

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-1-07

(PETITION FOR REPRESENTATION)

OREGON AFSCME COUNCIL 75,)	
)	
Petitioner,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
CITY OF ONTARIO,)	AND ORDER
)	
Respondent.)	
_____)	

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on November 27, 2007, following a hearing before ALJ B. Carlton Grew on July 11, 2007. The record closed with submission of closing briefs on August 7, 2007.

Jason M. Weyand, Legal Counsel, Oregon AFSCME Council 75, 308 S.W. Dorion Avenue, Pendleton, Oregon 97801, represented Petitioner.

Diana L. Moffat, Attorney at Law, Local Government Personnel Institute, 1201 Court Street, Suite 301, P.O. Box 908, Salem, Oregon 97308, represented Respondent.

On January 18, 2007, Oregon AFSCME Council 75 (AFSCME) filed this petition to represent a proposed bargaining unit that included employees in the following job titles: accounting assistant, accounts payable clerk, administrative assistant, assistant (Library), cash receipts/customer service, network administrator/office manager, planning technician, secretary, technology manager, and utility billing clerk, excluding

confidential and supervisory employees. On February 8, 2007, the City of Ontario (City) filed objections to the petition.

The issues are:

1. Is the position of technology manager appropriately included within the proposed bargaining unit of employees in the following job titles: accounting assistant, accounts payable clerk, administrative assistant, assistant (Library), cash receipts/customer service, network administrator/office manager, planning technician, secretary, technology manager, and utility billing clerk, excluding confidential and supervisory employees?
2. Is the proposed bargaining unit appropriate under ORS 243.682(1)?

RULINGS

The ALJ made no rulings

FINDINGS OF FACT

1. AFSCME is a labor organization and the City is a public employer under the Public Employee Collective Bargaining Act (PECBA).

Organization of the City

2. The City has a population of approximately 11,200. Its primary administrator is the City manager. The City employs approximately 155 employees, including 83 full-time employees (40 hours per week), four 35-hour-per-week employees, and 68 other part-time, seasonal, and casual employees. The City is made up of the following departments: Administration, Library, Finance, Fire, Parks and Recreation, Police, Developmental Services, Technology, Human Resources, City Recorder, Public Works, and the Airport. The City operates out of six different buildings and an airport. The buildings are the City Hall, City Hall Annex, Library, Recreation and Aquatics Center, Waste Water Treatment Plant, and Public Works Shop.

Labor Organization Representation of City Personnel

3. Currently, there are three separate bargaining units in the City. The represented employees' terms and conditions of employment are established in each bargaining unit's collective bargaining agreement.

(a) The Service Employees International Union Local 503, Oregon Public Employees Union (SEIU) represents approximately 22 police and dispatch employees, and 1 ordinance officer. The employees in this bargaining unit are prohibited from striking.

(b) The International Association of Fire Fighters (IAFF) represents the employees in this bargaining unit that are prohibited from striking.

(c) The Teamsters union represents approximately 24 employees in the Public Works Department. The employees in this bargaining unit are permitted to strike.

Unrepresented City Employees

4. Approximately 100¹ City employees are currently unrepresented. The unrepresented employees' terms and conditions of employment are established by the City Personnel Policy Manual and pay plan. Under the manual, all new and rehired employees serve a one-year probationary period. Promoted employees serve a six-month probationary period. The City's pay plan establishes minimum and maximum rates of pay for all unrepresented positions. The City's pay plan does not provide for annual steps, but does provide for merit increases for all full-time, non-probationary employees. Each employee included in the petition is paid on a different salary range, except for the two Public Works administrative assistants.²

History

5. There is no evidence that any previous representation petitions have been filed related to the employees covered by this petition. On December 20, 2006, AFSCME filed its first petition for City of Ontario employees seeking to represent "[a]ll part-time and full time [*sic*] employees for the City of Ontario who are not currently represented, excluding supervisors." By letter dated January 5, 2007, the elections coordinator notified AFSCME that its showing of interest was insufficient to support the petition based on the list of 114 employees provided by the City.

