IN THE SUPREME COURT
OF THE STATE OF OREGON

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 75, LOCAL 2043,	)	Employment Relations Board No. UP1411
Petitioner on Review,	)	CA A152059
v.	)	SO62750
CITY OF LEBANON,	)	
Respondent on Review	)	

PETITIONER ON REVIEW'S BRIEF ON THE MERITS

Appeal from the decision of the Court of Appeals on judicial review from a final order of the Employment Relations Board.

Giles Gibson, OSB No. 921750
Legal Counsel
Oregon AFSCME Council 75
6025 E. Burnside Street
Portland, OR 97215
(503) 730-2777
ggibsion@oregonafscme.com

Attorney for Petitioner on Review

John E. Kennedy, OSB No. 982697
Attorney At Law
The Morely Thomas Law Firm
80 E. Maple Street
Lebanon, OR 97355
(541) 258-3194
jkennedy@jekiii.com

Attorney for Respondent on Review

March 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

QUESTIONS PRESENTED ON REVIEW

1. Whether ERB erred in deciding that an individual member of a public employer's six-member governing board – in which all of the public employer's legal powers and budgetary authority are vested – shares its status as a public employer such that the employer is liable for unfair labor practices committed by the governing board member in her capacity as such.

2. Whether the Court of Appeals erred in deciding that an individual member of a public employer's six-member governing board is not a designated representative of the employer under ORS 243.672(1).

3. Whether a public employer can be held liable for unfair labor practices committed by an official or other agent of the employer who is not a ORS 243.672(1) "designated representative" of the employer.

4. Whether the Court of Appeals erred in deciding that the City cannot be held liable for Councilor Campbell's unfair labor practice conduct under the PECBA based on the application of common law agency principles.

PROPOSED RULES OF LAW

1. The individual members of a public employer's six-member governing board – in which all of its legal powers and budgetary authority is vested – share its status as a public employer such that the employer is liable for unfair labor practices committed by such governing board members in their

capacities as such.

2. A public employer can be held liable for unfair labor practices committed by designated representatives of the employer who are not "specifically designated by the public employer to act in its interests in all matters dealing with employee representation, collective bargaining and related issues."

3. A public employer can be held liable for unfair labor practices committed by officials and agents of the employer other than its ORS 243.672(1) "designated representative."

4. Common law agency principles such as apparent authority and implied ratification properly may be applied, consistently with the legislative policy underlying the Public Employee Collective Bargaining Act (PECBA), ORS 243.650 to 243.782, in determining whether public employers are liable for unfair labor practices committed by their officials, agents, and others.

NATURE OF THE PROCEEDING

Petitioner on Review American Federation of State, County and Municipal Employees Council 75, Local 2043 (AFSCME or Union) seeks judicial review of a Court of Appeals decision reversing a final order of the Employment Relations Board (ERB) in an unfair labor practice proceeding.

AFSCME initiated the proceeding by filing a complaint with ERB

alleging that Respondent on Review City of Lebanon (City) had committed unfair labor practices when Margaret Campbell, a member of the City's six-member City Council (Campbell), sent a letter to the editor of a local newspaper through which she harshly criticized AFSCME, harshly criticized unions in general, and expressly advised city employees to decertify their unions. Campbell signed the letter as "City Councillor, Ward II."

Before ERB, the City asserted as an affirmative defense that under ORS 243.672(1), unfair labor practices can only be committed by public employers or their designated representatives; that Campbell is neither a public employer nor a designated representative of the City; and therefore that the City cannot be held liable for her conduct.

ERB found that the City had committed unfair labor practices through Campbell's conduct and rejected its affirmative defense. *AFSCME Council 75, Local 2043 v. City of Lebanon,* 24 PECBR 996 (2012). In rejecting the City's affirmative defense, ERB reasoned that because the City's Charter vests all of the City's legal powers in the six-member City Council, "[t]he Council *is* the public employer, and Campbell shares that status because she is a member of the Council." 24 PECBR at 1005 (Emphasis in original) and 1005 n1.

The City sought review in the Court of Appeals based solely on the grounds of the affirmative defense it had asserted before ERB, disclaiming

responsibility for Campbell's conduct.

The Court of Appeals held that the City was not liable for Campbell's conduct and reversed and remanded ERB's Order. *AFSCME Council 75, Local 2043 v. City of Lebanon,* 265 Or App 288, 336 P3d 519 (2014).

The Court of Appeals concluded that Campbell is not a public employer and does not share the City's status as one because she is not a "public employer" as that term is defined by ORS 243.650(20). *AFSCME Council 75, Local 2043*, 265 Or App at 299, 299 n 2.

The Court of Appeals also concluded that Campbell is not a "designated representative" of the City. Because the PECBA does not define that term, the Court initially looked to the definition of "public employer representative" provided by ORS 243.650(21). 265 Or App at 294 (citing *Service Employees Int'l Union Local 503 v. DAS,* 202 Or App 469, 476, 123 P.3d 300 (2005), *rev den*, 341 Or 140 (2006)).

Upon determining that it could not discern whether Campbell was a "public employer representative" from the text of ORS 243.650(21) alone, the Court of Appeals looked for guidance to the changes in the statutory text over time. But there have never been any changes in the text of the "public employer representative" definition, which was only first added to the PECBA

in 1995. Thus the Court of Appeals actually looked to changes in the text of the definition of "public employer," ORS 243.650(20).

