EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-002-15

(CERTIFICATION OF REPRESENTATIVE)

OREGON LIQUOR CONTROL COMMISSION PEACE OFFICERS ASSOCIATION, Petitioner, v. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 75, LOCAL 2505, and OREGON LIQUOR CONTROL COMMISSION, Respondents.	)	RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Michael E. Coviello, Associate General Counsel, National Fraternal Order of Police, represented Petitioner Oregon Liquor Control Commission Peace Officers Association.

Giles Gibson, Legal Counsel, Oregon AFSCME Council 75, represented Respondent American Federation of State, County and Municipal Employees, Local 2505.

Yael A. Livny, Assistant Attorney General, Department of Justice, Labor and Employment Section, represented Respondent Oregon Liquor Control Commission.

On December 16, 2015, Administrative Law Judge Julie D. Reading issued a recommended order in this matter. The parties had 14 days from the date of service in which to file written objections. *See* OAR 115-010-0090. None of the parties filed objections.

When no party objects to a recommended order, we generally adopt the recommended order as our final order, and we consider any objections that could have been made to that order unpreserved and waived. *International Brotherhood of Electrical Workers, Local Union No. 659*

v. Eugene Water & Electric Board, Case No. UP-008-13, 25 PECBR 901 (2014). Consistent with that practice, we will adopt the recommended order as our final order in this matter. The final order is binding on, and has precedential value for, the named parties only. *Id.* Despite the precedential limitations of such a final order, we publish the uncontested recommended order as an attachment to the final order. *Clackamas County Peace Officers Association and Atkeson v. City of West Linn*, Case No. UP-014-13, 26 PECBR 1 (2014).

ORDER

1. The Board adopts the recommended order as the final order in this matter.

2. The petition is dismissed.

DATED this 7 day of January 2016.

Kathryn A. Logan, Chair

Jason M. Weyand, Member

Adam L. Rhynard, Member

This Order may be appealed pursuant to ORS 183.482.

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(CERTIFICATION OF REPRESENTATIVE)

OREGON LIQUOR CONTROL COMMISSION PEACE OFFICERS ASSOCIATION,	)	
Petitioner,	)	
v.	)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2505,	)	RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER
and	)	
OREGON LIQUOR CONTROL COMMISSION,	)	
Respondents.	)	

A hearing was held before Administrative Law Judge (ALJ) Martin Kehoe on July 23 and 24, 2015 in Salem, Oregon. The record closed on September 21, 2015, following receipt of the parties' post-hearing briefs. In a periodic reassignment of cases, the matter was transferred to ALJ Julie Reading for issuance of this Recommended Order.

Michael E. Coviello, Associate General Counsel, National Fraternal Order of Police, represented Petitioner Oregon Liquor Control Commission Peace Officers Association.

Giles Gibson, Legal Counsel, Oregon AFSCME Council 75, represented Respondent American Federation of State, County and Municipal Employees, Local 2505.

Yael A. Livny, Assistant Attorney General, Department of Justice, Labor and Employment Section, represented Respondent Oregon Liquor Control Commission.

On May 1, 2015, the Oregon Liquor Control Commission Peace Officers Association (OLCCPOA) filed an amended petition seeking to represent liquor enforcement inspectors (inspectors) and compliance specialist 3-enforcement technicians (enforcement technicians)

employed by the Oregon Liquor Control Commission (Commission or OLCC). On May 22, 2015, both the Commission and the present representative of all Commission non-supervisory employees, the American Federation of State, County and Municipal Employees, Local 2505 (AFSCME), timely objected.

The issue is:

1. Is the proposed bargaining unit appropriate within the meaning of ORS 243.682(1)?

We conclude that this petition does not propose an appropriate bargaining unit and we dismiss the petition.

RULINGS

The rulings of the Administrative Law Judge were reviewed and are correct.

FINDINGS OF FACT

The Parties

1. The Commission is an Oregon state agency historically charged with administering the Oregon Liquor Control Act (LCA). Starting in July 2015, it also became charged with regulating the distribution of recreational marijuana.

2. The Commission's non-supervisory employees have been union represented as a single bargaining unit for approximately 60 years. Respondent AFSCME has represented that bargaining unit for approximately 30 years.

3. Petitioner OLCCPOA represents approximately 40 Commission employees currently in the AFSCME bargaining unit, including inspectors and one enforcement technician, who seek to form their own bargaining unit.

Background – Current Circumstances

4. The Commission has five regional offices and 11 satellite offices. At the time of hearing in this case, the Commission had 183 non-supervisory employees and planned to add additional employees to regulate recreational marijuana sales.

5. The Commission has traditionally administered the LCA by purchasing, warehousing, and distributing liquor to independently operated liquor stores (the Distilled Spirits Program) and by licensing and regulating businesses that serve and sell alcohol (the Public Safety Services Program). The Commission also employs personnel to provide administrative support to these programs such as human resources, information services, financial services, and communications.

6. The Commission emphasizes career development for its employees. It often allows employees to work out-of-class temporarily in order to gain the skills necessary for promotion. As a result, many employees are long term and promote to various positions.

7. The Public Safety Services Program consists of five field offices responsible for compliance work in specific regions, including Portland, Salem, Bend, Eugene, and Medford. Each field has a manager. These managers report to the Public Safety Division Director.

8. To perform its licensing and regulation duties, the Commission's Public Safety Services Program employs inspectors, liquor control investigators (investigators), enforcement technicians, office specialists, dispatchers, administrative assistants, and other employees. These employees all report to their respective field manager.

9. Investigators are charged with investigating new liquor applications submitted by prospective licensees and providing them with training and education. They are not required to take an oath of office. Inspectors are sworn, meaning they take an oath of office. They are typically charged with regulating compliance of existing licensees. They perform this duty by investigating complaints, observing violations while undercover, and issuing sanctions when licensees are non-compliant. Both inspectors and investigators provide education about liquor control laws to applicants, licensees, government agencies, law enforcement, and the general public. At various times in the past, inspectors and investigators have shared licensing and regulatory duties, which was referred to as a "dual-role" position.

10. The Commission classifies both inspectors and investigators as liquor regulatory specialists. However, they have separate working titles and position descriptions. Historically, both positions have had the same set of minimum qualifications necessary to commence employment. The minimum qualifications include:

> "three years of recent (within the last ten years) experience conducting investigations of allegations, facts, behaviors, documents, laws, legal precedents and/or other information. This experience must include preparing written reports using individual judgment in developing conclusions or recommendations that are subject to review in court, administrative hearings or comparable formal review process." (Exh. R-13 at 4.)

11. In 2012, the Legislature enacted legislation requiring that the compliance duties be performed only by sworn inspectors who have received a Commission-specific enforcement training from the Department of Public Safety Standards and Training (DPSST). Accordingly, now all newly hired inspectors must obtain DPSST training within 18 months of hiring. Employees classified as compliance specialist 3 – enforcement technicians must also receive this training and become sworn officers. The DPSST training consists of a two-week course where employees learn about liquor licensing and procedures. Following that, inspectors attend a four-week course covering defensive tactics, scope of authority, administrative law, and criminal law.

