hunt regarding the prior bargaining demands over the ADA call-outs.

55. The minutes of the December 3, 2008 JLRC meeting, which were approved on February 26, 2009, reflect the following discussion:

> "Jon [Hunt] stated that any change in policy warrants both sides getting together and discussing the language of the policies. The local has the right to bargain over the change, including the drug policy, ADA call-out issues, and the new CSI policy that result in discipline. Fred [Hansen] stated that operators are being disciplined via rule violations and NOT CSIs." (Exh. C-27 at 2.)

56. By letter dated January 14, 2009, Hunt notified P. Hanson that he had a number of issues he needed to discuss at an upcoming meeting including, "TriMet's proposal to change the CSI policy. The Union had some questions that are still awaiting response." (Exh. C-28.)

57. On January 16, 2009, this Board issued its decision in Case No. UP-62-05. As part of its decision, the Board held that because ATU presented insufficient evidence to establish the existence of the *status quo* prior to the District's implementation of the 2005 Policy, it did not prove that the District had violated ORS 243.672(1)(e) when the District adopted that policy. ATU appealed this decision and continued to deny the validity of the 2005 Policy. ATU representatives never told ATU E-Board member Guergerich about the Board's decision in Case No. UP-62-05. Bruce Hansen was aware of the decision, but did not read it and did not know that the 2005 Policy stated it replaced the 1996 Policy.

58. The 90-day expedited bargaining period under ORS 243.698 expired on January 29, 2009. Between the October 31 meeting and this date, ATU never referred to this expiration date in any correspondence with the District, asked the District to schedule further meetings about the SIP within this time frame, or requested that the District extend the 90-day bargaining period.

59. Sometime in February 2009, the SIP team identified an implementation date of May 1, 2009. The implementation date was driven partially by the changes the IT unit had to make to switch from a CSI database to a SIP database.

60. The minutes of the March 31JLRC meeting, which were approved on May 6, 2009[11], reflect that during a discussion of the guidelines regarding CSIs Hunt stated that "the union is still not getting what they've asked for regarding CSI's * * *." (Exh. C-29 at 2.)

61. On April 1, 2009, the ATU representatives and P. Hanson held their second meeting about the SIP.[12] At this meeting, P. Hanson stated she was going to "craft a new CSI."[13] (Exh. C-30.) Schwarz asked whether P. Hansen had answers to their questions from the last meeting, and she said she did. She also provided the ATU representatives the list of the 30 employees she had referred to at the October 31

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[11]While the May 6 meeting minutes are dated 2008, the context of the minutes and the reference back to the March 31, 2009 meeting in the minutes makes it clear that the meeting occurred in 2009. See Exhibit 29 at 3.

[12]ATU witnesses Jordon-Fairley, Schwarz, and Bruce Hansen based their testimony about what occurred at this April 1 meeting on what they testified were their notes of the meeting, including Jordan-Fairley's notes (Exh. C-32), Schwarz's notes (Exh. C-34), and Bruce Hansen's notes (Exh. C-69). However, for the following reasons we conclude that Exhibits C-32, C-34, C-54, C-69, and R-32 are all notes taken at the May 7, 2009 meeting: (1) the notes are all made on a SIP document with a footer, which states "Updated 5/7/2009 10:08 AM by SV [Vinci];" (2) this SIP document could not have been provided at the April 1 meeting because it includes changes which were made after that meeting; (3) Exh. C- 54, purportedly Schwarz's notes of the May 7, 2009 meeting, is identical to Exh. C-34, his purported notes of the April 1 meeting; (4) Bruce Hanson testified about two different meetings based on different pages of the same SIP document; and (5) Jordan-Fairley's and Bruce Hansen's handwritten notes essentially reflect the same discussion as Schwarz's and P. Hanson's May 7 meeting notes (Exh. R-32), but are not consistent with Guengerich's notes (Exh. C-30) or Hunt's notes (Exh. C-31). Therefore, the testimony of Jordan-Fairley, Bruce Hansen, and Schwartz as to what occurred at the April 1 meeting was not credible.

[13]ATU witnesses testified that P. Hanson presented Exh. C-35, the revised SIP document, on April 1, and that nothing much occurred at the April 9 meeting. P. Hanson could not recall whether she presented the revised SIP at the April 1 or April 9 meeting. We find that the revised SIP was presented at the April 9 meeting. ATU E-Board member Guengerich's notes of the April 1 meeting (Exh. C-30) do not indicate that P. Hanson presented a new CSI proposal and, in fact, state that the first thing that happened at that meeting was that P. Hanson said she was going to craft a new CSI. P. Hanson recalled meeting with Vinci directly after making the notes on C-35 during a meeting with ATU, and Vinci's e-mail of April 10 reflects that she made her revisions based on P. Hanson's notes that day. In addition, Hunt's notes of the April 1 meeting (Exh. C-31) were made on the 1996 Policy, not the revised SIP document. Finally, the footer on Exh. C-35 is dated April 9, 2009.

meeting. Schwarz was concerned when he saw the list because it included all complaints between 2004 and 2008 for more than 30 employees. He also saw operators who should not be on the list and it appeared that the District was stacking complaints, which it was not supposed to do under the policy. Schwarz raised some of his concerns about specific employees during the meeting. ATU stated it wanted everyone to have a clean slate as of May 1, 2009, the effective date of the SIP. During the meeting, Schwarz walked P. Hanson through a copy of the 1996 Policy and identified the specific safeguards that ATU wanted under the SIP, such as no discipline without three sustained complaints; joint investigations; Union representation; no punishment for an operator getting out of their seat; the operator's right to see the complaint; fit for duty tests for drinking complaints; and the use of both presumption of innocence and preponderance of evidence standards. Schwarz stated that ATU did not recognize the 2005 Policy. At the end of the meeting, ATU representatives assumed that P. Hanson would produce a revised SIP, which would include the safeguards from the 1996 Policy.

62. ATU representatives and P. Hanson met again on April 9. Hanson provided a copy of a revised SIP at this meeting, which reflected an effective date of May 1, 2009. At the beginning of the meeting, P. Hanson told ATU representatives that operators would no longer be disciplined over what a customer said alone. During the meeting, Hanson made a number of notations on the SIP document to reflect potential changes in areas that ATU representatives had raised concerns. In regard to Immediate Action, P. Hanson wrote "add ATU" and "paid status" in section 1.0, "interviewing witness – use of customer contacts * * *" in section 2.0, and deleted "departments will be notified" in section 2.0. (Exh. C-35 at 1.) Under Non-immediate Action, P. Hanson wrote "such as" and "while on duty," and deleted "political campaigning, damaging property, drinking, eating, etc." (*Id.* at 2.) In Direct Access, P. Hanson wrote "brief and informative vs. confrontational." (*Id.* at 4.) At some point during the discussion, a pizza P. Hanson had ordered was delivered and the group began to eat and talk about other matters. There was no further discussion about the SIP.

63. On April 10, 2009, Director Vinci sent an e-mail to a number of management employees which included updated SIP materials for use in trainings and briefings. Vinci noted that some minor changes had been made to the policy based on "our meeting from the other day and Peggy's conversation with ATU today." (Exh. C-36.) By e-mail dated April 13, 2009, P. Hanson notified Vinci and Gruenewald that "I am writing a final communication to ATU today - includes 2005 policy findings, SOPS revisions (Sandy completed), grace period, and list of 30 plan..." (Exh. C-37.) P. Hanson never sent this communication to Hunt.

64. As of April 16, 2009, P. Hanson believed that she had presented the final SIP documents to ATU and that the work on the SIP was completed. By e-mail dated April 17, 2009, P. Hanson notified the field operations managers to start training controllers, dispatchers, and field supervisors on the SIP. On April 21, 2009, P. Hanson sent an e-mail to various managers in which she referenced a "SIP ATU Letter." P. Hanson did not send Hunt the final SIP documents or a "SIP ATU Letter" during this time.

65. By letter dated April 22, 2009, General Manager Fred Hansen sent Hunt formal notice that the CSI Policy would be replaced by the SIP. The letter referenced his understanding that

> "a core team of Customer Service, Transportation, and ATU representatives has been reviewing how to make more effective use of customer feedback. This review has resulted in the decision to eliminate the CSI policy, and instead approach customer information as a tool to help us better manage our service.
>
> "* * * * *
>
> "The transition from the CSI policy does not change or remove any disciplinary action for represented employees. Disciplinary action remains subject to the provisions of Article I, Sections 3 and 4 of the current Working and Wage Agreement. TriMet will continue to track customer feedback in a database to help inform staff when making decisions about service delivery.
>
> "On May 4, 2009, we will establish a new baseline for all operators, with the exception of the 30 individual operators you and Peggy Hanson mutually identified based on their CSI records. Managers will work directly with these 30 operators to support them in an effort to improve their performance. As of May 4, 2009, the CSI Policy and associated procedural or administrative functions will no longer be in effect." (Exh. C-41 at 1 and 2.)