¹The testimony regarding the total number of City employees and the number of employees in the different categories was inconsistent. However, this inconsistency did not affect the decision in this matter

²The two part-time accounts payable clerk positions used to be on the same salary range until they were combined into one position.

6. On January 5, 2007, AFSCME filed an amended petition, seeking to represent “[a]ll strike-permitted part-time employees who work 20 or more hours per week and all full-time employees for the City of Ontario who are not currently in another represented bargaining unit, excluding temporary, seasonal and casual employees, also excluding supervisors and confidential employees.” AFSCME withdrew this petition.

7. On January 18, 2007, after discussions with the City’s representative, AFSCME filed the petition before this Board, seeking to represent the 12 employees in the specified positions. The City filed timely objections to the proposed unit on February 8, 2007.

Positions Included in the Proposed Bargaining Unit

8. On the date of the hearing, the proposed bargaining unit included 11³ employees in the following positions: accounting assistant, accounts payable clerk, administrative assistant, library assistant, cash receipts/customer service specialist, network administrator/office manager, planning technician, fire secretary, technology manager, and utility billing clerk

Finance Department Positions

9. The Finance Department includes four of the proposed positions: the accounting assistant, the accounts payable clerk, the utility billing clerk, and the cash receipts/customer service specialist. All these positions are supervised by the Finance director. The Finance director is supervised by the City manager. The Finance Department is located in City Hall.

10. The accounting assistant is responsible for various accounting tasks, including general ledger and accounts receivable activities. She also prepares documents for the financial director and performs general office tasks. She has access to some confidential administrative work. She is a full-time employee, working a regular full-time schedule (Monday through Friday from 8:00 a.m. to 5:00 p.m.). Her position requires an advanced knowledge of accounting procedures, practices, and office procedures; the completion of college level accounting courses; and three years of practical accounting experience

³At the time of the hearing, the two part-time accounts payable clerk positions had been merged into one full-time position

11. The accounts payable clerk is responsible for performing routine accounting work in the accounts payable function. She is a full-time, regularly scheduled employee. The position requires a high school diploma, or its equivalent, and no advanced knowledge of accounting. The workload for this position is comparable to the utility billing clerk position.

12. The utility billing clerk processes information obtained from utility meters, mails and receives utility bills, deposits funds, and provides customer service related to utility issues. This position requires a high school diploma, or its equivalent, and no prior knowledge of accounting. The utility billing clerk works a regular, full-time schedule.

13. The cash receipts/customer service specialist covers the front desk, receives payments from walk-in customers, and performs general clerical tasks. She works a regular, full-time schedule. This position requires a high school diploma or its equivalent. At the time of the hearing, the City was recruiting for this position, which was vacant. The front desk was being covered by the accounts payable clerk and other Accounting Department employees as needed.

Library

14. The Library is located approximately two blocks from City Hall. It is open Tuesday, 11:00 a.m. to 4:00 p.m.; Wednesday, 2:00 p.m. to 8:00 p.m.; and Saturday, 12:00 p.m. to 4:00 p.m. The Library also operates a bookmobile.

15. There are five Library employees: the library supervisor, the library assistant, and three pages.⁴ The library assistant and the pages work under the library supervisor, who is supervised by the City manager. AFSCME seeks to include the library assistant in the proposed bargaining unit.

16. The library assistant works 35 hours per week. Her work schedule includes some evenings. The library assistant works both in the library and the bookmobile. She is responsible for cataloguing, reference, circulation, mending, inter-library loans, collections, filing, typing, and other related work. This position also

⁴The formal title of the library assistant is bookmobile/library assistant. The three pages actually have three different titles: library assistant, library page, and library aide. All three of these positions were referred to as "pages" during the hearing. We will refer to them in this way to distinguish them from the library assistant.

performs general clerical duties. This position requires a high school diploma or its equivalent.

17. The pages' primary duties are to stack and catalogue books. One page works a regular schedule of 15 hours per week. The other pages work regular schedules of 5 hours per week. Pages have limited work experience and skills.