12. Prior to the requirement of DPSST training for inspectors, there was a great deal of duty sharing between inspectors and investigators. Now, if an investigator lacks the required DPSST training, he or she cannot perform the regulatory duties of inspectors. However, at times inspectors will assist with investigations work if a backlog builds up. This is most likely to happen in the smaller regions. Additionally, there are some inspectors who have been reassigned to investigation positions. Further, there are some investigators who have conditionally transferred to inspector work, subject to completion of the DPSST training.

13. According to the liquor regulatory specialist class description, an employee responsible for conducting both application and compliance investigations:

> "Reviews the application or complaint and supporting information to plan the investigation. For complaints, questions complainant to get complete information. Explains the Liquor Commission's authority and decides whether to open an investigation. For application or compliance investigations interviews witnesses, gets statements or deposition, observes business openly or covertly, and collects physical evidence.
>
> "Assesses financial and other business documents for sources and adequacy of financing, to determine ownership or find hidden ownerships, and the reasonableness of proposed sales projections. Gathers data about applicant's background and personal qualifications.
>
> "Applies statutes, rules, and case law to business plans, operating data, and compliance history. Writes reports summarizing investigative findings with recommendation for granting or denying the license or sanctioning the licensee.
>
> "Serves subpoenas and coordinates witness examination at administrative hearings. Testifies at administrative hearings. Gives technical assistance on liquor law violation matters to other law enforcement agencies." (Exh. R-13 at 1.)

14. According to the investigator job description, the purpose of their position is to:

> "Ensure that qualified applicants receive liquor licenses. To achieve this, the investigator conducts a background investigation and provides specialized training to the applicant. The investigator uses discretionary judgment to plan the scope and direction of the investigations. Investigations include an analysis of the ownership, operation, management of the prospective business, the applicant's operating proposal, an analysis of the applicant's OLCC compliance history and business location (if previously licensed), and analysis of the impact of the proposed operation on the community, and a recommendation on granting, restricting or denying the license. The investigator trains and educates various audiences about statutes, administrative rules, policy and licensing standards used to evaluate applications." (Exh. P-7 at 21.)

15. Enforcement Technicians perform a number of compliance related duties at the policy level, including public safety program policy development and communication, technical assistance and case evaluation, program monitoring, and development of legislation and administrative rules. They also review the inspectors' case reports for legal sufficiency and act as a liaison between inspectors and the case presenters in the Administration Process and Policy Division.

16. According to the liquor regulatory specialist class description, an employee responsible for conducting inspections:

> "Visits licensed premises to observe business practices related to liquor law compliance. Confers with licensees to identify compliance problems and establish corrective plans. Advises liquor licensees, their permittees, and other employees to prevent violations. Observes licensed businesses to discover violations or potential violations. Takes enforcement action or otherwise intervenes upon seeing violations." (Exh. R-13 at 1.)

17. The inspectors perform the following duties as outlined in their position description:

> "Investigations/Caseload Management
>
> "Manages an active compliance caseload, assesses priorities and uses discretion to plan scope and direction of investigations. The work is accomplished by:
>
> "Analyzing and investigating the validity of complaints of liquor law violations through a variety of means (talking with the complainant, licensee and any witnesses, observations at the licensed business, reviewing police reports and the compliance history of the business, etc).
>
> "Taking the appropriate action on valid complaints to ensure licensees comply with liquor laws on a short and long term basis. This action can fall on a spectrum from education and prevention up through administrative sanctions and possibly license cancellation.
>
> "Visiting licensed premises to observe activities, both undercover and openly, to assess liquor law compliance and to assist licensees with compliance. Performing field inspections to monitor and enforce the laws and rules of the Liquor Control Act.
>
> "Referring non-liquor related violations/crimes to appropriate law enforcement agencies.
>
> "Identifying and evaluating causes of non-compliance with liquor laws and design[ing] long and short term compliance building plans for license applicants, licensees and permittees. Making recommendations to licensees in the development

of individualized control plans. Monitoring and supporting compliance building plans.

“Collecting, analyzing and interpreting technical reports of other professional disciplines such as police reports, court reports, and medical/alcohol treatment reports for information about businesses that will help with compliance decisions.

“Analyzing licensees’ business and financial records to detect the presence of unauthorized ownership and organized crime which may cause a violation or ineligibility.

“Locating, interviewing and deposing witnesses associated with liquor law violations and assessing their credibility.

“Writing clear, concise, formal reports on activities, administrative and criminal investigations to document facts, reasons for conclusions and actions sufficient for use in administrative hearings or in court.

“Effectively communicate internally and externally throughout investigative process to ensure results and findings are understood.

“Exercising statutory authority of a peace officer in dealing with people involved in criminal violations of the Liquor Control Act or other related statutes. This authority may involve detaining subjects during an investigation and issuing criminal citations in lieu of arrest and/or making physical custody arrests.

“Detecting, seizing, maintaining, controlling and disposing of evidence.

“Interpreting, researching and applying relevant statutes and rules, case law, Attorney General’s opinions and Commission policy to relevant facts. Analyzing facts to decide appropriate action to gain compliance from licensees and permittees including education and counseling, warnings and notice of violation tickets.

“Delivering Commission violation charge letters and subpoenas and verifying license suspensions.

“Prepare witnesses, present or assist in presenting the Commission’s case, develop and document exhibits and evidence to ensure admissibility in administrative hearings. Testifying on behalf of the Commission at administrative hearings and court trials.

<u>“Balanced Public Safety Activities</u>

“Plans and conducts minor decoy operations, with other law enforcement agencies or alone. Recruits and trains minor decoys. Accompanies decoys into licensed

businesses while purchases are made. Issues criminal citations and prosecute administrative violations as appropriate. Documents and communicates results.

“Checks ID at licensed businesses. Helps licensees prevent minors from attempting to purchase alcohol by making cooperative ID checking visits to businesses. Jointly with security personnel, permittees or store clerks, checks the ID of patrons who enter or attempt to enter the business. Issues criminal citations as appropriate. Document and communicate results.

“Investigates producers of false ID. Tracks false ID back to the producer whenever possible. Conduct investigations designed to prosecute the manufacturers of false identification. Implement other minor intervention strategies as appropriate and needed.

“Identifies and proposes remedies, individually or in teams, to address compliance issues at businesses.

“Training/Communication

“Designs and implements specialized training programs to educate and counsel licensees, permittees, governmental bodies, law enforcement agencies, and the public, in groups or individually, about liquor control laws and policies, and their corresponding responsibilities.

“Communicates with people of diverse cultural, ethnic and socioeconomic backgrounds, including using second language skills, as requested by management.

