

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-012-12

(PETITION FOR UNIT CLARIFICATION)

TUALATIN EMPLOYEES' ASSOCIATION,	)	
	)	
Petitioner,	)	RULINGS, FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
v.	)	AND ORDER
	)	
CITY OF TUALATIN,	)	
	)	
Respondent.	)	
_____	)	

A hearing was held before Administrative Law Judge (ALJ) B. Carlton Grew on August 14, 2012, in Salem, Oregon. The record closed on September 17, 2012, following receipt of the parties' post hearing briefs. The ALJ issued his Recommended Order on February 8, 2013. On May 8, 2013, the Board heard oral argument on the Respondent's objections to the Recommended Order.

Daryl S. Garrettson, Attorney at Law, Lafayette, Oregon, represented Petitioner.

Daniel Rowan, Attorney at Law, Local Government Personnel Institute, Salem, Oregon, represented Respondent at the hearing. Ashley Boyle, Labor Relations Attorney, Local Government Personnel Institute, Salem, Oregon, represented Respondent at oral argument.

On April 23, 2012, Petitioner filed this Petition for Unit Clarification seeking to clarify certain employees into the existing bargaining unit under OAR 115-025-0005(2). The City objected on the following grounds: the Petition was improperly filed under subsection (2); the parties' longstanding practice has been that these employees are not included in the bargaining unit; the employees at issue had an administrative affinity with management and no opportunity to choose their bargaining unit status; and two of the employees were confidential employees. On August 6, 2012, pursuant to direction from the ALJ and without objection from the City, the Association filed a Second Amended Petition removing some positions and adding the authority of OAR 115-025-0005(3).

The issue in this case is, pursuant to OAR 115-25-0005(3), should the bargaining unit of “all regular full-time, and part-time employees of the City of Tualatin, excluding casual, temporary and seasonal employees, employees represented by the Tualatin Police Officers Association, or employees defined as supervisory or confidential by state statute” be clarified to include the following positions: Management Analyst II - Community Development; Deputy City Recorder - Administration; Program Coordinator - Community Development; Program Coordinator - Community Services; Program Coordinator - Finance; Program Coordinator - Operations; Program Coordinator - Police; Paralegal - City Attorney’s Office; Network Administrator; Information Technology Technician; and Information Technology Coordinator?<sup>1</sup>

For the following reasons we conclude that the bargaining unit should be so clarified.

### RULINGS

On April 27, 2012, a notice was posted informing employees that the Association’s petition had been filed, and that objections to the petition must be filed within 14 calendar days from the date of the notice. Timely objections to that petition were filed by seven employees. Six of those employees also testified at the August 14 hearing.

On February 8, 2013, the ALJ issued his Recommended Order. Thereafter, six of the employees who filed objections filed a request to intervene. Two other employees, who had not filed objections to the petition, also requested to intervene.

On March 27, 2013, we denied the request to intervene. With respect to the two employees who did not object to the petition, we found that their requests were too late under OAR 115-025-0030 and OAR 115-025-0035.

As to the other six employees, we explained that they were “interested persons” to the proceedings, but not “parties.” We further observed that those six employees testified at the hearing, which gave them the opportunity to present information relevant to the case, and that we would consider that testimony in our review.

We incorporate our March 27 ruling into this order. The other rulings of the ALJ were reviewed and are correct.

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<sup>1</sup> In response to the Association’s OAR 115-025-0005(2) petition, the City initially contended that the Deputy City Recorder and Network Administrator positions qualified as “[c]onfidential employee[s]” within the meaning of ORS 243.650(6). Thereafter, however, the City abandoned that position, and at oral argument conceded that none of the disputed positions were “confidential,” “managerial,” or “supervisory.” Consequently, we limit our discussion to the Association’s OAR 115-025-0005(3) petition.

The City also argues that this Board should order an election for these employees. This Board does not order elections in subsection (3) cases, as the issue is whether the positions at issue are currently members of the bargaining unit based on the contract language, not whether the employees want to become members of the bargaining unit.

## FINDINGS OF FACT<sup>2</sup>

1. The City is a public employer as defined by ORS 243.650(20). The Association is a labor organization as defined by ORS 243.650(13), and the exclusive representative of a bargaining unit of approximately 70 City employees.