The Court of Appeals ultimately concluded that Campbell was not a "designated representative" of the City within the meaning of ORS 243.672(1). In doing so, the Court relied on a "limiting intent" that it inferred from the fact that the ORS 243.650(21) "public employer representative" definition, which was first added to the PECBA in 1995, uses more specific terms to define "public employer representative" than *former* ORS 243.650(18) (1993), *renumbered as* ORS 243.650(20) (1995), *amended by* Or Laws 1995, ch 286, § 1(20) had used to define "public employer" before 1995. *Id.* at 297. Finally, the Court of Appeals also rejected AFSCME's argument that common law agency, estoppel and apparent authority principles should be applied to hold the City responsible for Campbell's letter. The Court first suggested it is an open question "whether a public employer can be held liable for an unfair labor practice committed by an agent other than its designated representative", since the term "agent" does not appear in either ORS 243.650(20) and (21) or ORS 243.672(1). 265 Or App at 297, 299 n 3.

Assuming without deciding that agency principles could be applied, the Court of Appeals concluded the City could not be held liable for Campbell's letter based on several distinctions between the facts of this case and those in

Badger v. Paulson Investment Co., Inc., 311 Or 14, 803 P2d 1178 (1991), where this Court determined there was sufficient evidence of an apparent agency relationship between an investment company and its two registered representatives to hold the company liable for the representatives' securities law violations. *Id* at 299-300.

FACTS

AFSCME represents a bargaining unit of approximately 27 employees of Respondent City of Lebanon ("City") under the Public Employee Collective Bargaining Act, ORS 243.650-243.782 ("PECBA").

In February 2011, City Council member Margaret Campbell sent a letter to the editor of the *Lebanon Express*, a local newspaper, addressing "All Citizens of Lebanon". Rec 170. Campbell's letter responded to a prior letter that AFSCME's president, Richard Nelson, and the president of the city police union, Greg Burroughs, had previously sent to the City regarding the difficult budget crisis that the City was then facing, which had prompted concerns about the possible need to reduce services and lay off employees. Rec 167-168.

Campbell's letter harshly criticized Nelson's earlier letter and broadly maligned unions in general, including by suggesting that they are rapidly becoming "the last refuge of the incompetent, inept, uncooperative, intransigent and impotent employee . . . ." *Id.* at 171.

In concluding her letter, Campbell expressly urged City employees to de-certify the unions. *Id.* And, although she had stated once early in the letter that she was writing it as an individual, Campbell *signed* the letter as "Margaret A. Campbell, City Councilor, Ward II."

Thus, Campbell's letter concludes as follows:

> To employees of the City and other organizations imprisoned by the dictatorship of a union as a private citizen ***I advise you to seek out the Department of Labor website where you can find instructions on how to de-certify your union captors***. As an individual and former union member I believe you can put your dues to better use in your own household budget and in supporting causes that truly express your own values.
>
> Sincerely,
> Margaret A. Campbell
> City Councilor
> Ward II

Rec 171 (Emphasis added).

On February 9, 2011, the newspaper published an article summarizing Campbell's letter, including her advice to city employees to "de-certify your union captors." Rec 169. The article stated that Campbell planned to read the letter at the City Council's meeting that evening, and that a copy of the letter was posted on the newspaper's website. *Id.*

Nearly every employee in the Union's bargaining unit read Campbell's letter. Doing so prompted many employees to lose confidence in the Union and

to inquire of Nelson whether it was benefitting them and whether they should continue to be represented by it. Rec 174. The letter also prompted Nelson and other employees to become fearful of engaging in any sort of concerted public activity to protest City actions. Rec 174, 178-179.

ERB held that, through Campbell's letter, the City had unlawfully coerced employees in the exercise of their rights guaranteed under the PECBA in violation of ORS 243.672(1)(a). 24 PECBR at 1004. ERB also held that the City had impaired the Union's ability to represent its members in violation of ORS 243.672 (1)(b), which makes it an unfair labor practice for an employer to "[d]ominate, interfere with or assist in the formation, existence, or administration of any employee organization." 24 PECBR at 1005-06.

SUMMARY OF ARGUMENT

ERB's ruling that City Councillor Campbell shares the status of the City as a public employer for the purposes of the unfair labor practice statute, ORS 243.672(1) is correct and should be affirmed. The Court of Appeal erred in concluding otherwise merely because Campbell is not herself a public employer within the meaning of ORS 243.650(20).

Careful consideration of the statutory text and context, including the structure, policies, and purposes of the PECBA, the changes to the statutory text enacted through Senate Bill 750 (SB 750) in 1995, and the legislative

history of the SB 750 changes, all confirm the correctness of the ERB's ruling, and its consistency with the legislative policies underlying the PECBA.

A key aspect of the context in this case is the well established fact that the PECBA was modeled on the National Labor Relations Act (NLRA), and thus that pre-1973 NLRA precedent provides valid guidance to resolving questions that arise under the PECBA. That precedent confirms that in administering the NLRA, the National Labor Relations Board (NLRB) and the federal courts have never hesitated to impute responsibility for unfair labor practices committed by agents and officers of private sector employers to those employers in order the effectuate the purposes of the NLRA, which include protecting employees from interference with the free exercise of their collective bargaining rights. That precedent supports a strong inference that the 1973 legislature intended for ERB to do precisely the same thing in administering the PECBA

Due to the need to impute liability for Ms. Campbell's conduct to the City, and the peculiar resistance to that which has arisen in this instance, there has been much talk of agency and apparent authority principles here. The simple fact is, however, that once Ms. Campbell accepted appointment to the six-member Lebanon City Council, she became more of a principal of the City than an agent. She represents the City by virtue of the office she holds.