“Serves as Commission liaison to governmental bodies, police agencies and the industry in issues relating to liquor law compliance, and mediate between parties in controversial matters.

“When appropriate responds to the media concerning liquor laws and matters of investigation.

“Mentors, trains and provides oral and/or written progress reports on new inspectors.

“Recommends new policy and proposed or revised administrative rules to better serve the public, law enforcement community, liquor industry, and government and special interest groups.

“May assume regional manager's duties and accountability in the manager's absence when requested.

“Other duties as assigned. [Essential/Non-essential] determined on case by case basis. Duties may include but are not required of the position and are not limited

> to: Minor Decoy Specialist, Minor Intervention Specialist, Defensive Tactics Instructor, Field Training and Evaluation (FTEP Instructor, Field Specialist (i.e. sex trafficking, child exploitation, gang activity, drug recognition, etc.), college campus liaison, toastmasters, verbal judo instructor, fatal vision expert, etc." (Exh. E-2 at 2-4.)

18. In performing their duties, inspectors and enforcement technicians, unlike other Commission employees, are required to follow a compliance manual that covers topics such as peace officer authority, premises checks and undercover operations, search and seizure, intake procedures, conducting the investigation, evidence, arrest, custody, and citation in lieu of arrest.

19. Inspectors and enforcement technicians are also subject to a use of force policy that does not apply to other Commission employees. Under the use of force policy, the Commission strongly discourages use of force and instead requires inspectors to disengage from escalating situations if they can safely do so. Inspectors are not permitted to pursue fleeing suspects. However, inspectors are sometimes injured. They are occasionally required to use force in protecting themselves and minor decoys.

20. Inspectors and enforcement technicians have authority to issue citations and make arrests for crimes involving or relating to liquor laws, for example, false swearing, unsworn falsification, and misrepresentation of age by a minor. Inspectors and enforcement technicians also have the authority to issue citations to individuals who have committed crimes relating to liquor laws, for example, minor in possession, attempted purchase of alcohol, and entering an area prohibited to minors. Inspectors are not authorized to stop, detain, cite, or arrest a person when the alleged crimes are not related to the enforcement of the LCA. When encountering non-LCA related crimes, inspectors and enforcement technicians are expected to summon local law enforcement. However, they may make arrests for crimes such as forgery, narcotics, escape, and resisting arrest when those crimes arise from a liquor violation. They may also seize evidence related to other crimes.

21. Inspectors carry pepper spray, hand-cuffs, a collapsible baton, and a large flashlight in order to protect themselves from suspects or members of the public that become violent. Inspectors also carry a metal badge and are permitted to obtain and wear body armor. Although inspectors often wear plain clothes to conduct undercover work, they are also issued uniforms consisting of tan pants and black polo shirts with an insignia to wear during certain events. No other Commission employees use these items. At times, the Commission may prohibit or require inspectors to carry or wear these items.

22. Inspectors have had concerns with their safety and the use of force policy. They have raised these concerns to AFSCME leadership. AFSCME leadership has brought some of these concerns to Commission management.

23. Inspectors frequently work with other employees in the Public Safety Division. Twice a week in the Portland Metro office, the Public Safety Division employees meet, including the inspectors, investigators, and dispatchers. Additionally, inspectors frequently interact with non-sworn compliance specialist 3-case presenters in the Administrative Policy and Process section preparing cases for hearing. Further, the inspectors regularly communicate with dispatchers throughout their shift, reporting their compliance activities. Inspectors also have contact with administrative personnel who support their work, such as IT and finance personnel.

24. Inspectors work nights and weekends when liquor serving establishments are most active. They typically work four 10-hour shifts on Wednesdays through Saturdays. They report to dispatchers who also work these hours. Some warehouse employees in the Distilled Spirits Program also work evenings and weekends. Most other Commission employees, including investigators, work standard office work hours. Enforcement Technicians generally work office hours, but sometimes provide support for inspectors in the field.

25. The Commission utilizes a numerical pay scale developed by the Oregon Department of Administrative Services (DAS). The Commission's represented employees' salary ranges start at 15 and continue through 29. The Union and the Commission determine employee salary ranges through collective bargaining. Inspectors and investigators are in salary range 25. Enforcement technicians are in salary range 29. Investigators and inspectors are both non-exempt under the Fair Labor Standards Act and are paid hourly. All Commission employees can receive shift differentials.

26. Inspectors receive the same benefits available to all other Commission employees. However, they are also entitled to an additional retirement benefit extended to police and fire fighters by statute.

Background – 1986-1988

27. In 1986, AFSCME sought to compel the Commission to interest arbitration. AFSCME argued that inspectors were police officers, and therefore, strike-prohibited under ORS 243.726 and 243.736(1)(g). This Board determined that the inspectors were not police officers, and thus not strike-prohibited. *AFSCME Local 2505 v. Oregon Liquor Control Commission*, Case No. UC-68-86, 9 PECBR 9128 (1986). On appeal, the Oregon Court of Appeals affirmed this Board's decision. *AFSCME Local 2505 v. OLCC*, 91 Or App 385, 387 (1988).

28. In 1986-1988, when the *AFSCME Local 2505* cases were decided, inspectors carried pepper spray (or mace), hand-cuffs, a collapsible baton, and a large flashlight, but did not carry a firearm. Further, in 1986, inspectors had authority by statute to serve and execute warrants of arrest and search and seizure. Despite these statutory authorities, however, the Commission limited the inspectors' ability to exercise these authorities by policy. Also, at that time, the Commission limited inspectors' enforcement powers to liquor control statutes and regulations.

29. The inspector job description at the time of the *AFSCME Local 2505* decisions included the following duties:

> "Educates and counsels licenses, permittees, governmental bodies and public, in groups or individually about Liquor Control Acts, Rules and Policies and their corresponding responsibilities. (20%)
>
> "Receives and asses[es] complaints of non-compliance with Liquor Laws. (7%)
>
> "Investigates complaints of non-compliance with Liquor Laws and determines their validity. (30%)
>
> "Identifies and evaluates cause of non-compliance and establishes an appropriate short and long term compliance building plan for licensees and permittees, and monitors and supports compliance building plan. (10%)
>
> "Takes appropriate action to gain licensee or permittee compliance including education and counseling, warnings, and notices of violation. (5%)
>
> "Inspects licensed premises to assess liquor law compliance and assist licensees to comply. (14%)
>
> "Prepares, writes and presents clear, concise, formal reports on activities and investigations to document reasons for conclusions and compliance actions. (5%)
>
> "Prepares for and testifies as witness on behalf of the Commission at Administrative hearings or in court. (1%)
>
> "Delivers Commission Administrative Action Letters and subpoenaes [sic], takes depositions and verifies license suspensions. (1%)
>
> "Exercises limited Statutory Authority of a Peace Officer in dealing with non-licensees or non-permittees found in violation of the Liquor Control Acts. (4%)
>
> "Trains law enforcement agencies in their liquor law responsibilities and in referring administrative action cases for Commission follow-up. (1%)
>
> "Distributes license applications, collects fees and issues receipts, and issues special licenses as appropriate when the local license investigator is absent. (2%)" *AFSCME Local 2505* at 9137-9138.

