

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-014-11

(PETITION FOR UNIT CLARIFICATION)

WOODBURN POLICE ASSOCIATION,)

Petitioner,)

v.)

CITY OF WOODBURN,)

Respondent,)

and)

OREGON AFSCME COUNCIL 75,)

LOCAL 642,)

Incumbent.)

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

None of the parties objected to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on May 1, 2012, after a hearing held on October 26, 2011, in Salem, Oregon. The record closed on November 21, 2011, following receipt of the parties' post-hearing briefs.

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

Jason M. Weyand, Legal Counsel, AFSCME Council 75, Salem, Oregon, represented Incumbent AFSCME.

N. Robert Shields, City Attorney, Woodburn, Oregon, represented the City, which took no position on this matter and did not participate in the hearing or briefing.

On April 28, 2011, Petitioner Woodburn Police Association (Association) filed this Petition for Unit Clarification regarding the Code Enforcement employees of the City of Woodburn (City). Those positions are currently represented by Oregon AFSCME Council 75, Local 642 (AFSCME). The Petition seeks to determine whether two employees in the Code Enforcement Officer (CEO) position are more appropriately included in the Association unit under OAR 115-025-0005(6).

AFSCME filed timely objections to the Petition. It argues that the positions are not appropriately included in the Association unit because they lack a community of interest with the Association unit members and that moving them to the Association unit will create a mixed unit of strike-permitted and strike-prohibited employees.

The issue presented for hearing was: Is the position of Code Enforcement Officer, currently represented by AFSCME, more appropriately included in the Association's bargaining unit of Police Officers and Trainees?

RULINGS

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

FINDINGS OF FACT

1. The City is a public employer as defined by ORS 243.650(20). The Association is a labor organization as defined by ORS 243.650(13) and represents the 20 strike-prohibited sworn Police Officers (Police Officers and Trainees) employed by the City, excluding supervisory and confidential employees. AFSCME is a labor organization as defined by ORS 243.650(13) and the exclusive representative of a bargaining unit of 47 strike-permitted positions of the City including the two CEOs.¹

¹In addition to the CEO position, the AFSCME unit contains the following positions: Accounting Clerk II, III; Administrative Assistant-Public Works; Associate Planner; Building Inspector I/Plans Examiner II, III; Bus Driver; CAD/GIS Technician; Clerk I, II, III; Construction Inspector/Engineering Technician; Custodian; Engineering Technician I, II, III; Evidence Technician; Foreman; Industrial Waste Coordinator; Information Systems Technician; Librarian; Library Assistant; Library Assistant/Security Monitor; Library Page; Library Program Coordinator/Security Monitor; Mechanic; Meter Reader; Municipal Court Clerk; Municipal Court Coordinator; Permit Technician; Records Clerk; Sewer Line Maintenance Technician; Transportation Coordinator; Utility Worker I, II, III; Wastewater Lab Technician; Wastewater Operator I, II, III; Wastewater Treatment Plant Maintenance Technician; Water Operator I, II; Water Technician I; and Water Treatment Plant Maintenance Technician.

2. The City and the Association are parties to a collective bargaining agreement that expired June 30, 2011. AFSCME and the City are parties to a collective bargaining agreement in effect from July 1, 2009 through June 30, 2012.

Duties and Skills: Code Enforcement Officers

3. At the time of hearing, the City employed two CEOs. They work much of their time in the field in order to enforce the City's ordinances. Much of their work concerns nuisance abatement and abandoned vehicles, as well as enforcing drinking and behavior restrictions in City parks. CEOs contact members of the public, make enforcement decisions, and issue citations and park exclusions. They write their reports on the same CAD system as Police Officers. CEOs do not respond to or enforce violations of criminal law, are not required to be familiar with Oregon criminal statutes, and do not have the power or training to arrest persons. If an arrest appears necessary, the CEOs contact the Police. They are not trained or equipped to use force except in self defense. Accordingly, they carry handcuffs and Tasers but are not trained or qualified with firearms and do not carry firearms. Neither CEO had ever used handcuffs, Tasers, or any form of force on a person while on the job.

4. CEOs attend the daily briefing held by the Police Patrol Sergeant, and are the only non-management, non-Association employees who do so. The briefings describe recent criminal activity, photographs and descriptions of persons the Police are seeking, and other law enforcement-related information. CEOs are LEDS certified, and sometimes check the names of individuals they contact against the law enforcement database. CEOs will contact Police if the individual is being sought by Police.

