

On February 10, 2011, Petitioner American Federation of State, County and Municipal Employees, Local 3327 (AFSCME or Union) filed this Petition for Unit Clarification under OAR 115-025-0005(3) regarding employees of Oregon Health Sciences University (OHSU) working at the Oregon State Hospital (Hospital or OSH) pursuant to a contract between the Hospital and OHSU. The Petition seeks to determine whether the OHSU physicians working at the Hospital are included in the existing AFSCME bargaining unit based on the express terms of the parties' collective bargaining agreement.

The Hospital and OHSU filed timely objections to the Petition.¹ The Hospital argues that: (1) the parties have treated the OHSU physicians as outside of the bargaining unit since 2006, and AFSCME thus seeks impermissibly to add employees to its unit under OAR 115-025-0005(3); (2) required uniformity in patient care and joint peer review by Hospital and OHSU physicians is not the same as uniformity in terms and conditions of employment; (3) the involvement of both employers in hiring some OHSU physicians who end up working at the Hospital is irrelevant; and (4) contracts between the Hospital and OHSU preserve OHSU as the employer of OHSU physicians performing work at the Hospital, and the Hospital does not in fact have the right to control those physicians. AFSCME argues that the Hospital has assumed such a degree of control over the OHSU physicians that they have become Hospital employees.

The issue is:

Are the physicians known as the "OHSU contract Physicians" who work at Hospital included in the AFSCME bargaining unit under the express terms of the parties' certification description or collective bargaining agreement?

RULINGS

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

FINDINGS OF FACT

1. The Hospital and OHSU are public employers. AFSCME, a labor organization, is the exclusive representative of a bargaining unit of approximately 44 physician positions employed by the Hospital.

2. AFSCME and the Hospital (or its predecessors) have been parties to a series of collective bargaining agreements beginning in the 1980s through the agreement in effect at the time of hearing. The latter agreement covered the period September 2009 through June 30, 2011. All of those agreements contained the following recognition clause:

¹OHSU did not present testimony or documentary evidence at the hearing, and did not file a post-hearing brief, relying on the evidence and argument of the Hospital.

“ARTICLE 1 - RECOGNITION

“The Employer recognized the Union as the exclusive bargaining agent and representative for all Physicians employed by the State of Oregon, Department of Human Services, whose primary responsibility is clinical care of patients;[²] excluding all contract Physicians, supervisory and confidential employees as defined by ORS 243.650(6) and (14), and all Resident Physicians.”³

3. The Hospital has had chronic difficulties in finding sufficient physicians (psychiatrists) to fill its employee roster and provide quality patient care. Among other factors, there are insufficient psychiatrists to meet the national demand. At the time of hearing, the Hospital directly employed only about 60 percent of the needed 44 physicians. As a result, the Hospital obtains additional qualified physicians through personal service contracts with individual physicians, and *locum tenens*⁴ contracts with firms providing physicians. The majority of the additional physicians, however, are obtained through OHSU under the terms of a series of contracts.

4. The Hospital uses personal services contracts with qualified individual physicians to perform short-term projects, usually for a matter of months. There are usually between one and three such physicians working at the Hospital at any given time, often in specialties not generally utilized by the Hospital. The contracts are created under standard State procurement processes and agreements.

5. The Hospital also contracts with *locum tenens* agencies who provide physicians for work on a temporary basis, usually less than three months. The *locum tenens* agencies locate the physicians, verify their credentials, and complete other initial screening to ensure that the provided physicians are appropriately qualified to work at the Hospital. The Hospital pays the *locum tenens* agency for the services of the physician. There are usually four *locum tenens* physicians at OSH at any given time.

Hospital/OHSU Agreement

6. In 2006, the Hospital and OHSU entered into the first of several successive agreements to provide OHSU physicians to work at the Hospital. Both institutions gained from the relationship. The Hospital gained a substantial number of additional physicians, including physicians qualified to supervise other physicians; easier access to continuing medical education resources for its own physicians; and benefits to staff and patients resulting from involvement with a research and

²The Hospital is the current repository of all Physicians employed by the State of Oregon, Department of Human Services, whose primary responsibility is clinical care of patients.