Employees do not need to see her assigned a special portfolio of labor relations or other hands-on duties to know that she and the other members of the Council will be at the table when the key decisions are being made.

ERB's Order should be affirmed in this case not only because it is correct, but also because its being affirmed is important to avoiding an unnecessary step backwards. Public employer governing board members should allowed to believe that they may coerce and restrain public employees in the exercise of their PECBA rights with impunity.

ARGUMENT

1. The Employment Relations Board ruled correctly in holding that as a member of the City's six-member Governing Board in which all of the City's legal powers are vested, Councillor Campbell shared the City's Status as a "public employer"

ERB correctly applied the law in recognizing that Campbell shared the City's status as a public employer within the meaning of ORS 243.672(1) and holding the City liable for her unfair labor practices. The Court of Appeals erred in holding that simply because Campbell is not a public employer as defined by ORS 243.650(20), the City cannot be held liable as one based on her conduct. *See,* 265 Or App at 299, 299 n 2.

The question of whether Campbell is a public employer, or shares the City's status as one as ERB held, arises here under ORS 243.672(1), *not* ORS 243.650(20). ORS 243.672(1) provides it is an unfair labor practice "for a

public employer or its designated representative" to engage in any of the proscribed conduct described in its subsections. Most importantly for present purposes, ORS 243.672(1)(a) provides it is an unfair labor practice "for a public employer or its designated representative" to interfere with, restrain or coerce employees in or because of the exercise of the rights guaranteed them under ORS 243.662.[1] The ORS 243.650(20) definition does not resolve whether Campbell is a public employer or shares the City's status as one for the purposes of ORS 243.672(1).

The ORS 243.650(20) definition of "public employer" indirectly establishes that PECBA-covered public employers can only become liable under ORS 243.672(1) independently of their "designated representatives" when their officials' or other agents' conduct is imputed to them. It does not specify, however, when or under what circumstances such conduct is properly imputed to them. Nor do any of the PECBA's other express provisions. As a result, further interpretation is required.

---

[1]ORS 243.662 provides that:

> "Public employees have the right to form, join and participate in the activities of the labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

As explained below, proper application of the applicable principles of statutory construction confirm the correctness of ERB's analysis and its consistency with the relevant legislative policy, and confirm that in order to ensure the continued effectuation of PECBA's purposes, ERB's Order should be affirmed.

A. Controlling Principles Of Statutory Interpretation

In interpreting statutes, we seek "to discern the meaning of the statute most likely intended by the legislature that enacted it, [by] examining the text in context, any relevant legislative history, and pertinent rules of interpretation." *Oregon OSHA v. CBI Services, Inc.*, 356 Or 577, 584-585, 341 P3d 701 (2014) (citing *PGE v. Bureau of Labor and Industries,* 317 Or 606, 610-612, 859 P2d 1143 (1993) and *State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009)).

Where, as here, a disputed terms are part of a regulatory scheme administered by an administrative agency, it must also be determined whether they is "exact" terms, "inexact" terms, or a "delegative" terms, and thus how much interpretive authority the legislature delegated to the agency in applying them. *Blachana v. Bureau of Labor and Industries,* 354 Or 676, 687, 318 P2d 735 (2014) (citing *Springfield Education Assn v. Springfield School District No. 19*, 290 Or 217, 223, 621 P2d 547 (1980).

"'Exact' terms are terms of precise meaning." *Id.* "Inexact" terms communicate a complete policy statement, but the words used may be imprecise, requiring further interpretation." *Springfield Education Assn*, 290 Or at 224-225. "Delegative" terms require the Agency to make policy determinations in the first instance. *Id.* at 223.

B. Review of the Relevant Statutory Text

ORS 243.672(1)'s provision that it is an unfair labor practice for either "a public employer or its designated representative to" engage in certain conduct indicates that public employers are subject to liability not only for the unfair labor practice conduct of their designated representatives, but also for their own.

ORS 243.650(20) in turn, provides that, unless the context requires otherwise, "public employer" means the State and any of its various listed political subdivisions, including cities.[2]

---

[2]ORS 243.650 provides that

> "As used in ORS 243.650 to 243.782, unless the context requires otherwise:
>
> * * * *
>
> "(20) 'Public employer' means the State of Oregon, and the following political subdivisions: Cities, counties, community colleges, school districts, special districts, mass transit districts, metropolitan service districts, public service corporations or municipal corporations and public and quasi-public corporations."

Like corporations, the State and the political subdivisions listed in the ORS 243.650(20) definition, including cities, are all fictional entities rather than natural persons. As such, public employers as defined by ORS 243.650(20) can only act through their officers and agents. *See, Sherman, Clay & Co. v. Buffum & Pendleton, Inc.*, 91 Or 352, 358, 91 P 241 (1919) ("[C]orporations can only act through their officers and agents"); *State v. Oregon City Elks Lodge No. 1189*, 17 Or App 124, 130, 520 P2d 900 (1974) ("Since a corporation is not a natural person, it can, by definition, act only through its officers and agents.")

It follows that in providing for public employers to be liable for their own unfair labor practice conduct as well as that of their designated representatives, ORS 243.672(1) actually provides for them to be liable for the conduct of their *other* officers and agents, *i.e.*, officers and agents *other than* those who are their designated representatives. The PECBA does not by its terms prescribe or limit the circumstances under which such officials' or agents' conduct can be imputed to public employers, however. Neither ORS 243.650(20), ORS 243.672(1), or any of PECBA's other provisions address those questions. Nor does the PECBA identify any affirmative defenses that might be asserted to avoid such liability.

