

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-18-09

(REPRESENTATION PETITION)

MARION COUNTY DISTRICT)	
ATTORNEY INVESTIGATOR)	
ASSOCIATION,)	
)	
Petitioner,)	
)	
v.)	RULINGS,
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
MARION COUNTY,)	AND ORDER
)	
Respondent,)	
)	
and)	
)	
SERVICE EMPLOYEES INTERNATIONAL)	
UNION LOCAL 503, OREGON PUBLIC)	
EMPLOYEES UNION,)	
)	
Incumbent.)	
_____)	

The parties waived oral argument on the County's objections to a Recommended Order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on June 22, 2010, after a hearing held before ALJ B. Carlton Grew on October 19 and November 23, 2009, in Salem, Oregon. The record closed on February 16, 2010, following receipt of the parties' post-hearing briefs.

Mark J. Makler, Attorney at Law, Garrettson Gallagher Fenrich & Makler, PC, Portland, Oregon, represented the Petitioner.

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

Joel Rosenblit, Attorney at Law, Service Employees International Union Local 503, Oregon Public Employees Union, Salem, Oregon, represented the Incumbent.

On May 12, 2009, the Marion County District Attorney Investigator Association (Association) filed a petition for certification of a representative under OAR 115-025-0000(1)(a), or in the alternative for unit clarification under OAR 115-025-0005(3). The Association sought to represent a bargaining unit of

“[a]ll employees employed by the Marion County District Attorney’s Office as Criminal Investigators, who are certified by DPSST as ORS Chapter 181 Police Officers for the State of Oregon, and who are employees considered prohibited from striking within the definition of ORS 243.736, excluding confidential or supervisory employees within the definition of the PECBA.”

By letter dated May 13, 2009, the Elections Coordinator notified the Association that the petition appeared to be untimely since the positions at issue were currently in the bargaining unit represented by the Service Employees International Union Local 503, Oregon Public Employees Union (SEIU), and were covered by a collective bargaining agreement. The Elections Coordinator told the Association that she intended to request that this Board dismiss the petition as untimely, “[u]nless you can present clear and convincing evidence” why the petition should not be dismissed. By letter dated May 19, 2009, the Association responded that a contract bar did not apply to the petition because the positions at issue were strike-prohibited police officers specifically excluded under the terms of the SEIU agreement. On May 21, 2009, the Elections Coordinator served the petition.

On June 8, 2009, Marion County (County) and SEIU filed timely objections to the petition asserting that: 1) the Association did not have standing to file a unit clarification petition under OAR 115-025-0005(3); 2) the representation petition was subject to a contract bar under OAR 115-025-0015(2); 3) the petitioned-for group of employees was not an appropriate stand-alone bargaining unit; and 4) granting the petition would further fragment the County’s workforce.

The issues are:

- 1) Is the petition timely ?
- 2) Does the petition propose an appropriate bargaining unit under ORS 243.682(1)?

RULINGS

1. The ALJ correctly dismissed the Association's unit clarification petition. A petition for clarification of a bargaining unit "may be filed by the recognized or certified representative or by the public employer when no question of representation exists, subject to the other requirements of this rule." OAR 115-025-0005(1). Under OAR 115-025-0005(3), a unit clarification petition may be filed at any time when the issue raised "is whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement * * *."

The Association has no standing to file a unit clarification petition under subsection (3) because it is neither the recognized or certified representative nor a public employer. In addition, by seeking to create a new bargaining unit, the petition presents a question of representation. *Welches School Dist. v. Welches Education Assn.*, 116 Or App 564, 568, 842 P2d 437 (1992) (a question of representation, not unit clarification, exists when a petition proposes formation of a new bargaining unit). The appropriate method for resolving a question of representation is through the process mandated by ORS 243.682 and OAR 115-025-0000.¹

2. The ALJ also correctly ruled that evidence the Association sought to present related to the supervisory status of the criminal investigations supervisor is not relevant to this proceeding. OAR 115-025-0050(3) provides that "questions concerning public employee status shall not be decided in proceedings to determine the appropriate bargaining unit for a representation election unless the results of such an election cannot be certified without the resolution of such questions." Since only one of the four positions at issue here is potentially a supervisor, the results of an election could be certified without resolution of whether the position is a public employee within the meaning of the Public Employee Collective Bargaining Act (PECBA).