Fire Department

18. The Fire Department is located in City Hall. The employees in the Fire Department include the fire chief; assistant fire chief; secretary; eight full-time firefighters, represented by IAFF; and approximately 29 part-time, volunteer firefighters and haz-mat techs. AFSCME seeks to include the secretary in the proposed bargaining unit.

19. The secretary is the only position in the Fire Department that is responsible for performing general office and clerical duties for the fire chief and other staff. She also does medical billings for EMT calls, acts as receptionist, and dispatches staff by radio for fire inspections. She does not do emergency dispatching. Some of the secretary's work involves interactions with other departments. She prepares the monthly bank statement for the Finance Department and works with the planning and utility employees regarding assignment or change of street addresses.

20. The secretary works 35 hours per week on Monday through Friday from 9:00 a.m. to 5:00 p.m. She is supervised by the fire chief, who is supervised by the City manager. Occasionally, she helps with public safety education in the schools. She never covers for other City employees. In the spring, she attended an executive secretary assistant training with some of the other employees subject to the petition.

21. The part-time, volunteer firefighters and haz-mat techs⁵ are not in the IAFF bargaining unit. They are covered by the Volunteer Association and the City Personnel Manual. These positions all perform firefighter duties. The haz-mat techs also are qualified to work at spills of hazardous materials. These positions are required to attend approximately two hours of paid training per month. However, these positions are not paid for their assistance with fires, hazardous material spills, or other department activities, and their attendance at these activities is voluntary.

⁵The City referred to these firefighters and haz-mat techs as "part-time" and "volunteer" interchangeably.

Police Department

22. There are approximately 33 employees in the Police Department. The Department positions include: the chief of police; police captain; police sergeant; 22 police and dispatch employees, represented by SEIU; network administrator/office manager (office manager); records clerk; ordinance officer, represented by SEIU; alcohol decoy; and police cadet. The Police Department is located in City Hall. AFSCME seeks to include the office manager in the proposed bargaining unit.

23. The office manager performs the general clerical and administrative services for the department, and is responsible for administering the Police Department Records Management Program. This program is not used in other departments. She works nine hours per day, Monday through Thursday, and four hours on Friday. She works with dispatchers and patrol officers, and deals with confidential justice system information, including citizen information and related criminal records. She is supervised by the police chief, who is supervised by the City manager. The position requires a high school certificate, or its equivalent, experience in office management, and advanced computer skills.

24. The records clerk is a part-time clerical position working in the Police Department Dispatch Center. She takes phone calls on the business line and can work with the Law Enforcement Data System (LEDS). At the time of the hearing, SEIU had a pending grievance over the inclusion of the records clerk in the police bargaining unit. The records clerk is supervised by the lead telecommunicator.

25. The ordinance officer patrols the City and seeks out, or responds to, ordinance violations. He deals mostly with dog and weed abatement issues. He works a regular full-time schedule.

26. The alcohol decoy is an occasional on-call position used for sting operations. The police cadet is an educational position, which is currently unfilled. The prior cadet accompanied the ordinance officer on patrol five to ten hours per week.

Planning and Zoning

27. Planning and Zoning, which is part of the Development Services Department, is located in the City Hall Annex. Only two employees, the planning technician and his supervisor, the planning and zoning administrator, work in Planning and Zoning. AFSCME seeks to include the planning technician in the proposed bargaining unit. The planning technician works a regular full-time schedule. This

position works directly with citizens providing necessary maps; reviewing legal requirements for permits; and helping with engineering, building, and zoning permit applications. The technician also answers the permit center phones, prepares reports for the Planning and Zoning administrator, and schedules building inspections. He is partially paid out of the Public Works Department budget. The Planning and Zoning administrator is supervised by the Public Works director, who is supervised by the City manager. Other employees located in the Annex include the engineering technicians, who are represented by Teamsters.