³The collective bargaining agreement does not define the terms “employed by the State” or “contract Physicians.” Neither term appears elsewhere in the agreement.

⁴*Locum tenens* means “placeholder.”

academic institution. OHSU gained a means to give its physicians more practical experience, more employment, and a valuable resource for academic research.⁵

7. The Hospital/OHSU agreements were renewed and modified several times. Some of the modifications increased the number of physicians that the Hospital could obtain from OHSU. The current agreement covers the period August 1, 2011 to June 30, 2013. It provides in part:

“Part 1 Statement of Work

“1. Purpose of Agreement

“The purpose of this Agreement is to continue a relationship between OHSU and the Hospital [Hospital or OHA] and continue to improve the practice of psychiatry, improve the education and professional development of psychiatric professionals, and improve patient care at the Hospital. In this relationship, OHSU will provide licensed clinical psychiatric and related services necessary to fulfill the requirements of this Agreement, and other consultative services as requested by the Hospital. **To the extent necessary, OHSU will recruit and employ additional qualified psychiatrists who are willing to provide services on behalf of OHSU to the Hospital’s patients under this Agreement.** [Emphasis added.]

“As evidenced by the Recitals to this Agreement, OHA and OHSU have overlapping and mutually supportive missions and purposes on behalf of the State of Oregon. Moreover, consistent with ORS chapter 190, OHA and OHSU may cooperate by agreement or otherwise in their pursuit of these missions and purposes, and they intend that this Agreement should reflect that statutorily authorized cooperation.

“But, notwithstanding the foregoing, **OHA and OHSU also intend that OHSU will perform its services under this Agreement as an independent contractor and that the physicians that OHSU employs and assigns to provide services to Hospital and Hospital’s patients are solely the employees of OHSU, that the provisions of this Agreement establish performance expectations, standards, and desired outcomes for professional medical services, and that neither this Agreement nor its implementation will prescribe the physical details of the delivery of professional medical services by OHSU and its employees.** [Emphasis added.]

⁵Independently of the Hospital/OHSU agreement, some Hospital physicians have academic appointments at OHSU, including Hospital Chief of Psychiatry Michael Duran.

“2. Amount of Qualifications for Psychiatric Services

“OHSU, through its Medical School’s Department of Psychiatry, will provide up to 640 hours of psychiatric services per week to the patients of the Hospital. To provide these services, OHSU shall assign physicians (“OHSU Physicians”) who are licensed to practice medicine in the State of Oregon and board certified or by the American Board of Psychiatry and Neurology or board eligible with an expectation of board-certification no later than two (2) years after assignment by OHSU to provide services under this Agreement. OHSU will adjust the number of hours worked by OHSU Physicians at the Hospital depending upon the Hospital’s available funding to pay for these services.

“* * * * *

“4. OHSU Administrative Support:

“OHSU will provide the services of one (1) administrative support person per nine (9) OHSU Physicians. This person will provide administrative support to the OHSU Physicians in addition to other related duties assigned by the Hospital’s medical staff coordinator. Should the number of OHSU Physicians increase above nine (9), the administrative support staff full-time equivalent (FTE) will increase proportionally.” [Emphasis added.]

“6. Services by Other OHSU Physicians:

“a. The Other OHSU Physicians shall act as the primary medical/clinical leader of the Interdisciplinary Treatment Team (IDT) for the Hospital patients assigned to the IDT. [Emphasis added.]

“b. The Other OHSU Physicians will provide psychiatric and medical care to Hospital patients under their care. [Emphasis added.]

“c. The Other OHSU Physicians shall be responsible for the admission and discharge of patients to any Unit to which they have been assigned, perform psychiatric and physical examinations of patients when indicated, formulate diagnoses and treatment plans for patients, and perform clinical treatments directly as well as monitoring clinical treatments done by others.

