

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. CC-01-12

(REPRESENTATION PETITION)

INTERNATIONAL BROTHERHOOD)	
OF ELECTRICAL WORKERS)	
LOCAL UNION 659,)	
)	
Petitioner,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
CITY OF MYRTLE CREEK,)	
)	
Respondent.)	
_____)	

A hearing was held before Administrative Law Judge (ALJ) Wendy L. Greenwald on March 21 and 22, 2012, in Salem, Oregon. The record closed with the receipt of the parties' post-hearing briefs on April 6, 2012. On April 16, 2012, this matter was transferred to this Board for decision.

Paul C. Hays and Ping Tow-Woram, Attorneys at Law, Carney Hays & Marsh, Portland, Oregon, and Jon Flegel, Assistant Business Manager, International Brotherhood of Electrical Workers Local Union 659, Central Point, Oregon, represented Petitioner.

Dan Rowan, Attorney at Law, Labor Government Personnel Institute, Salem, Oregon, represented Respondent.

On January 19, 2012, International Brotherhood of Electrical Workers Local Union 659 (Union) filed this petition seeking to certify a bargaining unit without an election pursuant to OAR 115-025-0000(1)(c). The bargaining unit proposed in the petition includes:

“All maintenance, production, and clerical employees including the following employees employed at the City of Myrtle Creek: Public Works Foreman, Park Facility Foreman, Park Facility Worker, Utility 1, Utility 2, Waste Water Treatment Plant Operator 1, Waste Water Treatment Plant Operator 2, Water Treatment Plant Operator 1, City Recorder, Billing Clerk and Financial Officer

excluding supervisory and confidential employees as provided by the Oregon Public Employee Collective Bargaining Act (PECBA).”¹

The authorization cards submitted in support of the petition comply with the requirements of OAR 115-025-0065(2) and are sufficient to support the list of employees provided by the City based on the proposed bargaining unit description.

The City filed timely objections to the petition, asserting that (1) the position of wastewater treatment plant operator 2 should not be included in the bargaining unit because the position is vacant; (2) the bargaining unit is not appropriate under ORS 243.682(1)(a) and OAR 115-025-0050 because the public works employees lack a community of interest with the clerical employees and the petition failed to include the similar positions of court/records clerk and wastewater treatment plant supervisor; (3) the finance officer and city recorder should be excluded as confidential employees within the meaning of ORS 243.650(6)²; and (4) the finance officer, parks/building foreman, and public works foreman should be excluded as supervisory employees within the meaning of ORS 243.650(23).

The issues in this case are:

1. Is the proposed bargaining unit an appropriate unit under ORS 243.682(1)(a) and OAR 115-025-0050?
2. Are the finance officer, parks/building foreman, and public works foreman excluded from the bargaining unit as supervisory employees under ORS 243.650(23)?
3. Is the finance officer excluded from the bargaining unit as a confidential employee under ORS 243.650(6)?

RULINGS

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

FINDINGS OF FACT

1. The Union is a labor organization that has petitioned to represent a bargaining unit of employees who work for the City, a public employer. The proposed bargaining unit includes the positions of public works foreman, park/building foreman, grounds maintenance

¹For purposes of this petition, the parties use the term clerical to refer to the positions of finance officer, utility billing clerk, and court/records clerk. At times, the parties used different names to refer to the same position. To avoid confusion, we use the title of the positions in the job descriptions.

²The parties stipulated at the hearing that the city recorder is a confidential employee excluded from the bargaining unit under ORS 243.650(6). There is no need to address whether the finance officer is a confidential employee because we have determined she is a supervisory employee and excluded from the bargaining unit.

worker, utility worker I and II, wastewater treatment plant operator I and II, water treatment plant operator I, utility billing clerk, and finance officer.

2. The City has a council/manager form of government under which the city administrator is responsible for all administrative duties and the Council provides policy direction. Aaron Cubic is the current city administrator.

3. There are 11 unrepresented City employees at issue in this petition, including the finance director, utility billing clerk, court/records clerk, parks/building foreman, grounds maintenance worker, public works foreman, utility workers I and II, water treatment plant operator I, and two wastewater treatment plant operator Is.³ There are also two vacant positions that the City does not currently intend to fill, the accounting clerk and the wastewater treatment plant operator II.

4. The City Hall administrative offices and Police Department are located in the same building. The Police Department offices share a hall and mail room with City Hall. Employees who work out of or have offices at City Hall include Administrator Cubic, the finance officer, the utility billing clerk, the city recorder, the public works director, and the parks/building foreman. The court/records clerk has an office in the Police Department. Other City facilities include a public works shop, a wastewater treatment plant, two water treatment plants, and various parks and recreation facilities.

5. Administrator Cubic directly supervises the public works director, finance officer, and city recorder, and jointly supervises the court/records clerk with the police chief.

6. Currently, the Police Department employees are the only City employees represented by a labor organization (Police Association). Administrator Cubic is responsible for formulating proposals and negotiating collective bargaining agreements with the Police Association. In the most recent negotiations, Cubic bargained directly with the Police Association president. During prior negotiations, Cubic, the city recorder, and a labor attorney made up the City's bargaining team.

7. During bargaining with the Police Association, Administrator Cubic asked Finance Officer Edith Calkins to provide information on salaries and benefits, calculate the cost of the Police Association's proposals and the City's potential bargaining proposals, and determine the impact of the City's potential proposals on the City budget. Cubic also discussed the City's potential bargaining proposals with Calkins, who helped him formulate his financial bargaining strategy. Cubic would need this type of assistance from Calkins in bargaining with another bargaining unit.