5. CEOs occasionally assist Police Officers in traffic control at vehicular accident and crime scenes and locations where search warrants are being executed. They also may help preserve evidence by taking photographs, overseeing individuals on the scene,² or transporting evidence in their vehicles. They engage in this activity approximately once per month. CEOs also may be asked to observe property prior to execution of a search warrant to identify the number of residents and animals.

6. CEOs regularly attend trainings with Police Officers, except for firearms and driving training. Those trainings cover CPR, Taser use, defensive tactics, and police ethics. CEOs are not required to take training from the Oregon Department of Public

²When City Police Officers are engaged in law enforcement activity at a large household, there may be insufficient officers on the scene to monitor all the people and animals, and they are aided by the CEOs.

Safety Standards and Training (DPSST), are not required to be certified by the DPSST (except for the purpose of using LEDS), are not subject to the DPSST moral fitness requirements, and are not required to pass the DPSST physical fitness test. They sometimes train with members of the City's Tactical Services Unit (SWAT Team), where they role play the "bad guy" to aid the training of Police Officers.

7. CEOs are supervised by the Police Detective Sergeant, and do not share a common supervisory chain with any other AFSCME-represented employees except possibly the Records Clerks and Evidence Technicians.

8. Most of the CEO contact with other City personnel is with employees represented by the Association. The CEOs file their reports with AFSCME-represented Police records staff.

Duties and Skills: Police Officers

9. Police Officers work much of their time in the field enforcing traffic and criminal law. They have the power to enforce the City Codes, but generally leave that work to the CEOs. They are trained to use and carry firearms and are authorized to use non-defensive force and to arrest persons.

10. Police Officers attend the daily briefing held by the Police Patrol Sergeant. They are in charge of vehicular accident scenes, crime scenes, and locations where search warrants are being executed. They are responsible for seizing and maintaining evidence. Some of them are full-fledged members of the City's SWAT Team.

11. All City Police Officers are required to attend and pass the 16 week Police program at the DPSST Police Academy. They must also pass the physical fitness test for police officers. After this, and the successful completion of additional on the job training within one year, Police Officers receive their basic DPSST certification which they must receive and maintain to keep their employment.

12. Police Officers are supervised by the Police Detective Sergeant, who is a sworn officer and a supervisor. Police Officers do not share a common supervisory chain with any AFSCME-represented employees except the two CEOs and possibly the Records Clerks and Evidence Technicians.³

³The record does not reveal who supervises the AFSCME-represented Records Clerks and Evidence Technician, but given the nature of their work and the isolation of their location, we infer that at least part of their supervision is from Police officials.

Duties and Skills: Other AFSCME Unit Employees

13. There is little evidence in the record regarding the duties and skills of other positions represented by AFSCME. Review of the wide range of job titles indicates that there are some other AFSCME-represented employees who work in the field and enforce City Codes, such as the Building Inspectors.

Benefits

14. The benefits of AFSCME-represented and Association-represented employees are similar, but are more favorable for the Association's unit members. Both groups accrue sick leave at the same rate. Both groups are eligible for the same medical insurance plans, but Association-represented employees pay five percent of their medical costs while AFSCME-represented employees pay 15 percent of those costs. Association-represented employees receive higher life insurance payouts than AFSCME-represented employees.

15. Association-represented employees accrue vacation time at a higher rate than AFSCME-represented employees. AFSCME-represented employees receive paid holidays off, while the Association-represented Police Officers receive additional vacation accrual in exchange for working on holidays.

16. Association-represented employees are members of the Police and Fire PERS Retirement Program, which provides greater retirement benefits at an earlier retirement age than regular employee PERS.

Interchange or Transfer of Employees and Promotional Ladders

17. There is no standard interchange, transfer, or promotion ladder between CEOs and any other position in either bargaining unit. Three Code Enforcement Officers have become Police Officers in the last five years, but only through the same open competitive process as any other applicant, and through completing a new trial service period and earning DPSST certification. There is no evidence that any other AFSCME-represented employee or Police Officer has ever transferred to a Code Enforcement position.

Common Supervision of the Employees

18. The CEOs and Police Officers share common supervision. The only other AFSCME-represented employees who may share supervision with Association-represented employees are the Records Clerks and Evidence Technician.