Public Works Department

28. The Public Works Department includes administration, water treatment, wastewater treatment, facility maintenance, and street maintenance. The positions included in the petition in Public Works are the two administrative assistants. The two assistants have the same job description and same pay scale, and both work regular full-time schedules. The assistants provide general secretarial services including answering phones, faxing, filing, and typing. These positions have regular contact with the public. These positions require typing, grammar, and spelling skills. One assistant works under the Public Works director in City Hall. The other assistant works at the Public Works Shop (Shop) under the operations manager. The Shop is the operations building for water, sewer, and streets.

29. In addition to her general clerical duties, the assistant in the Public Works Shop also covers for the planning technician on Wednesday afternoons, when the technician has a regular meeting, and occasionally when he is absent. When the technician position was vacant, this assistant worked half days in the planning office covering the technician position. She also provided training to the planning technician when he was hired. This assistant is not paid a differential for this fill-in work.

30. The operations assistant is an unrepresented position in the Public Works Department that was not included in the petition. This position works a regular, full-time schedule. The position works in the Shop and is responsible for the operations manager's administrative duties. He also helps oversee contract work, visits contractors on the job, and oversees employees when the operations manager is unavailable. This position has some responsibility for assignment of work details in consultation with the operations manager. The position has no primary supervisory responsibilities.

31. The facility manager is an unrepresented position in the Public Works Department that was not included in the petition. This position works a regular full-time schedule and is responsible for the maintenance and upkeep of City buildings

and heating systems. He is an exempt employee under the Fair Labor Standards Act (FLSA). This position is located in the Shop and is supervised by the Public Works director. The position also oversees the City's custodial contract. In the past, the facility manager supervised the City custodial employees. For the last three years the custodial work has been contracted out.

Technology

32. The Technology Department is responsible for maintaining all City-owned computers, maintaining the local area network and connectivity between City Hall and outlying facilities, maintaining the City's website, and developing specialty applications as needed. Due to difficulty in filling the position, the City Council decided to contract out the technology manager position several months before the hearing. At the time of the hearing, the City had contracted out the position of technology manager and it was no longer filled by a City employee.

33. Before the position was contracted out, the City employed one technology manager in the Technology Department. That employee was responsible for providing comprehensive computer hardware, software, programming, and network support. The employee was responsible for developing the Department budget, purchasing equipment, and maintaining computer-related policies. This was a regularly scheduled, full-time position. The employee worked in City Hall and was supervised by the City manager.

34. The prior technology manager had full control over all information coming in and out of the City over the computer and e-mail system. The technology manager did not regularly monitor employee computers, but had previously been asked by the Human Resources director to obtain employee computer history. The technology manager had access to e-mails between the Human Resources director, City manager, and supervisors related to collective bargaining, confidential employee matters, discipline issues, wage and hour information, and other personnel decisions. The technology manager had no role in labor relations.

Parks and Recreation

35. The City operates an Aquatics and Fitness Center and a Recreation Building, which are located next to each other about five blocks from City Hall. The Parks and Recreation director, who is supervised by the City manager, is primarily responsible for the Recreation and Aquatics Center employees.

36. Recreation and Aquatics currently have approximately 45 part-time employees, including 3 recreational officials, 22 lifeguards (3 of whom work in other positions including maintenance, swim instructor, and soccer), 8 recreation department positions, 2 pre-school teachers, 2 maintenance positions (1 of whom also works as a lifeguard), and 10 recreational instructors (1 of whom also works as a lifeguard). AFSCME has not sought to include any of the Recreation and Aquatics employees in the proposed bargaining unit. The employees in these positions are subject to the City Personnel Manual. These employees have no job duties in common with the petitioned-for employees. None of these employees work with computers, have City e-mail accounts, or do clerical/administrative work. None of these employees work sufficient hours to receive benefits. The employees in these positions are asked to attend general City training on days they are at work, but are not called into training on days they are not at work.

37. The lifeguards, instructors, and teachers are considered by the City to be “regular part-time” positions. These positions work set schedules year round. The lifeguards are traditionally a younger group of employees. The City historically cycles through employees in the lifeguard position.

38. The Recreation Department also employs seasonal employees, including the soccer officials, softball officials, a softball umpire, and a tennis coach.