- “d. More specifically, the Other OHSU Physicians shall:
- “(1) Perform psychiatric, physical, and neurological examinations in time frames as indicated by Hospital policies and procedures;
 - “(2) Diagnose illnesses and prepare appropriate orders for treatment;
 - “(3) Maintain all required documentation in timely fashion and in good order;
 - “(4) Testify before the Psychiatric Security Review Board and the circuit courts as required;
 - “(5) Prepare necessary documentation and testify as necessary in the informed consent administrative process;
 - “(6) Provide clinical leadership and supervision to direct care staff;
 - “(7) Conduct meetings with the IDT to prepare individual patient Treatment Plans following time lines indicated in Hospital policies and procedures and provide clinical leadership to Hospital personnel who implement the plans;
 - “(8) Collaborate with the appropriate clinical and administrative personnel in implementing plans for operation of the therapeutic environment within the Hospital;
 - “(9) Prescribe medication, document effects and side effects, and make medication modifications as clinically indicated;
 - “(10) Provide direct services to patients such as group and individual therapy;
 - “(11) Conduct all necessary procedures for the use of seclusion or restraint as directed by Hospital policy;
 - “(12) Complete in a timely manner the medical record in accordance with requirements of Medical Staff Bylaws, rules and regulations and [H]ospital policies including but not limited to assessments, orders, progress notes and discharge summaries;
 - “(13) Prepare correspondence that communicates findings from patient evaluations to hospital administration, judges, the Psychiatric Security Review Board (PSRB), attorneys and others as indicated or required;
 - “(14) **Serve on committees consisting of physicians with clinical privileges to treat patients at the Hospital;**
 - “(15) Participate in peer review, quality assurance, and utilization review activities at the Hospital;
 - “(16) **Assist with training and continuing education of Hospital staff;**
 - “(17) Participate in continuing education;

- “(18) Maintain qualifications to perform techniques of basic life support (CPR);
- “(19) **Attend meetings of physicians with clinical privileges to treat patients at the Hospital;**
- “(20) **Participate in activities in community and hospital settings of direct interest and benefit to OHA.** [Emphasis added.]

“e. The number of Other OHSU Physicians to be assigned, their work sites, their rotation schedules, their specialties, and further terms and conditions of their assignment under this Agreement shall be agreed upon by OHSU and Hospital in all cases and prior to each assignment.”

“7. Services by OHSU Supervising Physician:

“a. As authorized by ORS 426,020 (1)-(3)(b), **the Hospital’s CMO may delegate part of his or her authority to supervise the clinical activities of both Hospital-employed and contractor-employed physicians to a physician employed by a public or private entity which contracts with OHA to provide physician services at the Hospital.** [Emphasis added.]

“b. If the Hospital requests OHSU to provide these services and the CMO delegates the necessary authority to an OHSU-employed physician, then OHSU shall provide OHSU Supervising Physician services under this Agreement. Such services will be under the clinical and overall administrative direction of the Hospital’s Superintendent and the CMO.

“c. In addition to providing Other OHSU Physician services described above, **an OHSU Supervising Physician will supervise the psychiatric services provided by Hospital-employed and contractor-employed physicians and shall exercise administrative supervision over those persons at the Hospital, as assigned by the Hospital’s Superintendent or the CMO,** including but not limited to the following supervisory and administrative activities: [Emphasis added.]

- “(1) Monitor the staffing of physicians at the Hospital;
- “(2) Assure all physicians are performing all tasks within their scope of practice;
- “(3) Monitor and enforce quality assurance of physicians;
- “(4) Assist the Hospital to be in compliance with applicable laws of the State of Oregon;

- “(5) Assist with hospital and community clinical consultations to families in the interest of the care of Hospital patients, at the direction of the CMO and/or the Hospital Superintendent;
- “(6) Provide assistance in identifying and correcting problems in the provision of medical and clinical care in the Hospital as requested by the Hospital Superintendent or CMO;
- “(7) Provide assistance to the CMO with backup coverage and other Hospital-wide assignments; and
- “(8) Supervise clinical activities of other clinical personnel as requested by the Hospital.

“d. An OHSU Supervising Physician shall refrain from expressing any personal opinions or beliefs that are capable of being construed, or misconstrued, as official Hospital policy. An OHSU Supervising Physician shall refer all press inquires related to his/her services under the Agreement to the Hospital Superintendent.”