66. Hunt was in Seattle on April 22 and 23, so did not immediately receive Fred Hansen's letter. When he finally saw the letter, he believed it included a number of misstatements. Hunt did not believe that ATU had been part of a core team meeting on the SIP. He felt that the current CSI policy was cumbersome but provided a process

which determined whether a complaint was substantiated. Hunt had never agreed to a list of 30 operators.

67. On April 23, 2009, Bruce Hansen's supervisor told him that the District was going forward with training employees on the SIP. Bruce Hansen telephoned Hunt in Seattle and objected that the District was going forward with the SIP even though bargaining had not been concluded.

68. On April 24, 2009, District Communication Manager Collins sent an e-mail to Hunt, which included a message that had been posted on TriNET for operations' employees. TriNET is the District's core web-based communication tool through which it passes information to employees. The message notified employees that the CSI would be discontinued and stated further:

> "[w]e have communicated with ATU throughout, and discussed in detail with union leadership in the elimination of the CSI policy. Here are a few details:
>
> * This does not change or remove any disciplinary action for represented employees.
> * Disciplinary action remains subject to the provisions of Article I, Sections 3 and 4 of the current Working and Wage Agreement.
> * As of May 4, the CSI policy will no longer be in effect.
> * A letter from General Manager Fred Hansen to ATU President Jon Hunt about the discontinuation of the CSI policy can be read here." (Exh. C-43.)

69. On April 25, 2005, Hunt e-mailed Collins asking "[w]hy is the [*sic*] going out before we have had [a] chance to discuss this? We are still waiting to hear from Peggy [Hanson] someone has jumped the gun." (Exh. C-44.)

70. In a telephone conversation with P. Hanson on the morning of April 28, 2009, Hunt told her he had received telephone calls from ATU E-Board members who had been invited to attend a SIP training, and he wanted the training process to stop. Hunt stated his concern that P. Hanson had failed to send copies of the SIP materials to all of the transportation officers and asked that she do this. Later that day, P. Hanson e-mailed Hunt the materials they had discussed on the phone that morning, which included "all revisions we agreed to and inserted into the management procedures." (Exh. C-46 at 1.)

71. By letter dated April 29, 2009, Hunt responded to Fred Hansen's April 22 letter stating in part:

> "Briefly, the history of this situation is that the Union demanded to bargain over any changes to the parties' CSI policy/practice. Peggy Hansen [sic] then met with the Union committee comprised of Transportation officers. At each such meeting, she made promises to provide information and address certain Union concerns prior to the next meeting. In every instance, she failed to deliver as promised. Those actions constitute bad faith bargaining.
>
> "The Union absolutely **does not** agree to the changes in the documents provided. Among other objectionable changes, TriMet's new approach removes every protection provided to Union members against unsubstantiated and unfair customer complaints. We therefore demand that TriMet notify the Union that it has suspended implementation and that it either agrees to return to the bargaining table on this issue or that TriMet agrees to take the matter before an arbitrator as required by State statute.
>
> "Should TriMet not take the above action, an unfair practice charge will be filed immediately." (Exh. C-47.)

72. On April 29, 2009, P. Hanson sent an e-mail to Banta indicating that she had read Hunt's April 29 letter, and stating that

> "I have excellent notes and record [*sic*] of every work session and all agreements reached with ATU in the work that ended the CSI Program and the transition to SIP. On Tuesday 4/28, Jon Hunt also agreed our work was completed, but, explained his dilemma of opponents he is facing in the upcoming ATU campaign.
>
> "Following your review and decision in how you wish to proceed, I am fully confident and well prepared to present our work and agreements achieved with ATU to any arbitrator."[14] (Exh. C-48.)

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[14]While P. Hanson testified that Hunt told her the District's actions could have a negative affect on his election campaign in their April 28 telephone conversation, Hunt testified that he did not refer to his campaign during this conversation. However, resolution of this conflict is not critical to our decision.

73. On May 4, 2009, the District implemented the SIP. The SIP, as implemented, included some changes from the April 9 meeting. Under Immediate Action, the policy now included the language "and an ATU representative" and "and placed on administrative leave" under Section 1.0 and "witness interviews and other customer information will be used" in Section 2.0. Under Non-Immediate Action, the policy now included the phrase "such as smoking and littering while on duty" and the sentence "The supervisor in the field will brief and inform the employee of the concern in a non-confrontational manner" under Direct Access. (Exh. R-26 at 4 and 6.)

74. On May 6, 2009, District managers Fred Hansen, Banta, and Colleen Sexton, and ATU representatives Hunt, Schwarz, and Evette Farra attended a JLRC meeting. The minutes, which were approved at the JLRC meeting on June 23, 2009, reflect the following discussion:

> "The recent change in the CSI policy was discussed in length, specifically with respect to final communications and misunderstandings between ATU and TriMet management around the communications. Jon [Hunt] indicated that the ATU would be distributing a 'Tracking Faster' memo to members and filing a ULP. Fred [Hansen] stated that he believed that the change was good for employees and that employees viewed the changes as positive, and that only those behaviors that are observed by TriMet staff would be subject to any form of discipline. To resolve the misunderstanding Steve [Banta] agreed to meet with Peggy Hanson and to convene a follow-up meeting immediately after the JLRC meeting to resolve the issue." (Exh. C-50 at 2.)[15]

75. After the JLRC meeting, Banta and P. Hanson met with Hunt, Schwarz, and Farra. Hunt gave the managers a document entitled "Tracking Faster," which it intended to post on the ATU's bulletin board, and a copy of a ULP alleging a claim arising out of the District's implementation of the SIP. (Exh. C-45.) Hunt told the managers that ATU would "pull it [the complaint] back" if they would talk about including the protections ATU needed. (Hunt testimony, TR. I at 115.) Banta and P. Hanson agreed to meet with ATU and the transportation officers about the SIP.

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[15]While Hunt testified he told the managers during the JLRC meeting that ATU had already mailed the ULP complaint, we rely on the minutes, which were subsequently approved by both parties, as the most accurate reflection of what occurred.

76. On May 7, 2009, Hunt, Schwarz, and the ATU E-Board officers met with Banta and P. Hanson to discuss the SIP.[16]

77. On May 12, 2009, District Counsel Shelley Devine e-mailed ATU Counsel Susan Stoner that "I had heard the ATU wasn't going to file this [ULP], but yesterday we received an ERB-filed copy with a May 22, 2009 date for an informal response. Can you let me know what's going on?" (Exh. C-74 at 1.) Stoner responded that the ULP had been filed after ATU had requested that the District stop implementing the SIP, but the implementation had not stopped. Stoner continued that "[a]t the JLRC meeting, Jon gave your folks a copy of it. I am sure he told them that it was already filed." (*Id.*)

SIP Procedures and Subsequent Events

78. The SIP provides for customer service representatives to take customer calls, obtain sufficient information to respond to customers at the time the call is received, code and record calls in the SIP database, track overall system performance, and record information so no additional follow up is required. Unless closed during intake, calls recorded in the SIP database are assigned a primary manager responsible for the complaint and forwarded to that manager to review, address, and close the file.

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[16]The parties disagree over whether the District was aware prior to the May 7 meeting that ATU had already filed this ULP. ATU argues that it told the District the ULP had been filed and, as a result, evidence of what occurred during the May 7 meeting should be excluded as offers of or attempts to compromise under ORS 40.190 and Oregon Evidence Code Rule 408. However, the District argues that it understood that ATU had threatened to file a ULP on May 6, but did not receive notice from ERB that the ULP had been filed until May 12, and, therefore, what occurred during the May 7 meeting is evidence of continuing discussions about the SIP and not offers of compromise to resolve the ULP. We take official notice of our records in this case, which reflect that the complaint was filed on May 7, and that ERB sent the District notice of the complaint by letter dated May 8.

We find that ATU did not prove that the District knew the ULP had been filed on May 6. Hunt's initial statement during the JLMC meeting was that ATU would be filing a ULP. His later statement, that he intended to "pull it back," could easily be interpreted to mean that he would not file the complaint. In addition, the District's Counsel Shelley Devine's e-mail of May 12, 2009, expressed genuine surprise that the ULP had been filed. On the other hand, while we received the evidence related to the discussions at the May 7 meeting at the hearing, we do not include this evidence in our findings because those discussions occurred after the SIP was implemented and are not relevant to whether the District committed the alleged violations. At most, this evidence is relevant to the filing of the ULP and the contradictions in testimony regarding the April 1 and 9 meetings.

When a complaint relates to a specific operator, that operator's name is included in the database. The manager may remove the operator's name if the name was incorrectly included. Approximately 200 to 400 managers have access to the information in the SIP database. Operators do not have access to the SIP database.