Airport

39. The airport manager is responsible for the operation of the City’s airport. This position oversees airport operations and hangers, manages the airport office, and facilitates airport projects. The airport is located approximately one mile from City Hall. The airport manager works directly under the City manager, who prepares the airport budget. The airport manager, who sets his own hours, works 20 hours per week. He receives no City benefits.

Benefits

40. All full-time unrepresented employees are covered under a City County Insurance Group (CCIS) health insurance and vision plan. They also are eligible for dental, life, and disability insurance. The City currently pays 90 percent of the premiums for these employees. Employees who work 35 hours per week are eligible for coverage under the same insurance plans, but receive no employer contribution to the premiums. Employees who work less than 35 hours per week are not eligible for health benefits. The police and fire bargaining units are covered under CCIS, but are on

different plans than unrepresented employees. Teamsters' members are covered under the Oregon Teamsters Employers Trust. The unions have negotiated different City premium contributions.

41. The City provides three levels of other benefits for full-time, unrepresented employees, management employees, and department heads. Unrepresented full-time employees are eligible for vacation, sick leave, and holidays. In addition to the unrepresented employee benefits, management employees and department heads are eligible for deferred compensation and a higher level of vacation benefits. Employees currently in the positions of facilities manager and operations manager receive management employee benefits. The technology manager used to receive management employee benefits.

42. All employees who work 600 hours and six months qualify for coverage under the Public Employee Retirement System (PERS). Unrepresented employees pay the six percent employee contribution to PERS.

Transfers and Promotional Paths

43. There are few promotional or transfer paths available within the proposed unit. Employees in the Finance Department, with sufficient accounting skills, could be promoted to the accounting assistant position. Beckie Justice, the current accounts payable clerk, previously worked as the fire secretary. When an accounts payable clerk position became vacant, Justice applied for, and was hired into, that position.

Employee Desires

44. The petition was supported by an adequate showing of interest. None of the unions currently representing employees at the City have sought to represent the petitioned-for employees. Dawn Eden, the Public Works administrative assistant, had originally approached Teamsters about representation and the Teamsters' representative was not helpful. Ed Aronson, the planning technician, has worked for the City for two years and neither the Teamsters nor SEIU has ever approached him about representation. The IAFF unit has never shown an interest in adding the Fire Department administrative assistant, Jill Gaschler, to its unit. Eden, Aronson, and Gaschler want to belong to a unit represented by AFSCME.

Fragmentation

45. If a fourth bargaining unit is added to the City, the City workload would increase. The City would be required to bargain two contracts at the same time, and would incur the additional expense of hiring an outside attorney to bargain the contract. The addition of a fourth bargaining unit would also create a whipsaw phenomena with the four unions all watching to see what the other unions achieve in bargaining

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The petition does not propose an appropriate bargaining unit.

AFSCME proposes a bargaining unit of employees in the following job titles: accounting assistant, accounts payable clerk, administrative assistant, assistant (Library), cash receipts/customer service, network administrator/office manager, planning technician, secretary, technology manager, and utility billing clerk, excluding confidential and supervisory employees.

The City objects that the proposed bargaining unit lacks a distinct community of interest and would unduly fragment the City's workforce. The City contends that the petition singles out 11 employees for representation without justification for excluding other unrepresented City positions. The City also objects to the inclusion of the technology manager based on this position's administrative affinity and the fact that the City has contracted out this position.

Relevant Law

ORS 243.682(1) provides that this Board shall:

“(1) Upon application of a public employer, public employee or a labor organization, designate the appropriate bargaining unit, and in making its determination 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.”

This Board has defined community of interest by example to include “similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, common supervisor, etc.” OAR 115-025-0050(2)

In applying the statutory criteria to determine an appropriate unit, this Board has discretion to determine how much weight to give each factor. *Oregon Public Employees Union v. Department of Administrative Services*, 173 Or App 432, 436, 22 P3d 251 (2001). In addition, the criteria listed in the statute are not exclusive: we also consider the policies and preferences developed by this Board. *Oregon Workers Union v. State of Oregon, Department of Transportation and SEIU, Local 503, OPEU*, Case No. RC-26-05, 21 PECBR 873 (2007). We have a well-established preference for designating the largest possible appropriate unit for a public employer in order to avoid undue fragmentation in the workplace:

“* * * We have expressly declined to allow separation of one small group of employees into their own bargaining unit, except where the small group is clearly distinguishable from a larger group by reason of its peculiar responsibilities or where some other compelling circumstances dictate such a unit.” *Teamsters v. Linn County Parks & Recreation Department*, Case No. C-40-80, 5 PECBR 3081, 3084-85 (1980) (Footnote omitted.)