³The parties stipulated at the hearing that the wastewater treatment plant supervisor is a supervisory employee excluded from the bargaining unit under ORS 243.650(23). The parties also stipulated that the housekeeper, meter reader, and swimming pool staff are not appropriately included in the bargaining unit.

8. Salary Schedule: The city administrator develops and recommends a pay plan to the Council. Positions are “grouped in a class with positions of approximately the same difficulty and responsibility for purpose of pay range development” to meet the City’s guideline of providing equal pay for equal work across department lines. The current pay plan consists of 15 pay ranges, each including eleven regular steps and two longevity steps. Relevant here, the positions are grouped by pay ranges, with minimum and maximum hourly step rates, as follows: Range Seven (\$13.34 to \$17.78) – grounds maintenance worker I, utility worker I, and utility billing clerk; Range Eight (\$14.41 to \$19.21) – court/records clerk, utility worker II, wastewater treatment plant operator I, water treatment plant operator I; Range Nine (\$15.57 to \$20.74) – wastewater treatment plant operator II; Range Eleven (\$18.16 to \$24.20) – parks/building foreman, public works foreman, and city recorder; Range Twelve (\$19.61 to \$26.13) – wastewater treatment plant supervisor; Range Thirteen (\$21.18 to \$28.22) – finance officer; and Range Fifteen (\$24.70 to \$32.92) – public works director.

9. Overtime Exempt Employees: The finance officer and public works director are the only positions relevant here that are exempt from overtime.

10. Schedules of Work: The City’s personnel rules provide that each department establishes its regular work schedule, and requires work in excess of the normal established work period to be approved by the appropriate department head.

11. Leaves: The personnel rules establish the amount of and requirements for various types of leave available to City employees, including paid holidays, vacation leave, longevity awards, sick leave, military leave, and jury leave. Such leaves are subject to approval as follows: (1) requests for paid or unpaid leaves of absence must be submitted prior to the leave being taken and “approved by the Department Head or City Administrator;” (2) employees are entitled to take vacation leave “as the head of their respective departments may approve,” and “Department Heads” are to establish staff vacation leave schedules which employees will follow; and (3) an employee may use paid sick leave for the reasons identified in the rules if the employee informs his/her immediate supervisor of the need for sick leave and provides a written statement from a licensed physician for more than three days sick leave.

12. Transfers/Promotions: The City encourages filling vacancies by transfer or promotion and cross trains employees, where possible. When a vacancy occurs, the city administrator notifies all City employees, who are given an equal opportunity to apply. Kenneth Redinger, who previously worked as a utility worker I, is currently employed as a water treatment plant operator I.

13. Hiring: The City uses interview panels to fill vacancies. If the vacancy involves a department head, Administrator Cubic participates on the panel. Otherwise, the panel typically includes the department head, a foreman, and a field employee. Cubic also assists in developing the interview questions or, in some cases, the panels use previously established questions. The interview panel ranks the applicants, compares rankings, and usually recommends the applicant with the highest overall ranking. Cubic, who must approve all hiring decisions, usually accepts the panel’s recommendation.

14. Evaluations/Personnel Actions: The City uses standard evaluations and personnel action forms which require the person conducting the evaluation to check a box to recommend the completion of an employee's six-month probationary period or merit increase. The evaluator's recommendations are subject to approval by Administrator Cubic. Cubic usually approves such personnel actions as long as merit increases have been included in the Council-approved budget. On one occasion, Cubic did not approve a recommendation for a merit increase because it had not been included in the budget.

15. Time Sheets: Employees prepare time sheets, on which they record their monthly time worked and leave time taken (vacation, sick, and compensatory time). The time sheets include a place for the supervisor's signature. Once signed, the time sheet is submitted for payroll purposes.

16. Discipline/Discharge: The City has a progressive discipline policy. The rules provide the reasons for which employees may be disciplined and the types of discipline that may be imposed. Administrator Cubic has delegated authority to the public works director, public works foreman, parks/building foreman, wastewater treatment plant supervisor, and finance officer to issue oral or written reprimands. If Cubic was notified of concerns that might merit a suspension, demotion, or discharge, he would either investigate the matter himself or contract out the investigation, and then make a decision based on the investigation. As of the hearing date, the public works foreman, parks/building foreman, and finance officer had never issued a written or oral reprimand or recommended a suspension, demotion, or discharge.

17. Grievance Procedure: The personnel rules include an employee grievance procedure for addressing complaints or differences and appealing discipline. A regular (non-probationary) employee may process a grievance based on the following steps: discussion of the grievance with his/her supervisor; discussion of the grievance with the department head; filing a written grievance with the department head; and appealing the department head's decision to the city administrator, who investigates the grievance and issues a final decision. The record contains no evidence of grievances filed under this process.

18. Insurance and Benefits: The City provides all regular and probationary employees group health and life insurance and provides for regular employees to participate in the Public Employee Retirement System (PERS), with the City paying the employees' six percent contribution.

Finance Officer

19. The finance officer position's essential functions are assisting Administrator Cubic with preparing and maintaining the budget, which includes providing input on payroll and fringe benefits; maintaining financial records and supportive data for audit purposes; processing payroll and related reports; inputting revenue information and preparing accounts payable checks; reconciling bank statements; communicating with outside agencies regarding insurance, retirement, and other benefits; and balancing the City's accounts. The finance officer also assists with daily telephone calls and in-office questions from the public, routes such questions to the

appropriate personnel, and communicates with employees and department heads during the payroll process. This position does not generally make policy decisions.