79. The SIP defines the following four categories of operator-related customer calls and the process to be followed in each category:

(1) Immediate action complaints raise issues "of immediate concern for the safety or well being of customers and/or employees," including striking a vehicle, pedestrian or cyclist; unwanted physical contact; an employee leaving their seat or vehicle during confrontation with another person; or biased statements by the employee. (Exh. R-26 at 6.) The SIP provides that such a complaint "requires the appropriate supervisor and/or station management staff to meet with an employee and an ATU representative as soon as the issue comes to their attention." (*Id.*) Under the procedures for these complaints, the transportation manager arranges with the station agent to relieve the operator; meets with the operator in the field; interviews the operator; generally places the operator on paid administrative leave until an investigation is complete; obtains witness interviews and other customer information for a formal investigation; and records all actions in the SIP database.

(2) Direct access complaints relate to employee behavior categories, including reports of erratic or aggressive driving; endangerment of public safety (such as ejecting a minor from a bus); use of cell phone or earphone while driving; off-route operation; intimidation of a motorist, pedestrian, or cyclist; and substance abuse (which is handled under the drug and alcohol policy). Under the SIP, after the customer service representative logs the call, the supervisor meets with the employee in the field in a non-confrontational manner "as soon as an activity comes to his/her attention to ensure the employee is following appropriate policies and/or procedures. This interaction may or may not result in further actions by management." (Exh. R-26 at 4.) The supervisor is also responsible for completing appropriate reports, closing the file in the SIP database, and following up with the employee.

(3) Priority incidents are defined as a serious violation of the ADA, including failing to announce stops, secure a mobility device, clear priority seating, deploy a lift or ramp, report a lift failure or problem, or kneel the bus; passing up a passenger with a mobility device or service animal; or prohibiting a service animal on board. Priority incidents are assigned a code and recorded in the SIP database, which the assistant manager reviews on a daily basis. The manager then contacts the employee to ensure knowledge of the proper policy/procedure, is responsible for a follow-up plan to ensure

an employee's performance, and if there are further complaints, investigate the behavior. If the behavior is confirmed through evidence or observation, the employee may be subject to progressive discipline under the standards in the parties' Agreement.

(4) Non-immediate action complaints include reports related to customer service (such as rude or unhelpful behavior); policy disputes (such as fare issues, courtesy stops, etc.); personal behaviors (such as on-duty smoking or littering); driving behaviors (such as failing to use a seat belt, speeding, etc.); pedestrian safety (such as failure to yield or aggressive driving); bicyclist safety (such as failure to yield or encroaching); and service delivery (such as late/early arrivals, no shows, and rider pass ups). Non-immediate action reports are assigned a code, recorded in the SIP database, and reviewed daily by the manager, who determines the appropriate action, which could include no action or a response based on a pattern of complaints; a larger performance pattern; or a single customer report such as a poorly lit stop. The SIP also provides that operators can review their logged customer reports upon request from their assistant manager.

When a manager identifies that an employee has received a pattern of non-urgent complaints about certain conduct, the manager provides the employee resources and assistance to improve their performance under the Employee Support Model. This could include training, coaching, information sharing, and access to employee assistance programs. This process is to be supportive and non-disciplinary with the goal of ensuring that the employee understands the operating procedures and is committed to following them. After this process, the manager continues to monitor the operator's performance. If the operator receives additional complaints regarding the same conduct, the manager either talks with the operator again or requests assistance to determine if the reports are true. If the road supervisor observes and reports this conduct, the manager meets with the operator and takes appropriate action (counseling or verbal warning). Further verified reports of such conduct result in additional counseling or progressive discipline under the parties' Agreement.

80. In early November 2009, Hunt received a telephone call from an operator who had been accused by a customer of stealing $500.00 from the customer's wallet. The operator was upset because he had been removed from duty, placed alone in a room for a period of time without ATU representation, missed his lunch hour, and believed that management failed to check the audio/video record to determine if the operator took possession of the customer's wallet. Hunt did not know the circumstances, but believed the operator was exonerated.

81. Since the adoption of the SIP, Schwarz has received many complaints from employees. Some employees complained that their manager came out to the bus to talk

to them about a customer complaint while they were on their break and that they spent their whole break talking to the manager, had no opportunity to call a union representative, and did not feel like driving after the discussion with the manager.

82. In the autumn of 2009, Merlo garage managers identified 15 operators who had the largest number of complaints. The managers met with each employee and E-Board member Jeffrey Ackerson to discuss the complaints, with the following results: (1) after reviewing Operator JT's seven or eight complaints covering the period July, August, and September, it was determined that one customer had called in all of the complaints and once the employee changed to a different line, he no longer had complaints; (2) after reviewing Operator JO's twelve complaints, some of which dated back to January 2009, it was discovered that JO's manager and JO had already discussed and resolved many of the complaints and there were no videotapes available regarding the other complaints; (3) after reviewing Operator MC's complaints, it was discovered that some of the complaints had previously been addressed; (4) after Operator CO told her manager that the complaints they were reviewing had already been discussed, the manager ended the meeting; (5) after reviewing Operator MN's complaints, it was determined that half of the complaints were actually commendations; (6) after Operator KC was issued a letter of expectation, which referenced a prior work improvement plan, the letter was reissued without this reference because it was determined the information about the prior plan was incorrect. None of these employees were disciplined as a result of the discussions with their manager or the complaints.

83. After the SIP was implemented, ATU E-Board member Ackerson represented an operator who had been falsely accused of touching someone. The operator was vindicated after the videotape was reviewed.

84. In March 2010, Ackerson represented Operator SE, who had been issued a letter entitled "Future Expectations – Non-Disciplinary." (Exh. R-47 at 1.) In the letter, Assistant Manager Jean Cook reviewed the complaints, the discussion that had occurred regarding the complaints, and the District's expectations, including that SE would respond to customer questions politely and respectfully, keep his personal thoughts to himself, not speak in a condescending or sarcastic manner, greet and acknowledge boarding customers, and not pass-up passengers without authorization or unless loaded to capacity. Cook stated further "My goal is for us to create a strategy that will change this behavior. For this reason, we discussed an employee support strategy that will include sitting in with Customer Service, take a ride-along with a trainer and have follow-up meetings. These resources are only to help you become a better operator as a TriMet employee." (*Id.* at 2.)

85. Around this same time, ATU E-Board member Ackerson discussed the concept of patterns with Assistant Manager Greg Larson, who explained that if an operator received five of the same coded complaints, then this was a pattern and the operator would be brought in for counseling and monitored to see if any other complaints came in regarding the same conduct, after which they would begin progressive discipline.

86. From May 4, 2009 through October 19, 2009, the District received 13,210 complaints. The number of complaints in each category were immediate – 48; direct access – 426; priority – 115; non-immediate – 5,563; and other – 9,619 (non-operator complaints). These complaints were closed as follows: 48 percent at intake; 35 percent within five days; 11 percent within one month; and 5 percent after one month.

87. From 2007 until the date of the hearing in this matter, the District has issued disciplinary action based on events which started out as customer complaints to six employees. Since the SIP was implemented, only one employee has been disciplined. The District has issued no discipline as a result of a pattern of complaints.

CONCLUSIONS OF LAW

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

2. The District did not make a unilateral change in the *status quo* involving the handling of customer complaints in violation of ORS 243.672(1)(e).

3. The District did not bargain in bad faith by engaging in surface bargaining over the handling of customer complaints in violation of ORS 243.672(1)(e).

4. The District did not fail to comply with the bargaining and interest arbitration requirements of ORS 243.698 in violation of ORS 243.672(1)(f).

DISCUSSION

We first address the claim that the District made an unlawful unilateral change in the *status quo* when it implemented the SIP. The obligation to bargain in good faith under ORS 243.672(1)(e) includes an obligation to bargain prior to changing existing employment conditions related to mandatory subjects of bargaining during the term of a contract. *AFSCME v. Wasco County*, Case No. C-176-75, *order on remand*,

4 PECBR 2397 (1979), *aff'd*, 46 Or App 859, 613 P2d 1067 (1980). In determining whether the employer violated ORS 243.672(1)(e) in these cases, we apply the analysis set out in *Lebanon Education Association/OEA v. Lebanon Community School District*, Case No. UP-4-06, 22 PECBR 323, 360 (2008), where we stated:

> "In a unilateral change case, we must identify the *status quo* and determine whether the employer changed it. If the employer changed the *status quo*, we then decide whether the change concerns a mandatory subject for bargaining. If it does, we examine the record to determine whether the employer completed its bargaining obligation before it decided to make the change. If the employer failed to complete its bargaining obligation, we then consider any affirmative defenses the employer raised (*e.g.*, waiver, emergency, or failure to exhaust contract remedies)."