2. The bargaining unit was originally certified by a consent election in 1984 to be represented by the then Oregon Public Employees Union (OPEU).<sup>3</sup> The Association replaced OPEU as the bargaining representative for this unit in 2003 following a consent election.

3. The City has two bargaining units: the Association and the Tualatin Police Officers Association.

4. The most recent City-Association collective bargaining agreement contains the following recognition clause in its Preamble:<sup>4</sup>

“The City of Tualatin (City) recognizes the Tualatin Employees’ Association (Association) as the sole and exclusive bargaining agent for all regular full-time, and part-time employees of the City of Tualatin, excluding casual, temporary and seasonal employees, employees represented by the Tualatin Police Officers Association, or employees defined as supervisory or confidential by state statute.”

The unit description has not changed since its 1984 inception in any manner relevant to this Petition.

5. The collective bargaining agreement also includes a provision regarding the interpretation of titles in the agreement:

“The use of article titles, sections or paragraph headings throughout this Agreement are [*sic*] intended for easy reference only and shall not be interpreted and/or implied

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<sup>2</sup>Because the Association initially filed its petition under OAR 115-025-0005(2), and because the City likewise indicated that some of the disputed positions were “confidential,” “managerial,” or “supervisory,” the hearing record included considerable evidence regarding the precise job duties of those disputed positions, and the ALJ’s Recommended Order properly included detailed factual findings regarding those job duties. In light of the City’s concession, however, that none of the disputed positions are “confidential,” “managerial,” or “supervisory,” many of those facts are no longer probative concerning the Association’s subsection (3) petition. Therefore, we modify the “Findings of Fact” in the Recommended Order to exclude those findings that are no longer pertinent to our analysis.

<sup>3</sup>OPEU has since changed its name to SEIU Local 503, OPEU.

<sup>4</sup>The collective bargaining agreement in evidence expired June 30, 2012. At the time of hearing, the parties were bargaining for a successor agreement to cover the period July 1, 2012 through June 30, 2015. The record contains no evidence that the relevant language in the new agreement will differ from the agreement in evidence.

so as to eliminate or substantially reduce, increase, or in any way modify the terms and conditions thereof.”

6. The collective bargaining agreement also includes a provision regarding the means for adding positions to the bargaining unit:

“If a new classification is added to the bargaining unit by the City, the Association shall be provided with the City's proposed rate of pay and a copy of the job description. That rate shall become permanent unless the Association files written notice of its desire to negotiate the permanent rate within ten (10) calendar days from the date it receives its notification of the classification. If a request for negotiations is filed by the Association, the parties shall begin negotiations within fifteen (15) calendar days. If there is disagreement between the parties as to the exclusion of a new position from the bargaining unit, such issue will be subject to the procedures of the Employment Relations Board. ”

7. The collective bargaining agreement also includes several “Exhibits,” one of which is entitled “EXHIBIT A - ASSOCIATION CLASSIFICATIONS.” Exhibit A contains only a list of positions. The bargaining unit positions at issue in this Petition are not included on that list. “EXHIBIT B - SALARY SCHEDULE” contains a list of positions and their various hourly and monthly salary steps. Exhibit A’s list of positions has varied from contract to contract, but such an Exhibit has been attached to every collective bargaining agreement since at least the 1990s.<sup>5</sup>

8. The Second Amended Petition covers 11 employees: five Program Coordinators; three Information Technology (IT) employees; and one employee each for the positions of Paralegal, Deputy City Recorder, and Management Analyst II. None of the positions are exempt from overtime.

9. Throughout the years, the City has undergone numerous organizational changes, which has resulted in adding new positions/titles and changing job responsibilities for existing positions/titles. Those reorganizations and changes are detailed more below.

10. From the time that the bargaining unit was first certified in 1984, the City has notified all employees, including Association representatives, when the City created a new position, changed a job title, or filled a vacant position. Since at least the 2003 Association consent election, the City has informed prospective employees applying for the positions named in the Petition that the positions were outside the bargaining unit. Before the events giving rise to the Petition, the Association or OPEU did not assert that the positions at issue were included in its bargaining unit.