“* * * * *

“10. Assignments of OHSU Physicians

“The final authority and determination of where OHSU Physicians are assigned rests with the Hospital’s Superintendent and CMO, either of whom are authorized to make such decisions for purposes of the Agreement.

“* * * * *

“13. Performance Reviews

“OHSU will regularly perform performance reviews of its physicians assigned to the Hospital.

“Part 2 Payment and Financial Reporting

“* * * * *

“2. OHSU’s Responsibilities

“a. OHSU shall pay recruitment expenses, moving expenses and salaries, make all appropriate state and federal payroll tax deductions and contributions, and provide all OHSU-approved fringe benefits (including pension contributions) to the OHSU Director of Public Psychiatry, Chief OHSU Psychiatrist, OHSU Supervising Physician, Other OHSU Physicians, and OHSU administrative support personnel who provide services to Hospital under this agreement. OHA shall

have no liability for the salaries, taxes, and fringe benefit expenses associated with such persons, and OHSU shall hold OHA harmless and indemnify it from any claims from any person or entity arising from or related to such items. OHA sole monetary liability to OHSU in connection with this agreement shall be the payments described in section 3 below. **For purposes of this Agreement, the OHSU Director of Public Psychiatry, Chief OHSU Psychiatrist, OHSU Supervising Physician, Other OHSU Physicians, and OHSU administrative support personnel who provide services to Hospital and its patients under this Agreement shall remain employees solely of OHSU, and shall not be deemed to be employees or agents of OHA or Hospital.** [Emphasis added.]

- “b. During the term of this Agreement, OHSU shall maintain professional liability coverage, either through third party insurance or self-insurance or a combination thereof, for all services constituting patient care provided by OHSU personnel acting within the scope of their OHSU employment pursuant to this Agreement sufficient to cover the liabilities of OHSU and OHSU personnel under the OTCA, as it currently exists or as it may be amended during the term of this Agreement. * * *
- “c. OHA acknowledges that OHSU provides no insurance coverage for liabilities, loss, injury, damage or costs (including medical expenses) arising from activities performed by a physician pursuant to a separate agreement between a physician and Hospital, or for activities performed outside the scope of this Agreement. However this provision is not intended to limit coverage by OHSU or its insurers for the error, omission or negligent acts of physicians in the delivery of patient care services at Hospital’s facilities pursuant to the terms of this Agreement.
- “d. **OHSU shall assume all responsibilities and pay for all costs incurred in the recruitment and retaining of OHSU Physicians and any other activity involved in fulfilling the terms of this Agreement.** OHA shall have no liability for these physician expenses beyond the compensation to be paid to OHSU stated in this Agreement, Section 3. ‘Consideration’, above and Paragraph 3. ‘OHA Responsibilities’, of this section below. [Emphasis added.]
- “e. OHSU shall provide monthly invoices to OHA for services specified in this Agreement.

“3. OHA Responsibilities

- “a. **OHA agrees to pay OHSU for physician services and administrative services at the rates and subject to the limits provided under this Agreement.** The total billings by OHSU to OHA under this Agreement for such services and expenses shall not exceed \$12,707,040. [Emphasis added.]
- “b. OHA shall pay OHSU the following hourly rates for each actual hour of service provided by each of the following categories of OHSU service providers to Hospital under this Agreement:

“* * * * *

- “(7) **For each actual hour of OHSU services delivered to Hospital in Categories (1), (2), (3), (4), and (5) immediately above, OHA shall pay OHSU an additional \$30 per hour for administrative costs.** For actual hour of OHSU services delivered to Hospital in category (6) * * * OHA shall [pay] OHSU an additional \$7 per hour for OHSU administrative costs. [Emphasis added.]
- “(8) The foregoing hourly rates apply regardless of the time of day, day of week, or holiday status of any day on which the hourly services are provided or the number of hours worked in a given week by any individual.

“* * * * *

- “e. In the event that OHA, the Department of Administrative Services (DAS), or an insurer for OHA or DAS undertakes the representation and defense of claims involving OHSU or its employees, agents or officers, or any combination thereof, no settlement or other resolution of the claim involving payments to third parties shall be undertaken without prior notice to OHSU at the address provided above.”