For the reasons discussed in more detail below, we conclude that ATU has failed to carry its burden of proving that the District made a unilateral change in the *status quo* when it implemented the SIP in violation of ORS 243.672(1)(e). In applying the *Lebanon Community School District* analysis to the facts of this case, we first decide that the *status quo* existing at the time the SIP was implemented was based entirely on the 2005 Policy and that some of the safeguards asserted by ATU continued as part of the *status quo* under that Policy. We next determine that some of these safeguards constituted mandatory subjects of bargaining and were changed by the District when the SIP was implemented. However, we ultimately conclude that ATU failed to make a timely and sufficient demand to bargain and failed to diligently pursue bargaining as required under ORS 243.698.

Identification of the *Status Quo*

A complainant has the burden of demonstrating the existence of the *status quo* it is relying on as the basis of its unilateral change complaint. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05, 22 PECBR 911, 956 (2009). The *status quo* is generally established based on an expired collective bargaining agreement, past practice, work rule, or policy. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-53-00, 19 PECBR 656, 664-65, *supplemental orders*, 19 PECBR 804 and 19 PECBR 848, *recons*, 19 PECBR 895 (2002), *aff'd*, 187 Or App 92, 67 P3d 951 (2003). Once the *status quo* is identified, the complainant has the burden of proving that a change in the *status quo* has occurred. *McKenzie Education Association/Lane Unified Bargaining Council/OEA v. McKenzie School District 68*, Case No. UP-81-94, 16 PECBR 156, 164 (1995).

In its complaint, ATU alleges that the *status quo* is either the 1996 Policy or the 2005 Policy plus the safeguards from the 1996 Policy. In its brief, ATU argues that the *status quo* is not based on any CSI policy, but "the actual practices in place prior to the changeover to SIP." (ATU's Post-Hearing Brief at 14.) In support of its allegations and argument, ATU asserts that even after the District adopted the 2005 Policy, a past practice existed under which the District continued to use the 1996 Policy or, at least, provided certain safeguards that had existed under the 1996 policy. It is these safeguards that ATU alleges were changed when the District implemented the SIP. For the reasons discussed below, we conclude that the *status quo* regarding the processing of customer complaints prior to the implementation of the SIP was established by the 2005 Policy.

The party alleging a *status quo* based on a past practice has the burden of proving its establishment. *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon*, Case No. UP-62-05, 22 PECBR 911, 946, *recons*, 23 PECBR 34 (2009). A legitimate past practice must be clearly established. "To be clearly established, a practice must be clear and consistent, occur repetitively over a long period of time, and be acceptable to both parties. We must also consider the circumstances under which the past practice was created, and the existence of mutuality." *AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993 (2005). "Acceptability means that both parties know about the conduct at issue and consider it the acceptable method for dealing with a particular situation." *Eugene Police Employees' Association v. City of Eugene*, Case Nos. UP-38/41-08, 23 PECBR 972, 998 (2010). Mutuality means that the "practice arose from a joint understanding by the employer and the union, either in their inception or their execution." *AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, 20 PECBR at 993.

ATU has failed to establish critical characteristics of a binding past practice based on the continued use of 1996 Policy. ATU has failed to demonstrate that the asserted past practice was acceptable to both parties, supported by mutuality, or consistently applied. The 2005 Policy itself states the District's intent to replace the 1996 Policy. The parties also participated in litigation over the right of the District to unilaterally replace the 1996 Policy with the 2005 Policy, and this Board ultimately upheld the District's right to do so. While some lower level managers cited to and applied provisions of the 1996 Policy after the 2005 Policy was adopted, and some of these managers' communications were copied to higher level managers, there is no evidence that the lower level managers had the authority to bind the District to the use of the 1996 Policy. In addition, the evidence shows that other managers included references to and applied the 2005 Policy. In fact, in a May 13, 2008 Determination Letter, a supervisor specifically advised ATU that the older CSI policies it was relying on were no longer

recognized by the District and that the District had complied with the 2005 Policy. Therefore, ATU failed to prove a *status quo* based on the 1996 Policy.

ATU also failed to establish that the asserted procedural safeguards from the 1996 Policy continued as the *status quo* under that 2005 Policy based on past practice. ATU relies on the evidence that it continued to successfully assert these safeguards from the 1996 Policy in meetings with some managers, even after the 2005 Policy was adopted. However, again the evidence does not show that the District accepted or agreed to a past practice to continue use of these safeguards or that the safeguards were consistently applied under the 2005 policy. In fact, the District had intentionally eliminated many of these asserted safeguards from the 2005 Policy based on its belief that they already existed under the just cause clause in the parties' Agreement. It is just as likely that the District continued to respond to ATU's assertions of these safeguards based on the rights and obligations provided for in the parties' Agreement or other protections, rather than as a matter of the terms of the 1996 Policy. For example, in one case the District responded to ATU's assertion of a lack of representation relying on an employee's *Weingarten* rights, which are based not on policy, but on the Public Employee Collective Bargaining Act. Finally, some of the asserted safeguards, such as the right to notice of all complaints within five days and the verification of all customer complaints, were directly contrary to the process used in handling complaints under the 2005 Policy.

Status Quo Under the 2005 Policy

Since we have found that the 2005 Policy established the *status quo*, our next step is to determine if that policy provides for the procedural safeguards asserted by ATU.

a. Employee provided notice of all complaints within five days:

ATU failed to prove that the *status quo* required that an employee be given notice of all customer complaints within five days. ATU relies on the notice provisions under the 1996 Policy and the provision under the 2005 Policy that provides for a response time goal regarding notification of non-urgent complaints of three days. However, ATU fails to take into account two significant changes under the 2005 Policy. First, the 2005 Policy sets the time line for the notice as a "goal," not a requirement. Additionally, ATU ignores the fact that under the process established for "reviewed complaints" in the 2005 Policy, the District generally had no obligation to provide employees notice of the first five complaints in a rolling 12-month period. Therefore, the District did not eliminate this safeguard from the *status quo* in violation of ORS 243.672(1)(e).

b. Operator presumed to be innocent, two signed statements or other evidence required, and preponderance of evidence standard used:

ATU proved that under the *status quo*, an operator was presumed innocent prior to and during the investigation of an urgent complaint. This presumption was specifically included in the 2005 Policy.

ATU did not prove that the *status quo* included a presumption of innocence during the investigation of a non-urgent complaint, a requirement for two signed witness statements to substantiate complaints, or the use of a preponderance of evidence standard. Neither the use of a presumption of innocence standard for non-urgent complaints nor a reference to the preponderance of evidence standard were included under the 2005 Policy. In addition, while a substantiated complaint under the 1996 Policy required signed statements from "two credible callers or witnesses," the 2005 Policy allowed the District broader discretion regarding the type of proof, which could include statements from "credible callers or witnesses and/or physical evidence or information resulting from field or ride checks" to substantiate complaints. Therefore, the District did not eliminate these safeguards from the *status quo* in violation of ORS 243.672(1)(e).

c. District's "[i]nitial response to investigated, verified customer complaint problem will include notice of expected behavior and three-way determination of training, coaching and information sharing." (ATU Post-Hearing Brief at 15.)

ATU did not prove that the *status quo* was that management's initial response to an investigated, verified customer complaint would include a notice of expected behaviors and a three-way determination of training, coaching, and information sharing. ATU's assertion of the *status quo* here is based on the premise that all non-urgent complaints must be investigated and verified before this initial process occurs. However, the 2005 Policy eliminated this requirement. Instead, under the 2005 Policy, the initial meeting between the supervisor, employee, and the Union is held after the first five "reviewed" non-urgent complaints in a 12-month period.

In addition, the 2005 Policy did not limit the supervisor's initial response to the "reviewed" complaints to "notice of expected behavior and three-way determination of training, coaching and information sharing." It also allowed management to elect to design a training strategy. This training strategy provision was specifically added to the 2005 Policy so a supervisor would have the option of placing an employee on a work improvement plan. Therefore, the District did not eliminate this safeguard from the *status quo* in violation of ORS 243.672(1)(e).

d. An operator's right to Union representation included the requirement that the District proactively contact the Union about urgent complaints prior to contacting the operator, and an opportunity for the operator to contact a union officer before being confronted with either an urgent or non-urgent complaint:

ATU did not prove that the *status quo* included a requirement that the District notify ATU about urgent complaints prior to contacting an operator. Unlike the 1996 Policy, the 2005 Policy did not include a requirement that the customer service unit notify a union representative about an urgent complaint at the same time it was notifying the District General Counsel's office, General Manager, and the employee's supervisor. The 2005 Policy only provided for the District to coordinate with and make recommendations to the union representatives about the investigation of a complaint, and to inform the Union after the investigation when an intended action affected a represented employee. While Ennis explained that the 2005 Policy did not remove ATU's right to be immediately notified about urgent complaints, he did qualify his testimony that under the 2005 Policy, the right had been limited to occur as appropriate.