### **Program Coordinators**

11. The five Program Coordinators at issue work in the Departments of Operations, Finance, Community Services, Community Development, and Police.

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<sup>5</sup>Both parties agreed that there is no evidence in the record regarding the origins of Exhibits A or B.

12. The City created the Program Coordinator classification in 1992, replacing its Administrative Assistant classification. There is no evidence that OPEU sought to bargain over the bargaining unit status of the Administrative Assistant classification or its change to Program Coordinator. In 1992, the City had five Program Coordinator positions, one in each of the following City work sections: Administration; Economic Development; Engineering & Building; Operations; and Parks & Recreation. At the time of hearing, only the Program Coordinators in Administration and Operations retained their original job titles.

13. During the 2003 change of representative from OPEU to the Association, none of the existing Program Coordinator positions were included on the “*Excelsior* list”<sup>6</sup> and none of those employees voted in the Association’s certification election.

14. In 2004, the City created the Police Program Coordinator position. In 2009, the City created the Finance Program Coordinator position. The City identified these positions as non-represented in its job postings, and the Association did not, at that time, raise the issue of whether these positions were included in its bargaining unit.

15. In 2010, the City merged its Economic Development and Engineering and Building Departments, each of which had a Program Coordinator. These two Program Coordinator positions were combined into one position, Program Coordinator in Community Development. At some point before this Petition, the City merged the Parks and Recreation Department and the Library Department, and the Parks and Recreation Program Coordinator became the Community Services Program Coordinator.

### **Information Technology Technician**

16. The City created the Information Technology Technician (IT Technician) position in December 2007.

17. The IT Technician performs activities necessary for the efficient, reliable operation of the City’s computer systems, networks, and computers, and coordinates or provides maintenance on City computer hardware and related hardware, including cell phones.

### **Information Technology Coordinator**

18. The City created the IT Coordinator position in November 2005 as a “non-exempt management” position, outside of the bargaining unit. According to the position description, the IT Coordinator is to develop, organize, and manage the City web site; design its Geographic

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<sup>6</sup> This term refers to the National Labor Relations Board’s decision in *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966), which requires employers involved in pending representation elections before the Board to submit a list containing the names and addresses of all employees eligible to vote, which the Board then makes available to the organizing unions.

Information System (GIS); and perform a variety of related technical tasks. The IT Coordinator also represents the City on various regional governmental GIS entities.

**Management Analyst II**

19. Before 2006, the City created a Management Analyst I position, which was never added to the bargaining unit. In November 2011, after the Analyst I position had been vacant for several years, the City created the Management Analyst II position. Ben Bryant, who held the Management Analyst II position at the time of hearing, accepted the job believing that the position was unrepresented. Bryant believed that the unrepresented status would allow him to gain administrative experience that could lead to promotion. There is no evidence that the Association sought to bargain over the bargaining unit status of the Management Analyst II when that position was created.

**Paralegal**

20. Since at least 1996, the City has employed a legal assistant for the City Attorney. For some time before 2006, the position was called Legal Services Assistant. The Legal Services Assistant was never considered part of the bargaining unit, was not included on the 2003 *Excelsior* list, and did not vote in the 2003 Consent Election. In 2006, the City changed the job title to Paralegal. There is no evidence that the Association sought to bargain over the bargaining unit status of the Legal Services Assistant classification or its change to Paralegal.

**Deputy City Recorder**

21. This position has existed in some form since 1995, and performed supervisory duties for much of that time. In March 2012, the City changed the title of this position (originally called Secretary to the City Manager) from Executive Assistant to Deputy City Recorder and removed its supervisory duties.

**Network Administrator**

22. In January 2012, the City combined its Information Services (IS) and Geographic Information Systems (GIS) functions into one department. As part of this reorganization, the City contracted for an interim IS Director, and created the position of Network Administrator. The City hired a permanent IS Director six months later. The Network Administrator, IT Coordinator, IT Technician, and GIS Technician all report to the IS Director.

23. Before the 2012 reorganization, the Network Administrator position was called the IS Manager and supervised the IS Technician position. That supervisory role ended with the creation of the Network Administrator position, which has no supervisory duties. This change prompted the Association's interest in whether the disputed positions were properly excluded from the bargaining unit, and led to this Petition.