Wages

19. The wages of the employees in the 47 positions represented by AFSCME and the employees in the 20 positions represented by the Association are governed by their respective collective bargaining agreements. Both collective bargaining agreements include five salary steps.

20. At the time of hearing, the beginning monthly salary for a Police Trainee (the lowest paid position in the Association bargaining unit) was \$4031.⁴ The beginning monthly salary for a Police Officer was \$4224, with a top monthly salary of \$5643. Police Officers also receive longevity pay after ten years of service if they also have an advanced DPSST certification.

21. At the time of hearing, the beginning monthly salary for the lowest paid positions in the AFSCME unit was \$2226 (Clerk I), and the highest monthly salary was \$4932 (Engineering Technician III). The monthly salary range for CEOs was \$3177 to \$3861. Some AFSCME unit positions are eligible for incentive pay ranging from two to nine and one-half percent of their base salary, but these incentives do not apply to CEOs.

22. Association-represented employees are eligible for additional premium pay, including for DPSST certifications, Motorcycle Patrol, SWAT team, Field Training Officer, Detective, and School Resource Officer. There is no evidence that CEOs would be eligible for any of this premium pay if they were subject to the Association contract. The Association agreement provides for bilingual pay at a higher rate than bilingual pay under the AFSCME contract (seven percent versus two and one-half to three and one-half percent). There is no evidence that the City uses bilingual employees as CEOs.

Hours

23. The CEOs work four 10-hour shifts per week, 8:00 am to 7:00 pm, with one hour for lunch. One of them works Wednesday through Saturday, the other works Monday through Thursday. They do not work night shifts, weekends, or holidays. If they are absent for a day, no one covers their shift. There is no evidence that they work overtime.

⁴These salary amounts are estimates. The record does not contain consumer price index information required to calculate the exact salary range. These figures represent the lowest possible salaries under the City-Association agreement.

24. There is little evidence in the record about the hours of other AFSCME-represented employees. The collective bargaining agreement provides that individual employees may work alternative work schedules.

25. Association-represented employees work 12-hour shifts on a "2-2-3" schedule (employees work two 12-hour shifts, take two days off, and then work three 12-hour shifts for a 28 day work period). Police Officers provide 24/7 coverage, working weekends, nights, and holidays. Association Officers receive vacation accrual instead of holiday time off. The first Police shift extends from 6:00 am to 6:00 pm, and the second shift is 6:00 pm to 6:00 am.

Other Working Conditions

26. CEOs carry a Taser, Asp, pepper spray, and protective gloves. They also carry a Nextel phone using the same frequency and dispatcher as Police Officers. The Police are generally aware of the CEOs' location in the field should CEOs call for assistance. CEOs may also wear ballistic vests, because they may be perceived as a County or City Police Officer when entering private property. They drive unmarked white pickup trucks or trucks marked with the insignia of the City. The trucks do not have sirens.

27. The CEOs wear uniforms whose general appearance is identical to that of Police Officers. CEOs have the designation Community Services where a Police Officer has the designation Police.

There is little evidence of the working conditions of other positions represented by AFSCME. We infer from their job titles that few of them wear uniforms and few of them work in the field. There is no evidence that any other AFSCME-represented employees wear uniforms similar to the Police, use the Police radio frequency, or carry defensive equipment such as Tasers and Asps.

28. CEOs work out of the Police Department building, a separate structure 2.5 miles from City Hall. There are five other AFSCME-represented employees in the Police Department: three Records Clerks and two Evidence Technicians.

29. AFSCME-represented employees have a six-month period of trial service. Association-represented employees serve an 18-month period of trial service.

The History of Collective Bargaining

30. CEOs have been represented by AFSCME for at least 20 years. No other labor organization has previously attempted to organize them. No witness at hearing

could recall a time when any strike-permitted employees were represented by the Association. AFSCME has raised issues of concern to CEOs at the bargaining table.