ATU also did not prove that the *status quo* included an opportunity for the operator to contact a union representative before being confronted regarding a complaint. Regarding a non-urgent complaint, the 2005 Policy did not provide for an opportunity for an employee to talk with his union representative prior to the meeting with the supervisor to discuss the complaints. It only provided that a union representative would be present at this meeting. In addition, the 2005 Policy did not require the District to allow the employee to contact ATU prior to meeting with the employee to explain the allegations in an urgent complaint or placing the employee on administrative leave. The 2005 Policy did not even include a requirement that a union representative be present when the District interviewed the employee during the investigation of an urgent complaint.

These *status quo* assertions regarding union representation appear to be based not on the *status quo* under the 2005 Policy, but on an employee's right to representation under the parties' Agreement and *Weingarten*. As Ennis explained, in implementing the 2005 Policy, the District purposely replaced certain due process and just cause protections included in the 1996 Policy with the reference that discipline would be administered under the parties' Agreement. This perhaps explains why the grievance in evidence, which was filed after the implementation of the 2005 Policy, raised the issue of lack of representation by referring to *Weingarten*. Therefore, the District did not eliminate these safeguards from the *status quo* in violation of ORS 243.672(1)(e).

e. Operators not confronted about non-urgent complaints while driving:

ATU did not prove that the *status quo* was that operators would not be contacted about a non-urgent complaint while driving.[17] It is true that the 2005 Policy provides for a meeting between the supervisor, employee, and union representative after the fifth non-urgent complaint. However, the policy does not limit contact regarding non-urgent complaints to this meeting. In fact, in several places the policy indicates the potential for contact with the employee regarding non-urgent complaints under other circumstances. For example, the policy provides that non-urgent complaints may be discussed with an operator in the rare cases where information is needed to respond to a customer. In addition, the 2005 Policy established the category of priority complaints, which included an immediacy requirement, but did not specify the type of contact that would occur. Finally, while drivers were generally notified about complaints at the beginning or end of their shift, field supervisors who observed violations also sometimes approached operators in their vehicles to discuss such concerns. Therefore, the District did not eliminate this safeguard from the *status quo* in violation of ORS 243.672(1)(e).

f. Investigation of complaints be fair and full:

While we find ATU's assertion of a *status quo* based on a "fair and full" investigation to be vague, ATU did prove that the *status quo* included a requirement of a "thorough" investigation of urgent complaints. Specifically, the policy provided for an investigation in which the customer was identified, contacted, interviewed, and provided a signed statement; witnesses were identified, contacted, and interviewed; additional background facts and relevant information were gathered and documented; the employee's past performance record was reviewed; the employee was interviewed and provided a written statement; the employee was entitled to present witnesses and evidence; the TOD director prepared written findings and recommendations; the Union was notified regarding actions affecting a represented employee; the TOD director met with the employee and union representative to present the written conclusions; and disciplinary action was taken in accordance with the parties' Agreement.

Regarding non-urgent complaints, the 2005 Policy did not include a specific provision for a similar investigation process. However, under the definition of a "confirmed" complaint, the 2005 Policy did require the District to substantiate a complaint when discipline was pending based on "[s]tatements from contemporaneous

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[17]While ATU did not word this safeguard in terms of non-urgent complaints only, it relied on the policy provisions regarding non-urgent complaints. Therefore, we limit our consideration to these complaints.

credible callers or witnesses, and/or physical evidence or information resulting from field or ride checks * * *." (Exh. R-2 at 3.) Therefore, ATU proved that these requirements were the *status quo* concerning the investigation of non-urgent complaints.

g. An operator cannot be disciplined based on unsubstantiated non-urgent complaints:

ATU proved that the *status quo* was that an operator would not be disciplined based on unsubstantiated non-urgent complaints. As stated above, the 2005 Policy required "[s]tatements from contemporaneous credible callers or witnesses, and/or physical evidence or information resulting from field or ride checks" to substantiate a complaint when discipline was pending. In addition, the 2005 Policy specifically provided that "reviewed" non-urgent complaints, which were entered into the database without investigation, could not be used for discipline and that discipline was to be based on the parties' Agreement and any relevant guides, policies, and procedures.

h. District required to allow operator to see a complaint and to be able to present witnesses and evidence in response to the complaint:

ATU proved that the *status quo* allowed an operator to elect to be informed about reviewed complaints and required that the operator be notified about other complaints. The 2005 Policy did not require the District to provide the employee a copy of "reviewed" complaints. It did provide that an employee could elect to be informed about these complaints. The supervisor was also required to notify an operator about relevant non-urgent complaints after the fifth complaint and immediately explain the allegations of an urgent complaint to the employee.

As addressed under subsection f., ATU also proved that the *status quo* required the District to allow an employee to present witnesses and evidence as part of the investigation of an urgent complaint. However, the 2005 Policy did not provide for the employees to present witnesses or evidence in response to non-urgent complaints. Therefore, the District did not eliminate this safeguard from the *status quo* in violation of ORS 243.672(1)(e).

I. "Reviewed" Complaints removed from record after 12 months:

ATU proved that under the *status quo,* non-urgent "reviewed" complaints were removed from an employee's record after 12 months. The 2005 Policy specifically provided that reviewed complaints would be "identified and maintained for a rolling 12 months." (Exh. R-2 at 6.)

j. The "stacking of unsubstantiated complaints (patterns)" cannot be used to justify beginning the disciplinary steps:

ATU did not prove the asserted *status quo*. ATU's real objection here is to the 2005 Policy provisions that allow the District to meet with an operator to clarify expectations and develop a training strategy or seek agreement on a work improvement plan based on five "reviewed" complaints, and to pursue further steps, including discipline, if the employee does not achieve the agreed-upon expectations. Unlike the 1996 Policy, the 2005 Policy specifically allows the use of a pattern of unsubstantiated complaints as an initial step which could lead to discipline. Therefore, the District did not eliminate this safeguard from the *status quo* in violation of ORS 243.672(1)(e).

k. The District could not rely on third-party or anonymous complaints:

ATU proved that the *status quo* was that the District could not rely on anonymous urgent complaints at all, and could not rely on anonymous non-urgent complaints to support discipline. As previously discussed, under the 2005 Policy the District was required to obtain a signed written statement from the customer for urgent complaints. The 2005 policy also required that "[s]tatements from contemporaneous credible callers or witnesses, and/or physical evidence or information resulting from field or ride checks" was required to substantiate a complaint when discipline was pending. However, the 2005 Policy did not clearly provide that "reviewed" non-urgent complaints could not be anonymous complaints, and there appears to be some discretion in this regard since the policy states that "[a]nonymous customer comments will be recorded, but a full investigation of them may be limited or otherwise deemed unnecessary as determined by the Director of Customer Service." (Exh. R-2 at 5.)

ATU did not prove the *status quo* was that the District could not rely on third-party complaints. There is no language in the 2005 Policy that addresses the use of third-party complaints, and even Schwarz admitted that he had not successfully argued this requirement after the District implemented that policy. Therefore, the District did not eliminate this safeguard from the *status quo* in violation of ORS 243.672(1)(e).

l. The District could not pursue discipline or a work improvement plan without a stated number of investigated and verified complaints:

ATU did not prove the asserted *status quo*. As previously explained, the 2005 Policy provided for a work improvement plan after five non-urgent "reviewed" complaints in a 12-month period, and for discipline after the work improvement plan

process. However, the policy included no obligation that the District investigate or verify those first five non-urgent complaints. Therefore, the District did not eliminate this safeguard from the *status quo* in violation of ORS 243.672(1)(e).

Changes in the *Status Quo*

We conclude that ATU demonstrated that some of its asserted procedural safeguards existed as part of the *status quo* based on the 2005 Policy at the time the District implemented the SIP. The procedural safeguards which were part of the *status quo* included: (1) a specified investigation process for urgent complaints; (2) a requirement that the District rely on substantiated non-urgent complaints when discipline is pending; (3) an operator's right to elect to be notified about "reveiwed" complaints and be given notice of all other complaints; and (4) the removal of non-urgent complaints after 12-months. It is undisputed that the District replaced the 2005 Policy with the SIP and that this resulted in some changes in how customer complaints were processed by the District. Therefore, we next determine whether the District's implementation of the SIP changed the *status quo* in any of these identified areas.

(1) Urgent Complaint Investigation Procedures:

ATU proved that the District changed the *status quo* regarding the investigation process for urgent complaints when it implemented the SIP. The SIP includes a process for customer complaints that require immediate action. These complaints are substantially the same as the urgent complaints under the 2005 Policy. However, the requirements in the SIP regarding the investigation of immediate complaints are much more limited.

The SIP does provide for the District to meet with the employee and union representative as soon as the complaint comes to the District's attention, the employee to be interviewed, and the use of witness interviews and other customer information as part of the investigation. It does not specifically provide for an employee to be presumed innocent prior to and during the investigation, a signed customer statement, additional background facts and relevant information to be gathered and documented, the review of an employee's performance record, a written employee statement, an opportunity for the employee to present witnesses and evidence, the preparation of written findings and recommendations, notice to the Union of any actions, or a meeting during which the written conclusions are presented. Therefore, the District changed the *status quo* in these areas when it implemented the SIP.