Hiring by the Hospital

16. The Hospital spends significant resources in recruiting employee physicians. Hospital Chief of Psychiatry Duran estimates that he spends half of his time on such efforts. As part of that process, the Hospital regularly holds open recruitments for psychiatric physicians. OHSU is also regularly seeking and hiring psychiatric physicians.

17. The Hospital advertises nationally for physicians. Those advertisements regularly include a statement that the position includes “opportunities to have an academic appointment with [OHSU].” During the Hospital employment screening process, Hospital officials attempt to

determine whether a candidate's interests are more aligned with the exclusively clinical work at the Hospital or with the additional academic focus of OHSU. In the recent past, the Hospital provided OHSU representatives the opportunity to meet with the Hospital candidates to explain the OHSU program as an employment option. The OHSU representative was usually the OHSU Chief Psychiatrist/Supervising Physician Christopher Lockey, and his meeting with prospective physician employees often lasted more than an hour. At least one OSH physician candidate chose employment with OHSU after meeting with Lockey. At the time of hearing, the Hospital had discontinued this practice as part of its formal interview process because it proved confusing to applicants. However, Hospital officials remain attentive to whether a candidate may be more suitable for OHSU, and continue to inform candidates of the OHSU option.

Hiring by OHSU

18. Aside from the referrals described above, the Hospital has no involvement in the OHSU physician hiring process. However, when OHSU proposes a physician for work under the Hospital/OHSU agreement, Hospital managers (and sometimes Union physicians) interview the candidate to ensure he or she is appropriate for work at the Hospital. The Hospital has a veto over any OHSU physician who is proposed for work at the Hospital. However, OHSU has the right not to hire a physician even if the Hospital approves, in which case the physician will not work as an OHSU physician at the Hospital.

Work and other participation of OHSU physicians at the Hospital

19. Every physician who performs patient care at the Hospital is subject to Hospital rules, regulations, and practices regarding the provision of that care, whether they are a Hospital employee or a contract employee. Insofar as patient care is concerned, there is no difference between the work of Hospital employee physicians and OHSU contract physicians.

20. In order to practice at any hospital, a physician must have physician privileges granted to them by the hospital medical staff body. The Hospital medical staff body is called the Medical Allied Health Professional Staff (MAHPS) Executive Committee and operates under authority granted by Hospital Bylaws.⁶ The MAHPS Executive Committee decides whether to grant or, as part of a regular peer review process or complaint process, revoke physician privileges. A refusal to grant, or a decision to revoke, physician privileges bars a physician from practicing in the Hospital.

21. The Hospital Bylaws provide that the MAHPS Executive Committee will include seven staff physicians, two of whom "may be contracted staff who have completed at least one year of membership in contracted status." The Bylaws were changed on or before February 2011 to include contract physicians because contract physicians are subject to peer review by the MAHPS Executive Committee. While the rule would permit service of *locum tenens* physicians as well, only OHSU physicians had served in these roles at the time of hearing. The result of these changes is that both Hospital physicians and OHSU physicians conduct peer review of Hospital employee

⁶In addition to reviewing physician privileges, the MAHPS Executive Committee serves a variety of other regulatory functions, and is an important part of Hospital governance.

physicians and OHSU physicians. This includes OHSU physicians serving on the three-member panel that hears appeals from denials of privileges. In at least one case, OHSU physicians have participated in peer review processes resulting in adverse action against Hospital physicians.

22. According to the Hospital/OHSU agreement, OHSU provides the Hospital with a proposed physician work schedule of up to 640 hours of work per week. However, the Hospital schedules the OHSU physicians, as well as scheduling of Hospital employee and *locum tenens* physicians. The goal is to ensure that all areas of the Hospital have adequate physician coverage, and the Hospital and OHSU work together to meet that goal.

23. The Hospital/OHSU agreement restricts scheduling of OHSU physicians as Psychiatric Officer of the Day on holidays unless specifically requested by the Hospital Chief Medical Officer. This schedule limitation was included in the Hospital/OHSU agreement pursuant to Hospital negotiations with AFSCME, which sought to protect its contractual premium holiday pay for bargaining unit members.