The Desires of the Employees

31. The CEOs wish to be represented by the Association.

CONCLUSIONS OF LAW

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

2. The Code Enforcement Officers are more appropriately included in the Association bargaining unit.

Standards for Decision

The Association seeks to transfer one strike-permitted position, held by two employees, in the Police Department from the AFSCME strike-permitted bargaining unit to the Association bargaining unit of strike-prohibited employees, under OAR 115-025-0005(6).⁵ Accordingly, our task is to evaluate the two bargaining units to determine if the Association unit is more appropriate for the positions at issue. *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections, and AFSCME, Council 75*, Case No. UC-25-99, 18 PECBR 576, 584 (2000). In determining if the Association bargaining unit is more 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 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 among departments. 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). Although

⁵OAR 115-025-0005(6) permits this Board to clarify "a group of employees who are represented within (as a fragment of) another bargaining unit" into a bargaining unit represented by a petitioning labor organization, if we determine "that it would be appropriate to add the positions in question to the petitioning organization's bargaining unit." If we make such a determination and the showing of interest is adequate, we must order a self-determination election to allow the petitioned-for employees to vote on representation by either the current labor organization or the petitioning labor organization.

the desires of employees is one of the factors this Board uses to determine appropriate bargaining units, it is rarely, if ever, the only determining factor. When there are no clearly distinct community of interest factors favoring a particular proposed unit, this Board does not give controlling weight to employees' preferences. *Oregon AFSCME Council 75 v. City of Ontario*, Case No. RC-1-07, 22 PECBR 260, 275 (2008); *Teamsters Local Union No. 223 v. Yamhill County, and Yamhill County Employees' Association*, Case No. RC-14-07, 22 PECBR 459, 473 (2008). 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). See also *Administrative-Professional Association of Lane County Public Works, Inc. v. Lane County, and AFSCME Local 2831*, Case No. UC-12-09, 24 PECBR 76, 154 (2011).

Because strike-permitted employees lose their right to strike if they are added to a strike-prohibited unit, this Board has a "strong preference for separate bargaining units for strike-permitted and strike-prohibited employees." *Ashland Police Association v. City of Ashland, and International Brotherhood of Electrical Workers, Local 659*, Case No. UC-22-06, 22 PECBR 1, 9 (2007), citing *AOCE v. State of Oregon, Department of Corrections*, Case No. UC-25-99, 18 PECBR 576, 587-88. Accordingly, "we do not lightly make unit determinations that convert statutorily strike-permitted employees to strike-prohibited status. There must be compelling reasons for that result based upon other community of interest factors." *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections, and AFSCME, Council 75*, Case No. UC-24-99, 18 PECBR 441, 450 (2000). Our overriding goal is to group those employees who share the greatest community of interest in the same bargaining unit. *Oregon State Police Officers' Association v. State of Oregon, Department of State Police, and Oregon AFSCME Council 75*, Case No. UC-6-00, 18 PECBR 930, 935 (2000).

When considering a Petition to add strike-permitted employees to a strike-prohibited bargaining unit, we also consider a number of additional factors. They are:

"(1) the percentage of strike-prohibited employees in the bargaining unit; (2) the relationship of the employees' duties to the mission of a law enforcement agency; (3) the uniqueness of the employees' positions; (4) the extent to which other employees with similar duties are organized; (5) the pattern of organization in the work force; and (6) the history and stability of labor relations." *City of Ashland*, 22 PECBR at 9, citing *Washington County Police Officers Association v. Washington County*, Case No. UC-36-00, 19 PECBR 641, 648-49 (2002).

When a petition involves a law enforcement agency, we focus on the degree to which the work of the petitioned-for employees is distinctive to the agency and whether the positions at issue are significantly involved and integrated with a law enforcement mission. *Multnomah County Deputy Sheriff's Association v. Multnomah County, and AFSCME Local 88*, Case No. UC-14-01, 19 PECBR 733, 748 (2002).

DISCUSSION

Community of Interest

The duties performed and skills used by the CEOs are distinctive; they are unlike any other position described in the record, although Building Inspectors may share some of their characteristics. The essence of the CEO position is identifying and citing violations of City Codes, which has at least some similarities to the work of Police Officers in identifying and citing violations of criminal statutes. There is no evidence in the record that the duties and skills of CEOs overlap significantly with any other City employees.

The benefits provided to the CEOs are the same as those provided to other AFSCME-represented employees. The differences between benefits provided to Association and AFSCME bargaining unit employees, as applied to CEOs, are not sufficient to affect this petition.

There is no significant interchange or transfer of CEO employees between AFSCME-represented positions and Association-represented positions. Three CEOs have gone on to become City Police Officers in the last five years, but their CEO positions offered them no recognized advantage in that application process.

The promotional ladders between the CEOs and Association bargaining unit are limited and do not affect the outcome of this petition.