(2) Use of Non-urgent Complaints For Discipline:

ATU did not prove that the District changed the *status quo* requirement that discipline must be based on substantiated non-urgent complaints in violation of ORS 243.672(1)(e). The SIP includes a category of non-immediate complaints, which are essentially the same as the non-urgent complaints under the 2005 Policy. Although the SIP no longer includes a finding of "reviewed," it provides a similar process under which initial non-immediate complaints are generally not investigated or verified and, after reports of a similar nature have occurred, the manager meets with the employee to discuss the operating rule at issue and provide appropriate support. The SIP also provides that this approach is non-disciplinary. For discipline to occur, the SIP provides that an employee's behavior must be confirmed through evidence or observation, that verified reports of non-compliance will be required to initiate progressive discipline, and that progressive discipline is to be administered based on the parties' Agreement.

(3) An operator can elect to be informed about non-urgent reviewed complaints and is provided notice of other complaints:

The SIP did not change the *status quo* regarding an operators right to elect to be informed about all non-urgent complaints, and be provided notice of other complaints in violation of ORS 243.672(1)(e). Similar to the 2005 Policy, the SIP allows operators to elect to review any of their logged customer reports upon request from their manager. The SIP also provides for an employee to be immediately notified about any immediate complaints and for management to notify an employee about complaints which merit intervention through the Employee Support Model.

(4) Reviewed non-urgent complaints will be removed after 12-months:

The SIP changed the *status quo* which required that "reviewed" non-urgent complaints, would be removed after 12 months. Unlike the 2005 Policy, the SIP does not place a timeline on the retention of the unsubstantiated non-immediate complaints.

Did the Changes In the *Status Quo* Concern a Mandatory Bargaining Subject?

Since we have concluded that the District changed the *status quo* regarding some of the safeguards at issue when it adopted the SIP, we must next determine whether these changes concern a mandatory subject of bargaining. We previously explained that:

> "In analyzing a scope of bargaining dispute, we first determine the subject of the dispute, and then decide whether it is one which is

mandatory for negotiations. *Oregon AFSCME Council 75 v. State of Oregon, Department of Public Safety Standards and Training*, Case No. UP-56-99, 19 PECBR 76, 90, *supplemental order*, 19 PECBR 317, *ruling on recons*, 19 PECBR 344, *ruling*, 19 PECBR 473 (2001). In order to determine if a subject is mandatory, we look to the relevant statute. We consider whether the disputed matter concerns a *per se* mandatory subject under ORS 243.650(7)(a), is considered mandatory under subsection (7)(f), or is defined as permissive under subsections (7)(b), (d), (e), or (g). If none of these steps resolve the bargaining status of the subject at issue, we apply the balancing test required by subsection (7)(c). We determine whether the subject has 'a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment.' *Federation of Oregon Parole and Probation Officers v. Washington County*, Case No. UP-70-99, 19 PECBR 411, 425 (2001); and ORS 243.650(7)(c)." *AFSCME Local 88 v. Multnomah County*, Case No. UP-18-06, 22 PECBR 279, *order on recons*, 22 PECBR 444, 449 (2008).

Here the subject of the dispute is a process for receiving, maintaining, and investigating customer complaints and comments, which is not one specifically addressed under ORS 243.650(7)(a), (b), (d), (e), (f), or (g). Accordingly, we must apply the balancing test under ORS 243.650(7)(c) to determine whether these subjects are mandatory for bargaining.

ATU argues that we should find the SIP complaint procedures are wholly mandatory because of the stressful nature of the investigation process and the potential impact on an employee's right to a bonus, promotion, or ability to be rehired by the District. In support of its argument, ATU relies on our early scope of bargaining decisions in *Springfield Education Association v. Springfield School District No. 19 (Springfield)*, Case No. C-278, 1 PECBR 347, 353 (1975) and *South Lane Education Association v. South Lane School District No. 45J (South Lane)*, Case No. C-280, 1 PECBR 459 (1975).[18] ATU

[18]These cases were consolidated on appeal with *Eugene Education Association v. Eugene School District No. 4J*, Case No. C-279, 1 PECBR 446 (1975). The subsequent history of the consolidated cases is *aff'd in part, rev'd in part*, 24 Or App 751, 547 P2d 647, *modified*, 25 Or App 407, 549 P2d 1141, *rev den*, 276 Or 211 (1976), *on remand*, 3 PECBR 1950, *recons den*, 3 PECBR 1969 (1978), *aff'd*, 42 Or App 93, 600 P2d 425 (1979), *aff'd as modified*, 290 Or 217, 621 P2d 547 (1980), *on remand*, 3 PECBR 1970(a) (1981). In the original appeal, the Court of Appeals affirmed this Board's decision regarding the bargaining status of the proposals at issue, except for two proposals not relevant here. The subsequent decisions addressed only the two exceptions.

also relies on our later decisions in *Gresham Grade Teachers Association v. Gresham Grade School District No. 4 (Gresham)*, Case No. C-61-78, 5 PECBR 2771, 2803 (1980) and *East County Bargaining Council v. Centennial School District No. 28JT (Centennial)*, Case No. C-185-82, 6 PECBR 5556 (1982), *recons den*, 6 PECBR 5630 (1983), *aff'd*, 69 Or App47, 685 P2d 452, *vacated in part and remanded*, 298 Or 146, 689 P2d 958 (1984), *remand*, 8 PECBR 6776 (1985).[19] ATU asserts that under these cases, this Board has consistently held that proposals regarding complaint procedures are mandatory topics of bargaining.

The District initially argues that the transition to the SIP as a whole is permissive because the SIP is really about how the District receives, stores, and organizes customer feedback, not about employees' conditions of employment. The District further argues that any changes in the SIP related to employee procedural safeguards are not mandatory bargaining subjects because such procedures would unduly interfere with the District's right to manage its customer complaint process/investigations in the same manner as the proposals that this Board held to be permissive in *Oregon Public Employees Union v. State of Oregon, Executive Department (OPEU v. Executive Department)*, Case No. UP-71-93, 14 PECBR 746 (1993), and *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections (AOCE v. DOC)*, Case No. UP-91-93, 14 PECBR 832, 870-72 (1993), *AWOP*, 133 Or App 602, 892 P2d 1030, *rev den*, 321 Or 268, 895 P2d 1362 (1995).

In *Springfield* and *South Lane*, we held that bargaining proposals that provided procedures for the processing of complaints against teachers were mandatory for bargaining because of the impact on an employee's employment conditions. We explained that the entire complaint article "relates to procedures for processing complaints filed against an individual teacher by persons other than the school district's administration," which "may have an influence upon a teacher's tenure." *Springfield*, 1 PECBR at 353. The proposals in *Springfield* and *South Lane* included procedures such as the right to a meeting with a supervisor, representation by another teacher or union representative, a conference with the complainant, a full investigation, a meeting with the superintendent, a meeting with the school board, and a limitation on such complaints being placed in a teacher's personnel file.

In *Gresham*, we held mandatory a proposal which required a complaint "used in any manner in job security, compensation, or evaluation" be promptly investigated, with

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[19]The court's decisions on appeal and this Board's order on remand address the bargaining status of an evaluation proposal not relevant here.

the teacher being notified of the complaint and given an opportunity to respond. 5 PECBR at 2803. In doing so, we relied on our prior decisions in *Springfield* and *South Lane*, and explained that the proposal addressed matters of minimum fairness we had previously found mandatory in the context of teacher evaluations. Under a proposal addressing a teacher's rights regarding disciplinary procedures, we found mandatory a due process definition which included prior notice of the charges, a right to representation, a right to discuss the matter with the employee's supervisor, and the right to meet with the school board. We stated that such due process procedures were "strictly a matter of minimum fairness procedures." 5 PECBR at 2779. Finally, we held that other procedures which gave "teachers notice of the bases for various types of disciplinary action and a right to be heard thereon, and are mandatory proposals because they concern minimum fairness procedures." 5 PECBR at 2780. On the other hand, we held that a proposal that the employer must review the teacher's personnel file with the teacher prior to discipline was permissive because it provided for more than the minimum fairness procedures of notice and opportunity to be heard.