As a result, "public employer" as used in ORS 243.672(1) remains susceptible to multiple interpretations notwithstanding the ORS 243.20 definition. It could be interpreted to mean that public employers (as defined by ORS 234.650(20)) can only be held liable for unfair labor practices committed by their officers and agents that are formally authorized or ratified by majority votes of their governing boards, as the City suggested to ERB and before the Court of Appeals. It could alternatively be interpreted to mean that public employers can be held liable for unfair labor practices committed by the officers or agents without formal authorization, through the broad application of agency and apparent authority principles to impute responsibility for such officers' and agents' conduct to public employers in order to effectuate the PECBA's purposes, as AFSCME contends.

It follows that for the purposes of the *Springfield* trichotomy, "public employer" as used in ORS 243.672(1) is either an *in*exact term or a delegative one. *See, Blachana,* 354 Or at 687 (Terms capable of more than one meaning, and which therefore require agency interpretation, are inexact). Accordingly, this Court must review ERB's interpretation for consistency with the legislature's intent. *Blachana*, 354 Or at 687.

C. Statutory Context - Other Relevant PECBA Provisions

The relevant statutory context for interpreting ORS 243.672(1) includes PECBA's other provisions, including ORS 243.672(2), which describes labor organization unfair labor practices. ORS 243.672(2) closely tracks ORS 243.672(1) in providing that it is an unfair labor practice "for a labor organization or its designated representative to" engage the conduct described in its several subsections.

In providing that it is an unfair labor practice for either "a labor organization or its designated representative to" engage in such conduct, ORS 243.672(2) subjects unions to liability for their own unfair labor practice conduct and for that of their designated representatives, just as ORS 243.672(1) does with respect to public employers. And because labor organizations are also fictional entities rather than natural persons, ORS 243.672(2) gives rise to the same questions regarding the circumstances under which the unfair labor practice conduct of their officers and agents is properly imputed to them that ORS 243.672(1) does regarding public employers.

ORS 243.656 describes the policies underlying the PECBA. This Court previously summarized those policies as follows:

> "ORS 243.656 declares as policy the interest of the people in harmonious and cooperative labor relations in government, free from interruption and

> unresolved disputes, through a system of labor organization and collective bargaining."

Springfield Education Assn, 290 Or at 231-232.

The first listed of the PECBA-prohibited unfair labor practices is the same for employers and for labor organizations. Just as ORS 243.672(1)(a) prohibits interference with, restraint, or coercion of employees "in or because of the exercise of rights guaranteed in ORS 243.662"[3] by employers, ORS 243.672(a) prohibits such interference, restraint, or coercion by unions.

Protecting employees from interference with, restraint or coercion in or because of the exercise of their rights guaranteed under ORS 243.662 by holding employers and labor organizations accountable for such conduct is critical to the effectuation of the PECBA's purposes, including its purpose to

> "***promote the improvement of employer-employee relations within the various public employers by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, and to be represented by such organizations in their employment relations with public employers."

---

[3]ORS 243.662 provides that:

> "Public employees have the right to form, join and participate in the activities of the labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations."

ORS 243.656(5).

D. Because the PECBA was modeled on the NLRA, cases decided under the NLRA before 1973 provide valid guidance for interpreting the PECBA

The PECBA was modeled after the National Labor Relations Act (NLRA), 29 USC §§ 151-168 (1971). *Elvin v. Oregon Public Employees Union*, 313 Or 165, 177, 832 P2d 36 (1992). As a result, cases decided under the NLRA, and particularly those decided before the PECBA's enactment in 1973, are properly looked to for guidance in interpreting PECBA (*id.*), including NLRA cases concerning "affirmative defenses to unfair labor practice charges." *AOCE v. State of Oregon and Department of Corrections,* 353 Or 170, 181, 295 P3d 38 (2013).

The NLRA's relevant terms closely track those of the PECBA. As is true of the PECBA, the NLRA's first-listed unfair labor practice is interference with, restraint, or coercion of employees "in the exercise of the rights guaranteed by Section 7" of the NLRA, 29 USC § 157. NLRA §§ 8(a)(1) and 8(b)(1), 29 USC §§ 158(a)(1) and 158(b)(1).

E. Application Of Agency Principles By The National Labor Relations Board And Federal Courts To Impute Unfair Labor Practice Conduct To Employers Under the NLRA

It was well established in cases decided under the NLRA before 1973 that the unfair labor practice conduct of an employer's officers and agents are

properly imputed to the employer through the broad application of agency principles, including apparent authority. Whether an agent's unfair labor practice conduct was imputed to the employer turned on whether the affected employees "might reasonably have believed" that the agent was acting on the employer's behalf. *NLRB v. Geigy Co.*, 211 F.2d 553, 557 (9th Cir. 1954), *cert den,* 348 US 821 (1954); *see also, NLRB v. Texas Independent Oil Co.,* 232 F.2d 447, 450 (9th Cir. 1956) (Conduct imputable if employees "would have just cause to believe" that the agent had acted on employer's behalf); *accord, Alpine Coal Company*, 150 NLRB 445, 449 (1964); *Finesilver Manufacturing Co.*, 160 NLRB 1400, 1410 n 3 (1966); *McKinnon Services, Inc.*, 174 NLRB 1141, 1144 (1969).

