

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-04-12

(UNIT CLARIFICATION)

COALITION OF GRADUATE)
EMPLOYEES, LOCAL 6069, AFT,)
)
Petitioner,)
)
v.)
)
OREGON UNIVERSITY SYSTEM,)
OREGON STATE UNIVERSITY,)
)
Respondent.)
_____)

RULINGS,
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

On October 22, 2012, the Board heard oral arguments on Petitioner’s objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on August 27, 2012, after a hearing was held on May 31 and June 5, 2012, in Salem, Oregon. The record closed on June 29, 2012, with the receipt of the parties’ post-hearing briefs.

Eben L. Pullman, Field Coordinator, and Richard H. Schwarz, Executive Director, AFT-Oregon, Tigard, Oregon, represented Petitioner.

Jeffrey P. Chicoine, Attorney at Law, Miller Nash LLP, Portland, Oregon, represented Respondent.

On March 9, 2012, the Coalition of Graduate Employees, Local 6069, AFT (Union) filed a petition under which it sought to add approximately 767 unrepresented graduate assistant positions¹ to its current bargaining unit of approximately 951 graduate assistants at Oregon State University (OSU) through either a certification without an election process under

¹The term graduate assistants, as used in this order, is intended to apply to students with either graduate teaching assistant (GTA) or graduate research assistant (GRA) appointments.

ORS 243.682(2)(a) and OAR 115-025-0000(1)(c) or through the unit clarification process under OAR 115-025-0005(4). This Board bifurcated the petition into two separate cases: one addressing the certification without an election portion of the petition (Case No. CC-05-12); and the case before us addressing the unit clarification petition (Case No. UC-04-12).²

On March 20, 2012, the Union filed an amended unit clarification petition in Case No. UC-04-12. OSU filed timely objections to the amended petition on the basis that the petitioned-for positions are not public employees within the meaning of ORS 243.650(19) and do not share sufficient community of interest with the current bargaining unit positions.

The issues in this case are:

1. Are the petitioned-for individuals public employees within the meaning of ORS 243.650(19)?
2. Is the proposed unit of all graduate students with GTA or GRA appointments, or a combination of GTA and GRA appointments, employed by OSU with a minimum appointment of 0.15 FTE, excluding supervisory, confidential, and managerial employees, an appropriate bargaining unit under ORS 243.682(1)(a)?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT

1. The Union is a labor organization and the exclusive representative of a bargaining unit of employees at OSU, a public employer.
2. In 1999, the Union filed a petition seeking to represent graduate assistants at OSU. OSU objected because the petitioned-for unit included graduate assistants engaged in teaching or research primarily to fulfill advanced degree requirements, who it asserted were not public employees under *University of Oregon Graduate Teaching Fellows Federation v. University of Oregon (GTFF v. U of O)*, Case No. C-207-75, 2 PECBR 1039 (1977). The parties subsequently entered into a consent election agreement excluding graduate assistants who were teaching or performing research primarily to fulfill a degree requirement. The consent election agreement was signed by Associate Vice Chancellor Joe Sicotte, on behalf of the Oregon University System (OUS). In November 1999, this Board certified the Union as the exclusive bargaining representative of a bargaining unit which was essentially the same as the current bargaining unit.³

²The Board subsequently dismissed the petition for certification without an election. *Coalition of Graduate Employees, Local 6069, AFT v. Oregon University System, Oregon State University*, Case No. CC-005-12, 25 PECBR 42 (2012).

³*Coalition of Graduate Employees, AFT, AFL-CIO v. Oregon University System*, Case No. RC-14-99 (1999).

3. The Union and OSU are parties to a collective bargaining agreement (Agreement) effective from July 1, 2008 through June 30, 2012. Under that Agreement, the current bargaining unit includes all OSU graduate students with graduate teaching assistant (GTA) or graduate research assistant (GRA) appointments working a minimum 0.15 full-time equivalent (FTE) appointment in a given academic term,

“provided that at least 0.10 FTE is devoted to service to OSU as an employee, *excluding* (a) supervisory employees; (b) confidential employees; (c) managerial employees; and (d) graduate students with GTA or GRA appointments in their capacity as students who are teaching or performing research primarily to fulfill an advanced degree requirement.” (Emphasis in original.)

OSU currently treats graduate assistants with combined GTA and/or GRA appointments as bargaining unit members even though only one of their appointments falls within the bargaining unit definition.

Background Regarding GTFF/University of Oregon Bargaining Unit

4. In 1977, this Board issued an order in which it concluded that University of Oregon (U of O) graduate teaching fellows (GTFs), who were engaged in teaching or research to fulfill an advanced degree requirement, were not eligible to be included in a bargaining unit of GTFs represented by the Graduate Teaching Fellows Federation Local 3455, AFT, AFL-CIO (GTFF) because they were students and not public employees within the meaning of ORS 243.650(17).⁴ *U of O*, 2 PECBR at 1039 (1977).

5. In March 1998, pursuant to a consent election agreement, this Board certified the GTFF bargaining unit at the U of O to include GTFs “with service awards who are teaching or performing research to fulfill a requirement for an advanced degree” in the existing bargaining unit.⁵ The consent election agreement was signed by Associate Vice Chancellor Sicotte, on behalf of what is now called the Oregon State Board of Higher Education (OSBHE).

6. The current GTFF bargaining unit at the U of O includes “[a]ll graduate students with GTF appointments (service awards) employed by the University of Oregon, excluding supervisors and confidential employees.” At the time of the hearing in this matter, there were approximately 1,480 U of O graduate students with GTF appointments, consisting of 75 percent teaching assistants, 16 percent research assistants, and 9 percent administrative assistants. Eighty-five percent of the funding for GTFs at the U of O is through general/operating funds.

⁴At the time of this decision, the definition of public employee in the Public Employee Collective Bargaining Act (PECBA) was found under ORS 243.650(17). The current definition is in ORS 243.650(19).

⁵*Graduate Teaching Fellows Federation, Local 3455, AFT, AFL-CIO v. University of Oregon*, Case No. UC-56-97 (1997).

Oregon State Board of Higher Education and Oregon University System

7. OSBHE is the governing board for the seven public universities, including OSU. OSBHE advocates for higher education in the political and budgetary process and hires and fires university presidents. OSBHE has generally delegated to the institutions matters related to budgets, personnel hiring, labor relations, and collective bargaining.

8. OUS is the coordinating entity for the higher education system. OUS enacts broad oversight policies and ensures that the institutions coordinate their academic program offerings to complement, rather than compete with, each other.

9. OSU, U of O, Eastern Oregon University (EOU), Western Oregon University (WOU), and Portland State University (PSU) are OUS institutions. OUS Vice Chancellor of Finance and Administration Jay Kenton and OUS Human Resources Division Director of Labor Relations Rick Hampton signed the parties' 2008-2012 Agreement. Kenton also signed the GTFF/U of O 2010-2012 Collective Bargaining Agreement on behalf of OSBHE. OUS representatives have been part of the employer's bargaining team at EOU, WOU, and PSU.

OSU Academic Structure

10. The three elements of OSU's mission include the education of students and the preparation of the next generation of professionals; knowledge generation and application through research, by examining, addressing, and helping to provide solutions to society's problems; and outreach and engagement, with a focus on understanding the needs and issues of the external environment and translating research back to the broader community for its use. OSU accomplishes its mission through undergraduate education, graduate education and research, and community outreach and engagement.

11. OSU offers approximately 200 undergraduate and 80 graduate degree programs. For the Spring 2012 quarter, OSU enrolled 19,245 undergraduate students; 575 professional students; and 3,445 graduate students, including 1,545 master's degree candidates, 1,249 doctorate (Ph.D.) candidates, and 651 non-degree students.

12. The purposes of OSU's undergraduate education are to prepare professionals to become members of the broader community and to educate students holistically to become productive citizens. Undergraduate education is typically instruction driven, with one-third of the program based on general education requirements and two-thirds on a specific discipline. Undergraduate education goals are driven by the institution and generally funded through tuition and state general funds.

13. OSU's professional degree programs include the School of Pharmacy, School of Veterinary Medicine, doctorate of education, master's in business administration, master's in fine arts, master's in engineering, and master's in agriculture. These programs, which are almost exclusively funded through student tuition, are designed to provide students with expertise and in-depth knowledge in a particular area through course-work instruction and specialized training, and hands-on experience in a clinical setting.

14. OSU's graduate student education involves research-based programs, through which students earn a master's degree or a Ph.D.⁶ These graduate programs are largely a function of OSU's research enterprise and are driven by the research grants faculty members secure for projects from external sources. Most of the problems faculty address through their research projects, such as climate change or genetics, cannot be solved by one generation of scientists. As a result, research-based graduate education, especially at the Ph.D. level, is primarily focused on developing the next generation of scientists, researchers, and university educators and recruiting students to continue faculty research projects in the future.