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

FINDINGS OF FACT

1. The County, a public employer, employs approximately 1,500 full-time and part-time employees. Around 1,100 of these employees are currently represented by five different labor unions, as follows:

¹On June 19, 2009, the Association notified the ALJ that it did not object to the dismissal of the unit clarification portion of the petition.

(a) Marion County Law Enforcement Association (MCEA) represents approximately 221 employees in the Sheriff's Office, excluding the employees in the parole and probation division;

(b) Federation of Parole and Probation Officers (FOPPO) represents approximately 41 Sheriff's Office deputies, who perform parole and probation duties;

(c) Oregon Nurses Association (ONA) represents approximately 22 registered nurses in the Health Department;

(d) Marion County Juvenile Employees Association (MCJEA) represents approximately 35 juvenile detention workers in the Juvenile Department; and

(e) SEIU, the County-wide collector unit, represents approximately 766 employees in different classifications who are not included in other bargaining units.

2. The SEIU unit has been the collector unit at the County since at least 1977.² The description of the SEIU unit has changed over time. The 1995-98 SEIU Collective Bargaining Agreement with the County provided that SEIU represented two bargaining units, one general unit of strike-permitted employees and a second unit of strike-prohibited group workers in the Juvenile Department. On February 14, 2002, this Board issued an order designating the two bargaining units represented by SEIU as:

"Strike-Permitted Bargaining Unit: All regular employees of Marion County except supervisory and confidential employees, or employees represented by other labor organizations or employees considered prohibited from striking within the definition of ORS 243.736.

"Strike-Prohibited Bargaining Unit: All regular employees of Marion County Juvenile Department who are classified as Group Workers 1, 2 or 3 or work as 'guards' within the definition of ORS 243.736 except supervisory and confidential employees or employees represented by other labor organizations."³

²The SEIU unit was originally represented by the Marion County Employees Association (MCEA), who later affiliated with the Oregon State Employees Association, which was the predecessor for the Oregon Public Employees Union, which was the predecessor for SEIU. We refer to this unit as the SEIU unit throughout this decision.

³*Service Employees International Union Local 503, Oregon Public Employees Union v. Marion County*, Case No. UC-45-01, 19 PECBR 653 (2002).

After this Board's certification, these bargaining unit descriptions were incorporated into the recognition clause of SEIU's subsequent collective bargaining agreement. That agreement, which expired in June 2008, provided that the County and SEIU would bargain over the employment conditions for the two units jointly, but recognized each unit's right to different dispute resolution procedures.

3. By March 2008, SEIU and the County were engaged in bargaining for a successor agreement. During that bargaining, SEIU and the County signed a tentative agreement which deleted the group worker 1 classification from the strike-prohibited bargaining unit description because that position no longer existed.

4. On April 30, 2008, MCJEA filed a petition with this Board to represent the employees in SEIU's strike-prohibited bargaining unit. On July 21, 2008, after an election, this Board certified MCJEA as the exclusive representative of the Juvenile Department group workers.⁴

5. At the time MCJEA was certified as the exclusive representative of SEIU's former strike-prohibited bargaining unit, SEIU and the County had reached a complete tentative agreement on their successor contract and were finalizing the contract language. The County and SEIU did not believe there were any other strike-prohibited employees in the SEIU bargaining unit and agreed to delete the language referring to the strike-prohibited bargaining unit from the recognition clause of their 2008-10 Agreement. The modified recognition clause in that agreement, which was executed on July 23, 2008, provides:

"The Employer recognizes the SEIU Local 503, OPEU/MCEA, Local 294 as the sole and exclusive bargaining representative for ALL regular employees except supervisory and confidential employees or employees represented by other labor organizations or employees considered prohibited from striking within the definition of ORS 243.736." (Emphasis in original.)