Thus in *McKinnon Services*, the National Labor Relations Board (NLRB) imputed the coercive anti-union conduct of one of an employer's secretaries to the employer. 174 NLRB at 1144, 1147. Although the secretary was not a supervisor, she worked primarily for the employer's manager, regularly conveyed instructions from him to other employees, and screened applicants for employment. *Id.* at 1411. In concluding that other employees "would have just cause to believe" that she was acting for and on behalf of the employer, the NLRB reasoned that the secretary's responsibilities "put her in a

position to be identified with management in the eyes of the employees." 174 NLRB 1411.

Here too, although the factual scenario is much different, employees of the City similarly had ample cause to believe that in sending her February 2011 letter "to All Citizen of Lebanon," Councillor Campbell acted on behalf of the City in advising City employees to de-certify their Union. Simply by virtue of the inescapable fact that she is a member of the City Council that wields all of the City's powers, she is so integral a part of the employer that she, and each of the *other* Council members, effectively share the City's status as employer. Her express advice to the City's employees in through an open public letter to "de-certify [their] union captors" was highly coercive and indelibly associated with the City. As ERB correctly observed, the City Council *is* the public employer, and Councillor Campbell shares its status as such by virtue of her membership on the Council. 24 PECBR at 1005.

It matters not that, unlike the secretary in *McKinnon Services*, Campell does not actually work elbow to elbow with the City's employees and convey instructions to them from management. Everywhere she goes, she is a City Councillor, one of the six people who – at the time she sent her letter – were charged with dealing with a municipal cash flow problem that already long since prompted concerns about likely layoffs.

It should be noted that, just as ERB did here, the NLRB and the federal courts give very little weight to statements by employer officials suggesting that in making coercive statements and implied threats to employees they are only expressing their own opinions. *See, e.g.*, NLRB v. *Geigy Co.*, 211 F2d at 557 (Finding that Supervisor's purported qualification of his coercive statements to employees by stating he was just expressing his personal opinions did not dispel their coercive effect).

The fact that the NLRB and the federal courts have been broadly applying apparent authority and other agency principles to impute unfair labor practice liability to employers under the NLRA since before 1973 supports a strong inference that in enacting the PECBA, the legislature intended that these same principles be applied to the same effect under the PECBA.

F. Application Of Agency Principles By ERB In Imputing Unfair Labor Practice Conduct Under the PECBA

And indeed, ERB's case law reflects that it has long *applied* apparent authority and related agency principles in determining whether to impute unfair labor practice conduct to employers continuously since the PECBA's enactment.

Thus in an one early case of particular relevance here, ERB imputed liability to a public employer for the conduct of its governing board members

on the ground that they were agents of the employer. *Linn-Benton Rural Teachers Assn v. Price School District*, 1 PECBR 163 (1974).

In *Linn-Benton Rural Teachers Assn*, five of the employer's governing board members visited an employee at his home in order to "'. . . make up [his] mind for [him]'" about the union, *i.e.* to instruct him *not* to participate in the union organizing effort that was then underway, and to instead side with management in opposing it. 1 PECBR at 165 (quotation marks and brackets in original).

ERB concluded that the public employer, "by inferring through its agents the school board members that they were unhappy with the teachers seeking the Rural Teachers Association to represent them in collective bargaining," had engaged in "improper interference, restraint, or coercion proscribed by ORS 243.672(1)(a)." 1 PECBR at 166.

In another early case, ERB applied apparent authority principles to impute the unfair labor practice conduct of a school principal to his employer. *Roseburg Education Assn v. Douglas County School District No. 4, et al.*, 3 PECBR 1828, 1833-34 (1978).

In *Roseburg Education Assn*, the principal was found to have violated PECBA's later repealed "communication bar" unfair labor practice provision[4] by publicly posting a district memo regarding bargaining issues and instructing teachers to read it. 3 PECBR at 1830, 1832.

It was undisputed in *Roseburg Education Assn* that the district had not intended for the memo to be disclosed to bargaining unit employees, and that the principal had posted the memo "without first consulting the district," and thus without its authorization. *Id.* at 1830, 1832. In concluding the district was nonetheless liable, ERB reasoned that the principal had:

> "acted in his capacity of principal of Hucrest School, and as a supervisory employee of the District. The District, therefore, is liable for his actions, unless such actions were clearly

---

[4]Or Laws 1973, ch 536, §§ 4(1)(i) (*codified as former* ORS 243.672(1)(I) (1993), *repealed by* Or Laws 1995, ch 286, § 2). *Former* ORS 243.672(1)(i) made it an unfair labor practice for a public employer to:

> "Communicate directly or indirectly with employees in the bargaining unit other than the designated bargaining representative during the period of negotiations regarding employment relations, except for matters relating to the performance of the work involved."

Labor organizations were likewise barred from communicating during periods of negotiations regarding employment relations with employer representatives other than those designated to represent the employer in the negotiations. Or Laws 1973, ch 536, §§ 4(1)(i) and (2)(f) (*codified as former* ORS 243.672(1)(i) and 243.672(2)(f) (1993), *repealed by* Or Laws 1995, ch 286, § 2).

> repudiated by the District. The record contains no evidence of repudiation."

Id. at 1833-1834. Thus the public employer in *Roseburg Education Assn* was held liable for the principal's unfair labor practice conduct despite its having not authorized the conduct. *See also, Molalla Union High School Assn of Classified Employees v. Molalla Union High School District No. 4, et al*, 7 PECBR 6244 (1984).

In *Molalla Union High School Assn*, ERB imputed the conduct of the public employer's designated representative and one of its supervisors to it although the employer had not authorized the conduct of either and had expressly instructed the designated representative *not* to engage in such conduct. 7 PECBR at 6260, 6266.