15. Graduate students are recruited for or accepted into a graduate program with the expectation of advancing research on a particular faculty member's project. As part of their degree requirement, graduate students are expected to spend approximately 75 to 80 percent of their time in research with a faculty member. Two critical dimensions of a graduate student's research experience are learning to be an independent researcher and obtaining an integrative experience allowing them to see their problem in the broader context. A graduate student applies to both the OSU Graduate School and their program of interest. While the application is pending, the student talks with the program's faculty members. A condition of a student being admitted to a graduate program is that a faculty member agrees to serve as the student's faculty advisor and the student agrees to work under that faculty advisor. This is usually a mutual decision. Since part of the faculty member's research project is designed for student work, often times a student's general thesis area is determined at the time the student is admitted to a specific graduate program.

16. Faculty members generally accept a student into a graduate program with the expectation that the student will have the education, skills, background, and interest to work on the faculty member's project. The student's faculty advisor is responsible for developing and delivering the student's graduate degree program, pursuing research funding needed to recruit graduate students, recruiting students, providing the expertise that allows the student to learn about research methodology and the research itself, overseeing the student's research work, and ensuring that the student is advancing toward his/her degree. A faculty advisor could decide not to renew a graduate student if they determined the student was not a good fit for the program or not performing adequately. A student's research-based graduate education is also overseen by a graduate committee comprised generally of faculty members, who can provide the student with the broader context.

17. OSU master's and Ph.D. degree programs are administered through the Graduate School. The Graduate School sets the policies regarding the general requirements for these programs. Under these policies, all master's degree students are required to complete a minimum of 45 graduate credit hours, including a thesis or research in lieu of thesis, conduct research or produce creative work, demonstrate subject matter mastery, and be able to ethically conduct scholarly or professional activities. Specific programs may have other requirements.

⁶Although some of the professional programs are for students earning a master's degree, witnesses generally used the term "graduate program" only in regard to the research-based graduate programs, which is how the term is used in this Order.

Graduate Assistantships

18. OSU graduate programs compete with other research-based universities to recruit the highest quality graduate students. As a result, some programs offer students financial support through graduate assistant appointments, which may be very influential in a student's decision to attend OSU. Departments attempt to fit the right funding to the right student based on the mix of skills and funding available. OSU considers the stipends paid to graduate assistants to be financial aid. Students in research-based graduate programs would be required to perform the research as part of their degree requirement even if they were not given a graduate assistant appointment.

19. Programs pay graduate assistant stipends out of a faculty member's research grant, gift, or contract funds. These funds also pay for the materials and equipment needed for the research project, and approximately 30 to 50 percent of the funds are used for OSU administrative costs. The amount of a graduate assistant stipend is intended to be competitive to allow the program to recruit students. The amount of the stipend is not intended to directly reflect the number of hours required for the research. The Graduate School has graduate assistant stipend guidelines that establish a minimum recommended stipend based on FTE for graduate assistants. Departments must follow the minimum stipend requirements but may offer higher stipends.

20. The Graduate School provides on-line information on financing a graduate education, which states that "[t]he most common form of student support, graduate assistantships are employment-based appointments where students, in exchange for their service, receive a stipend, tuition remission, and an institutional contribution toward the health insurance program available only to graduate assistants." The website contains further information on graduate assistantships, stating that:

"There are many reasons to become a graduate assistant, not the least of which is financial support for your education. In exchange for service, an assistantship provides a monthly salary, tuition remission, and an institutional contribution toward the graduate assistant-only health insurance premium. Teaching assistantships (TAs) may include leading a discussion, delivering lectures, grading papers, or supervising a laboratory. Research assistantships (RAs) typically assist faculty in conducting research projects. As OSU is a teaching and research institution, it follows that the work of our graduate assistants is essential to fulfilling the university's mission.

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"Assistantship appointments range from 0.20 FTE to 0.49 FTE (FTE meaning full-time employment). An assistant on a 0.30 FTE appointment, for example, is expected to provide 156 hours of service during a 13-week academic term. When a student is offered an assistantship, the administering academic department provides the details of the appointment (e.g. contract dates, FTE, monthly stipend, expectations of position).* * *.

“All graduate assistants are required:

- “• To perform the full duties of service as determined by their departments,
- “• To be **enrolled in a minimum of 12 credit hours** each term of their appointment during the academic year (9 credits during the summer), and
- “• To be making satisfactory progress toward an advanced degree.”

21. In reference to graduate assistantships, OSU Fiscal Operations Policy and Procedures Manual provides that “[s]tudents can receive financial support from the University as an OSU employee. * * * The compensation for the work completed is in the form of salary and benefits, as well as, tuition remission.”

22. Graduate students with GTA appointments generally teach lower division undergraduate courses or provide instructional assistance to faculty with upper division or graduate courses. GTA duties could include delivering lectures, supervising labs or recitation sections, grading papers, preparing materials, or performing other similar instruction-related activities. GTAs are usually designated as bargaining unit members. Bargaining unit or represented GTAs come from either a professional graduate degree program or a research-based graduate program. Represented GTAs may provide assistance in programs other than the one in which they are enrolled. Unrepresented GTAs provide services in their degree program for compensation and to fulfill a degree requirement that a student teach a certain number of terms. These GTA appointments are intended to help students master the course content, challenge their ability to communicate ideas, and provide them training in teaching, lesson planning, and the classroom culture. Graduate programs which require teaching experience in addition to research experience include crop and soil sciences, molecular and cellular biology, food science and technology, fisheries and wildlife, and botany and plant pathology.

23. Graduate students with GRA appointments generally provide assistance with program-based field, laboratory, or research work. Represented GRAs are appointed to a specific job that may benefit a degree program, but the research is not a requirement of their degree. This could include taking care of plants in a greenhouse for a large research program, maintaining an animal collection, being responsible for certain specialized equipment, collecting data, or analyzing data. Unrepresented GRAs provide services in their degree program on a research project which is related to their degree, typically by performing an independent part of the project. These GRAs receive compensation for their work and get hands-on experience in their field of interest. The subject or source of a graduate student's thesis is usually related to the area of their faculty advisor's research project or the work that the student is assigned as part of the assistantship. Students also may be able to tailor their work on the research project to provide data or other information related to the development or completion of their thesis.

24. OSU uses the same “Appointment Letter” template for all graduate assistants, regardless of whether they are represented or not. On the template, the person issuing the letter checks boxes indicating the graduate assistant's bargaining unit status. The template states that a graduate assistant is not included in the bargaining unit when their appointment requires them “to perform duties primarily to fulfill an advanced degree requirement * * *.” All graduate assistants are assigned an FTE level in their appointment letter and informed of the expected duration of their appointment. Graduate assistants also receive a position description which sets out the basic

duties of the appointment. Many position descriptions contain the number of hours assistants are expected to work based upon their FTE status.⁷ The appointment letter states that “[a]lthough the number of hours you are expected to work may fluctuate slightly during your appointment period, you may not work more than 255 working hours per term, which is a maximum of .49 FTE, in all jobs or appointments you may have within the Oregon University System.”

25. OSU’s Office of Human Resources has designed guidelines to help departments and programs determine whether a graduate assistant will be performing service work, which is bargaining unit work, or academic-oriented work, which is not bargaining unit work. The guidelines’ examples of service appointments include a teaching appointment that is not part of a student’s degree requirement, an appointment for a student who has completed the use of specialized equipment for his own research and is assisting other graduate assistants in using the equipment for their research, and an appointment to care for and feed animals to be used in research which is not the student’s. The examples of academic appointments include a student teaching a class for the purpose of gaining teaching experience as part of the student’s degree requirement, a student conducting research to be used in the student’s thesis, and a student who is caring for and feeding animals to be used in the student’s research.

26. All graduate assistants receive tuition remissions, the same health insurance plan, employer payment of 85 percent of the employee-only health insurance premium, a monthly stipend, and a \$300 per term lump sum differential. OSU deducts state and federal income taxes and worker’s compensation from all graduate assistants’ pay checks, processes their stipends through the same payroll system used for OSU employees, and issues W-2 Wage and Tax Statements reflecting the amount of stipend paid. Since the bargaining unit was created, OSU has withheld taxes from represented and unrepresented graduate assistant stipends pursuant to the Tax Reform Act of 1986. Graduate assistants’ W-2 forms name the Oregon University System-OUS as the employer.⁸

27. Tuition remissions are an enrollment tool used by OSU to recruit and retain the highest quality graduate students and researchers. In the Fall of 2000, OSU implemented the OSU Graduate Tuition Remission Allocation Model, Tuition Remission Policies, and Accounting and Management Procedures. Under the policies, graduate tuition remission is provided to students with 0.20 FTE or greater. The policies also state:

“At OSU, graduate research and teaching assistantships are awarded to graduate students with superior records in their graduate and/or undergraduate work. All

⁷The form sets the following as the approximate number of hours to be worked per term: .20 FTE, 104 hours; .25 FTE, 130 hours; .30 FTE, 156 hours; .35 FTE, 182 hours; .40 FTE, 208 hours; .45 FTE, 234 hours; .49 FTE, 255 hours.