20. The finance officer position requires a minimum of four years' experience in municipal or governmental finance; demonstrated knowledge of local government financial, accounting, budgeting, and cost control principles; a preference for a bachelor's degree in accounting or finance; two years' supervisory experience; and familiarity with Springbrook financial software.

21. Edith Calkins has worked as the finance officer for approximately two years. Calkins uses Springbrook financial software to perform her duties, including those related to costing and determining the impact of bargaining proposals. This software is only on the finance officer's and utility billing clerk's computers.

22. Calkins is also responsible for administering employee benefits, such as health insurance and retirement. Recently, Administrator Cubic requested Calkins assistance in responding to the Council's request to lower the cost of health insurance. Calkins will be responsible for communicating with the health insurance companies to obtain plan options, providing information about those options to Cubic, and analyzing the impact on the budget.

23. The finance officer's position description states that the position is responsible for supervising the utility billing clerk, but notes the clerk position "need[s] very little supervision and work[s] independently unless a problem arises."⁴ Most of the utility billing clerk's duties are routine. The finance officer has authority to give the clerk special assignments. Since the clerk is currently in the process of learning her routine duties, Calkins has only assigned the clerk the work of updating the City scrapbook.

24. Calkins was involved in hiring the current utility billing clerk. Calkins, City Recorder Carolyn Shields, and Administrator Cubic narrowed down the approximately 100 applications for the position to 12 candidates. Calkins, Cubic, Shields, and Public Works Director Sean Negherbon then interviewed and ranked the applicants' responses. Calkins and another panel member gave the applicant hired for the position the highest ranking. The other two panel members gave that applicant a high ranking, but ranked another applicant higher. The panel members then discussed how the two applicants compared and decided there was insufficient reason to change their scores. The hiring decision was made based on who had the highest overall score after the numerical ratings of the interviewers were tallied. Cubic told Calkins to notify the selected applicant of her appointment to the position.

25. Calkins is responsible for approving the utility billing clerk's requests for days off. Calkins could authorize the clerk to work overtime, but there is little need to do so. Calkins approves the clerk's time sheets before submission to payroll. In July 2011, Calkins prepared the clerk's most recent evaluation, in which she ranked the clerk's performance in various

⁴The position description also states Calkins is responsible for overseeing the duties of the accounting clerk, however, this position's duties were distributed to other employees and the City does not currently intend to fill that position.

categories, wrote specific comments, and recommended the clerk's completion of her six-month probationary period and a merit increase. Calkins' recommendations were approved by Administrator Cubic.

26. Calkins has orally corrected the work performance of the utility billing clerk. At the time of the hearing, Calkins planned to issue the clerk an oral reprimand. Calkins does not believe she was required to get authorization prior to issuing the reprimand. Administrator Cubic was present when Calkins received the telephone call from the clerk that was the basis of Calkins' concerns. At the time, Calkins discussed her concerns with Cubic, told him that she felt she needed to talk with the clerk and give her an oral reprimand, and Cubic agreed. Calkins believes she has authority to issue oral and written reprimands. If more serious discipline is required, Calkins would talk with Cubic about how to proceed and make a recommendation to him.

Utility Billing Clerk

27. The utility billing clerk is responsible for performing bookkeeping duties regarding billing, account maintenance, and payment collection for water and sewer services. The position also collects and maintains records of customer deposits and system development charges, acts as the cashier and receptionist, and prepares required reports and correspondence. The position works independently, with little supervision, essentially performing a series of routine duties on a monthly basis. The clerk has contact with other City employees who have offices in or come to City Hall to pick up customer calls, such as the public works crew.

28. The position requires at least two years' education or experience in accounting and experience in working with the public. The position must be able to operate all types of office equipment and have knowledge of the Springbrook billing, Excel, and Word software programs.

Court/Records Clerk

29. The court/records clerk is primarily responsible for processing and maintaining municipal court records, payments, policies, procedures, and other documentation; assisting in the courtroom; communicating with the public on routine matters; scheduling and communicating with police officers, attorneys, corrections officers, and defendants regarding court dockets and trial dates; exchanging information with other police agencies; entering and maintaining accurate police records in various databases; and providing information regarding police records, activities, and operations to the public, Police Department personnel, and other agencies.

30. The court/records position requires a high school diploma or an equivalent combination of education and experience in performing the position's primary duties; knowledge of municipal court operations; experience with court, record keeping, and word processing computer software; an Oregon driver's license; and possession of or the ability to obtain LEADS and notary public certifications.

31. Prior to July 1, 2011, Mary Bay worked as a police records clerk. In July 2011, the court clerk duties were added to her position. She works out of the Police Department offices, but is not a member of the Police Association bargaining unit.

32. Bay interacts with City Hall employees, who process court payments and deal with witnesses. She also occasionally interacts with public works employees regarding Police Department office repairs or maintenance issues.

City Recorder

33. The city recorder position is primarily responsible for maintaining the City Code; providing official notice of public meetings; acting as the custodian of the City's public records; serving as clerk to the Council and its committees and commissions; serving as the election officer; and providing administrative and technical support to the city administrator. As the support for the Council, the city recorder attends Council meetings; takes minutes during executive sessions; records Council proceedings; drafts or edits the minutes; reviews the agenda; assembles records for Council approval; and ensures appropriate distribution of Council-approved documents.

34. The city recorder position requires a high school diploma or GED, and six years' administrative experience related to handling municipal government public records and meetings, or a combination of experience and training. The position also requires advanced knowledge of computer software programs, such as word processing, spreadsheet, presentation graphics, desktop publishing, and data entry; the ability to perform financial and statistical record keeping; and human relations and teamwork skills.