The CEOs and Association bargaining unit members share common supervision. The limited evidence in the record suggests that AFSCME-represented Police support staff are also supervised by Police Department officials.

Wages, Hours, and Other Working Conditions

Because the CEO is a unique position, it has no analogue in the Association unit wage and benefit structure. Although there are some differences in vacation time and other benefits between the AFSCME and Association collective bargaining agreements, those differences are not significant for purposes of this petition and there is no evidence

that those differences would apply to CEOs in any event. The monthly starting salary for a CEO is \$3177, with a maximum salary of \$3861; the monthly starting salary for a Police Officer Trainee is \$4031, and for a Police Officer, \$4224, with a maximum salary of \$5643.

The provisions for salary schedule advancement for employees in the AFSCME and Association bargaining units are also similar. Employees in both bargaining units are paid on a five-step salary scale with advancement every 12 months.

The CEOs work a day shift and have holidays and weekends off. All Association bargaining unit members work shifts organized around a 24-hour day.

Both CEOs and Police Officers do much of their work in the field in contact with members of the public. It appears that most other AFSCME-represented employees work in office environments or on other City work sites, although the Building Inspector may also work in the field with members of the public. CEOs and Police Officers wear similar uniforms labeled to identify them as CEOs or Police Officers, and both carry Tasers, pepper spray, Asps, and Nextel telephones; there is no evidence that any other City employees wear uniforms or carry defensive equipment. Only Police Officers carry firearms.

History of Collective Bargaining

The CEOs have been in the AFSCME bargaining unit for at least 20 years. The Association Police Officers have been in the Association bargaining unit since its creation.

Desires of Employees

The AFSCME-represented CEOs identified in the Petition wish to be represented by the Association.

Strike-Permitted/Strike-Prohibited Status

The Association bargaining unit currently includes 20 strike-prohibited employees (100 percent). If the two AFSCME-represented Code Enforcement Officers are added to the Association bargaining unit, the current percentage of strike-permitted employees in the bargaining unit will increase from zero percent to nine percent.

The CEOs' work has some similarities to the mission of the Police Department Officers in that they contact members of the public to inform them of potential

violations of law. The CEOs also perform some support functions for Police work, such as traffic control, suspect identification, and Police training role playing. The CEOs attend some Police-oriented training, and some of the subjects covered in the trainings, such as self-defense, have a relationship to the work of CEOs. Aside from traffic control and monitoring individuals while a search warrant is executed, there is virtually no interchange of duties between CEOs and Police Officers.

The relevant pattern of organization in the work force is defined by whether or not the employee is a sworn Police Officer. Adding the CEOs to the Association unit would change that pattern slightly, but would not affect the vast majority of the remaining employees in either unit.

Both the Association and AFSCME bargaining units have a long history of representing City employees. There is no evidence that the outcome of this case will significantly affect the stability of labor relations aside from the transfer of these positions themselves. It is unlikely that granting the petition will lead to confusion regarding the placement of other positions. Granting the petition could, at most, raise the issue of whether a few Police Department support positions are appropriately placed in the Association bargaining unit.

The work of the CEOs is distinct, but similar in approach to law enforcement work such that the CEOs benefit from law enforcement training and from their regular communication with the Police dispatcher. The Police in turn benefit from the CEOs' daily-briefed eyes and ears in the field and their assistance with traffic and sedentary search warrant control. We conclude that the positions at issue are significantly involved and integrated with a law enforcement mission.

Based on our analysis of the relevant statutory factors and the additional considerations appropriate to a mixed unit, we conclude that although placement in either unit may be appropriate, these factors represent a compelling justification for placing the CEO position in the Association unit.

We will grant the Petition seeking to transfer the CEO position to the Association bargaining unit. We will conduct a self-determination election so that these employees can vote on whether to be represented by AFSCME or the Association.

ORDER

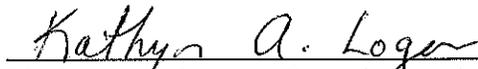
1. The Elections Coordinator shall, as soon as practicable, conduct a secret mail ballot election for the Code Enforcement Officers. The ballot will provide a choice between the Woodburn Police Association and Oregon, AFSCME Council 75, Local 642.

DATED this 12 day of July 2012.



Susan Rossiter, Chair

*Jason M. Weyand, Board Member



Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.

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