30. At the time of this Board's Order in *AFSCME Local 2505*, the Commission had recently stopped providing inspectors with the full DPSST (then Bureau of Police Standards and Training or BPST) training and certification completed by police officers of general jurisdiction. The Commission was in the process of further expanding an existing two-week course relating to liquor control to include criminal law, evidence, and self-defense training.

CONCLUSIONS OF LAW

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

2. This petition does not propose an appropriate bargaining unit, and is dismissed.

DISCUSSION

Inspectors and enforcement technicians seek to form their own bargaining unit. They assert that legislative changes have rendered them strike-prohibited police officers; that they do not share a community of interest with the remaining bargaining unit; and that they are entitled to break out from the rest of the bargaining unit as a craft unit. The Commission and AFSCME respond that the inspectors and enforcement technicians are not strike prohibited; that they share a community of interest with the remaining unit; and that separating them would unduly fragment the existing bargaining unit.

STANDARDS FOR DECISION

When presented with a question of representation, this Board must designate an appropriate bargaining unit. In doing so, we balance the following statutory factors: community of interest, working conditions, history of collective bargaining, and employee preferences. ORS 243.682(1) and OAR 115-025-0050(2). In addition to these statutory factors, this Board has adopted and applied other factors in determining appropriate bargaining units consistent with the objectives of the Public Employee Collective Bargaining Act (PECBA). The most prominent of those factors is our preference for establishing the largest possible appropriate bargaining unit. Specifically, we prefer to designate "wall-to-wall" units in order to avoid fragmentation. *Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-13, 20 PECBR 745, 750 (2004). Additionally, we may determine a unit is appropriate in a particular case, even if some other unit might also be appropriate. ORS 243.682(1)(a).

In this case, OLCCPOA is first asserting that inspectors and enforcement technicians are police officers who are strike-prohibited by statute. Specifically, ORS 243.736(1) provides that bargaining units containing the following professions are strike prohibited: deputy district attorneys, emergency telephone workers, Oregon Youth Authority employees who supervise juvenile offenders, firefighters, correctional guards, parole officers, probation officers, and police officers. We first address whether inspectors and enforcement technicians are strike-prohibited, because if so, the current bargaining unit would be considered a "mixed unit" of strike-prohibited and strike-permitted employees, which requires analyzing specific additional "mixed unit" factors. If the inspectors and enforcement technicians are not strike-prohibited, we instead employ the statutory and precedential factors above in light of the specific criteria applicable when an employee group wishes to separate from a larger unit.

INSPECTORS AND ENFORCEMENT TECHNICIANS' STRIKING STATUS

OLCCPOA argues that the inspectors and enforcement technicians should be separated from the remaining unit because they are strike-prohibited. Respondents AFSCME and the Commission respond that the inspectors and enforcement technicians are not strike-prohibited police officers, relying on prior Board and Court of Appeals precedent. Specifically, in 1986, AFSCME sought to compel the Commission to interest arbitration.[1] AFSCME argued that inspectors[2] were police officers, and therefore, strike-prohibited under ORS 243.726 and 243.736(1)(g). This Board determined that the inspectors were not police officers, and thus not strike-prohibited. *AFSCME Local 2505* at 9128. On appeal, the Oregon Court of Appeals affirmed this Board's decision, ordering interest arbitration and quoting our order at length. *AFSCME Local 2505*, 91 Or App 385, 387.

This Board and the Court of Appeals determined that inspectors were not strike-prohibited police officers in *AFSCME Local 2505* because: (1) the Legislature, through statutes, did not regard them as police officers in significant ways other than for retirement purposes; (2) the inspectors' focal job duties of enforcing liquor control violations were not substantially the same as the broader enforcement duties of police officers; and (3) it would not further the underlying legislative policy of ORS 243.736, which is to prohibit strikes when it would create a public crisis for certain employees to do so. *AFSCME Local 2505*, 91 Or App at 388-389.

OLCCPOA acknowledges the decisions in *AFSCME 2505*. It asserts, however, that both legislative changes and changes in the inspectors' duties have superseded those determinations and rendered them inapplicable. Specifically OLCCPOA argues that the legislative changes show: (1) that the Legislature now regards inspectors as police officers; (2) that changes in duties reflect more law enforcement type duties; and (3) the potential public harm of having inspectors strike supports the underlying purpose of ORS 243.726.

Analysis – Legislative Changes

OLCCPOA argues that the Legislature started to regard inspectors as police officers in 2012 with the passage of Senate Bill (SB) 1528. SB 1528 made changes relevant to inspectors in several statutes, including ORS Chapters 133, 153, 161, 181, and 471. ORS Chapter 133 governs arrest, search, seizure, and extradition. Chapter 153 governs violations and fines. Chapter 161 governs crimes and punishments. Chapter 181 governs the State Police and DPSST. Chapter 471 comprises the LCA.

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[1]The PECBA bargaining process begins with table bargaining and then moves to mediation, final offers, cooling off, and for strike-permitted employees, self-help (meaning striking). For strike-prohibited employees, the PECBA bargaining process is largely similar, but includes a final step of binding interest arbitration, rather than self-help. *International Association of Firefighters, Local 890 v. Klamath County Fire District #1*, Case No. UP-049-12, 25 PECBR 871, 882 (2013).

[2]Enforcement technicians were not discussed in *AFSCME Local 2505* and may not have yet been a distinct position. Additionally, they are not included in the statutory language at issue in this case. Accordingly, we only refer to the inspectors in discussing *AFSCME Local 2505* and the relevant statutes.

In addition to SB 1528, OLCCPOA cites a more recent substantial legislative change since *AFSCME Local 2505*. Specifically, in 2015, Oregon's Measure 91 legalized recreational marijuana and placed regulatory and compliance responsibility duties with the Commission. To further regulate recreational marijuana, the Legislature enacted House Bill (HB) 3400 during the 2015 session, which will go into effect on January 1, 2016. On that date, inspectors will be designated by statute as "regulatory specialists" under ORS 471.001(10). The term "regulatory specialist" will replace "liquor enforcement inspector" in ORS Chapters 133, 153, 161, 181, 471, and 475.

OLCCPOA argues that SB 1528 added the inspectors to the definition of peace and police officers "in every possible statute." (Petitioner's Post-Hearing Brief at 2) While OLCCPOA did not articulate arguments related to all of these statutes, it provided several of them in an exhibit. (Exh. P-11). We address the most relevant statutory changes below. As explained, while the Legislature may now include the inspectors in several definitions of "peace officer" and "police officer," the Legislature has not begun to regard or define inspectors as police officers. Accordingly, we determine the Court of Appeals opinion in *AFSCME 2505* has not been superseded by statute.