35. Carolyn Shields began working for the City approximately 21 years ago as an accounting clerk. She was then promoted to the position of deputy recorder, which she held for two years, after which she was promoted to her current city recorder position, which she has held for approximately six years. Shields has one year of college in the area of accounting, which was required for the accounting clerk position.

36. Shields does not currently attend or assist Administrator Cubic with the Police Association negotiations and such duties are not part of her job, although she has been part of the City's bargaining team in the past. Shields does not oversee benefits, but is listed as the City's contact person on the health insurance plan and she can remove or add employees to the plan. She is not currently involved in the process of looking for a new insurance plan. Shields has a good understanding of the City's current insurance benefits and believes she would be able to confer with the city administrator regarding the impact of insurance plan options on the budget.

37. Shield's current job duties do not include accounting responsibilities and she does not have Springbrook software on her computer. Previously, when the finance officer's position was vacant, Shields used the Springbrook software to access financial information. It took Shields more time to do this than it would have taken the finance officer, since Shields was not as familiar with the software. Shields is familiar with the Police Association's collective bargaining agreement, knows that the City currently picks up employees' PERS contribution,

and could use the Springbrook software to calculate the cost of the PERS pick up on the City's budget. With training, Shields believes she would be able to cost out bargaining proposals and provide economic advice to Administrator Cubic on bargaining strategies.

Public Works Director

38. The Public Works Department (Department), which is overseen by the public works director, consists of the water treatment plants, parks/building department, wastewater treatment plant, and public works crew.⁵ The water treatment plants are operated by a water treatment plant operator I. The parks/building department consists of the parks/building foreman and the grounds maintenance worker. The wastewater treatment plant is operated by a wastewater treatment plant supervisor and two wastewater treatment plant operators. The public works crew consists of the public works foreman and two utility workers.

39. Negherbon has been the Department's director for a little over one year. He has overall responsibility for the operations in the Department. Prior to becoming the director, Negherbon worked as the City's water treatment plant supervisor.

40. Director Negherbon relies on the assistance of the parks/building foreman, wastewater treatment plant supervisor, and public works foreman in carrying out his duties. Negherbon would consider their opinions if an employee sought to transfer between the Department's different sections. Negherbon reviews the evaluations written by the parks/building foreman and public works foreman and must approve all personnel action recommendations, which he has done so far without change. Unless Negherbon had a problem with an evaluation, or there was something in the evaluation he wanted to critique, he approves evaluations without change.

41. Neither the public works nor parks/building foremen have ever issued an oral or written reprimand or been involved in a grievance. Negherbon believes he would usually concur with either foreman's recommendation for a reprimand. Negherbon expects he and the foreman would conduct a joint investigation regarding the basis for the reprimand, unless the reason for the reprimand was clear, such as an employee missing work in violation of the attendance policy.

42. Director Negherbon holds a weekly Monday morning meeting with the public works foreman and wastewater treatment plant supervisor to review the work completed during the prior week and the goals and workload for the upcoming week.

Water Treatment Plant Operator I

43. The water treatment plant operator I is primarily responsible for operating and maintaining the City's water treatment plants, including performing water quality analysis and testing, maintaining an inventory of chemicals and supplies, reviewing plans and specifications

⁵The parties also used the term "public works department" to refer to the public works crew that operates out of the public works shop. To avoid confusion, we do not use the term in that context.

for capital improvements, and assisting staff in operating the water distribution system. This position also performs daily customer service calls, repairs and maintains water meters, responds to customer concerns, and may assist the public works crew.

44. The water treatment plant operator I is required to have a high school diploma or GED, an Oregon driver's license, and an Oregon Water Treatment Level I license or be able to obtain one within 12 months. The position must also be skilled in the functions and activities of maintaining a conventional water system and be able to operate equipment such as tractors and backhoes.

Parks/Building Foreman

45. The parks/building foreman position is responsible for providing "leadership and direction in the operation, maintenance and personnel management of the Parks and Building facilities and infrastructure." This position's duties include requesting the purchase of necessary supplies; overseeing and participating in field data related to planning and design work; assisting in budget preparation; identifying and performing preventative maintenance requirements on heating, ventilation, and air conditioning equipment; maintaining and repairing wood structures, plumbing fixtures, water and sewer lines, and pools and fountains; operating and maintaining mechanical tools and equipment; and working with outside contractors on projects.

46. The parks/building foreman position requires a high school diploma or GED, three years' experience in parks and building general maintenance and construction, the ability to drive a manual transmission vehicle, and an Oregon driver's license with a CDL class A endorsement.

47. Dan Van Cleave, the current parks/building foreman, previously worked as the parks/buildings director from November 1995 until November 30, 2011. In the director position, Van Cleave reported directly to Administrator Cubic. On November 30, 2011, Cubic downgraded the parks/building director position to a parks/building foreman, moved the position from Pay Range 13 to Pay Range 11, and demoted Van Cleave to the new position. Cubic made this change because of issues with Van Cleave's management/supervisory skills, the need to build efficiencies into the City's structure, and budget issues. Cubic did not reduce Van Cleave's salary.

48. In his new position, Van Cleave is supervised by Public Works Director Negherbon. Administrator Cubic told Van Cleave that the main change in his responsibilities was that he would no longer be required to report to the City Council or to staff the Parks Commission. Cubic gave a copy of the new parks/building foreman job description to Van Cleave, but Van Cleave left it with Cubic and did not take it with him. Cubic did not tell Van Cleave that his responsibilities regarding Grounds Maintenance Worker Daniel Snyder had changed.