However, as AFSCME points out, this Board has determined that, over time, the application of the preference for larger units had sometimes “taken on a life of its own.” *AOCE v. State of Oregon, Department of Corrections and AFSCME*, Case No UC-36-97, 17 PECBR 730, 745 (1998), *AWOP* 161 Or App 667, 984 P2d 959 (1999) This Board further clarified application of this preference in stating:

“* * * [O]ur preference for large units is an administratively-created factor. While it is derived from the Public Employee Collective Bargaining Act (PECBA) policies, the preference itself is not statutory. To function properly, the preference must be applied in a way that supports, rather than supplants, the statutory unit determination factors.” *LIUNA v. City of Keizer*, Case No. RC-37-99, 18 PECBR 476, 483 (2000)

This Board later summarized the circumstances in which a separate department bargaining unit is appropriate:

“This Board has determined that a separate department bargaining unit may be appropriate where: (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.” *International Brotherhood of Teamsters v. Bay Area Hospital*, Case No. RC-36-01, 19 PECBR 898, 905 (2002) (Citation omitted.)

In *LIUNA v. City of Keizer*, we found appropriate a small group of city utility workers based on their desires and distinct community of interest. These utility employees performed outside manual labor, were physically separate from other city employees, and worked independently of other city departments. 18 PECBR at 484-85. In *International Brotherhood of Teamsters v. Bay Area Hospital*, we certified a separate unit of security officers based on a finding that these employees all had identical job duties and skills that were distinct from other hospital employees. In addition, the security employees all worked outside, had no common supervision or transfer/promotional ladder with other employees, and worked in an office that was off limits to other hospital employees. 19 PECBR at 909.

We have also found other smaller units of employees to be appropriate under our reexamined preference. For instance, in *Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-03, 20 PECBR 745 (2004), we designated a unit of residential counselors and residential services monitors because they all performed the same distinct job functions working with adult offenders in a residential setting at the County’s Community Corrections Center. We have also designated separate units of seasonal employees based on a finding of distinct community of interest. The distinct community of interest in these cases was the positions’ unique job duties and the fact that we do not normally place seasonal workers into a bargaining unit of regular employees. See *Laborers’ International Union of North America, Local #483 v. City of Portland*, Case No. RC-30-00, 19 PECBR 384 (2001); and *Oregon AFSCME, Council 75 v. City of Corvallis*, Case No. RC-41-03, 20 PECBR 684 (2004).

Analysis: The Proposed Bargaining Unit

AFSCME urges us to designate the proposed bargaining unit as appropriate based on the distinct community of interest and the desires of the affected employees. However, the evidence related to the statutory unit determination factors does not support a finding that these employees have a distinct community of interest or that other compelling reasons support the designation of a separate bargaining unit of these positions.

Community of interest, wages, hours, and working conditions. The positions have some similarity of duties and skills. They are all administrative and/or clerical positions. These positions primarily work in an office setting and spend a significant amount of their time on the computer and phone. They all have direct contact with the public, although some more than others. These positions require a high school diploma or its equivalent. There is also some interchange of work and training in these positions. For instance, the accounts payable clerk previously worked as the fire secretary. The assistant in the Public Works Shop also covers for, and has provided training for, the planning technician. All these employees are also covered by the same policy manual and are eligible for coverage under the same insurance plan.