## CONCLUSIONS OF LAW

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

2. The Management Analyst II - Community Development; Deputy City Recorder - Administration; Program Coordinator - Community Development; Program Coordinator - Community Services; Program Coordinator - Finance; Program Coordinator - Operations; Program Coordinator - Police; Paralegal - City Attorney's Office; Network Administrator; Information Technology Technician; and Information Technology Coordinator are included in the existing City of Tualatin/Tualatin Employees' Association bargaining unit of "all regular full-time, and part-time employees of the City of Tualatin, excluding casual, temporary and seasonal employees, employees represented by the Tualatin Police Officers Association, or employees defined as supervisory or confidential by state statute."

### **Discussion**

The Association's petition seeks a determination that, under OAR 115-025-0005(3), the disputed positions are included in the Association's bargaining unit pursuant to the existing bargaining unit description contained in the Association-City collective bargaining agreement. The City argues that the parties never intended this result, as reflected by Exhibit A to the contract.

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."

Under OAR 115-025-0005(3), the issue is not whether the employees *should be added* to the bargaining unit; we decide only whether the employees are *already in the unit* based on the language of the certification or the collective bargaining agreement. *Marion County v. Marion County Employees Association Local 294, SEIU Local 503*, Case No. UC-12-02, 19 PECBR 781, 782 (2002). In evaluating a petition under subsection (3),

"[t]his Board generally will look only to the express language of the certification description or of the collective bargaining agreement in deciding whether the disputed positions are included or excluded. The express terms of the certification or agreement clearly must not include the disputed positions for this Board to find that they are excluded from the unit. Doubts will be resolved in favor of inclusion in the unit." *Salem Education Association v. Salem School District 24J*, Case Nos. C-262-79, C-2-80, and C-73-80, 6 PECBR 4557, 4572-73 (1981). *See also Marion*

*County Law Enforcement Association v. Marion County*, Case No. UC-37-02, 20 PECBR 398, 402 (2003).

The parties' dispute requires us to interpret the collective bargaining agreement to determine if the disputed positions are included in the Association's bargaining unit. We follow well-established rules when interpreting collective bargaining agreements. *Portland Police Assoc. v. City of Portland*, 248 Or App. 109, 113, 273 P3d 192 (2012).

"As with other contracts, the general rule applicable to the construction of an unambiguous collective bargaining agreement is that it must be enforced according to its terms. A contract is ambiguous if it can reasonably be given more than one plausible interpretation. 'If a contract is ambiguous, the trier of fact will ascertain the intent of the parties and construe the contract consistent with' that intent. Specifically, if a term of the contract is ambiguous, the court will 'examine extrinsic evidence of the contracting parties' intent,' if such evidence is available. 'If the ambiguity persists, we resolve it by resorting to appropriate maxims of contractual construction.'" *Id.*, quoting *Arlington Ed. Assn. v. Arlington Sch. Dist. No. 3*, 196 Or App 586, 595, 103 P3d 1138 (2004).

We first determine whether the collective bargaining agreement is ambiguous regarding whether the disputed positions are included in the bargaining unit. "[T]o determine whether a contract is ambiguous, we analyze whether 'it is susceptible to more than one plausible interpretation,' considering 'the context of the contract as a whole, including the circumstances in which the agreement was made.'" *Id.* at 116-17, quoting *Cassidy v. Pavlonnis*, 227 Or App 259, 264, 205 P3d 58 (2009). With those principles in mind, we turn to the relevant provisions of the collective bargaining agreement.

The collective bargaining agreement recognizes the Association as the bargaining representative for the following described unit:

"[A]ll regular full-time, and part-time employees of the City of Tualatin, excluding casual, temporary and seasonal employees, employees represented by the Tualatin Police Officers Association, or employees defined as supervisory or confidential by state statute."