49. Van Cleave currently has an office in City Hall, which may be moved in the future. In the morning, Van Cleave comes to his office to check his e-mail, prepare his weekly report, and check for work orders from Director Negherbon or Administrator Cubic. If there are

no specific work orders, he determines what projects he works on. Van Cleave usually works on projects alone. On occasion, he requests assistance from Grounds Maintenance Worker Snyder or the public works crew. Van Cleave spends approximately 90 to 95 percent of his time working in the field on park structures or buildings and 5 to 10 percent of his time in the office. He provides Negherbon a written report of the work completed each week.

50. As parks/building director, Van Cleave was responsible for overseeing the work of Grounds Maintenance Worker Snyder and the seasonal swimming pool staff. As director, Van Cleave approved Snyder's days off; signed Snyder's time sheet; and evaluated Snyder. He had authority, which he rarely used, to assign work to Snyder. At one point, Van Cleave raised concerns with Administrator Cubic about Snyder's performance, but he felt nothing was accomplished, so gave up. Van Cleave did not know that he had authority to issue a reprimand as the parks/building director.

51. Two to three years previously, then Director Van Cleave gave Snyder high marks on his evaluation. When he gave the evaluation to Administrator Cubic for his approval, Cubic asked Van Cleave if the evaluation accurately reflected the discussions they had about problems with Snyder's performance. When Van Cleave said it did not, Cubic told him that the evaluation needed to be accurate. As a result, Van Cleave revised Snyder's evaluation to include lower marks. When Van Cleave presented the evaluation to Snyder and Snyder asked why Van Cleave had given him such low marks, Van Cleave told Snyder that he had originally marked Snyder higher but Cubic had told him to change the evaluation.

52. At the time of the hearing, Van Cleave had been a parks/building foreman for approximately four months. The position's job description provides that the foreman is responsible for supervising employees assigned to parks and building operations, including providing management oversight and guidance; scheduling tasks and vacation leave; conducting performance evaluations; and leading and motivating subordinate employees.

53. As director, Van Cleave participated in hiring panels. Two or three years ago, Van Cleave participated in hiring the pool manager. Last summer or fall, Van Cleave participated in selecting the RV park host, who receives a free RV space but no pay. He believes he would be involved in a hiring panel if Snyder's position became vacant.

54. As foreman, Van Cleave rarely assigns Snyder work, but gives Snyder any work orders he has received for Snyder from Director Negherbon or Administrator Cubic. Non-routine parks jobs are usually done by Van Cleave or Negherbon. Van Cleave does not know if he has authority to grant Snyder's days off. When Snyder notifies Van Cleave he will be gone, Van Cleave notifies Director Negherbon. Van Cleave does not sign Snyder's time sheets. Van Cleave does not know if he will evaluate Snyder or if he has authority to issue Snyder an oral or written reprimand.

Grounds Maintenance Worker

55. The grounds maintenance worker is primarily responsible for the day-to-day park maintenance, including upkeep and cleaning of restrooms and other buildings; mowing and

fertilizing the grass; maintaining trees, plants, and other landscaping; and collection of garbage and litter. The position may also assist the public works crew with maintenance and repair of the water and sewer systems.

56. The grounds maintenance worker position requires a high school diploma or GED and two years' experience, or equivalent combination of education and experience; an Oregon driver's license; and the skills to perform the position's duties.

57. Snyder has been the City's grounds maintenance worker for approximately 18 years. Snyder arrives at 7:30 a.m., sets his own work priorities, and generally follows the same seasonal routine schedule of duties every day. Van Cleave has never directed Snyder in how to do his job, except on one occasion, when Director Van Cleave told Snyder that a Parks Commission member or Administrator Cubic wanted Snyder to do it differently.

58. Snyder rarely works with Van Cleave. If Van Cleave asked Snyder for assistance, he would provide it. Snyder does not know who will conduct his next evaluation. Van Cleave gives Snyder work orders from Director Negherbon or Administrator Cubic, and sometimes Negherbon gives Snyder work orders directly. If Snyder has questions about work, he talks with either Van Cleave or Negherbon, although Negherbon is often easier to reach because Van Cleave is usually working in the field.

Wastewater Treatment Plant Supervisor

59. The wastewater treatment plant operates 24 hours a day. The wastewater treatment plant supervisor is responsible for the operation, supervision, and management of the wastewater treatment plant. He makes process control decisions; performs administrative and management work; assists in budget preparation; oversees purchasing; prepares required reports and statistical data; engages in short- and long-term planning; and performs the duties of a wastewater treatment plant operator. He also arranges for coverage of the water treatment plant operations on the weekends and in the absence of the water treatment plant operator, as needed.

60. The wastewater treatment plant supervisor is required to hold an Oregon Class III Wastewater Treatment Certification or higher, have an Oregon driver's license, be able to operate manual transmission vehicles, and be a Class III or Class IV Wastewater Treatment Operator.

61. Steve Turner has been the City's wastewater treatment plant supervisor for approximately sixteen years. He holds a Class IV Wastewater Treatment Certification. Turner currently supervises two wastewater treatment plant operator I positions. He ensures that employees obtain required training and certifications; prepares work schedules and assigns special projects; approves vacation requests; arranges coverage for vacations, sick time, and holidays; conducts employee evaluations; and makes recommendations for merit raises and completion of probation.

62. Turner communicates with the water treatment plant operator in arranging coverage of the water treatment plant; may request assistance from the public works crew on

projects; deals with City Hall staff on purchase orders and purchasing supplies; and also orders supplies through the parks/building foreman.