ERB's cases reflect that it also applies apparent authority and related agency principles in imputing responsibility for unfair labor practice conduct of labor organizations' officers and agents to labor organizations. *See, e.g., Clackamas Community College v. Clackamas Community College Education Assn, et al.* 3 PECBR 1807 (1978), *affd per curiam,* 26 Or App 2, 583 P2d 36 (1978).

In *Clackamas Community College Education Assn,* a public employer alleged violations of ORS 234.672(2)(a), (2)(b) and (2)© by its teachers' union

and an individual teacher, naming both as respondents. The employer's claims arose from its five biology teachers' having erased the audio tutorial tapes they had developed for teaching biology at the end of the school year. The erasure, which the public employer likened to a strike, had reportedly complicated the work of a part-time teacher hired to teach biology over the summer.

The respondent biology teacher in *Clackamas Community College Education Assn* was neither an officer nor a member of the union. *Id.*, 3 PECBR at 1812. One of the other biology teachers had been a union bargaining team member and president-elect of the union at the time of the erasure, but had not discussed it with any other union officers. No evidence was presented of the union's having either "authorized, directed, or participated in the erasure." *Id.* at 1811.

ERB concluded the erasure had not interfered with, restrained or coerced any employees in or because of the exercise of PECBA rights, and dismissed the ORS 234.672(2)(a) claim on that basis. *Id.*

In dismissing the employer's remaining claims, ERB ruled that in the absence of proof that the union had either inspired or engaged in the erasure, or had authorized it or knowingly condoned it, it could not be held liable for any unfair labor practices based on the erasure. *Id.* at 1811-1812.

ERB subsequently cited *Clackamas Community College Education Assn* for the proposition that "a labor organization cannot be held liable for the acts of a third party absent proof that the organization itself engaged in, authorized or approved the acts." *Baker School District No. 5J v. Baker Education Assn, et al*, 5 PECBR 3057, 3065 (1980).

In *Williams v. Chemeketa Community College Classified Employees Assn,* 12 PECBR 789 (1991), ERB concluded that a former union officer's conduct was not imputable to the union because he had acted independently and his conduct had not been sanctioned or approved by it. 12 PECBR at 807 (citing *Clackamas Community College Education Assn*). Although two *current* officers' conduct *was* imputable to the union, ERB found that the conduct had not violated ORS 243.672(2)(a). *Id.*

G. Changes in the text over time: The SB 750 Amendment of the PECBA's "public employer" definition and the introduction of the "public employer representative" definition in 1995 do not suggest that the unfair labor practice conduct of public employer officials like Campbell is no longer imputable to public employers

Context also includes changes to a statute's text over time. As the Court of Appeals noted, the term "public employer" was first defined by one of ORS 243.650's predecessors, *former* ORS 243.710, in 1963, and was re-defined by another in 1969. 265 Or App at 295-296.

It was only with the PECBA's enactment that in 1973, however, that unfair labor practices were first described and prohibited by statute in Oregon's public sector, and ERB was first assigned the responsibility and granted the authority to administer and enforce the statute's provisions.

In enacting the PECBA, the legislature adopted a new, 2-sentence definition of "public employer":

> "(18) 'Public employer' means the State of Oregon or any political subdivision therein, including cities, counties, community colleges, school districts, special districts and public and quasi-public corporations, except mass transit districts organized under ORS Chapter 267. 'Public employer' includes any individual designated by the public employer to act in its interests in dealing with public employees."

Or Laws 1973, ch 536, § 1(18); ORS 243.650(18) (1985).

In 1987, the phrase "except mass transit districts organized under ORS Chapter 267" from the first sentence of the definition. It then read as follows:

> "(18) 'Public employer' means the State of Oregon or any political subdivision therein, including cities, counties, community colleges, school districts, special districts and public and quasi-public corporations. 'Public employer' includes any individual designated by the public employer to act in its interests in dealing with public employees."

Or Laws 1987, ch 792, § 1(18) (codified as *former* ORS 243.650(18) (1993).

In 1995, the definition was renumbered and amended. Its second

sentence was deleted altogether, and its remaining sentence was amended as follows:

> "(**20**) 'Public employer' means the State of Oregon [*or any*], **and the following** political **subdivisions**: [therein, including] Cities, counties, community colleges, school districts, special districts, **mass transit districts, public service corporations** and public and quasi-public corporations.

Or Laws 1995, ch 286, § 1(20). As a result, the definition currently reads as follows:

> "(20) 'Public employer' means the State of Oregon, and the following political subdivisions: Cities, counties, community colleges, school districts, special districts, mass transit districts, public service corporations and public and quasi-public corporations."

ORS 243.650(20).

Also through Senate Bill 750 (SB750) in 1995, the original second sentence of the "public employer" definition was amended and recast as a new, separate definition -- of the term "public employer representative," as follows:

> "(**21**) 'Public employer **representative**' includes any individual **or individuals specifically** designated by the public employer to act in its
>
> interests in **all matters** dealing with [public employees] **employee representation, collective bargaining and related issues**."
>
> Or Laws 1995, ch 286, § 1(21).

These changes to the text of the public employer definition over time do not provide clear guidance regarding when unfair labor practice conduct can be imputed to public employers. The 1987 and 1995 amendments of the public

definition's original first (and only remaining) sentence only revised the list of political subdivisions to which PECBA applies.