⁸Prior to the Tax Reform Act of 1986, grant or fellowship amounts payable to degree candidates for teaching and research were not treated as income if all such degree candidates had to perform these services. The Tax Reform Act of 1986 limited this exclusion from income for degree candidates and other students to apply only to grant funds specifically targeted to educational expenses, such as tuition, fees, and books. Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1986 (H.R. 3838, 99th Congress; Public Law 99-514)*, 38-45 (May 4, 1987).

graduate assistants are required to perform some duties as part of their appointments. Duties of teaching assistants are related to the University's instructional program and duties of research assistants are related to the research function of the University. Graduate assistants providing duties related to fulfilling their educational requirements are paid stipends, while graduate assistants that provide service to the Institution are paid wages."⁹

28. In addition to graduate assistants, OSU has graduate fellowships.¹⁰ Graduate fellowships are a form of financial assistance under which students are awarded tuition, scholarships, or stipends for which specific duties or work is not required. Graduate fellowship stipends are not administered through the payroll system and OSU does not withhold taxes from payments received by graduate fellows or include such payments in a W-2 Tax Statement. The fellowship payments and tuition remission are included on federal tax Tuition Statement Form 1098-T.

29. OSU has a policy addressing employees' obligations regarding conflicts of interest involving research. The current policy does not specifically state that the policy applies to graduate assistants. OSU's prior conflict of interest policy applied to all academic staff members, which as defined, specifically included graduate assistants.

30. OUS rules require all institution employees to assign to OSBHE any invention or technology improvement conceived or developed using institution facilities, personnel, information, or other resources; and educational and professional materials resulting from the institution's instruction, research, or public service activities. The rule applies to graduate assistants, graduate teaching fellows, and student employees. Under its policies, OSBHE reserves ownership rights over all institution work-related inventions and educational and professional materials developed by any employees or persons using institutional facilities, personnel, or resources, including patents and copyrighted resources. The policy does not apply to scholarly works, such as books or works of art.

31. OSU's Intellectual Property Guidelines for Students require all undergraduate students, graduate students, graduate assistants, and graduate fellows who receive monetary support from OSU to assign to OSU their intellectual property rights specifically related to the projects for which they receive financial support.

⁹We find credible the testimony of Human Resources Director Jacquelyn Randolph that the OUS Financial Administration Standard Operating Manual (FASOM) Section 5.02: Grants and Contracts Graduate Fee Remissions is an outdated policy, which is no longer in effect. However, this finding does not significantly impact our decision.

¹⁰The Union is not seeking to include the graduate fellows in the bargaining unit under this petition.

32. In May 2012, there were approximately 1,613 graduate students with graduate assistant appointments.¹¹ The number of graduate assistant appointments (represented and unrepresented) was 1,774 due to the fact that some students held more than one appointment.

33. In May 2012, approximately 933 graduate assistants were designated as in the bargaining unit. This included 744 GTAs, 105 GRAs, and 84 graduate assistants with combined GTA and/or GRA appointments. Represented appointments are funded primarily from general funds. Some represented GTAs are students in professional programs, who provide teaching assistance unrelated to their degree requirements. Others may be first or second year research graduate students, who have not yet been assigned to a research project. Represented GRAs usually work on a large research project or maintain specific equipment or a collection in an area not directly related to their degree requirement.

34. In May 2012, approximately 680 graduate assistants were designated as unrepresented. This included 647 GRAs, 29 GTAs, and 4 graduate assistants with multiple appointments. The unrepresented GTAs were primarily students serving as teaching assistants to meet their degree programs' teaching experience requirements. The unrepresented GRAs were primarily research graduate students assigned to a research project.

35. During 2011 and 2012, an average of 5.3 percent of the total graduate assistants were moved into or out of the bargaining unit from one term to the next.

36. Graduate assistants have offices, which may be shared with other graduate assistants, faculty researchers, or graduate students. They have keys to their offices and access after normal business hours.

37. The parties' Agreement provides for a minimum FTE monthly salary for represented graduate assistants and allows the departments to set a higher monthly salary. Under the Agreement, a represented graduate assistant's salary is determined by multiplying the salary rate by the assigned FTE. FTE is based on hours worked during an academic term, with a range from 0.10 FTE, defined as 52 hours per term, to 0.49 FTE, defined as 255 hours per term.

38. The parties' Agreement includes a grievance procedure. Faculty advisors are not part of this procedure. The grievance procedure provides that disputes over whether a graduate assistant is included in the bargaining unit are to be resolved through an expedited grievance process on unit eligibility issues. There have been no unit eligibility grievances filed under this process.

39. OSU has passed along benefits achieved by the Union through collective bargaining to non-bargaining unit graduate assistants, including employer-paid health insurance contributions and other benefits. During bargaining, OSU frequently includes the cost of

¹¹Although the parties' stipulated that there were 1,713 graduate assistants, the total of number of GTAs and GRAs reflected in three of the exhibits is 1,613. In addition, due to the number of multiple appointments, there is difference in the parties' numbers of represented and unrepresented GTAs and GRAs. To the extent possible, our numbers are based on actual students.

providing economic benefits for non-bargaining unit graduate assistants in its estimates of economic proposals. Faculty members do not serve on OSU's bargaining team.

Facts Regarding Some Specific Programs and Graduate Assistants

40. As of May 2012, the Food Science and Technology Department (FST) had 16 unrepresented graduate assistant appointments. The FST Graduate Handbook provides that GTAs are expected to fulfill the specified work hours commensurate with their assigned FTE and perform duties as determined by the department and faculty advisor.

41. As of May 2012, the Crop and Sciences Department (CSD) had 13 represented and 24 unrepresented graduate assistant appointments. The CSD Graduate Student Handbook provides that

“[g]raduate students on assistantship appointments (GRA) are employees, and have obligations for work on Departmental projects. Work schedules will be decided by the major professor. It is recognized that thesis research may contribute to Experiment Station projects; consequently, there may be little distinction between project work obligations and thesis work.

“* * * * *

“It is important to recognize that Graduate School is a unique opportunity for educational, professional, scientific, and personal growth. As such, to fully benefit from this experience, the assistantship should not be viewed as a typical job. Rather, the greater the effort, the greater the long-term benefit for the student.”

42. As of May 2012, the Environmental and Molecular Toxicology (EMT) Department had 24 unrepresented graduate assistant appointments. The Department's Graduate Student Handbook provides that a 0.49 FTE GRA appointment is considered full-time and students pursuing a thesis degree are expected to be in residence at EMT during normal working hours and any additional time required for their research and classroom activities. The Handbook instructs students that: students receiving financial aid are not permitted to hold outside employment because they are expected to devote their time to their studies and research projects; lack of progress, research productivity, or poor grades in course work could result in dismissal from the program; and all graduate study research data and laboratory notebooks are the property of OSU, the faculty advisor, and/or the funding agency. The Handbook also states that:

“the most critical measure of success as a graduate student is adequate progress in reaching research and programmatic goals. The time and effort required for maintaining adequate progress will differ among individual students. Students should maintain good lines of communication with their major professor and Thesis/Dissertation Committee to ensure realistic goals are set and adequate progress can be maintained.”

43. All EMT students are expected to engage in research during each term they are enrolled. This includes laboratory rotations for first-year students, which expose them to diverse research fields and techniques, provide breadth to their research training, and help them identify their area of research interest and select a faculty advisor. Other research includes that which leads to a master's degree or Ph.D. student's thesis or research in lieu of thesis for non-thesis master's degree students. The amount and type of research depends on a student's course of study, typically requires after hours and weekend work under schedules dictated by the research project, and "includes the goal setting and planning required to successfully perform experiments, the specific experimental manipulations, as well as consistent literature review to keep abreast of research developments and discoveries in Toxicology and the basic sciences."

44. Joshua Robinson has a 0.49 FTE unrepresented GRA appointment in the EMT Department, where he works in the Harper toxicology lab. Robinson primarily performs research to support the needs of the laboratory. He also provides reasonable lab support, such as making requests for chemical pickups, producing lab protocols concerning chemical safety, and assisting with the use of the lab spectrometer. Robinson reports to the lab research coordinator and his faculty advisor. He is currently working on developing a test for certain materials to rapidly categorize their level of hazard, which is part of his faculty advisor's main grant. The work he performs was previously performed by a faculty research assistant. The distinction between his work and the faculty research assistant's work is the capacity to perform research and the specific research needs. Robinson was a guest lecturer in his faculty advisor's class and has shown individuals around the lab when his advisor was absent. Teaching is not a requirement for his degree program.