Wastewater Treatment Plant Operator I

63. The wastewater treatment plant operator I is responsible for maintaining the daily operations of equipment at the wastewater treatment plant and some process control. The position's duties include taking and testing samples throughout the plant; making process changes based on testing; maintaining, repairing, and troubleshooting pumps, wastewater equipment, and other machinery; changing grit and screening bags daily; and performing laboratory testing.

64. The wastewater treatment plant operator I position requires an Oregon Class I Wastewater Treatment Certification, an Oregon driver's license, a high school diploma or GED, and one year's experience in wastewater treatment.

Wastewater Treatment Plant Operator II

65. The wastewater treatment plant operator II is responsible for processing wastewater and controlling biological functions at the treatment plant. The position is responsible for monitoring, operating, and maintaining the plant equipment and machinery; monitoring process controls in the absence of the plant supervisor; and responding to call outs at the plant for water and sewer line problems. The position's duties include inspecting, monitoring, and performing preventative/corrective maintenance on plant operations and equipment, including meters, gauges, computers, and other monitoring devices; collecting and analyzing samples; performing and interpreting lab tests; cleaning and maintaining plant buildings, equipment, and grounds; operating vehicles; and assisting with budgeting and purchase of supplies.

66. The wastewater treatment plant operator II position requires an Oregon Class II Wastewater Treatment Certification, an Oregon driver's license, a high school diploma or GED, two years' wastewater treatment experience or the equivalent college education, three years' field education or experience, and six months' experience as an operator I.

Public Works Foreman

67. The public works foreman is responsible for the operation, maintenance, and personnel management related to water distribution, wastewater collection, streets, storm water, and the airport system. He schedules work projects on a day-to-day basis, as needed; oversees the work of crew members; manages and coordinates the assignment and maintenance of public works equipment and vehicles; orders and maintains supplies and parts; and completes required paperwork. The public works crew operates out of the public works shop, where the foreman's office is located.

68. The public works foreman position requires a high school diploma or GED; three years' experience in public works maintenance, general construction, water distribution and treatment, or sewage collection and treatment; ability to operate manual transmission vehicles;

Oregon driver's license with a CDL class A endorsement; an Oregon Department of Environmental Quality Wastewater Collection Grade I Certification; an Oregon State Health Department Water Distribution Grade I Certification; and an Oregon Department of Agriculture Right of Way Public Pesticide Applicator license. The position must also be able to operate heavy equipment, supervise or participate in the repair and maintenance of equipment and vehicles; perform data collection and record keeping; and be knowledgeable about pumping hydraulics, pump design and maintenance, plumbing design and construction, and mechanical maintenance.

69. The public works foreman's position description specifies that the position is responsible for supervision of the utility worker I, utility worker II, meter reader, and service/inmate workers. The description states that the public works foreman provides management and oversight of staff and schedules and supervises staff task assignments and vacation leave.

70. Quinn Pickering is the current public works foreman. He spends approximately 75 to 80 percent of his time in the field working on projects and 20 to 25 percent of his time attending to administrative duties. Pickering usually works side-by-side with the utility workers on projects, but sometimes works on projects separately. Pickering and the utility workers operate all necessary equipment.

71. The public works crew has an established annual schedule of projects that must be completed. Foreman Pickering maintains and writes the current project list on a white board. If either Pickering or the utility workers observe something in the field that needs to be addressed, they add it to the project list. Pickering has the authority to prioritize the work to be completed, although the utility workers generally know what work needs to be done without direction, including the order in which the work should be completed. Where priorities are not clear, Pickering and the utility workers usually discuss and agree on the work order.

72. In addition to the annual schedule of projects, the public works crew responds to calls from citizens and emergencies. Citizens either call directly to the public works shop or to City Hall. If an emergency occurs during the work week, Pickering addresses the emergency himself or assigns the utility workers to assist him. On weekends, Pickering determines whether an emergency needs to be addressed immediately and, if so, which crew member to call for assistance.

73. Pickering and the utility workers are often required to work outside of regular hours. Foreman Pickering has the authority to authorize compensatory time to finish a project. At times, the utility workers have worked past the end of their work day to complete an assigned emergency or project without seeking prior authorization. The utility workers submit their time sheets to Pickering, who signs them. If Pickering is not available, they take their time sheets to Negherbon or City Hall.

74. Pickering prepares the utility workers' performance evaluations, meets with them to review their evaluations, provides suggestions for improving work performance, and makes recommendations for completion of a probationary period or a merit increase. In June 2011, Pickering evaluated and recommended a merit increase for Utility Worker II David Cox, which

Administrator Cubic approved. Funds for City employee merit increases had previously been authorized by the Council. Pickering also evaluated Utility Worker I Nicholas Schartner and recommended the completion of his six-month probationary period and a merit increase, which Cubic approved.

75. The utility workers notify the public works foreman when they are sick. If a utility worker has a doctor appointment, he either notifies Pickering or the other utility worker, who notifies Pickering. When a utility worker wants to take vacation, the utility workers and Pickering consult the calendar to ensure no one else is on vacation. Pickering has authority to allow vacation requests. If an employee requests more than a week of vacation, Pickering discusses the request with Director Negherbon.

76. Pickering has not had to issue discipline during his three years in the position. While in the field, he has provided the utility workers simple oral corrections, such as telling them to avoid profane language, and talked with them about ways to improve their performance. Pickering has authority to recommend an oral or written reprimand. He can also send an employee home from work for the day. Pickering would confer with Director Negherbon or Administrator Cubic if additional discipline was a consideration.