However, these employees lack a distinct community of interest that would support a separate unit and thereby outweigh our policy against fragmentation. These are not positions with a single set of highly-specialized skills. Employees in the proposed unit do not work in a separate, self-integrated work unit or department. These employees work in a variety of departments and locations. In addition to their clerical duties and skills, these employees perform different job duties and possess different skills unique to their type of work. The library assistant has specific library-related duties and skills, including cataloguing, reference, circulation, and mending. The accounting assistant has accounting-related duties and skills, including working with ledger and accounts receivable activity. The office manager is the network administrator for the Police Department's Law Enforcement Management Records system and has advanced computer skills.

These employees also do not all have common supervision, promotional and transfer opportunities, wages, hours, or benefits. Only the Finance Department employees have the same first-line supervisor. The one promotional opportunity within the proposed unit is limited to the Finance Department employees. Only the Public Works administrative assistants are on a common wage range. Some employees work a regular schedule (five days per week, 8:00 a.m. to 5:00 p.m.); others work evenings (library assistant) or alternative schedules (office manager-network administrator). Some

positions work 40 hours per week and others 35 hours per week. Some of the positions are entitled to paid leave, while others are not. One position, the technology manager, received a higher level of benefits.

These employees also share a number of working conditions with other unrepresented positions not included in this petition. For example, access to health insurance and other benefits for all unrepresented employees is defined by the number of hours worked. All full-time unrepresented employees are eligible for an employer insurance contribution, vacation, and sick leave. All unrepresented employees working 35 hours per week are eligible for insurance benefits at their own cost. All unrepresented employees working less than 35 hours per week have no benefits. In addition, all unrepresented employees are subject to the City Policy Manual which defines the employees' probationary periods and other conditions of work. All unrepresented employee pay rates are established under the City pay plan.

Finally, some employees who were not included in the proposed unit have the same supervisor and work location as employees in the proposed unit. For instance, the library pages have the same first-line supervisor and work in the same location as the library assistant. One of the Public Works' administrative assistants has the same supervisor and works in the same location as the operations assistant. The library pages also perform some of the same duties as the library assistant.

History of bargaining and pattern of organization. The history of labor relations also does not support the proposed bargaining unit. The City already has three bargaining units: police, fire, and public works employees. All other employees at the City are unrepresented and have not previously sought representation. The mere lack of prior representation is not a compelling reason for designating a smaller bargaining unit.⁶

Desires of the employees. These employees desire a separate bargaining unit. The employees' desire for separate representation was evidenced by the showing of interest and testimony at the hearing. As discussed above, this Board has discretion to determine what weight will be given to the PECBA unit determination criteria. In the absence of clearly distinct community of interest factors, we will not give employee preference controlling weight. *Oregon Workers Union v. State of Oregon*; and *Association of State Professional Employees v. Department of Revenue and OPEU*, Case No. RC-55-95, 16 PECBR 615, 624 (1996), *AWOP* 148 Or App 635, 939 P2d 678 (1997).

⁶For an example of bargaining history sufficient to support a separate unit, see *Oregon School Employees Association v. South Coast ESD*, Region #7, Case No. RC-10-00, 19 PECBR 58 (2001)

Appropriate Bargaining Unit

Our inquiry in this case does not end with the conclusion that the bargaining unit proposed by AFSCME is not appropriate. Under ORS 243.682, this Board has authority to “designate the appropriate bargaining unit.” We can determine that another configuration of positions contained within the petition constitutes an appropriate unit. *IBEW Local 659 v. Eugene Water and Electric Board*, Case No. RC-36-93, 14 PECBR 808, 817 (1993) (quoting *Lane County Juvenile Department Association v. Lane County Juvenile Department and Lane County Peace Officers Association*, Case No. RC-123-87, 11 PECBR 395, 411 (1989)); and *Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-03, 20 PECBR 745 (2004). We can also determine that a bargaining unit that includes positions in addition to those in the proposed unit may be appropriate, if the showing of interest is submitted with the petition is adequate for the larger unit. *IBEW, Local 659 v. Eugene Water and Electric Board*, 14 PECBR at 817; OAR 115-025-0010(h); and OAR 115-025-0020.