In determining that Legislature, through statutes, did not regard inspectors as police officers, this Board and the Court of Appeals observed that inspectors were not included in the definitions of "peace officer" found in ORS 133.005(3) and 161.015(4). *AFSCME Local 2505* at 9148, 91 Or App at 388-389. With the passage of SB 1528, however, inspectors were added to those statutes, subjecting them to provisions governing arrest, search, seizure, and extradition.

Although the amendments appear to be a substantive change in the inspectors' status, in context of all relevant statutes, they are not now police officers by statute. As this Board and the Court of Appeals noted in *AFSCME Local 2505*, inspectors already had the authority they would have had if they been included in the definitions of "peace officer" and in "police officer" in Chapters 133 and 161. *AFSCME Local 2505* at 9148, 91 Or App at 388-389. Specifically, at the time of *AFSCME Local 2505* decision, the LCA stated that inspectors "have all the authority given by statute to peace officers of this state, including authority to serve and execute warrants of arrest and warrants of search and seizure." *See AFSCME Local 2505* at 9130. However, with the passage of SB 1528 that language was amended to read:

> "Liquor enforcement inspectors have authority as provided under this chapter, ORS chapter 153, ORS 133 to 133; 133.450; 133.525 to 133.703; 133.721 to 133.739; 161.235; 161.239 and 161.245 and chapter 743, Oregon Laws 1971, to conduct inspections or investigations, make arrests and seizures, aid in prosecutions for offenses, issue criminal citations and citations for violations and otherwise enforce this chapter, ORS 474.005 to 474.095 and 474.115, commission rules and any other laws of this state that the commission considers related to alcoholic liquor, including but not limited to laws regarding the manufacture, importation, transportation, possession, distribution, sale or consumption of alcoholic beverages, the manufacture or use of false identification or the entry of premises licensed to sell alcoholic liquor." ORS 471.775(2).

Accordingly, with SB 1528, the Legislature maintained the inspectors' prior authority for arrest, search, seizure, and extradition. The Legislature also clarified that such powers are subject to the requirements and restrictions outlined in ORS Chapters 133 and 161, and further specified that the inspectors' authority is limited to enforcing the LCA, commission rules, and other laws of the state related to alcoholic liquor. Accordingly, the inspectors' authority was not expanded in such a way as to make them police officers.

Additionally, the "peace officer" definitions in ORS 133.005(3) and 161.015(4) include several categories such as police officers, sheriffs, constables, investigators for prosecutorial bodies, judicial martials, humane special agents, and inspectors. Therefore, "peace officers" is intended to reflect a broader category which is not synonymous with police officers, but includes them.[3]

SB 1528 also made changes to ORS Chapter 181, which governs safety standards and training. OLCCPOA argues that the Legislature intended for inspectors to be police officers because under ORS 181.610(15), a "police officer" is defined as an officer, member or employee of a "law enforcement unit" who is responsible for enforcing the criminal laws of this state, and SB 1528 added "[t]he Oregon Liquor Control Commission with regard to liquor enforcement inspectors" to the definition of "law enforcement unit." However, a full reading of that statute shows that this amendment is not sufficient to establish that Legislature intended to start regarding inspectors as police officers, thereby superseding *AFSCME Local 2505*. Specifically, the full definition of "police officer" in ORS 181.610(15) reads as follows:

> (15) "Police officer" means:
>
> (a) An officer, member or employee of a law enforcement unit employed full-time as a peace officer who is:
>
> (A) Commissioned by a city, port, school district, mass transit district, county, county service district authorized to provide law enforcement services under ORS 451.010, tribal government as defined in section 1, chapter 644, Oregon Laws 2011, the Criminal Justice Division of the Department of Justice, the Oregon State Lottery Commission, a university that has established a police department under ORS 352.383 or 353.125, the Governor or the Department of State Police; **and**
>
> (B) Responsible for enforcing the criminal laws of this state or laws or ordinances relating to airport security; *** *(emphasis added)*.

Therefore, while inspectors are "peace officers" employed by a law enforcement unit, they are not "police officers" because they do not meet the conjunctive criteria under (A) and (B) in ORS 181.610(15). First, inspectors are not commissioned by any of the entities listed in subsection (A) such as a city, port, school district, mass transit district, county, or tribal government. Second, while inspectors are responsible for enforcing the liquor (and future recreational marijuana) laws

[3]We note that in ORS 133.525 (pertaining to search and seizure), the inspectors are included in the definition of "police officer." However, so are the other categories that are also defined as a "peace officer" in ORS 133.005(3) and 161.015(4). These include police officers, sheriffs, constables, investigators for prosecutorial bodies, humane special agents, and inspectors. Therefore, in light of this and the other provisions cited and analyzed herein, we are not persuaded that inclusion in the definition of police officers in this one instance renders them police officers.

of the state, as observed in *AFSCME Local 2505*, the language "[d]etecting crime and enforcing *the* criminal laws of this state" suggests that it would only include someone who has the "authority and duty to enforce *all* criminal statutes and to maintain public order generally." *AFSCME Local 2505* at 9148, 91 Or App at 388-389, *emphasis in original.* Accordingly, the Legislature has not now defined inspectors as police officers, superseding *AFSCME Local 2505*.

Further, Chapter 181 includes inspectors under the definitions of "public safety personnel" and "public safety officer." Other designations under "public safety personnel" include corrections officers, youth correction officers, emergency medical dispatchers, parole and probation officers, police officers, certified reserve officers, and fire service professionals. *See* ORS 181.010(17). Accordingly, the term "public safety personnel" is intended to be a broader category, which includes police officers and inspectors. However, as shown above, "police officer" has its own separate definition and does not include inspectors.

In further support of its argument that the Legislature intended inspectors to be police officers with the passage of SB 1528, OLCCPOA emphasizes that the inspectors are now statutorily required to receive DPSST training under Chapter 181. However, at the time of the *AFSCME 2505* case, the Commission also provided inspectors with DPSST training even though it was not statutorily required. And rather than making it clear that inspectors are police officers, relevant Chapter 181 provisions only reinforce distinctions between the two with respect to training. Specifically, certification of inspectors is governed by ORS 18.646, an independent provision from the provisions governing police officer training. Further, inspectors are not required to receive all of the same training required of police officers, such as vehicle pursuit and mental illness recognition (ORS 181.642), the Vienna Convention (ORS 181.642), and missing persons (ORS 181.643). Instead, inspectors receive specific training in liquor enforcement and then receive a shortened police training including a four-week course covering defensive tactics, scope of authority, administrative law, and criminal law.