Robinson works as many hours as it takes to get the work done, which is more than the minimum 40-hour work week he is expected to be present in the lab. Robinson works with his faculty advisor, faculty research assistants, undergraduate student workers, the lab research coordinator, and other graduate students. Robinson believes he would not spend the amount of time in the lab that he currently does if he did not have a GRA appointment and, although he would still have a research project, it would be more targeted at his scholarship requirements. The bulk of the data Robinson collects goes to meet the needs of his faculty advisor. Robinson is currently a master's degree candidate pursuing a non-thesis project degree plan and believes that his research work has educational value and is intertwined with his educational program. He has already completed his project requirements, but continues to take research credits because he is required to maintain his status as a graduate student until he successfully defends his degree. His current research is related to the needs of the lab and any publications in which he can contribute or participate. Robinson hopes to continue his research work in the Harper toxicology lab while pursuing a Ph.D. and transition to a new project.

45. As of May 2012, the Biological and Ecological Engineering Department had 11 unrepresented graduate assistant appointments. The Department's Graduate Student Handbook requires all GRAs to provide service to justify their stipend. Graduate assistants with a 0.49 FTE appointment are expected to provide an average of 20 hours of service per week, which may be in addition to their thesis research, and GRAs with lower appointment levels are to provide a proportionate amount of service.

46. As of May 2012, the Department of Fisheries and Wildlife (DFW) had 29 represented and 29 unrepresented graduate assistant appointments. The DFW Graduate Student Handbook provides that most faculty will not accept students into the program unless financial support is available and that graduate assistantships are awarded to students with superior undergraduate and/or graduate work. Under the Handbook, a GTA is expected to provide approximately 15 hours service per week, such as reading papers and handling laboratory and quiz sections. DFW considers teaching experience as a significant adjunct to a student's education. Appendix D to the Handbook, entitled "EMPLOYMENT OF GRADUATE RESEARCH ASSISTANTS," states that GRAs "are employed as assistants to a faculty member. Usually the research conducted by the GRA will be used for a thesis, but the GRA has no right to withhold data collected while receiving money for the work. The GRA may be permitted to use the research results of a thesis, but all data collected are the property of the University."

47. Peter Kappes is a DFW Ph.D. student. Kappes submitted an application to be admitted to DFW after seeing an opening for a research position on a professional website that posts jobs for master's and Ph.D. candidates. He went through a review process and his current faculty advisor offered him a position. Kappes holds a 0.49 FTE graduate assistant appointment, which rotates between a GTA and GRA. As a GTA, Kappes is designated as part of the bargaining unit because teaching is not a component of his degree program. As a GRA, he is designated as unrepresented because he performs duties primarily to fulfill his degree. His research involves spending approximately 40 hours per week assisting his faculty advisor on a long-term project funded by National Science Foundation (NSF) on Adelie penguin demography. His faculty advisor included funding for a Ph.D. student in the NSF grant to address several questions regarding the huge data set that has accumulated over the 20 years of the project. Kappes analyzes, cleans ups, and proofs the data. He also developed the work he was assigned into his own questions to be answered. Kappes will use the research in his thesis. His faculty advisor's goal is to publish a paper. Any papers Kappes writes will include his faculty advisor's name. Kappes also takes classes.

48. As of May 2012, the Department of Rangeland and Ecology had one represented and two unrepresented graduate assistant appointments. The Department's Graduate Student Handbook states that graduate assistantships are provided to qualified candidates based on academic proficiency, background training, and interest for research in specific areas; appointments are limited to 0.49 FTE; a student must make satisfactory progress on their degree to maintain an assistantship; must participate in the mandatory employee health insurance plan, and that "[i]n recognition of their employment status, tuition for graduate assistants is usually paid from the research project."

49. Mindy Crandall is currently a Ph.D. graduate student in Applied Economics, which is an interdisciplinary program administered through the Graduate School. Crandall's career goal is to teach and she does not plan on doing research. Crandall worked as a GRA during her time as an OSU master's degree student and during the first two years of her Ph.D. program. In 2009, she began her Ph.D. program and held an unrepresented GRA appointment, in what was previously called the Department of Agricultural and Resource Economics (AREc). As part of their degree requirements, AREc students were expected to conduct a combination of research and service and obtain teaching experience as a primary instructor or a teaching

assistant in up to two academic courses. AREc GRAs who were appointed to tasks that were primarily in support of projects distinct to the academic work necessary for their degree were included in the bargaining unit. Crandall's work on her faculty advisor's research project was not directly related to her thesis.

50. In May 2012, the Department of Forest Engineering, Resources and Management (FERM) had 4 represented and 21 unrepresented graduate assistant appointments. FERM students are expected to teach one term to gain experience. GRAs are supervised by a faculty advisor and associated with a faculty research project, which normally serves as a basis for the student's thesis.

51. From January through June 2010, Crandall was assigned to an unrepresented FERM GRA appointment. Crandall worked on an Integrated Landscape Analysis Project, during which she developed community level data for a large Forest Service grant. The research project was not relevant to her thesis work. From July 2010 through June 2011, Crandall was in a GRA position, which included 23 percent teaching duties designated as service work. The Department placed Crandall's appointment into the bargaining unit after she pointed out that a portion of her appointment had been designated as service work. In May 2011, Crandall received her annual evaluation from her faculty advisor, which was based partly on her GRA teaching and research duties. In June 2011, FERM renewed Crandall's GRA appointment without teaching duties and designated the appointment as not included in the bargaining unit. Crandall currently has a graduate fellowship.

52. Daniel Ritter is a graduate student in Applied Economics and has a 0.49 FTE unrepresented GRA appointment in the Department of Agricultural and Resource Economics. Ritter applied to and was accepted at OSU and two other schools, and decided to go to OSU because OSU offered him an assistantship and was more in line with both his research interests and where he wanted to live. Ritter's work has varied every quarter and has included data collection, determining county distribution, and conducting some elementary analysis on his faculty advisor's research project on endangered species. In addition, Ritter sometimes helps his current faculty advisor grade papers and is expected to help in some teaching capacity every third term. Ritter took a grant-writing course and wrote a grant for his department directed toward graduate student funding. He meets with his faculty advisor every week. The data Ritter has collected in the research project is not related to his thesis. He expects to do original research for the thesis, which will likely deal with the impact of Oregon agriculture on endangered species. His thesis work will require data collection similar to that performed in his current research project, which has helped Ritter identify potential sources of data. He is expected to work approximately 20 hours per week, but the actual time varies due to project-based deadlines. His starting and ending times are flexible, although his faculty advisor has required him to be available at certain times on certain projects.

53. As of May 2012, the Department of Forest Ecosystems and Society (FES) had 30 represented and 24 unrepresented graduate assistant appointments.

54. Stacey Frederick is a FES graduate student in a master's degree program. As an undergraduate research assistant, Frederick had previously worked in the same lab and on the same project with her current faculty advisor. Frederick sought admission to and was accepted into the master's degree program after her current faculty advisor recruited her to work on the research project as a graduate student. Frederick has a 0.49 FTE unrepresented GRA appointment and is currently working on a general population survey as part of a research project funded through the Joint Fire Science Program, examining public knowledge of and perceptions about smoke management and agency communications. Frederick is interested in the human side of natural resource problems and hopes to work for a federal agency. Frederick will use some of the work from the current survey, but not the majority of it, for her thesis. Frederick also took an area from her advisor's research project to develop a tag-on survey for her thesis, for which she sought and received funding. Frederick's faculty advisor will use the work on the current project to obtain another project. Frederick meets regularly with her OSU faculty advisor and corresponds by e-mail with a co-advisor from Ohio State University. Because Frederick's hours are based on project deadlines, they vary. She has not been directed to work any specific number of hours, but averages around 20 hours per week, to a maximum of 60 hours.

55. The Entomology Program Graduate Student Handbook states that GRAs are expected to work an amount of time commensurate with their FTE, so that a 0.49 FTE GRA "is expected to spend 20 hours per week throughout the year, on an approved project(s). If the thesis topic is related to the project, the time spent on the thesis research can be applied to this schedule."¹²

56. In May 2012, the Department of Nuclear Engineering and Radiation Health Physics had 7 represented and 38 unrepresented graduate assistant appointments. The Department's Graduate Student Handbook provides that graduate assistants are required to carry out duties assigned by their faculty advisor to justify their stipend and expected to provide a level of service proportional to their FTE, which may be in addition to time required for their thesis research.

57. In May 2012, the College of Earth, Oceanic, and Atmospheric Sciences (CEOAS) had 8 represented and 51 unrepresented graduate assistant appointments. Pursuant to the CEOAS Graduate Handbook, 0.49 FTE GRAs "work on research duties assigned by their faculty research supervisors an average of 20 hours per week, or at least 15 hours per week during the regular academic year and full-time during the summer. * * * Advanced students usually pursue their thesis research full-time as fulfillment of their assistantship duties." In addition, renewal of a GRA appointment is dependent on satisfactory performance and funding. The Handbook provides that GTA appointments are for students interested in teaching or lecturing experience.