In *Centennial*, this Board found mandatory a proposal that provided that documents which the teacher had not been given notice of within four weeks of preparation could not be the basis for any adverse action or placed in the personnel file. The proposal arose in the context of an employer disciplining a teacher, in part, based on a two-month-old complaint of which the teacher had no knowledge. This Board acknowledged that it had previously held "so-called 'Complaint Procedures' to be mandatory on the basis that they propose 'matters of minimum fairness' to teachers." 6 PECBR at 5567. It then found that the proposal at issue placed less burden on the employer than a typical complaint procedure because it only required that the employer give a teacher notice of documents prepared for a personnel file within four weeks of its preparation and the proposal that the document not be used without such notice was "a logical enforcement mechanism for the proposal and also is a matter of minimum fairness." (*Id.*)

In our later cases addressing complaint proposals, we continued to move away from our original decision that complaint procedure proposals were mandatory as a whole, and focused on whether specific complaint processes in a proposal provided for or went beyond matters of minimum fairness. *OPEU v. Executive Department* involved the investigation of non-criminal client complaints at various State institutions which housed mentally- and developmentally-disabled patients. Similar to ATU's assertion in the present case, the union in that case argued that the complaint process was wholly mandatory based on our prior rulings in *Springfield* and *Gresham*. However, this Board held that

> "[a]s a general matter, the State's need to investigate alleged employee wrongdoing at its institutions for the disabled clearly is superior to any conceivable contrary employee interests. * * * * * It follows that restrictions and conditions imposed on the investigation process which could potentially jeopardize its validity and integrity are similarly matters in which the State's interest in identifying client and patient abuse will generally override effects on employees subject to investigations." 14 PECBR at 767-68.

This Board then addressed the three procedures at issue. We first determined that the State was not obligated to bargain over the requirement that it disclose the particulars of the complaint or identify the accuser. We explained that such a requirement was "inherently antithetical to the process and its goals, *i.e.*, factfinding and assessment of culpability," and that the State's need to control the investigation and protect the individuals under its control outweighed the stigma of the investigation and anxiety to the employee. 14 PECBR at 768. For these same reasons and our conclusion that the employee had no legitimate interest in interfering with the investigation process, this Board also held that a requirement that the employee be given the first opportunity to provide information in response to a complaint was permissive, stating "[d]ecisions about when to interview parties and in general how to conduct client abuse investigations are not ones over which the State can be required to bargain." 14 PECBR at 768. On the other hand, this Board held that the proposed time lines within which the investigation of a suspended employee must be started, completed, and communicated to the employee were mandatory because "the State has no interest in unreasonably protracting or delaying the investigation process, while the accused employee has a significant interest in being cleared of or charged with wrongdoing in as swift a manner as possible." 14 PECBR at 769.

In *AOCE v. DOC*, this Board considered the bargaining status of a proposal related to the investigation of complaints about employee misconduct at a correctional institution.[20] We first held permissive requirements that the State notify an employee of the existence and nature of a complaint within 48 hours, the State divulge to the employee all of the information regarding the complaint 72 hours prior to interviewing the employee, and the employee's representative be entitled to consult with the

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[20]ATU argues that *AOCE v. DOC* is inapplicable to the present situation because it addressed procedures related to the investigation of employees by an outside agency. However, ATU mischaracterizes the facts of that case, which are that 20 percent of the complaints raised potential criminal conduct and were investigated by the Oregon State Police. The other 80 percent were investigated by the employer under the process at issue.

employee during the interview. We concluded that these procedures did not raise due process rights and relied on the employer's need to control the investigation, citing to *OPEU v. Executive Department*. We further stated that allowing an employee to consult with a union representative before answering questions at this stage of the investigation "substantially defeats the purpose of such an interview. That purpose is to obtain the employee's own, candid, spontaneous and unvarnished rendition of the events under investigation." 14 PECBR 872. On the other hand, we found that the requirements that investigators not use threats or intimidations during the interview and that a tape recording of the interview be allowed were mandatory because there was no evidence that either of these requirements would interfere with or adversely affect the investigation.[21]

Under ORS 243.650(7)(c), we must determine if the disputed matter has "a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment." Here, the District sought to implement a new process for the receipt, processing, and investigation of customer comments and complaints. On balance we conclude that the District was not required to bargain over the decision to change the SIP. The District is responsible for the transportation of a significant number of customers who place themselves in the hands of the District transit operators on a daily basis. To maintain the integrity of its services and the safety of its customers, the District's need to control the processing and investigation of the complaints filed by these customers outweighs the impact on an employee's working conditions. However, where the District's decision to change the SIP could affect an employee's continuing employment and wages, the District had an obligation to bargain over these mandatory impacts prior to implementing the SIP. Therefore, we consider the specific *status quo* procedures that the District changed by implementing the SIP to determine their bargaining status.

1) Urgent Complaint Investigation Procedures:

We conclude that the *status quo* investigation procedures that provided for a presumption of innocence, a written statement by the employee, notice to the Union of any recommended actions regarding represented employees, and a meeting with the employee and Union at which the District presents its written investigation conclusions

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[21]In his concurrence in the unilateral change case, *Eugene Police Employees' Association v. City of Eugene*, Case No. UP-38/41-08, 23 PECBR 972 (2010), Chairman Gamson cited to the decisions in *OPEU v. Executive Department* and *AOCE v. DOC* in concluding that the City's decision to have a police auditor participate during complaint investigation interviews was an aspect of the investigation within the City's control and, therefore, permissive.

are mandatory subjects of bargaining. These procedures all address matters of minimum fairness regarding an employee's right to notice, representation, and opportunity to respond during an investigation process. They also do not place a significant burden on the District or interfere with or jeopardize the District's need to control the process or its validity.

We further conclude that the *status quo* investigation procedures that required a signed customer statement, additional background facts, and relevant information to be gathered and documented, an employee's performance record to be reviewed, and the opportunity for the employee to present witnesses and evidence address permissive subjects of bargaining. These procedures all go beyond the minimum fairness requirements of notice, representation, and an opportunity to be heard. Such requirements interfere with the District's ability to control what evidence it obtains and relies on in investigating alleged employee wrongdoing. In addition, we previously held in *Gresham* that the requirement that an employer review the employee's personnel file prior to issuing discipline was permissive.

2) Removal of uninvestigated complaints after 12 months:

We conclude that the District's elimination of the *status quo* requirement that "reviewed" or uninvestigated non-immediate complaints be removed after 12 months is not a mandatory topic of bargaining. We agree with the District that the manner in which it administers its customer complaint database is more about how the District receives, stores, and organizes customer feedback than an employee's conditions of employment. Such a database allows the District to document and evaluate customer concerns in general and in the long term. Such information is important for the District to understand and address issues in the system as a whole and are critical for the District to continue to work on improving its services. A requirement that the District remove such information after a certain period of time goes well beyond minimum fairness protections. As the evidence shows, ATU can also challenge any impact from retaining such documents on an employee's working conditions through the parties' grievance process.

Did the District Satisfy Its Bargaining Obligation?

Since ATU and the District were subject to a collective bargaining agreement at the time the changes to the SIP were proposed and implemented, the parties' rights and obligations arose under the expedited bargaining process provided for in ORS 243.698. Pursuant to ORS 243.698(2) and (3), an employer who is obligated to bargain over a change in employment relations must notify the union "in writing of anticipated changes

that impose a duty to bargain," and the union must file a demand to bargain with the employer within 14 calendar days of the employer's notice or the union waives its right to bargain over the change. Assuming that a timely notice and demand to bargain have been made, the employer may not implement its proposed changes until the parties have bargained in good faith for 90 calendar days from the employer's notice.

ATU argues that the District did not comply with its obligations under ORS 243.698 because (1) although the District never provided an adequate notice, ATU submitted a timely demand to bargain, and (2) the District failed to bargain in good faith. The District admits that it did not bargain over the implementation of the SIP, but asserts that any bargaining obligation it had was waived by ATU based on (1) its failure to submit a timely bargaining demand, and (2) its agreement to the management rights clause language in the parties' Agreement. The District also asserts that ATU withdrew its claim that the District did not give adequate notice in its amended complaint.

We agree that ATU withdrew its claim that the District failed to provide sufficient notice of anticipated changes under ORS 243.698(2). ATU's original complaint alleged that the District violated the "notice and bargaining requirements of ORS 243.698" in violation of ORS 243.672(1)(f). (Complaint at 5.) On the other hand, ATU's second amended complaint alleged that the District "failed to comply with the bargaining and interest arbitration requirements of ORS 243.698." (Second Amended Complaint at 7.) However, regardless of whether the issue of adequate notice is alleged as a violation, to determine whether ATU made an adequate bargaining demand, we must first find that it "received sufficient and timely notice of the proposed change." *Tualatin Valley Bargaining Council/Hillsboro Education Association v. Hillsboro Union High School District 3J*, Case No. UP-125-92 ,14 PECBR 541, 549 (1993).