Additionally, OLCCPOA asserts that Measure 91 and HB 3400 – regulating legalized recreational marijuana – reflect a significant change since *AFSCME Local 2505.* However, this new legislation does not contain language rendering the inspectors strike-prohibited police officers. Instead, HB 3400 appears to clarify further that inspectors are not police officers, as they will be statutorily prohibited from carrying firearms. *See* HB 3400, Section 30. Additionally, before HB 3400, the enforcement division of the Commission was defined as a "criminal justice agency" under ORS 181.010 (pertaining to the State Police). However, with HB 3400' enactment, the Commission's inclusion into the definition will be narrowed to "performing duties related to investigating and enforcing the criminal laws of this state that the commission is charged to enforce." *See* HB 3400, Section 153. Accordingly, this provision also further clarified that the inspectors' focal duties are distinct from the broader duties of police officers.

Finally, and most importantly, despite two comprehensive pieces of legislation relating to the inspectors, the Legislature did not choose to explicitly add them to the list of strike-prohibited personnel in ORS 243.726 and 243.736(1)(g). Accordingly, we decline to impute that intention into the statute.

Having determined that SB 1528 and HB 3400 did not reflect legislative intent to treat inspectors like police officers such that *AFSCME Local 2505* could be considered superseded by statute, we now look at to whether the duties of inspectors have changed significantly since that holding to suggest that it is no longer applicable.

Analysis - Duties

In *AFSCME 2505*, which was decided by this Board in 1986 and the Court of Appeals in 1988, this Board and the Court of Appeals concluded that the focal job duties of inspectors were not substantially the same as the broader duties of police officers. Therefore, having concluded that the Legislature does not regard the inspectors as police officers, we next analyze whether there has been a significant change in the inspectors' duties, authority, training, or conditions of work since 1986-1988 sufficient to render this Board and the Court of Appeals opinion in *AFSCME Local 2505* inapplicable.

There has not been a significant change in the inspectors' working conditions and authority sufficient to support a determination that the inspectors are police officers. Just as they did in 1986, inspectors currently carry pepper spray (or mace), hand-cuffs, a collapsible baton, and a large flashlight; but they do not carry firearms. Further, as in 1986, inspectors presently have authority by statute to serve and execute warrants of arrest and search and seizure. Despite these statutory authorities, however, both now and at the time of the *AFSCME Local 2505* determinations, the Commission has significantly limited the inspectors' ability to exercise these authorities by policy. Also, both previously and currently, the Commission has limited inspectors' enforcement powers to liquor control statutes and regulations. Specifically, they have been expected to contact law enforcement when observing other violations in the course of their duties. Additionally, both then and now, while the inspectors may make an arrest and detain using handcuffs, they are directed to contact local law enforcement if transportation of an arrestee becomes necessary.

There has also not been a significant change in the inspectors' training requirements rendering them police officers. At the time of this Board's order in *AFSCME Local 2505*, the Commission had recently stopped providing inspectors with the full DPSST (then BPST) training and certification completed by police officers of general jurisdiction. Therefore, at that time, some inspectors would have had even more extensive law-enforcement training. A*FSCME Local 2505* at 9138. However, the Commission was in the process of expanding an existing two-week course relating to liquor control to also include criminal law, evidence, and self-defense training. *Id*. Currently, inspectors receive a specialized certification including two weeks of liquor licensing education with four weeks of law enforcement training including defensive tactics, scope of authority, administrative law, and criminal law. As explained above, this training is not identical to that received by police officers of various jurisdictions. Accordingly, the new training is not so expansive or different as to render the inspectors police officers.

Although the descriptions of the inspectors' duties have changed, they largely do the same type of work that they did during the *AFSCME Local 2505* decision, and have not assumed duties that would make them police officers. Specifically, according to the relative position descriptions and other evidence, both then and now, inspectors (1) analyze and investigate liquor law violation

complaints; (2) educate licensees, law enforcement, government agencies, and the public about liquor laws; (3) take appropriate action on violations by issuing warnings, charge letters, administrative action letters, citations, violation notices, and in some cases facilitating arrests; (4) visit and inspect licensed premises to ensure and assist with compliance; (5) act as a witness or assist in the preparation of other witnesses for administrative hearings and court; (6) prepare, write and present formal reports on Commission actions; (7) detect, seize, maintain, control, and dispose of evidence; and (8) exercise statutory authority of a peace officer in dealing with people involved in criminal violation of the LCA or other related statutes. *See AFSCME Local 2505* at 9132, 9135, and 9140.

Accordingly, while there have been some minimal changes in the duties of inspectors – both as described in job descriptions and as performed – these changes are not so significant as to establish that the Court of Appeals opinion in *AFSCME 2505* is no longer applicable binding precedent. Finally, we address this Board and the Court of Appeals analysis that there would not be a significant impact on the community if the inspectors were to strike.

Analysis - Legislative Policy of ORS 243.736

OLCCPOA argues that even if there would have been little impact on the community for inspectors to strike in 1986, there is a greater impact now due to: the legalization of marijuana, the increasingly depleted resources of police agencies due to economic factors, the continuing isolation of inspectors, and the police officer status of the inspectors.

We disagree with OLCCPOA on these points. First, as we established above, the inspectors have not been designated as police officers by statute. Second, OLCCPOA does not explain how the legalization of marijuana would create a greater risk to the community if the inspectors were to strike. Third, OLCCPOA's assertions regarding lesser resources of police agencies is not supported by facts in the record. Fourth, although there was some testimony regarding the continuing isolation of inspectors, OLCCPOA has failed to directly provide evidence establishing that this corresponds to an increased risk to the community.

With ORS 243.736, the Legislature intended to include in the absolute prohibition against strikes only those public employees whose job duties are such that it is apparent that a strike would create a public danger or threat. *AFSCME v. Executive Dept.*, 52 Or App 457, 482, *rev. den.*, 291 Or 771 (1981). Accordingly, we determine that inspectors are not police officers under ORS 243.736(1), and are not strike-prohibited. As such, we move to the next phase of analysis, which is whether inspectors should be carved out from the primary unit due to a lack of community of interest. In order to reach this decision, we must determine whether inspectors have a sufficient community of interest with the larger unit.

COMMUNITY OF INTEREST AND UNDUE FRAGMENTATION

This Board has a long history of avoiding splitting a work force into a number of small bargaining units because it is contrary to the objectives of the PECBA for several reasons. First, smaller bargaining units contravene the PECBA policy of creating "greater equality of bargaining power between public employers and public employees." ORS 243.656(3). Second, our preference

against fragmentation is based on the need to protect the interest of the public – more bargaining units increase the potential for labor disputes that could result in work stoppages and the disruption of services to the public. Third, our policy to avoid fragmentation also benefits public employers. Public employers are unduly burdened if they have to engage in bargaining sessions for multiple splinter groups. *Federation of Oregon Parole and Probation Officers v. Clatsop County and AFSCME Local 2746*, Case No. RC-009-12, 25 PECBR 174, 183 (2012).