24. OHSU physicians serve on many of the Hospital's governing committees, including the Superintendent's Cabinet, Care of Patients Committee, Ethics Committee, Falls Committee, Morbidity and Mortality Committee, Patient Safety Committee, Pharmacy and Therapeutics Committee, Quality Improvement Committee, Seclusion and Restraint Review Committee, and the Treatment Planning Advisory Group.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and the subject matter of this dispute.
2. OHSU physicians working at the Hospital are not included in the AFSCME bargaining unit under the express terms of the collective bargaining agreement.

AFSCME filed this petition under OAR 115-025-0005(3), asserting that the OHSU physician positions are included in its bargaining unit under the express terms of the parties' contract recognition clause.

OAR 115-025-0005(3) provides:

“When the issue raised by the clarification petition is whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement, a petition may be filed at any time; except that the petitioning party shall be required to exhaust any grievance in process that may resolve the issue before such a petition shall be deemed timely by the Board.”

The purpose of a subsection (3) petition is very narrow. A subsection (3) petition is a vehicle for parties to resolve an honest disagreement over whether certain positions are or are not already included in an existing bargaining unit based on the certification description or the contract

recognition language. A subsection (3) petition does not add positions to a bargaining unit,⁷ and we will dismiss a subsection (3) petition if we find it is an attempt to expand the unit by adding positions that are not already covered by the parties' agreement. *Oregon Public Employees Union, SEIU, Local 503 v. State of Oregon, Oregon State Hospital*, Case No. UC-37-96, 17 PECBR 434, 440 (1997); *Oregon AFSCME Council No. 75 v. Housing Authority of Portland*, Case No. UC-19-92, 13 PECBR 730, 735 (1992); *Oregon AFSCME Council 75 v. Clatsop County*, Case No. UC-72-91, 13 PECBR 619, 622 (1992).

To decide if positions are included in a bargaining unit under subsection (3), this Board interprets the language of the certification description or recognition clause. We address contract interpretation issues under a subsection (3) petition in the same manner that we address other contract interpretation issues. Our goal is to discern the parties' intent. To determine that intent, we apply the three-part analysis described in *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). We first examine the text of the disputed contract language in the context of the document as a whole and, if the provision is clear, the analysis ends. "Unambiguous contracts must be enforced according to their terms." *Portland Fire Fighters' Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491, 52 P3d 1056 (2002). Contract language is "ambiguous if it can reasonably be given more than one plausible interpretation." 181 Or App at 91. If the provision is ambiguous, we proceed to the second step and examine extrinsic evidence of the parties' intent. "[W]e will examine the parties' prior actions or practice as an aid to contract interpretation *only if* the contract language is ambiguous." *Lane County*, 23 PECBR at 425 (emphasis in original). Finally, if the provision remains ambiguous after applying the second step, we proceed to the third step and apply appropriate maxims of contract construction. *Yogman*, 325 Or at 364.

Accordingly, we first look to the recognition clause in the context of the Hospital/AFSCME collective bargaining agreement to determine the scope of the bargaining unit. "As a general rule, parties are strictly bound to agreements they have signed, and this Board will not rewrite or reconstitute the language of those agreements." *Gresham Grade Teachers Association v. Gresham Grade School District No. 4 and Larson*, Case No. C-184-78, 5 PECBR 2889, 2895 (1980), *remanded for reconsid*, 52 Or App 881, 630 P2d 1304 (1981), *order on remand*, 6 PECBR 4953 (1981).

⁷A Union may petition to add unrepresented positions to a bargaining unit under OAR 115-025-0005(4). Such petitions require a 30 percent showing of interest, must be filed during the contract open period (in most cases), are subject to the election and certification bars, and require an election. An employer may also object to such a petition on the basis that the positions the Union seeks are not appropriately included in the bargaining unit under the factors listed in ORS 243.682.

Here, the recognition clause provides that the bargaining unit consists of:

“all Physicians employed by the State of Oregon, Department of Human Services,⁸ whose primary responsibility is clinical care of patients; excluding all contract Physicians * * *.” (Findings of Fact 2.)