77. Approximately a year prior to the hearing, Foreman Pickering was on a hiring panel for a utility worker. Pickering, Director Negherbon, and Wastewater Supervisor Turner narrowed the applications; interviewed the selected applicants using standard questions which had been developed by either the city administrator or the prior public works director; ranked the applicants; and came to a consensus on hiring the applicant with the highest score. Director Negherbon contacted the applicant and offered him the position.

Utility Workers I and II

78. The utility workers are responsible for performing tasks related to the installation, repair, and maintenance of the streets, water and sewer systems, equipment, and other public works. They perform minor maintenance on vehicles and equipment, operate power and hand tools, and may assist with maintenance at the water treatment plant, wastewater treatment plant, parks, and facilities. The utility worker I performs both semi-skilled and skilled work, including heavy manual labor. The utility worker II performs skilled manual and equipment operation tasks, operates light and heavy equipment, and may act as the on-site crew lead worker.

79. The utility worker I and II positions require a high school diploma or GED and a Oregon driver's license with a CDL class A certification. In addition, a utility worker II must hold, or obtain within a year of employment, Oregon Wastewater Collection Class I and Water Distribution Class I Certifications.

80. Utility Workers Cox and Schartner almost always work on projects together. They have some routine work that they perform each day, and the rest of the day's work consists of projects selected from the projects listed on the white board. Foreman Pickering works with them approximately 85 percent of the time.

81. Schartner and Cox have occasionally helped the water treatment plant operator clean out wells and worked with the parks employees. They generally do not go to City Hall except to pick up paper work from the utility billing clerk or when Pickering is absent. They have weekly safety meetings with Foreman Pickering, Water Treatment Plant Operator Redinger, and Grounds Maintenance Worker Snyder.

82. When Pickering is absent, Schartner and Cox follow the project list on the white board, respond to emergencies, and go to City Hall once or twice a day to obtain any work calls.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The appropriate bargaining unit is

All regular clerical, maintenance, and production employees at the City, excluding employees represented by other labor associations and supervisory and confidential employees.

3. The finance officer and public works foreman are excluded from the bargaining unit as supervisory employees under ORS 243.650(23).

4. The parks/building foreman is included in the bargaining unit as he is not a supervisory employee.

DISCUSSION

Appropriateness of Bargaining Unit

ORS 243.682(1)(a) provides that in making a determination regarding an appropriate bargaining unit, this Board

“shall consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees. The board may determine a unit to be the appropriate unit in a particular case even though some other unit might also be appropriate.”

OAR 115-025-0050(2) further identifies factors for us to consider when determining whether a “community of interest” exists, such as “similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, and common supervisor.”

The Union proposes a bargaining unit that would include all unrepresented employees at the City. The City objects to the inclusion of what the parties refer to as the clerical employees (utility billing clerk and court/records clerk positions) in a unit with the Public Works Department employees. The City argues that the clerical employees lack a community of interest

with the Public Works Department employees as the two groups of employees do not have similar duties or skills, do not promote or transfer into each other's positions, work out of different locations in the City, and have different supervisors to whom they report. The only similarities, according to the City, are that all employees receive similar benefits and ultimately report to Administrator Cubic.

In determining what constitutes an appropriate bargaining unit, we have discretion to decide how much weight to give to each statutory factor. *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001). We apply those factors in a manner that best advances the policies and purposes of the Public Employee Collective Bargaining Act (PECBA). *Association of Public Employees v. Oregon State System Higher Education and Oregon Public Employees Union, Local 503 SEIU*, Case No. RC-113-87, 10 PECBR 883, 888 (1988).

The City contends the clerical employees and public works employees do not have a similar community of interest. It does not assert that the proposed unit fails to meet the other statutory criteria. We addressed this situation in *Oregon AFSCME, Council 75 v. City of Hermiston*, RC-24-96, 16 PECBR 792, 797-98 (1996), where the city asserted that the public works, wastewater, and water department employees did not have a community of interest with other departments. This Board rejected that argument, holding that "any functional and operational differences among City departments do not result in separate communities of interest for the employees." That same rationale applies in this matter.

Our long-standing preference is to certify the largest appropriate bargaining unit. *Teamsters Local Union 670, Public Employees Division, International Brotherhood of Teamsters v. Linn County Parks & Recreation Department, Linn County*, Case No. C-40-80, 5 PECBR 3081 (1980); *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 (2007). The clerical employees are City employees with a community of interest with the public works employees. We see no reason to exclude them from the proposed bargaining unit.

Supervisory Status

The City asserts that the positions of finance officer, parks/building foreman, and public works foreman are supervisors under the PECBA. Supervisors are not public employees under the PECBA and are excluded from collective bargaining units. ORS 243.650(19).

ORS 243.650(23) defines a supervisory employee as:

"any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment."

In applying this definition of supervisory employee, “we review the evidence to determine whether the employees at issue have actual authority to take, or the ability to effectively recommend, action in any of the twelve areas enumerated in the statute,” and whether this exercise of such authority requires the use of independent judgment. *The Dalles Police Association v. City of The Dalles*, Case No. UC-07-08, 22 PECBR 995, 1006 (2009). We address each position in turn.

Finance Officer

The City argues that the finance officer is a supervisor because she has actual authority to issue oral and written reprimands; was part of the hiring panel that selected the current utility billing clerk; prepared and signed the clerk’s performance evaluation; and recommended to Administrator Cubic that the utility billing clerk be granted a merit increase. The utility billing clerk is the lone employee who reports to the finance director.

The Union contends that the finance officer has never issued written or oral reprimands; has been involved solely as a panel member for hiring interviews with no independent authority to recommend or hire employees; and does not have authority to grant merit increases, as those are contingent upon approval by Administrator Cubic subject to available funding in the City’s budget.