In particular, this Board has frequently applied the well-established preference for larger bargaining units in cases involving the State. This emphasis flows from the Board's oft-stated goal with regard to State employee bargaining units, which is "to avoid establishing new units, or reorganizing existing units, when to do so would make the goal harder to achieve in the future." *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, 884 (quoting *OPEU v. Department of Corrections*, Case No. UP-91-90, 12 PECBR 876, 888-889 (1991)).

Along with the factors underlying the PECBA's principals, we must still also consider statutory factors including desires of employees, wages and hours, and other working conditions, history of collective bargaining, employee preferences, and community of interest. ORS 243.682(1). By administrative rule, "community of interest" includes such factors as similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, and common supervisors. OAR 115-025-0050(2).

In order to balance the statutory factors with the PECBA objectives of establishing and maintaining larger bargaining units, we have developed the following comprehensive test when a group of employees desires to break out from a larger bargaining unit: (1) employees in the proposed bargaining unit have working conditions that are significantly different from those of other personnel employed by the employer; (2) the department in which the employees work is self-contained and clearly separate from other employer operations; (3) the employees desire a separate bargaining unit; and (4) designation of the unit would not lead to undue fragmentation. *Oregon AFSCME Council 75 v. City of Ontario*, RC-1-07, 22 PECBR 260, 273 (2008) (quoting *International Brotherhood of Teamsters v. Bay Area Hospital*, Case No. RC-36-01, 19 PECBR 898, 905 (2002)).

OLCCPOA claims that the inspectors and enforcement technicians have a separate community of interest from the wall-to-wall unit because they are trained and sworn officers who are assigned duties that can only be performed by employees with their specific training and certification. AFSCME and the Commission assert that inspector duties are not so significantly distinct from the investigators as to distinguish their community of interest. While we find this comparison helpful, we also find that in the context of the wall-to-wall unit, the inspectors and enforcement technicians do not have a distinct community of interest. We discuss the individual factors below.

Working Conditions

The term "working conditions" includes factors such as wages and hours. The Commission's employee salaries are based on a range in a numerical pay scale determined by

DAS. The Commission's represented employees' salary ranges start at 15 and continue through 29. Inspectors and investigators are in salary range 25. Enforcement technicians are in salary range 29.

Inspectors and investigators have different working hours. Investigators typically work Monday through Friday, from 8 a.m. to 5 p.m. with some minor variations. In contrast, inspectors typically work four 10 hour shifts on Wednesdays through Saturdays. However, inspectors are not the only Commission employees who do not work standard business hours, as warehouse employees and dispatchers also work evenings and weekends.

In summary, therefore, inspectors share similar wages to investigators and share non-standard hours with warehouse employees and dispatchers. However, they are distinct from remaining members of the bargaining unit in these areas.

Similarity of Duties and Skills

OLCCPOA argues that due to the legislative changes discussed above, the inspectors have distinct duties that only they can perform. Specifically, inspectors dispatch to licensee establishments on a regular basis for compliance actions, including undercover operations. OLCCPOA also argues that unlike investigators, inspectors have the power of arrest, and statutory authority to serve subpoenas and warrants.

The Commission and AFSCME respond that the inspectors and investigators have similar duties. They point to the fact that they are combined under a single classification with identical minimum requirements to commence employment, and in the past inspectors and investigators have been dual role. And although inspectors are now required to receive specific DPSST training that the investigators are not, the Commission and AFSCME assert that both positions exercise independent judgment in planning and carrying out investigations, writing formal investigation reports, and both have substantial duties in educating the public, law enforcement, licensees, and applicants.

We agree that the inspector and investigator duties have become distinct, particularly in light of SB 1528, which now requires OLCCPOA inspectors to be specifically trained and sworn. However, investigators and inspectors still share a common set of knowledge and skills, as they both apply liquor control rules, regulations, and statutes in making independent decisions. While the inspectors have distinct duties that cannot be performed by investigators who have not completed the required DPSST training, there is overlap between the positions. Specifically, inspectors have been readily reassigned to investigator positions. The Commission has also reassigned investigators to inspector positions, subject to their completion of the necessary DPSST training. Further, inspectors sometimes fill-in for investigators when they become backlogged. Accordingly, while not identical, their duties and skills share a number of similarities.

The parties' arguments largely focus on comparing and contrasting the inspectors with the investigators that we have addressed above. We also note that the inspectors seek to break from a large and diverse wall-to-wall unit which includes administrative assistants, warehouse employees, information systems employees, budgetary employees, and financial employees. Therefore,

bargaining unit members currently have a number of differences in duties. We have determined that it is appropriate to maintain bargaining units of diverse classifications and duties. *See Oregon Association of Classified Employees v. Union School District No. 5*, Case No. C-55-80, 5 PECBR 4261, 4267 (1981). ("All of the classifications share at least one thing in common and that is they are all different from each other.")

Interchange or Transfer of Employees, Promotional Ladders

Despite the DPSST requirement for inspectors, there is still a fair amount interchange and transfer between them and the investigators. Specifically: (1) they have the same minimum qualifications (with the exception of the DPSST) training; (2) inspectors have been transferred to investigator positions; and (3) the Commission has permitted investigators to become inspectors subject to receiving the DPSST training. Additionally, the Commission presented evidence of having career-long employees who work up from the ranks and avail themselves of Commission career development opportunities. Some employees who begin in other positions and areas of the Commission are ultimately promoted into inspector and investigator positions. Therefore, this factor weighs in favor of the Commission and AFSCME.

Similarity of Benefits

Inspectors qualify for police and firefighter retirement benefits under ORS Chapter 238. Otherwise, their benefits are the same as those available to the remaining bargaining unit. Therefore, this factor weighs mostly in favor of AFSCME and the Commission.

Common Supervisors

The Commission's Public Safety Services employees, including inspectors, investigators, enforcement technicians, office specialists, dispatchers, and administrative assistants, all report to their respective field manager. Employees in the Commission's Distilled Spirits Program report to separate supervisors. Accordingly, the inspectors and enforcement technicians do share a common supervisor with several other employees from whom they wish to separate, including the investigators. This factor, therefore, weights in favor of the Commission and AFSCME.

History of Bargaining

The history of bargaining factor favors the Commission and AFSCME. Specifically, the Commission's non-supervisory employees have been union represented as a single bargaining unit for approximately 60 years and that unit has been represented by AFSMCE for approximately 30 years.

Employee Desire

OLCCPOA asserts that the petitioning employees' desire is a compelling reason for designating the inspectors and enforcement technicians as a separate unit. OLCCPOA contends that AFSCME has failed to adequately address the bargaining concerns of inspectors and enforcement technicians. Such concerns include AFSCME conceding to the Commission a method

of calculating inspector holiday and overtime pay that previously favored them, but not the remaining bargaining unit members. OLCCPOA also asserts that AFSCME has failed to submit proposals or attempt to negotiate use of force policy, the compliance manual, officer safety issues such as the use of firearms, uniform issues, or any other issues of specific concern to the inspectors and enforcement technicians.