Concerning the issue of the District's notice, we have held that "[a]n employer that intends to alter an employment relation involving a mandatory bargaining subject must notify the labor organization of the anticipated change sufficiently in advance of the expected implementation date for the change to allow a reasonable time for meaningful bargaining to occur." *Teamsters Local 670 v. City of Vale*, Case No. UP-14-02, 20 PECBR 337, 358 (2003). *See also Oregon School Employees Association v. Astoria School District*, Case No. UP-40-02, 20 PECBR 46, *recons*, 20 PECBR 63, 65 (2002). It is not disputed that P. Hanson notified ATU of the District's intent to replace the current CSI with the SIP at the October 31 meeting. She also gave the ATU representatives several written documents summarizing the purpose of the SIP and a draft of the SIP. P. Hanson's presentation at the October 31 meeting was sufficiently clear to alert ATU to the potential impact of the changes on mandatory bargaining topics. The October 31

meeting also occurred six months prior to the implementation of the SIP. Since ORS 243.698 only requires a 90-day bargaining period, the notice allowed sufficient time for meaningful bargaining over the change.

We next consider whether ATU made a timely and sufficient demand to bargain. As we previously stated, ORS 243.698 was adopted "as a limitation on mid-term bargaining obligations. There is now a strict limit on when a union must make a demand to bargain, and the law makes clear that a failure to issue a demand in that time period is a waiver." *Oregon School Employees Association v. Astoria School District*, 20 PECBR at 65. We have held that to be sufficient, a union's bargaining demand needs to notify the employer of the scope of the matters to be bargained. Where it is not clear, the union waives its right to bargain over matters not included in the demand. For example, where a union limits its demand to bargain to the decision or fails to diligently pursue bargaining over the impact of the decision, it waives its right to bargain the impacts of the decision. *Roseburg Fire Fighters Association, IAFF Local 1110 v. City of Roseburg*, Case No. UP-47-97, 17 PECBR 611, 631-32 (1998). *See also Oregon School Employees Association v. Sherman Union High School District #1*, Case No. C-218-80, 6 PECBR 4715, 4723 n 7 (1981). This same rule applies regarding the matters to be bargained.

We conclude that ATU failed to make a timely and sufficient demand to bargain over the SIP under ORS 243.698(3).[22] We do not agree, as ATU argues, that it is "undisputable" that it "gave consistent and clear notice of its demand to bargain and notice that it believed the parties were bargaining on the subject of the protections accorded employees with regard to customer complaints." (ATU's Post-hearing Brief at 52.) First, ATU relies, in part, on Hunt's September 11 letter as evidence of its demand to bargain. Yet, on its face, the September 11 demand to bargain was clearly limited to the issue of discipline associated with ADA call-outs. It was also sent a month and a half prior to the October 31 meeting, which ATU maintains was the first time that it became aware of the District's intent to change the customer complaint process by adopting the SIP.

ATU also failed to prove that its November 5 letter was sufficient to meet its obligation to demand to bargain over the SIP changes under ORS 243.698(3). The November 5 letter was provided to the District within 14 days of the October 31 meeting. The letter also referred to P. Hanson's presentation during that meeting. However, the November 5 letter does not state a clear demand to bargain over the SIP

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[22]ATU did not allege a claim that the District refused to bargain over the issue of ADA call-outs. In addition, since we dismiss this allegation due to ATU's insufficient bargaining demand, we need not address the District's contract waiver argument.

changes to the customer complaint process. Instead, it is another follow up letter to ATU's September 10 demand to bargain over the ADA call-outs. The subject line in the November 5 letter and the focus of the letter both reference the changes to the disciplinary scheme for ADA call-outs. The November 5 letter also does not include an actual demand to bargain, or state that ATU is expanding its prior demand to bargain as a result of the October 31 meeting. Instead, it merely notifies the District of ATU's assumption that the October 31 meeting initiated the bargaining required under ORS 243.698. In fact, Hunt admitted that he sent the November 5 letter so the District would know that ATU still wanted to bargain. His April 29 letter also stated that the meetings with P. Hanson were held after the bargaining demand was made. Both indicate that Hunt's November 5 letter was not a new bargaining demand.

ATU argues, however, that we should find that the District had an obligation to bargain because ATU relied on the District's actions, which were consistent with bargaining, and it was only later when the parties did not reach an agreement that the District took the position that it had not been bargaining. We recognize that ATU may have initially believed that the October 31 meeting was a bargaining session. At the least, Hunt notified Fred Hansen after the meeting that he was assuming this was the case. However, we find it difficult to understand how ATU would have continued to hold onto such a belief. For one, Fred Hansen's November 20 response to ATU's November 5 letter clarified that the District did not agree it was bargaining. In addition, even if we had found that Hunt did not receive this letter, there was other evidence to the contrary.

ATU's argument that it believed it was bargaining ignores the history leading up to the parties' meetings over the SIP. Earlier, the District had consistently refused to bargain over the ADA call-outs based on ATU's untimely demand. There is no evidence that the District ever changed this position. In addition, since at least 2005 the District had notified ATU directly, and through litigation, that it had no obligation to bargain over and never had bargained over the changes to the customer service policies. In light of this, it is difficult to understand why ATU would suddenly assume that the District was reversing itself and bargaining over changes to the customer service complaint process.

ATU also failed to prove that the parties were, in fact, engaged in bargaining or that ATU should have believed that they were. There is no reliable proof that the word bargaining was ever used during the October 31, April 1, or April 9 meetings on the SIP. Since the participants' recollections of these meetings were so unclear, we have primarily relied on their meeting notes, which include no reference to bargaining. And, while P. Hanson did indicate she hoped that ATU would sign off on the SIP at the October 31 meeting, an employer may seek a union's agreement to changes in a policy for many

reasons, even if it does not intend, or have an obligation, to bargain those changes. In fact, the first time ATU mentioned its right to bargain over changes in "the new CSI policy that result in discipline" was at the JLRC meeting on December 3, 2008.

The parties also did not behave in a manner that reflected participation in an expedited bargaining process. P. Hanson presented the SIP concepts on October 31 and then apparently did not follow up with ATU or schedule another meeting until April, well outside of the 90-day bargaining period. While ATU admits it was frustrated by P. Hanson's informal manner and a lack of progress regarding their discussions, it never asked to schedule additional bargaining sessions within the 90-day period, demanded timely responses from the District, or protested the District's failure to meet. Additionally, neither party presented formal bargaining proposals and ATU never confirmed the changes it had requested in a written format.

For these same reasons, even if we had found that ATU made a sufficient bargaining demand, we would conclude that ATU waived its right to bargain by failing to diligently pursue bargaining in a timely fashion. Assuming, as Hunt's letter asserted, that the October 31 meeting was the first bargaining session, the 90-day expedited bargaining period would have been exhausted on January 29, 2010. Yet the second meeting the parties had over the SIP did not occur until April 1. ATU never sought to schedule additional meetings over the SIP prior to the expiration of the 90-day period, objected to the District's unwillingness to meet during this time, or even explained this delay. ATU made no written bargaining proposals, demanded none from the District, and never sought the District's agreement to extend bargaining beyond the 90 days. Nor did it, after the 90 days had expired, move the matter to interest arbitration as it had threatened. The only evidence of activity regarding the SIP during the 90 days is Hunt's statement during the December 3 JLRC meeting that ATU had the right to bargain over a number of policy changes, including the new CSI, and his January 14 letter to P. Hanson indicating, among other things, that ATU still had questions that needed to be answered regarding the SIP. We conclude that this evidence alone is insufficient to prove that ATU diligently pursued bargaining over the SIP.

ATU also argues that its failure to pursue bargaining should not be held against it because it relied on P. Hanson's representations during the October 31 meeting that she would modify the SIP as requested. We have found that ATU and P. Hanson left the October 31 meeting with different understandings of what needed to occur due to their different perspectives regarding the purpose of the meeting and what changes would be needed to accomplish ATU's requests. We also note that Hunt admitted that ATU had relied on what it perceived to be similar "agreements" from managers in the past, but later found out that these "agreements" were not as clear as they believed. In

light of this history, we cannot excuse ATU's failure to diligently pursue bargaining. In fact, such a history made it incumbent on ATU to create a record of any agreements or understandings it believed had been reached on the next steps in the process after the October 31 meeting, which it did not.

Conclusion

While we found that the District had an obligation to bargain over some of the changes related to the implementation of the SIP, ATU failed to make a timely demand to bargain or to diligently pursue bargaining over those changes. As a result, the District did not make a unilateral change in violation of ORS 243.672(1)(e). In addition, since the District then had no obligation to bargain, it also did not bargain in bad faith under ORS 243.672(1)(e). Finally, since ATU failed to make a timely bargaining demand under ORS 243.698(3), the District did not fail to comply with the bargaining or interest arbitration provisions of ORS 243.698 in violation of ORS 243.672(1)(f). Therefore, we will dismiss the complaint.

ORDER

The complaint is dismissed.

SIGNED AND ISSUED this 25th day of March, 2011.

Wendy L. Greenwald
Administrative Law Judge

I certify the foregoing to be a true and correct copy of the original PROPOSED ORDER on file herein.

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 objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115-035-0050; 115-045-0040; and 115-070-0055.)