58. John Osborne is a CEOAS Ph.D. student and holds an unrepresented 0.49 FTE GRA appointment. Osborne's research project is related to his faculty advisor's interest in the dynamics of the coastal ocean and the application of the method of data assimilation to understand those dynamics. Osborne studies how wind-driven and tide-driven circulation

¹²The record does not include the number of Entomology Program graduate assistants or their bargaining unit status.

influence each other in the coastal ocean, which involves analyzing and processing observational data and preparing, running, and analyzing ocean and atmospheric models. Osborne's GRA appointment is primarily related to fulfilling his degree requirement and he will probably use research he collected during the project in his dissertation. His advisor has also asked Osborne to provide him with unrelated information to help him seek other grants and to share information or data analysis with other individuals. He sees his faculty advisor frequently because his office is across the hall. He is expected to work professional hours on his current project, which equates to approximately 40 hours per week. During some of this time, he works on his thesis. In the fall of 2011, Osborne worked on a different research project in the Indian Ocean, which was unrelated to his dissertation, because he and his advisor thought it would be a good opportunity to learn the work of his ocean-going colleagues. Osborne was previously a Union officer and served as a bargaining team member. He believes his current designation as an unrepresented GRA is consistent with the bargaining unit definition.

59. As of May 2012, the Geosciences Department had 57 represented graduate assistants. In 2008, Geosciences Department Chair Aaron Wolf decided that all department GRAs should be included in the bargaining unit because none of them were involved in research that was solely or primarily for their dissertation or thesis. Wolf did not consult with the OSU Human Resources Department before making this decision.

60. Matthew Loewen is a graduate student in the Geosciences Department, which is now part of CEOAS. He holds both a GTA and GRA appointment, which are both represented, for a total of 0.49 FTE. As a GTA, Loewen works in the plasma lab, where he assists outside and internal users in the operation of, and provides general maintenance for, a laser ablation system connected to a mass spectrometer. As a GRA, Loewen's primary research group is Volcanology, Igneous, Petrology, and Economic Resource Group (VIPER), which studies magma in the earth. This group includes both represented and unrepresented GRAs. VIPER participants read and discuss similar background papers that are relevant to their thesis topics and help each other learn different lab instruments. Loewen has the same faculty advisor for both appointments. Loewen typically works from 8:30 a.m. to 6:00 p.m., but his hours may vary.

61. In May 2012, the Department of Botany and Plant Pathology (BPP) had 29 represented and 26 unrepresented graduate assistant appointments. The BPP Graduate Student Handbook lists the criteria for the acceptance of graduate assistants; these include the applicant's merit, available faculty in the applicant's area of interest who are willing to serve as an advisor, facilities and resources to support the applicant's thesis research, and compatibility between the applicant's academic training and area of interest and BPP staffing needs. Under the Handbook, graduate assistants appointed to a 0.455 FTE are expected to spend 16 to 18 hour per week on their appointment and the faculty advisor, who determines the nature of the graduate assistant's research activities, "is encouraged to expect the student to spend some portion of this time on research or activities unrelated to the thesis work."

62. Joanna (Caity) Smyth is a BPP graduate student. She has a 0.1 FTE GRA appointment through BPP and a 0.39 GTA appointment in the Biology Department, which are both designated as unrepresented. Smyth's GRA appointment involves performing work related

to her faculty advisor's maize gametophyte (pollen) research project. Smyth's responsibilities include handling everyday tasks in the lab, such as seed counting, screening for genotypes, planting, DNA preps, and data collection. Her research responsibilities are related to work she needs to learn for her degree, and includes working with both the lab's corn and her own. Some of the work may relate to the research for her thesis topic, but the majority of her work is for the lab. Smyth has leeway in determining her hours except when her faculty advisor establishes a specific time for tasks such as seed planting. Smyth works with undergraduate students, a faculty research assistant, and her supervisor.

Smyth's GTA appointment includes work as a teaching assistant in an upper class undergraduate lab for Biology majors and working as an assistant in another lab. Smyth is responsible for developing an introductory lecture, designing quizzes, and grading and proctoring exams. In her GTA appointment, she works approximately 22 to 25 hours per week, which she is required to record on a time sheet. Her GTA appointment is related to the requirement that she teach two quarters under her Ph.D. program and is intended to prepare her for her career goals, which likely will include teaching. Smyth had a GTA appointment the prior year, which was not part of her degree requirement, and she believes she was included in the bargaining unit during that time. Smyth takes 16 hours of research class credits, which she uses to work on her thesis.

63. Kevin Weitemier is a BPP graduate student and has two GRA appointments for a combination of 0.40 FTE. In his 0.30 FTE appointment, which is not considered to be part of the bargaining unit, Weitemier works in his faculty advisor's lab on two principle projects related to strawberries and milkweed. He is currently working on sequencing the genome of milkweed. Weitemier's thesis is also about milkweed, but he is looking at a different species than that in his faculty advisor's research project. The data collected in this research project will not be used in his thesis, but the research and training from his faculty advisor will assist him in developing his own tools for his thesis project. His experience in the lab is also relevant to his degree. Weitemier's 0.10 GRA appointment, which is considered part of the bargaining unit, involves working in the Herbarium, where he preserves, stores, catalogues, and prepares plant specimens. He works under a different supervisor in the Herbarium. Weitemier's hours are flexible and are to be split between the two appointments. Weitemier's thesis work is done outside this time. He was recently required to make up time he took off from the Herbarium to travel through Nevada collecting plant samples for his thesis.

64. The Electrical Engineering and Computer Sciences Department (EECS) has 57 represented and 109 unrepresented graduate assistant appointments.

65. Sean McGregor is an EECS graduate student, who originally met his faculty advisor during an undergraduate research project. When McGregor applied to OSU, he communicated with his current faculty advisor about the different research projects that were available. He was accepted into three Ph.D. programs and decided to go to OSU, in part because it offered him a one-year assistantship. McGregor's faculty advisor allowed him to select the research project he would work on, which he did based on his interests. He has a 0.49 FTE unrepresented GRA appointment.

McGregor is currently working on the development of software for a wildfire simulator to do reinforcement learning. The work is related to his faculty advisor's research project and the advisor is required to provide progress reports to the funding organization. McGregor's research work may be potentially related to his thesis, but he has not been in the program long enough to identify a topic. McGregor's faculty advisor assigns him work by identifying development goals he is expected to achieve. His faculty advisor annually evaluates his performance as a graduate student based on a variety of factors, including research and scholarly activities performed during the review period; journal, conference, or workshop papers/posters; GTA/GRA duties; other progress; service, such as on committees; and career goals and desired skills. McGregor works between 5 and 60 hours per week, for an average of 20 hours per week. McGregor also developed an independent research project with other graduate students, which was unrelated to his faculty advisor's research project and outside of his faculty advisor's expertise. To maintain ownership of the independent project, McGregor and the other graduate students worked on the project during their free time and did not use OSU resources.

66. Sean Smith is a graduate student in a Ph.D. program in Materials Science, which is an interdisciplinary program involving EECS; Forestry; the Chemistry Department; and the Mechanical, Industrial, and Engineering Department. When Smith applied to OSU, he was offered programs by several faculty members. Smith selected his current advisor's program because he was interested in the research being conducted and his advisor promised to support him financially throughout his studies. Smith has a 0.49 FTE unrepresented GRA appointment in the Chemistry Department. Smith's research work is related to his faculty advisor's current grant project or is preliminary work on potential future projects. Smith works on several projects, including preparing and analyzing samples, reading papers, thinking of new experiments, and preparing presentations and posters. He also works on a project which he is hoping to use in his thesis related to a novel solution-based method of depositing thin films for electronic applications. Smith has group and individual meetings with his faculty advisor on a weekly basis. On the projects more closely related to his thesis area, Smith and his faculty advisor mutually determine how to proceed by making suggestions and talking about similar working papers they have read. Sometimes his faculty advisor will ask Smith to help with another student's project, train students on the use of tools, and help another student grade papers. Smith created a poster that his advisor will present at a conference and was asked to mentor other graduate students to help with the research work. Smith has not identified his thesis title, but the research work he is doing is in his thesis area, will help him identify a topic, and is part of his educational experience. He works an average of 45 hours per week.

67. Robin Hess is a Ph.D. graduate student in EECS and has a 0.49 FTE unrepresented GRA appointment. Hess is working on a project to develop a system to understand and interpret American football game video for the purpose of advancing knowledge of computer vision research. When Hess began graduate school, he approached his current faculty advisor and asked to work on the football project after he became aware that his advisor had funding for the project. Hess' GRA appointment has always focused on the same project, but at one point in the past, the project funding source changed. At that time, Hess was required to produce benchmarks for the funding agency, so he asked his advisor to put him in the bargaining unit, which his advisor did. Since Hess has completed his classroom work, all of his current degree work is research oriented. The research work Hess conducts for his faculty advisor and

for his thesis are essentially the same. Hess was required to sign an agreement assigning rights related to his research work to OSU. At one point, a company contacted Hess about using his work on the research project. Hess put the company in touch with his advisor, who negotiated an agreement to use the work. Hess will not receive any royalties under the agreement. His work has helped his advisor build a narrative that will allow him to keep doing research. Hess' advisor meets with him once a week and suggests methods for Hess to investigate. Hess is expected to work at least 20 hours per week, but often works more.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this dispute.
2. The petitioned for employees are “public employees” under ORS 243.650(19).
3. The proposed unit of all graduate students with Graduate Teaching Assistant or Graduate Research Assistant appointments, or a combination of GRA and GTA appointments, employed by Oregon State University with a minimum 0.15 FTE appointment, excluding supervisory, confidential, and managerial employees, is an appropriate bargaining unit.