AFSCME originally petitioned for a residual bargaining unit of all unrepresented employees. AFSCME amended its petition twice and finally settled on the bargaining unit description which set out the petitioned-for list of employees. However, assuming a sufficient showing of interest has been submitted, an appropriate unit would be a residual unit of all eligible representable employees of the City. A residual bargaining unit would not be contrary to our policy against fragmentation. In *Oregon School Employees Association v. Tillamook School District 9*, Case No. C-53-82, 6 PECBR 5332, 5337 (1982), we stated:

“* * * On petition of an outside labor organization, a residual unit of all remaining unrepresented employees may be designated if an incumbent [*sic*] exclusive representative refuses (or is unable) to seek representation of the classifications; the refusal of the exclusive representative of other employees to seek representation rights of residual employees may constitute a ‘compelling reason’ justifying designation of other than a wall-to-wall unit. * * *”
(Emphasis in original.)

Here, two of the current City bargaining units are strike-prohibited. As this Board has previously held, the law does not favor the inclusion of strike-permitted employees and strike-prohibited employees in the same bargaining unit. *See AOCE v. State of Oregon, Department of Corrections, and AFSCME, Council 75*, Case No. UC-25-99, 18 PECBR 576, 587 (2000). Therefore, it would be inappropriate to include the

remaining unrepresented City employees, who are strike-permitted, in either of these units.

The Teamsters bargaining unit, which is composed of strike-permitted employees, has shown no interest in representing the employees in the petitioned-for unit or other unrepresented City employees. At least one of the petitioned-for employees approached the Teamsters about representation prior to filing this petition. In light of this evidence, the absence of a petition filed by Teamsters, and the lack of intervention in this pending petition, we can reasonably infer that the Teamsters are unwilling to represent these employees. The Teamsters' lack of interest in representing any City employees other than those in its current bargaining unit constitutes a compelling reason for designating a residual unit composed of all remaining unrepresented City employees.

We are unable to determine whether a residual unit would be appropriate here, however, because of a lack of evidence concerning 45 positions in the City Recreation and Aquatics department. According to the City, these positions are filled by casual employees. We generally exclude casual employees from bargaining units of regular employees. Casual employees have only a tenuous relationship with the employer, so their bargaining priorities will differ significantly from those of the regular, full-time employees. Both the regularity and continuity of the casual employees' work schedules are important to determining whether employees are casual. *SEIU Local 503, OPEU v. Marion County*, Case Nos. UC-32/33-04, 21 PECBR 327, 338-39, *petition for reconsider and motion to amend denied*, 21 PECBR 482 (2006), *AWOP 215 Or App 501, 170 P3d 8* (2007). In *AFSCME, Council 75 v. City of Burns*, Case No. UC-32-86, 9 PECBR 9004, 9006-07(1986), we noted that:

“* * * Regular part-time employment involves an ongoing, stable, and substantial employment relationship characterized by recurring employment for a significant amount of time over a period of extended rather than limited duration. Casual employment, on the other hand, involves temporary, limited, or irregular service of the type that does not establish a fixed and regular employment relationship subject to meaningful collective bargaining.” (Citation omitted.)

The positions in question are recreational officials, lifeguards, recreation department employees, a pre-school teacher, maintenance employees, and recreational instructors. Because AFSCME did not petition for these position, the parties understandably did not develop a complete record regarding the nature of the

employment relationship these employees have with the City. Consequently, there is little evidence concerning the regularity and continuity of the employees' work schedules, and their expectations for continued employment with the City. Based on this record, we cannot determine whether these positions should be excluded from the bargaining unit because they are casual.

Although we conclude that a bargaining unit of all remaining regular unrepresented City employees is an appropriate one in these circumstances, we are unable to determine whether a substantial number of City jobs—certain positions in the Recreation and Aquatic Department—belong in this unit. We will dismiss the petition.

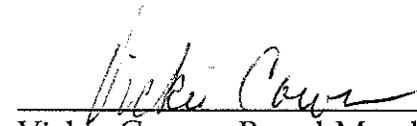
ORDER

The petition does not propose an appropriate bargaining unit and is dismissed.

DATED this 30th day of January 2008.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.