While we agree that the finance officer does not have ability to actually hire, or to effectively recommend the hiring of an employee under the City’s hiring panel process (See *Deschutes County Sheriff’s Association v. Deschutes County*, Case No. UC-62-94, 15 PECBR 796 (1995), *recons*, 16 PECBR 328 (1996) – no exercise of independent judgment when participating as hiring panel member), she has actual authority to issue oral and written reprimands. She also has authority, and used that authority in July 2011, to effectively recommend merit increases once she decides an employee has successfully completed probation. Cubic’s sole role in approving a merit increase is to determine whether there are available funds to pay for the merit increase; he does not “second guess” her decision to award an increase. Her authority in these two areas is sufficient for us to determine that the finance officer is a supervisory employee, and as such, is excluded from the proposed bargaining unit.

Public Works Foreman

The City asserts that the public works foreman is a supervisor because he has actual authority to issue oral and written reprimands; assigns and directs the work of the two City utility workers who report directly to him; prepares and signs the utility workers’ performance evaluations; and recommends merit and cost of living increases for the utility workers to Director Negherbon and Administrator Cubic.

The Union argues that the public works foreman has not issued any reprimands during his three years in the position, and has neither actual authority to discipline nor ability to effectively recommend any discipline without involving Negherbon or Cubic. According to the Union, cost of living increases are awarded by the City Council to all employees and do not involve any approval or recommendation by the public works foreman prior to their award.

The public works foreman, similar to the finance officer, has authority to issue oral and written reprimands. He has orally corrected behavior in the field, although has never imposed any formal written discipline. He assigns and directs the work of the two utility workers, as the Union acknowledges in its brief. Although cost of living increases are authorized by the City Council, merit increases are not automatically granted, and are approved only for employees whose work is deemed acceptable pursuant to a performance evaluation. He has the authority to decide if an employee has completed probation, and has written performance evaluations that effectively recommend merit increases for the utility workers. While these recommendations for merit increases are reviewed by Cubic, his role in the review is simply to determine whether funds are available to pay for the increase. The public works foreman is a supervisory employee, and as such, is excluded from the proposed bargaining unit.

Parks/Building Foreman

This position is on the same organizational level as the public works foreman and the wastewater supervisor. Although the City argues this position has authority similar to the public works foreman and wastewater supervisor, it does not.

This foreman position was created on December 1, 2011, when the City downgraded the parks/building director position. The former director was placed into this newly-created position as the parks/building foreman. According to Administrator Cubic, one of the reasons for making this change was due to issues with the director's management and supervisory skills. The City states that since the parks/building foreman was never told his level of supervisory authority was changed when he was demoted, this Board should infer that he retained the same level of supervisory authority. We do not find that to be a reasonable inference.

The City asserts that the foreman is a supervisor because he can effectively recommend that an applicant be hired, an employee has successfully completed probation, and an employee should be given merit increases. The foreman has not done any of these actions in his current position, and the evidence does not support that he would be doing any of them in the future.

The foreman spends at least 90 percent of his time working in the field. He completes work based on work orders given to him from Negherbon or Cubic. If there are no specific work orders for him, the foreman decides what projects to work on.

A single grounds maintenance worker is supervised by the foreman, according to the City. The foreman, however, does not perform any of the statutory functions necessary for us to determine he is a supervisor. If he were involved in hiring, it would be as part of a hiring panel, the process used by the City to fill permanent positions. He does not assign work to the ground maintenance worker. Rather, this employee works independently, sets his own work priorities, and completes work orders assigned to him by Negherbon or Cubic. Even as director, he rarely assigned work to the grounds maintenance worker.

The foreman does not believe he has authority to issue any discipline now, or when he was a director, and has never done so. While he drafted a performance evaluation for the ground maintenance worker when he was a director, he changed the evaluation scores when questioned by Cubic. The foreman does not know if he will evaluate the grounds maintenance worker in the

future. Performing the evaluation is a necessary step in the process of potentially recommending a merit increase. Based on the record, it is doubtful that he will ever make such recommendation.

As the parks/building foreman does not perform any of the twelve indicia of a supervisor, he is not a supervisory employee. He will be included in the proposed bargaining unit.

ORDER

1. The appropriate bargaining unit is:

All regular clerical, maintenance, and production employees at the City, excluding employees represented by other labor associations and supervisory and confidential employees.

2. The finance officer and public works foreman are excluded from the bargaining unit as supervisory employees under ORS 243.650 (23).

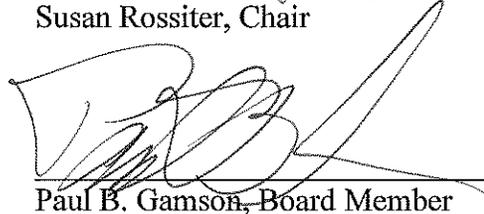
3. The parks/building foreman is not a supervisory employee, and is included in the bargaining unit.

4. The Elections Coordinator shall modify the list of employees provided by the City consistent with this Order, and check the showing of interest against the modified list. If it is determined that a majority of the employees wish to be represented by the Union for purposes of collective bargaining, this Board shall certify the Union as the exclusive representative of the bargaining unit.

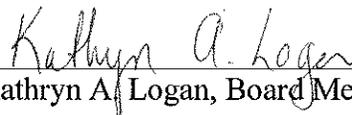
DATED this 13 day of June 2012.



Susan Rossiter, Chair



Paul B. Gamson, Board Member



Kathryn A. Logan, Board Member

This Order may be appealed pursuant to ORS 183.482.