Standing on its own, this clause is unambiguous as to the issue at hand. However, the City argues that, taken as a whole, the agreement is ambiguous regarding the unit description because the agreement includes two exhibits: "EXHIBIT A - ASSOCIATION CLASSIFICATIONS," and "EXHIBIT B – SALARY SCHEDULE." Exhibit A <sup>7</sup> provides a list of positions and does not

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<sup>7</sup>The agreement states that its titles, such as "Association Classifications" are "intended for easy reference only and shall not be interpreted and/or implied so as to eliminate or substantially reduce, increase, or in any way modify the terms and conditions thereof." Therefore, it is arguable that the agreement itself minimizes the significance of the list.

include the positions at issue here. Exhibit B provides the same list of positions divided into different salary steps. The representation clause does not, however, refer to or incorporate Exhibit A or B.<sup>8</sup> Indeed, Exhibit A is not referenced in any other part of the collective bargaining agreement. At oral argument, the parties agreed that the record does not contain evidence regarding the origin of Exhibit A.

We agree with the City that Exhibit A, which provides a list of “Association Classifications” that does not include the disputed positions, supports a “plausible interpretation” that the disputed positions are not part of the bargaining unit. *See City of Portland*, 248 Or App at 116-17 (a contract is ambiguous if it is “susceptible to more than one plausible interpretation”). However, although Exhibit A may make the agreement “susceptible” to such a plausible interpretation, we do not find it sufficient to overcome the more express and probative language of the recognition clause. As set forth above, the recognition clause identifies the bargaining unit as “*all* regular full-time, and part-time employees of the City of Tualatin” (emphasis added), with certain exceptions that do not apply to the disputed positions. The recognition clause, which is the most probative language concerning the designated bargaining unit, makes no reference to Exhibit A, and does not otherwise indicate that Exhibit A was intended to limit the sweeping language of the recognition clause.

Moreover, we resolve any remaining ambiguity by “resorting to appropriate maxims of contractual construction.” *Id.* at 113. Pertinent to evaluating petitions brought under OAR 115-025-0005(3), we have employed the following maxim in construing a collective bargaining agreement:

“The express terms of the certification or agreement clearly must not include the disputed positions for this Board to find that they are excluded from the unit. Doubts will be resolved in favor of inclusion in the unit.” *Marion County*, 20 PECBR at 402 (citing *Salem School District 24J*, 6 PECBR at 4572-73). *See also City of Portland*, 248 Or App at 117 (recognizing the maxim of construction that, when a collective bargaining agreement is ambiguous with respect to whether a particular issue is arbitrable, we resolve that ambiguity in favor of arbitrability).

Employing this statutory maxim for interpreting collective bargaining agreements in a subsection (3) petition further supports our conclusion that the disputed positions should be included in the unit.

The City also argues that these employees should not be included in the bargaining unit because they have an administrative affinity with City management. As the City acknowledges, administrative affinity is one of the criteria this Board uses to determine whether a proposed bargaining unit has a community of interest and the appropriate scope of a bargaining unit. It is not a criterion under OAR 115-025-0005(3), where the issue is “whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective

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<sup>8</sup> Because the City’s argument relies primarily on Exhibit A (and that exhibit provides the strongest support for the City’s position), we focus our analysis primarily on that exhibit.

bargaining agreement \* \* \*.” *See also Clackamas County Employees’ Association v. Clackamas County*, Case No. UC-23-87, 10 PECBR 481, 482 (1988) (consideration of “community-of-interest” factors not appropriate in the context of an OAR 115-025-0005(3) petition).

Finally, we address the City’s “waiver” argument. Specifically, the City argues that the Association effectively “waived” its right to file a subsection (3) petition because the disputed positions have been tacitly excluded from the unit throughout the parties’ lengthy collective bargaining relationship.<sup>9</sup>

We disagree with the City’s contention. As set forth above, the express language of the applicable rule provides that such a “petition may be filed *at any time*.” OAR 115-025-0005(3) (emphasis added).<sup>10</sup> Thus, the language of our rule forecloses a finding that the Association has “waived” its right to file a “unit clarification” petition under that subsection, and the City acknowledges that this Board has not previously held that either an employer or a union has “waived” its right to file a such a petition merely because a group of employees had been included or excluded from a bargaining unit before the petition was filed. Indeed, the very nature of such a “unit clarification” petition is for this Board to make a determination as to whether contested employees are effectively already in or out of an existing unit based on the language of the certification or the collective bargaining agreement. *See Marion County*, 19 PECBR at 782. Consequently, we decline to hold that the Association “waived” its right to file this petition because it had not filed such a petition at some earlier point.