AFSCME responds that it has actively promoted and protected the inspector and enforcement technician interests in bargaining. In support of its argument, it cites to (1) a seniority rights provision that allows employees notified of a lay-off to displace a less senior employee in the same classification, (2) the merging of investigators and inspectors into a single classification, and (3) an extension of the probationary period for new inspectors and investigators. Finally, AFSCME identifies a negotiated salary increase in 2007.

The benefits AFSCME asserts that it has bargained on behalf of inspectors and enforcement technicians are not clear benefits to the employees in those positions and they do not appear to address the types of concerns proffered by OLCCPOA. However, in large and diverse social organizations, particularly regarding employment relationships, it is inevitable that some members of the social group feel dissatisfied or believe their interests have been neglected by others. *Administrative-Professional Association of Lane County Public Works, Inc. v. Lane County, and AFSCME Local 2831*, Case No. UC-12-09, 24 PECBR 76, 164 (2011). Additionally, the record shows that AFSCME leadership has raised some of these issues with management. Accordingly, while we believe this factor favors OLCCPOA, we properly weigh it along with the additional factors including preference for wall-to-wall units, working conditions, and community of interest.

Self-contained and Clearly Separate

Inspectors and enforcement technicians are not self-contained and clearly separate from other employees in the Public Safety Program. The majority of Commission employees are located in the Portland Metro regional office. At the time of the hearing, the Portland Metro investigators, inspectors, and enforcement technicians were located in separate but adjacent areas. With the addition of recreational marijuana compliance specialists, however, the Commission will be combining the two areas into one large open area of cubicles. In the other regional offices, the offices are small enough that the inspectors work in the same areas as other employees, even if they are assigned individual offices.

Additionally, the inspectors have contact and interaction with investigators and other members of the Public Safety Division. Twice a week in the Portland Metro office, the Public Safety Division meets which includes the inspectors, enforcement technicians, investigators and dispatchers. Additionally, inspectors frequently interact with non-sworn compliance specialist 3-case presenters in preparing cases for hearing. Inspectors also frequently communicate with dispatchers, reporting shift starts and ends, as well as their in-field locations. Inspectors also communicate regularly with bargaining unit members who support their work, such as those in finance and information technology.

Undue Fragmentation

Given our analysis of the above factors, we determine that it would cause undue fragmentation to separate the inspectors from the remaining bargaining unit. Even with their distinct schedule and DPSST requirement, the inspectors share their remaining minimum qualifications, job classification, supervisor, and pay range with the investigators. Accordingly, bargaining on these matters would become fragmented and destabilized for the Commission and AFSCME.

Analysis

The sworn inspectors and enforcement technicians have a strong desire to form an independent union. The evidence and arguments presented by both OLCCPOA and AFSCME indicate that there is a significant disconnect between the inspectors and enforcement technicians' actual concerns and the issues AFSCME has advanced on their behalf. However, although the desire 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. *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).

Here, we have not concluded that the inspectors and enforcement technicians' working conditions are significantly different from the remaining bargaining unit. The inspectors and enforcement technicians are not self-contained and clearly separate from other employer operations. They work alongside, and coordinate some activities with, other bargaining unit employees in the Public Safety Program. Additionally, they share a common supervisor with these employees. Further, with the exception of DPSST training, the minimum qualifications between inspectors and investigators are identical. As a result, inspectors often temporarily fill-in for investigators and in some cases have been reassigned to that position. Investigators can be transferred to inspector positions, subject to completion of DPSST training. Given these factors, designation of the separate unit would lead to undue fragmentation and unstable bargaining relations.

There are some distinct duties that only the inspectors and enforcement technicians can perform by virtue of their DPSST training. They are the only Commission employees with the authority to perform actions such as arrest, search, seizure, and the issuing of citations for liquor law violations. Inspectors work a schedule that is distinct from most, but not all other employees. Additionally, they are the only ones who are issued self-defense items such as hand-cuffs, pepper spray, and body armor. However, the current wall-to-wall bargaining unit contains employees with diverse skills and unique tools required to perform their respective duties in areas such as accounting, information technology, and other administrative tasks. As such, maintaining inspectors and enforcement technicians in the current bargaining unit is appropriate.

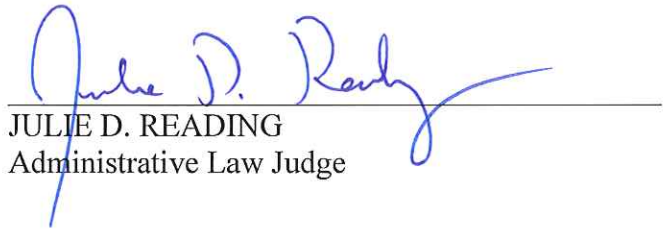
Finally, we find no basis on which to designate the inspectors and enforcement technicians as a craft unit. We have not typically designated craft units, and have instead included various professions in wall-to-wall units. However, we have made some exceptions when the members of

the craft are clearly distinct or there are other compelling circumstances to allow a splinter unit. *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, Local Union No. 290 v. Washington County*, Case No. RC-20-93, 14 PECBR 679, 685-691 (1993). These cases have included probation and parole officers, teachers, and deputy district attorneys. *See Oregon Education Association v. Children's Services Division, State of Oregon and Oregon Public Employes Union*, Case No. C-62-83, 7 PECBR 6404 (1984), *Teamsters Local Union No. 223 v. Tillamook County District Attorney's Office*, Case No. RC-74-93, 15 PECBR 373 (1994), and *Federation of Oregon Parole and Probation Officers v. Clatsop County and AFSCME Local 2746*, Case No. RC-009-12, 25 PECBR 174, 183 (2012). In those cases, we determined that a separate unit was appropriate after considering factors such as community of interest and self-containment. Here, we have found that the inspectors share a community of interest with the bargaining unit as a whole and are not self-contained. Accordingly, we do not find it appropriate to carve out a craft unit for the inspectors and enforcement technicians.

PROPOSED ORDER

The petition is dismissed.

SIGNED AND ISSUED on DECEMBER 16, 2015.



JULIE D. READING
Administrative Law Judge

NOTE: The Employment Relations Board's rules provide that the parties shall have 14 days from the date of service of a recommended order to file specific written objections with this Board. (The "date of filing objections" means the date objections are received by this Board; "the date of service" of a recommended order means the date this Board mails or personally serves it on the parties.) A party that files objections to a recommended order with this Board must simultaneously serve a copy of the objections on all parties of record in the case and file with this Board, proof of such service. The objections must be mailed, faxed or hand-delivered to this Board – not sent electronically. This Board may disregard the objections of a party that fails to comply with those requirements, unless the party shows good cause for its failure to comply. This Board does not accept electronic filing of objections (See Board Rules 115-010-0010(5) and (6); 115-010-0090; 115-035-0050; 115-045-0040; and 115-070-0055.)