The collective bargaining agreement does not include a definition of “contract Physicians” or “employed by the State. “Contract Physicians” is not used elsewhere in the agreement, and “employed by the State” is used twice more as part of the definition of “employee” in the section regarding PERS. Accordingly, we look to the recognition clause alone. The term “contract Physician” is ambiguous because it is capable of two plausible interpretations. It could refer to physicians under individual contracts to the Hospital, or it could refer to employees provided by contract with another institution, such as OHSU.

We turn, then, to the second step in our interpretation of the contract language and consider extrinsic evidence of the parties’ intent. When contract language is ambiguous, we examine the parties’ prior actions or practice as an aid to contract interpretation. *See Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09, 23 PECBR 416, 425 (2010). The only evidence in the record of the term’s meaning is in the parties historical treatment of physicians. Prior to this dispute, the parties treated physicians working under a personal contract for services and *locum tenens* physicians as contract physicians. Even after this dispute arose, both parties adhered to that interpretation. The OHSU contract physician category did not arise until after 2006, but until 2011, AFSCME did not dispute that these physicians were “contract physicians” under the agreement and excluded from the bargaining unit.

AFSCME contends, however, that

“[b]ecause of the level of control exercised by Oregon State Hospital over the work and working conditions of OHSU physicians, the OHSU physicians are not performing work at Oregon State Hospital as ‘contractors.’ Instead, they are performing work either as ‘employees’ or ‘joint employees’ of that hospital.” (AFSCME Written Argument, p. 2.)

AFSCME asserts that because the physicians are “employees” or “joint employees” of the Oregon State Hospital, they are included in the AFSCME bargaining unit under the express terms of the collective bargaining agreement recognition clause. We disagree.

As discussed above, the focus of our analysis in an OAR 115-025-0005(3) petition seeking to include employees in a bargaining unit is narrow. We interpret the language of the contract recognition clause to determine if the employees at issue are included in the bargaining unit. Here, the contract recognition clause defines the bargaining unit as a group of all clinical care physicians employed by the Hospital and specifically excludes “contract Physicians.” The key question is

⁸As noted above, the Hospital is the current repository of “all [clinical care] Physicians employed by the State of Oregon, Department of Human Services.”

whether the employees at issue are “contract Physicians” and on that point the parties’ course of dealing makes the meaning of that phrase clear. Since 2006, when the Hospital began using OHSU physicians, the parties have treated these physicians as “contract Physicians” who are excluded from the AFSCME bargaining unit.⁹

The OHSU physicians are “contract Physicians” within the meaning of the bargaining unit described in the recognition clause in the Hospital/AFSCME collective bargaining agreement. Their inclusion in the bargaining unit would add to the unit, not merely apply the unit description to employees whose status was previously undetermined. We will, therefore, dismiss the Petition.

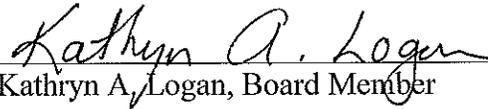
ORDER

The Petition is dismissed.

DATED this 10 day of December, 2012.



Susan Rossiter, Chair



Kathryn A. Logan, Board Member

*Jason M. Weyand, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Member Weyand did not participate in the deliberations and decision in this case.

⁹In support of its position, AFSCME cites the following cases in which we addressed joint employer status regarding individuals working under a contract with another entity: *International Brotherhood of Electrical Workers, Local Union 932 v. City of Siletz*, Case No. RC-12-00, 19 PECBR 178 (2001); *Coos County Board of Commissioners and AFSCME Local 2936 v. Coos County District Attorney and State of Oregon*, Case No. UP-32-01, 20 PECBR 87 (2003); and *City of Portland Planning and Engineering Employees Association v. City of Portland*, Case No. UC-58-95, 16 PECBR 879 (1996). In those cases, the recognition clause at issue defined the bargaining unit in terms of employee status, and it was necessary to determine whether the petitioned-for individuals were employees. Here, however, the bargaining unit description specifically excludes “contract physicians.” Because we have determined that the parties intended to exclude these individuals from the bargaining unit, their status as employees or joint employees is irrelevant.