The 1995 deletion of the definition's second sentence is no more enlightening. That sentence provided, in sum, that "'[p]ublic employer' includes any individual designated by the public employer to act in its interests in dealing with public employees." As such, it might be inferred that by deleting that sentence, the legislature intended to limit public employers' liability for unfair labor practices to those that are committed by their ORS 243.672(1) "designated representatives" and those committed with full, formal advance authorization by majority votes of their governing bodies. On the other hand, since the second sentence had only provided for the "public employer" definition to include individuals "designated by the public employer" to act in its interests, it might instead be inferred that by deleting it the legislature intended to remove the suggested requirement that such individuals be designated by the public employer, and thus possibly to expand the basis for unfair labor practice conduct to be imputed to public employers.

It should also be noted that, although the former second sentence of the public employer definition was on the books for 22 years, from 1973 to 1995, it does not appear to have ever been expressly relied upon as the ground for decision in any of ERB's published cases. That suggests the possibility that in

deleting the second sentence, the legislature may have intended only to remove surplus text from the statute.[5]

H. Legislative History: There is no suggestion in the legislative record that the SB 750 amendment of the "public employer" definition or the introduction of the "public employer representative" definition were intended to affect the meaning of either "public employer" or "designated representative" as they are used in ORS 243.672(1)

The legislative history of the 1995 changes is thin. The amendment of the "public employer" definition, and the proposed new "public employer representative" definition, were both included in the original version of SB 750. Draft, SB 750, February 27, 1995.

The amendment of the "public employer" definition was approved and enacted without change, and only one small amendment of the "public employer representative" definition was made before it became law. That amendment added the phrase "or individuals" to the definition. *See,* B-Engrossed version SB 750, § 1(22), May 3, 1995.

---

[5]It is noteworthy in this regard that the PECBA has never included a labor organization 'counterpart' to the second sentence of the pre-SB 750 public employer definition, either in its "labor organization" definition or otherwise. *See, e.g.,* ORS 243.650(12) (1993) ("'Labor organization' means any organization which has as one of its purposes representing employees in their employment relations with public employers.")

More than forty hours of public hearings were conducted on SB 750 by the Senate Committee on Labor and Government Operations ("Senate committee") and the House Committee on Labor ("House committee") in March and April, 1995. Hundreds of pages of written statements and other exhibits were submitted to the committees.

The bill proposed a large number of substantial changes to the PECBA,[6] and many were discussed and commented upon during the hearings and through the exhibits submitted to the committees. One searches almost entirely in vain, however, for comment on the included amendment of the "public employer" definition and the new "public employer representative" definition. AFSCME's extensive search through the legislative record did not unearth any evidence that either of these changes were intended to affect the meaning of the term "designated representative" as used in ORS 243.672(1) or (2).

---

[6]"As initially proposed, [SB 750, *aka*] the Derfler-Bryant bill[,] constituted a massive revision of the PECBA." Henry Drummonds, *A Case Study of the Ex Ante Veto Negotiations Process: The Derfler–Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law,* 32 Willamette University Law Review 69, 85 (1996). Most significantly, it proposed "radical restrictions on the scope of public sector bargaining" (*id.* at 89) that "threatened the demise of the collective bargaining process". *Id.* at 93.

In the very first of the public hearings, attorneys Les Smith and Gary Bullard both testified about SB 750 on behalf of its co-sponsor, Senator Gene Derfler. Smith testified about the bill's proposed changes to PECBA's definitions. He described several of the definitions in some depth, but referred to the revised "public employer" and the new "public employer representative" definitions only in passing, characterizing them both as clarifications. His exact words were: ". . . public employer, that definition has been also clarified,[7] as has been the public employer representative definition."[8]

Staff measure summaries of SB 750 were prepared by both committees. Staff Measure Summary (SMS) SB 750, Senate Committee on Labor and

---

[7] Just before, Smith had commented on the bill's 2 proposed changes to the "public employee" definition, which expressly excluded from the definition incarcerated persons and managerial employees, as follows:

> "The definition of public employee has been clarified, this makes . . . I think everyone would agree that incarcerated individuals should not be permitted to be part of a bargaining unit, and of course with the new definition of managerial employees, those too should be left out of a bargaining unit."

Tape recording, Senate Committee on Labor and Government Operations, March 3, 1995, Tape 62, Side A (testimony of Les Smith).

[8] Tape recording, Senate Committee on Labor and Government Operations, March 3, 1995, Tape 62, Side A (testimony of Les Smith).

Government Operations, April 6, 1995; SMS SB 750, House Committee on Labor, May 3, 1995. Each includes the same comments about the definitions.

Regarding the "public employer" definition the summaries both state: "[t]his is a clarification of current language which identifies the State and certain specific political subdivisions as 'public employers' for purposes of collective bargaining." *Id.* (Emphasis in original).

Regarding the "public employer representative" definition, they both state: "[t]his language clarifies that the public employer representative is specifically designated for all matters related to collective bargaining instead of all matters related to 'public employees.'" *Id.*

On April 21, 1995, Oregon Education Association representative John Danielson testified at one of the House committee's public hearings. He submitted a written statement that commented on the "public employer representative" definition. The statement first describes the definition as follows:

> The . . . [proposed "public employer representative" definition] provides that a public employer representative will include any individual specifically designated by the public employer to act in its interest in all matters dealing with employee representation, collective bargaining, and related issues.

Testimony, House Committee on Labor, April 21, 1995, Exh. K (statement of

John Danielson). It then comments as follows regarding the definition:

> We believe this statement is inconsistent with present practice which allows school districts to retain specialists for very specific responsibilities, to perform some of the tasks themselves, and to delegate some responsibilities to their permanent staff. We believe this subsection should be deleted.