DISCUSSION

The Union currently represents an existing bargaining unit of graduate students with GTA and GRA appointments. This bargaining unit, which was the result of a consent election agreement, excludes “graduate students with GTA or GRA appointments in their capacity as students who are teaching or performing research primarily to fulfill an advanced degree requirement.” Through this petition, the Union now seeks to add this excluded category of graduate assistants into its bargaining unit.

OSU objects to the proposed expansion of the existing bargaining unit. OSU’s primary argument is that the petitioned-for graduate assistants are not employees within the meaning of ORS 243.650(19) because they are teaching or performing research primarily to fulfill their advanced degree requirements. OSU also argues that because the petitioned-for graduate assistants perform their research or teaching duties for different reasons than the graduate assistants in the existing unit, the two groups do not share a sufficient community of interests.

Public Employee Status

We first determine whether the petitioned for individuals are public employees under the Public Employee Collective Bargaining Act (PECBA). This question presents an issue of statutory interpretation concerning the meaning of the term “employee” as used in ORS 243.650(19). Our goal in interpreting and applying statutes is to determine and give effect to the legislature’s intent. ORS 174.020(1)(a); *Marion County Law Enforcement Association v. Marion County*, Case No. UP-24-08, 23 PECBR 671, 687 (2010). We use the methodology explained in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), that was

subsequently modified by amendments to ORS 174.020¹³ and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). We first examine the text and context of the statutes and then consider any relevant legislative history the parties offer. If we are unable to determine the legislature’s intent after examining the statute’s text, context, and legislative history, we then apply maxims of statutory construction. *Bureau of Labor and Industries*, 317 Or at 612.

ORS 243.650(19) defines a public employee as “an employee of a public employer but does not include elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under section 41, Article I of the Oregon Constitution, or persons who are confidential employees, supervisory employees or managerial employees.” The parties have stipulated that OSU is a public employer, and OSU does not assert that the petitioned-for individuals fit into any of the enumerated exceptions to the definition of public employee listed in the statute. Thus, the sole remaining issue is whether the petitioned-for graduate assistants are “employees” of OSU or, as the Respondent asserts, they are students.

OSU contends that we conclusively determined the legislature’s intent regarding the meaning of the term “employee” as used in ORS 243.650(19) when we decided *University of Oregon Graduate Teaching Fellows Federation v. University of Oregon*, Case No. C-207-75, 2 PECBR 1039 (1977) (*U of O*). In *U of O*, we first concluded that University of Oregon graduate assistants teaching or performing research “which is not a requirement for an advanced degree are employed by the University to perform a service for a fee. As such, they are employees.” *Id.* at 1049. With little explanation, we then held that:

“A traditional employer-employee relationship does not exist when an individual is teaching or performing research to fulfill a degree requirement, even though the individual is being reimbursed for such service. Income for such service is not taxable income. Such an individual is a student and not a public employee.” *Id.*

OSU argues that our decision in *U of O* is controlling. After careful consideration, we disagree. First, we note that the 1977 order contains little explanation of the reasons for the decision to exclude graduate assistants who were performing their duties as part of a degree requirement. In fact, the only specifically listed basis for the decision was that the income

¹³The relevant portions of ORS 174.020 provide that:

“(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

“(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

“* * * *”

“(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.”

received by the students was not considered taxable income by the IRS. Given the absence of other factors cited in the decision, we presume that the tax treatment of the income was a primary factor. However, the tax treatment of the stipends paid to the petitioned-for employees changed after the Tax Reform Act of 1986. The stipends paid for teaching and research are now required to be treated as taxable income regardless of whether an individual's research and teaching duties are performed as a requirement for receipt of an advanced degree.¹⁴

This change alone is sufficient to revisit our conclusion in *U of O* and to consider the employee status of the petitioned-for employees independently. However, even absent this change, we would still refuse to apply our holding in *U of O* for a second reason. Whether an employee-employer relationship exists is necessarily a fact specific inquiry which must be decided based upon the totality of the circumstances. The prior case involved a different labor organization at a separate university, and thirty-five years have passed since the case was decided. These differences, coupled with the lack of explanation for the results in the *U of O* decision, necessitate an independent decision based upon a careful review of the merits of the petition and the facts in the record.¹⁵

Further confirmation of the changed circumstances between now and 1977 can be found at the University of Oregon, where the GTFF bargaining unit has been expanded to include the graduate assistants that we previously deemed to be non-employees in *U of O*. This change occurred when, twenty years after the *U of O* case was decided, the association and the university entered into a consent election agreement allowing the previously excluded graduate assistants an opportunity to vote to determine whether they would be represented. The eligible employees voted in favor of representation, and on March 9, 1998, this Board certified the GTFF as the

¹⁴This change is reflected in the Internal Revenue Code (IRC) Section 117. 26 USC § 117, Section 117(a) allows taxpayers to exclude "qualified scholarships" from their taxable income, but Section 117(c) excludes GTA and GRA stipends from the definition of "qualified scholarships," stating that subsection (a):

"shall not apply to that portion of any amount received which represents *payment for teaching, research, or other services* by the student required as a condition for receiving the qualified scholarship." IRC § 117(c)(1). (Emphasis added.)

For the purposes of determining taxable income, "the Oregon legislature intended to make Oregon personal income tax law identical to the Internal Revenue Code * * * subject only to modifications specified in Oregon law." *Ormsby v. Dept. of Rev.*, 18 OTR 146, 151 (citing ORS 316.007). No such exceptions apply to the graduate assistants at issue in this case, and as a result, the income is taxable under both federal and Oregon law.

¹⁵In addition to the tax treatment of graduate student stipends, the nature of the academic world's reliance upon GRA and GTAs has also changed. Universities, both public and private, are leaning more and more on graduate students to provide teaching and research services which they might not otherwise be able to afford to engage in. The dissent written by members Liebman and Walsh in *Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America., UAW, AFL-CIO*, Case No. 1-RC-21368, 342 NLRB 483, 175 LRRM 1089 (2004), contains a detailed summary of several recent scholarly works that discuss and summarize these changing trends. See *Brown University*, 342 NLRB at 493, fn 1, and 497-500.

representative of the entire GTFF unit for collective bargaining purposes, regardless of whether the duties were performed primarily in pursuit of their degrees or for other purposes. *Graduate Teaching Fellows Federation, Local 3455, AFT, AFL-CIO v. University of Oregon*, Case No. UC-56-97 (1997).

Having concluded that our holding in *U of O* is not controlling, we next look to the text and context of ORS 243.650(19), the provision that defines a “public employee.” In interpreting statutes, we give words of common usage their plain, natural, and ordinary meaning. *PGE*, 317 Or at 611. The PECBA’s definition of a “public employee” as “an employee” of a public employer is extremely broad, and subject only to the specific limitations inserted into the statute by the legislature. We find that the term is unambiguous and should be given its ordinary meaning, under which the primary indicia of employee status are that an individual performs work or services for an employer in exchange for wages or salary. This common sense, straight forward approach is the one we took in a similar situation in *International Association of Fire Fighters v. LaPine Rural Fire Protection District*, UC-38-91, 13 PECBR 403 (1992). In that case, we concluded that:

“Roberts’ Dictionary of Industrial Relations (BNA, 1971), in defining ‘employee’ at p. 117, states that ‘[i]n general usage the term ‘employee’ covers all those *who work for a wage or salary* and perform services for an employer.’ (Emphasis added.) We simply find no reason to conclude that the 1973 legislature, when it enacted the Public Employee Collective Bargaining Act (PECBA), intended the term ‘employee,’ as used in subsection (14) and elsewhere in the Act, to have other than that general meaning.” 13 PECBR at 408.

We see no reason to deviate from this definition in the present matter, but we would modify it to also incorporate the right to control test we have utilized when determining whether individuals are employees of a public employer or independent contractors. *Hillcrest-MacLaren Education Association v. Hillcrest and MacLaren Schools*, Case No. UC-39-89, 12 PECBR 19, 27 (1990) (citing *Great American Ins. v. General Ins.*, 257 Or 62, 66–67, 475 P2d 415 (1970)); see also *IBEW v. City of Siletz*, Case No. RC-12-11, 19 PECBR 178 (2001). The right to control is an essential element in an employment relationship, and should be considered alongside the indicia listed in *International Association of Fire Fighters v. LaPine Rural Fire Protection District*, Case No. UC-38-91, 13 PECBR 403, 408 (1992).¹⁶

OSU argues that the legislature intended to follow the National Labor Relations Board’s (NLRB) definition of employee under the private sector National Labor Relations Act (NLRA), and we should defer to cases decided under that statute. They contend that, under *Elvin v.*

¹⁶While the right to control test is appropriate for use in cases specifically involving the question of independent contractor status, it is not by itself an appropriate standard to define who is an employee under the statute in this dispute. Further, because OSU has not asserted that the graduate assistants are independent contractors, we need not address the issue in significant detail in this order. However, we do find that it was the legislature’s intent that under the PECBA the employer must have the right to control an employee before an employer-employee relationship is created.