Moreover, putting aside the express language of the rule itself (and the lack of any precedential support), injecting a “waiver” element into a subsection (3) petition would be problematic in many respects. As the instant matter demonstrates, an employer’s organizational structure is fluid. Over time, new departments may be added, existing departments may be merged, and others may be dropped or eliminated entirely. Likewise, within any given department or division of an employer, new positions may be created, or the job duties of existing positions may be changed. When such organizational restructuring occurs, either an employer or a union may seek clarification as to whether “certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement.” *See* OAR 115-025-0005(3).

With respect to a labor organization, it may discover that certain positions have not been considered to be part of a bargaining unit, even though the express terms of the parties’ agreement

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<sup>9</sup>The City also asserts that the Association should be estopped from its claims over these employees, without providing any analysis or argument. We do not consider that contention.

<sup>10</sup> The rule contains one exception to the “at-any-time” allowance: 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.” Neither party contends that this exhaustion exception applies to the Association’s petition.

say otherwise. Such confusion is more likely where, as here, an employer has restructured itself many times over, including consolidating departments, changing job titles and duties for existing positions, and creating new positions (or eliminating previous ones).<sup>11</sup>

Likewise, an employer may “discover” that its restructuring excludes a position that was previously considered to be a part of the unit under the express terms of the parties’ agreement. That realization may occur immediately or years down the road. In either event, the employer has the right to seek clarification of that position “at any time.” *Id.* Inserting a “waiver” analysis into a subsection (3) petition would be to ignore the dynamic nature of an employer’s operation, and would likely be unworkable or overly confusing.<sup>12</sup>

Finally, a “waiver” analysis could result in this Board effectively “rewriting” the parties’ contract. Under a subsection (3) petition, we determine “whether certain positions are or are not included in a bargaining unit *under the express terms of a certification description or collective bargaining agreement.*” OAR 115-025-0005(3) (emphasis added). If we were to employ a “waiver” analysis, as the City requests, we could be presented with a situation where we include or exclude a position from a bargaining unit, even though the express terms of the parties’ agreement *requires* otherwise. We do not believe that to be a proper function of this Board.

For the aforementioned reasons, we conclude that the express terms of the parties’ contract include the positions at issue.

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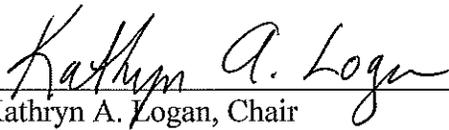
<sup>11</sup> Indeed, this record supports that the City’s most recent 2012 restructuring triggered the Association’s scrutiny regarding the disputed positions, and led to the filing of this petition. The record further supports that the City has represented (and believed) in past years that the disputed positions were excluded from the unit per the terms of the parties’ collective bargaining agreement because the positions were “confidential” or “supervisory.” As part of its organizational restructuring throughout the years, the City has added new positions, changed job-position titles, and changed the job responsibilities for the disputed positions, such that the City now concedes that none of the disputed positions qualify as “confidential” or “supervisory.” The City’s previous representations (and the Association’s acceptance of such) are the most likely source of the historical exclusion of the disputed positions from the bargaining unit. Such circumstances present a typical case for filing a subsection (3) petition.

<sup>12</sup> The City has not proposed a workable “waiver” analysis, and, as indicated above, we question whether one is available in the context of a subsection (3) petition.

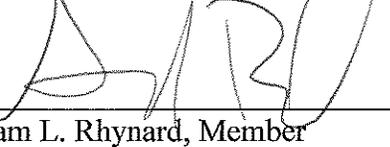
ORDER

The City employees working in the positions of Management Analyst II - Community Development; Deputy City Recorder - Administration; Program Coordinator - Community Development; Program Coordinator - Community Services; Program Coordinator - Finance; Program Coordinator - Operations; Program Coordinator - Police; Paralegal - City Attorney's Office; Network Administrator; Information Technology Technician; and Information Technology Coordinator are included in the existing City-Association bargaining unit.

DATED this 21<sup>st</sup> day of June 2013.

  
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Kathryn A. Logan, Chair

  
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Jason M. Weyand, Member

  
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Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.