Id. On April 26, the House committee adopted the amendment that added "or individuals" to the definition. Minutes, House Committee on Labor, April 26, 1995; B-Engrossed SB 750, § 1(22), May 3, 1995.

2. The Court of Appeals erred in deciding that an individual member of a public employer's six-member governing board is not a designated representative of the employer under ORS 243.672(1)

The Court of Appeals erred doubly in analyzing whether Campbell is a designated representative of the City under ORS 243.672(1).

The City first erred by assuming it was appropriate to use the ORS 243.650(21) definition of "public employer representative" to determine whether Campbell was a "designated representative" within the meaning of the unfair labor practice statute, ORS 243.672(1).

There is no reason to believe that in enacting SB 750 in 1995 the legislature intended its expressly open-ended new "public employer representative" definition to refer to or encompass "designated representative" as that term is used in ORS 243.672(1).

"Public employer representative" and "designated representative" are two different terms. They share but one common word. And although the specific term "designated representative" appears twice in the PECBA (in both ORS 243.672(1) and (2)), ORS 243.650(21)'s "public employer representative" definition does not expressly include the term "designated representative."

Moreover, "designated representative" is ambiguous from the outset. "Designated representative" and its variants are used to refer to different things in different contexts in labor relations.

Indeed, when the legislature passed SB 750 in 1995, the PECBA *itself* used variants of "designated representative" for purposes other than to refer to employers' and labor organization's ORS 243.672(1) and (2) designated representatives. *Former* ORS 243.672(1)(I) and (2)(f). As noted previously, former ORS 243.672(1)(I) and (2)(f) used variants of "designated representative" to refer to employers' and unions' chief spokespersons and bargaining teams in particular rounds of collective bargaining negotiations.[9]

---

[9]*Former* ORS 243.672(1)(i) made it an unfair labor practice for employers to communicate during negotiations "with employees in the bargaining unit other than the ***designated bargaining representative*** regarding employment relations," and *former* ORS 243.672(2)(f) made it an unfair labor practice for labor organizations to communicate during negotiations "with officials other than those ***designated to represent the employer*** regarding employment relations." (Emphasis added).

It follows that, even if it validly could be assumed (although it cannot) that the ORS 243.650(21) definition of "public employer representative" was intended to have roughly the same meaning "designated representative," it could not validly be assumed that it was intended to refer to "designated representative" as used ORS 243.672(1) rather than to refer to the representative an employer has designated to represent it in collective bargaining negotiations or one of its other common meanings, such as the representative an employer has designated to represent it in a specific labor arbitration or proceeding before the ERB.

The Court of Appeals next erred when, upon determining that it could not discern from ORS 243.650(21)'s text alone whether Councillor Campbell was a "public employer representative" as it defines that term, it turned for guidance to yet *another* definition, PECBA's former definition of "public employer." *Former* ORS 243.650(18) (1993). 265 Or App at 297-298.

It must be recalled that the Court was ostensibly seeking the intended meaning of "designated representative" as used in ORS 243.672(1), which provides that it is an unfair labor practice for either "a public employer or its designated representative" to engage in certain conduct. (Emphasis added). AFSCME respectfully submits that by turning to the ORS 243.650's *former* definition of "public employer" for guidance in determining the intended

meaning of "designated representative" in ORS 243.672(1), which contemplates unfair labor practices being committed by either public employers *or* their designated representatives, the Court of Appeals left the proverbial road.

The Court of Appeals ultimately inferred that the 1995 legislature had intended to limit the meaning of the term "designated representative" as used in ORS 243.672(1) from the fact that it used more specific language to describe the definitional example included in ORS 243.650(21)'s definition of "public employer representative" than the 1973 legislature had used to describe the definitional example it had included in the second sentence of *former* ORS 243.650(18)'s definition of public employer.

// // // //

// // // //

CONCLUSION

For all of the foregoing reasons and based on the above cited authorities and evidence, Petitioner on Review AFSCME Council 75, Local 2043 respectfully requests that the Supreme Court issue an Order reversing or vacating the decision of the Court of Appeals and affirming the decision of the Employment Relations Board herein.

DATED: March 4, 2015

Respectfully Submitted

Giles Gibson, OSB No. 921750
Legal Counsel
AFSCME Council 75
6025 E. Burnside Street
Portland, Oregon 97215

CERTIFICATE OF COMPLIANCE WITH

BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a) is 8,011 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and the footnotes as required by ORAP 5.05(4)(f).

Giles Gibson, OSB No. 921750
Legal Counsel
AFSCME Council 75
6025 E. Burnside Street
Portland, OR 97215
ggibson@oregonafscme.com
503-730-2777

CERTIFICATE OF SERVICE

I certify that on the 4th Day of March, 2015, I served two (2) copies of the foregoing PETITIONER ON REVIEW'S BRIEF ON THE MERITS upon:

John E. Kennedy
Attorney At Law
The Morley Thomas Law Firm
80 E. Maple Street
Lebanon, Oregon 97355

Attorney for Respondent on Review City Of Lebanon

by X First Class mail, postage prepaid; ____ facsimile; __ electronic mail.

DATED: 3-4-2015

Giles Gibson, OSB No. 921750
Legal Counsel
AFSCME Council 75
6025 E. Burnside Street
Portland, OR 97215
ggibson@oregonafscme.com

Attorney for Petitioner on Review