OPEU, 313 Or 165, 832 P2d 36 (1992),¹⁷ we are bound by the NLRB's decision in *Adelphi University and Adelphi University Chapter, American Association of University Professors*, Case No. 29-RC-1640, 195 NLRB 639, 79 LRRM 1545 (1972). We disagree. While the PECBA was modeled after the NLRA, the statutes are not identical and there are significant differences that have often led us to follow a different path than the ones taken by the NLRB. As we noted in *International Union of Operating Engineers, Local 701 v. Klamath Irrigation District*, C-65-76, 2 PECBR 894 (1976),

“[t]he essence of Respondent's argument is that since the NLRA excludes agricultural laborers from its coverage, and the NLRB has stated irrigation workers are agricultural laborers, and since some Oregon laws exclude such workers from their coverage, this Board must assume that the Oregon legislature intended to exclude irrigation workers from the coverage of the Public Employees' Collective Bargaining Act. However, in choosing its definition of a public employe set forth in ORS 243.650(17), the legislature considered federal and Oregon laws. The resulting statute differs substantially from federal labor law and from state law relating to private employes. Rules of statutory construction cannot be used to create an excluded category of employes where there is no evidence of legislative action of intent to exclude such employes.” 2 PECBR at 898.

We do not find that the legislature intended for us to strictly follow NLRB precedent in defining the term employee as used in ORS 243.650(19). The record is devoid of any evidence of legislative intent to exclude the employees at issue. Rather, as we discussed above, the 1973 legislature intended the word employee to have a general and inclusive meaning.

In addition, we disagree that the case cited by OSU, *Adelphi University*, is applicable even if we accepted the argument that NLRB's cases are binding on us in this matter. *Adelphi University* dealt only with an assertion by the employer that the appropriate bargaining unit for regular faculty members of the university should include graduate assistants who engaged in teaching and research and received stipends for their service. The NLRB disagreed, noting that the graduate assistants at issue were “primarily students” and had no community of interest with the regular faculty members. *Id.* at 640. The case did not, however, determine that the graduate assistants were not employees under the NLRA.

One year after *Adelphi University* was decided, and after the PECBA was enacted, the NLRB concluded that research assistants who performed research duties primarily for academic reasons were not employees under the NLRA. *The Leland Stanford Junior University and The Stanford Union of Research Physicists*, Case No. 20-RC-11813, 214 NLRB 621, 87 LRRM 1519 (1974). Like the *U of O* case discussed above, the NLRB in *Leland Stanford* focused in part on the tax treatment of the stipends paid to the research assistants, stating that, “[s]ignificantly, the payments to the RA's are tax exempt income.” *Id.* at 622. They then concluded that the research

¹⁷In *Elvin v. OPEU*, the Oregon Supreme Court noted that the PECBA is modeled after the NLRA and similar in structure, language and purpose. 313 Or at 175 n 7. Accordingly, the Court instructed us to interpret the PECBA by looking to decisions issued under the NLRA prior to the enactment of PECBA in 1973. *Id.* at 177-79.

assistants were primarily students and not employees subject to the Act, citing to *Adelphi University* in support of this position. *Id.* at 623.

We do not find *Leland Stanford* persuasive authority. It was decided after PECBA was enacted by the legislature and prior to the 1986 changes to the tax code which made the petitioned-for Oregon graduate assistants' income taxable. Further, *Leland Stanford* was overruled by the NLRB in 2000 by *New York University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO*, Case No. 2-RC-22082, 332 NLRB 1205, 165 LRRM 1241 (2000). In that case, the NLRB rejected the distinction between employee and student, stating:

“Stripped to its essence, the argument of the Employer and others is that graduate assistants who work for a college or university are not entitled to the protections of the Act because they are students. The Board’s broad and historic interpretation of the Act rejects such a narrow reading of the statute. Accordingly, we will not deprive workers who are compensated by, and under the control of, a statutory employer of their fundamental statutory rights to organize and bargain with their employer, simply because they also are students.” *Id.* at 1209.

A mere four years later, the NLRB again reversed direction and overturned the *New York University* decision in *Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW AFL-CIO*. Case No. 1-RC-21368, 342 NLRB 483, 175 LRRM 1089 (2004). It now appears that the NLRB may be ready to once again change its approach, as they recently granted reconsideration and invited briefs in two cases to address the issue of whether *Brown University* should be modified or reversed. *New York University*, Case No. 02-RC-023481 (June 22, 2012) and *Polytechnic Institute of New York University*, Case 29-RC-012054 (June 22, 2012).

Given the inconsistencies in the NLRB’s approach to the treatment of graduate assistants as employees or non-employees, we will not adopt its reasoning. The NLRB’s approach would essentially create an exception to the definition of public employee where the legislature did not see fit to incorporate one into the statute.¹⁸ We are unwilling and unable to do so. We are also troubled by the NLRB’s approach because it unnecessarily requires this Board to delve into the subjective motivations of the parties to determine whether the relationship between GRAs and GTAs and OSU is primarily economic or primarily educational. While we are obligated under certain provisions of the PECBA to review the motives of the parties for their actions or decisions, we need not and should not engage in such speculation in reviewing whether an individual is an employee. Rather, we should focus on the objective factors contained in *LaPine RFPD*.

¹⁸Under ORS 174.010, the our role is “simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.” Adopting the NLRB’s approach is inconsistent with this rule.

The alternative approach taken by the NLRB would require us to create a false dichotomy: that one must either be a student or an employee. We reject this notion and find that it is possible to be both a student and an employee. Nothing in the statute suggests that the two are incompatible, and we are not inclined to create such a distinction or carve out an exception where the legislature has not done so.

In summary, we conclude that the legislature intended the term employee, as used in ORS 243.650(19), to mean an individual who: (1) performs services for another person or entity, (2) in return for wages or salary, (3) under the control or right to control of the employer.¹⁹

We apply this definition to the facts in this case. In doing so, we conclude with little difficulty that the petitioned for individuals are employees of OSU and are “public employees” under ORS 243.650(19). It is undisputed that the petitioned for GRAs and GTAs perform research and teaching services for OSU. OSU’s primary purposes are teaching and research, the same areas in which the petitioned-for individuals provide their service. Clearly, the graduate assistants provide a significant benefit to the university through their labor. The services they perform are largely the same as the services performed by members of the current bargaining unit represented by the Union who are considered employees. As a result, the petitioned-for employees clearly meet the requirement that they perform services or work for OSU.

It is further undisputed that the petitioned for graduate assistants receive payment in the form of monthly stipends and lump sum payments. The stipends and lump sums are taxable wages, and OSU-OSBHE is listed as the employer on the graduate assistants’ W-2 forms. The level of stipend is based upon the amount of time the graduate assistant is expected to work under their appointment, as determined by OSU. Graduate assistants also receive benefits from OSU, including tuition remission and employer contributions to health insurance premiums. Accordingly, we conclude that the graduate assistants receive salary or wages in exchange for their services to OSU.

Finally, while not an issue raised by the employer, we find that OSU does maintain the right to control the graduate assistants in their work. OSU controls the fruits of the labor of its GRAs and GTAs through its intellectual property rules. OSU selects graduate assistants through a competitive process and sets the minimum standards for students to maintain those appointments. OSU also pays the graduate students directly through its payroll system, withholds income taxes from the stipends, pays workers compensation insurance for the students, sets the FTE rate for the appointments, and determines the expected number of hours to be worked by each GRA and GTA as well as the maximum number of hours employees can work.

The petitioned-for graduate assistants perform services for OSU in return for wages or salary, and OSU maintains the right to control the graduate assistants. As a result, we conclude

¹⁹This approach is nearly identical to the approach taken by the United States Supreme Court in defining who is an “employee” subject to the NLRA. In *NLRB v. Town & Country, Inc.*, 516 U.S. 85, 91-92 (1995), the Court held that an employee-employer relationship exists when a servant performs services for another, under the other’s control or right of control, and in return for payment. *Id.* at 90-91, 93-95.

that the petitioned-for individuals are employees of OSU, and as a result, are “public employees” under ORS 243.650(19).²⁰

Community of Interests

OSU also objects to the petition on the grounds that the petitioned-for employees lack a sufficient community of interest with the existing unit. In determining whether a proposed unit is appropriate, we consider the community of interest, wages, hours, and other working conditions of the employees involved, as well as the history of collective bargaining and the desires of the employees. ORS 243.682(1)(a). Community of interest factors include similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, and common supervision. OAR 115-025-0050(2).

This Board has discretion to determine how much weight to give each factor. *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001). We also consider the policies and preferences developed by this Board in determining the more appropriate bargaining unit. *Oregon Workers Union v. State of Oregon, Department of Transportation, and Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. RC-26-05, 21 PECBR 873, 883 (2007).

OSU’s primary concern is that, because of the different reasons for the individuals performing services as GRAs or GTAs, the petitioned-for individuals and the existing bargaining unit members have distinct community of interests. Having already concluded that an individual’s primary reason for accepting appointment as a GRA or GTA is not determinative of employee status, and having analyzed each of the statutory community of interest factors, we find that the two groups share a sufficient community of interest to form an appropriate bargaining unit.

The wages, including stipends and the \$300 lump sum differential, are the same for both groups based upon the FTE status of the graduate assistants as determined by OSU. The two groups also receive the same benefits, including tuition remission, employee health insurance, and employer paid workers’ compensation insurance. OSU pays 85 percent of the employee-only premiums for members of both groups.

The petitioned-for employees and the existing unit are all on the same FTE scale, with appointments ranging from .15 FTE to .49 FTE. The hours expected of each employee are

²⁰OSU also raises the argument that collective bargaining between the university and the petitioned-for graduate assistants would be difficult or impossible due to the academic reasons for the research and teaching performed by the assistants. This concern is mirrored in the NLRB’s decision in the *Brown University* case. However, as noted above, pursuant to a consent election agreement entered into by OSBHE and the GTFF, the University of Oregon currently collectively bargains with graduate assistants regardless of the reasons for their teaching and research activities. OSBHE would be a signatory to any collective bargaining agreement between Petitioner and Respondent, and there is nothing in the record to indicate that what is working at the University of Oregon would not work at OSU. Collective bargaining is a dynamic process that is suitable to a wide range of work environments. We have no reason to believe that OSU and the Union could not adopt a process that works for both parties.

determined by the FTE status of their appointment, and all employees are required to work no more than .49 FTE or a total of 255 hours. The working conditions of the groups are similar as well, with both groups performing the same types of services in the same general environment within the university. All graduate assistants are supervised by faculty members and all are subject to many of the same policies of OSU, including the policies on intellectual property and conflicts of interest discussed above.

The showing of interest submitted by the Union is sufficient to establish that the employees desire representation. And while there has been no history of collective bargaining with the unrepresented employees, OSU has traditionally passed on all negotiated benefits to the unrepresented employees. Further, there are a number of employees who have received appointments to positions within the bargaining unit, as well as appointments that were excluded from the unit. Many graduate assistants have moved in and out of the bargaining unit during their time at OSU.

In summary, while there may be some legitimate differences between the two groups of employees, there are more similarities than differences. Any existing differences are insufficient to render the proposed unit inappropriate for collective bargaining. As a result, we find that the petition proposes a unit appropriate for collective bargaining.

ORDER

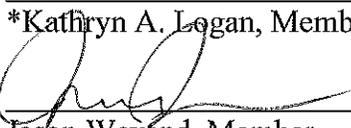
1. An appropriate bargaining unit is: all individuals with Graduate Teaching Assistant or Graduate Research Assistant appointments, or a combination of GRA and GTA appointments, employed by Oregon State University with minimum 0.15 FTE appointment, excluding supervisory, confidential, and managerial employees.

2. The Elections Coordinator shall conduct a secret ballot election amongst the unrepresented employees in the above bargaining unit for eligible employees to determine whether they wish to be represented by the Union for the purposes of collective bargaining. Eligible voters are unrepresented GRA and GTAs with a minimum 0.15 FTE appointment at OSU who are employed at the date of this Order and are still employed at the close of the election. The choices on the ballot shall be: Coalition of Graduate Employees Local 6069, AFT and No Representation.

DATED this 4 day of January, 2013.



Susan Rossiter, Chair

*Kathryn A. Logan, Member


Jason Weyand, Member

This Order may be appealed pursuant to ORS 183.482.

*Member Logan Dissenting

The majority holds that the petitioned-for graduate students are public employees within the meaning of ORS 243.650(19). They are not. Rather, they are students who are fulfilling degree requirements to complete their course of education.

We previously addressed this issue in *University of Oregon Graduate Teaching Fellows Federation v. University of Oregon*, Case No. C-207-75, 2 PECBR 1039 (1977), where we concluded that graduate students who teach or perform research as a degree requirement are not public employees because a “traditional employer-employee relationship does not exist * * *.” *Id.* at 1049. We based our decision on Oregon past practice and law, both of which have remained unchanged since our decision.

The majority holds that our prior opinion is no longer good law because it contains little explanation, the statute does not specifically exclude students as public employees, and the statement that the students’ “[i]ncome for service is not taxable income” is no longer correct. Neither lack of an explanation in a Board order, nor lack of a specific statutory exclusion is a sufficient basis for discounting a prior decision. The majority also does not claim that a previous Board erred when it made its decision. *See American Federation of State, County and Municipal Employees, Council 75, Local 189 v. City of Portland*, Case No. UP-46-08, 24 PECBR 1008 (2012) (the Board erred when it failed to apply a prior Board decision holding that a subject for bargaining was permissive rather than mandatory). Nor does the majority hold that a change in Oregon law requires a different result. Rather, the majority opinion presumes that the prior Board’s primary rationale for excluding graduate students from the bargaining unit who are fulfilling degree requirements was the non-taxable status of any monies or benefits provided to such graduate students by the university. Based on that presumption, the majority essentially holds that a change in the federal tax code transforms graduate students into employees. As the presumption is inaccurate, the resulting conclusion is not correct.

I also disagree that the facts have changed in any significant manner since we issued our 1977 decision so as to cause us to ignore our precedent. Further, to assert “changed circumstances” based on a consent election with another university and another bargaining unit is not what this Board has considered in the past as proper grounds for reconsidering and discarding precedent.

The requisite legal analysis is properly described by the majority. We first must review the statutory text and context, consider any legislative history, and if necessary, apply any applicable rules of statutory construction. In interpreting and applying the statute, this Board is to determine and give effect to the legislature’s intent. ORS 174.020(1)(a).

The legislature’s intent is initially found in ORS 243.656, the policy statement for the Public Employee Collective Bargaining Act (PECBA). This statement is built upon recognizing “harmonious and cooperative relationships between government and its employees;” acknowledging that “unresolved disputes * * * are injurious to the public, the governmental agencies, and public employees;” collectively safeguarding the public and employees “from injury, impairment and interruptions of necessary services;” and obligating the state to “protect the public by attempting to assure the orderly and uninterrupted operations and functions of government.” *Id.* Under this language, it is apparent the legislature focused on a “traditional

employer-employee relationship.” Such a relationship does not exist between the petitioned-for graduate students and the University.

This focus continues in ORS 243.650(19), the definition of a public employee:

“‘Public employee’ means an employee of a public employer but does not include elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under section 41, Article I of the Oregon Constitution, or persons who are confidential employees, supervisory employees or managerial employees.”

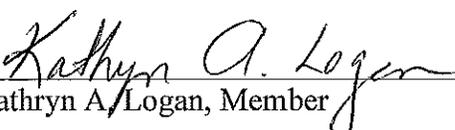
The issue is whether the petitioned-for graduate students are employees of, and employed by, OSU. An employee is “one employed by another usu. in a position below the executive level and usu. for wages.” *Webster’s Third New Int’l Dictionary* 743 (unabridged ed 2002). A “wage” is “a pledge or payment of usu. monetary remuneration by an employer esp. for labor or services usu. according to contract and on an hourly, daily, or piecework basis * * *.” *Id.* at 2568. To “employ” is “to provide with a job that pays wages or a salary or with a means of earning a living.” *Id.* at 743. All of these definitions are contingent upon a traditional employer-employee relationship.

Graduate students completing degree requirements are not “employed” as that term is commonly used. The focus is not on any labor or service or on “earning a living.” Rather, the focus is on their education.

The graduate students applied and were selected by the university to a degree program. The university offered stipends, tuition remission, and other benefits that might entice the graduate students to attend. If the graduate students accept the offer, the university then provides the students with an education tailored to meet the degree requirement, which must be met before the students can graduate. Simply receiving remuneration as part of the entire package for their education does not transform the students into employees.

The majority adopts a test to determine whether an individual is an employee. An employee is “an individual who: (1) performs services for another person or entity, (2) in return for wages or salary, (3) under the control or right of control of the employer.” Order at 25. This test is extremely broad, and according to the majority, incorporates the petitioned-for employees as public employees. The graduate students do not perform services as traditional employees and do not receive a wage or salary as we typically envision. The “control” that exists is simply dependent upon the degree requirements of a graduate student’s program. What the majority fails to consider is that the relationship between graduate assistants and their faculty advisors is not an employer-employee relationship but rather that of a teacher-student relationship.

This matter was correctly decided by the Administrative Law Judge. The petition should be dismissed. Therefore, I respectfully dissent.


Kathryn A. Logan, Member