6. There are approximately 46 SEIU-represented employees in the District Attorney's (DA) office, including support enforcement and criminal investigators, legal secretaries, program coordinators, and support agents. These employees work primarily out of the DA's office in downtown Salem. The support enforcement investigators, who deal with federally-protected information, work on the same floor as the criminal investigators, but in a separate secured area.

⁴*Marion County Juvenile Employees Association v. Marion County and Marion County Employees Union, Local 294 of Oregon Public Employees Union, SEIU Local 503*, Case No. RC-13-08.

7. The SEIU unit includes employees in positions that visit clients at home or conduct other field work, such as juvenile probation officers, who make unannounced visits to juveniles' homes; mental health specialists, who visit clients in their homes; developmental disability specialists, who visit clients in their homes; protective service investigators, who investigate potential crimes against clients; environmental health specialists, who inspect restaurants and pools for violations; public health nurses, who visit clients in their homes; and code enforcement officers, who conduct on-site inspections and issue citations for code violations.

History of the Criminal Division Investigator Position

8. The first investigator position in the DA's office was established in approximately 1980, under the title of criminal case analyst. The criminal case analyst position included investigators in support enforcement and criminal cases. These employees were originally unrepresented.

9. In December 1989, the County's Board of Commissioners (Commissioners) signed an order declaring that the employees in the criminal case analyst position were "police officers whose regular duties include the duties and functions of a police officer," and ordered these employees to be included in the police and fire Public Employee Retirement System (PERS) benefit program. The order applied to both the support enforcement and criminal investigators. As a result of the County's designation of these employees as police officers, the analysts became eligible for police and fire PERS benefits.⁵ The primary purpose of the order was to make it easier to recruit police officers for the criminal case analyst position.

10. In 1995, the legislature passed House Bill 2334, which made it a crime to assault a peace officer. The original bill was amended to add investigators working in district attorneys' offices who had been previously certified as peace officers in Oregon or another state. Dale Penn, the County DA from 1985 through October 2004, testified in support of the amendment.

11. Sometime prior to September 1997, the County reviewed all of the positions in its unrepresented pay plan to determine whether they qualified for unrepresented status under the PECBA, and if not, to designate the appropriate bargaining unit for these positions. During this process, the County reviewed the

⁵Without the County's action, the analysts would not have been eligible by law for police and fire PERS benefits. In 1997, the legislature considered, but did not pass, House Bill 2987, the purpose of which was to qualify investigators in district attorneys' offices who were previously sworn peace officers in Oregon for police and fire benefits under PERS.

position of criminal case analyst and compared it with similar positions in other jurisdictions. As a result, the County created the new classification of investigator. The investigator position included, but specified different duties for, the investigators in the support enforcement division and those in the circuit court division.⁶ The County placed employees in the investigator position in the general SEIU bargaining unit. The County recognized that in other jurisdictions, employees with duties similar to the investigators were placed in law enforcement bargaining units. The County chose not to put its investigators in its law enforcement bargaining unit because that bargaining unit contained only Sheriff's Office employees.

12. In June 2004, the County reclassified one of the criminal investigator positions as a criminal investigations supervisor. The County placed this position on its unrepresented staff pay plan. John Coggins, who had worked as a criminal investigator since 1997, was promoted into this position.

13. In April of 2008, the County approved the Use of Deadly Force Plan, which was developed by a county-wide planning committee pursuant to Senate Bill 111 (2007). One section of the plan provided that an officer's union representative would be notified following the officer's use of deadly physical force. On June 23, 2008, the criminal investigators asked SEIU whether it would provide them legal representation if they were involved in a shooting, and also notified SEIU that the investigators believed they were law enforcement officers prohibited from striking under ORS 243.726. The investigators stated that if SEIU was unwilling to provide immediate legal representation, it should release them so they could seek representation with a law enforcement union. At some unidentified time, SEIU notified the criminal investigators that it "would not provide them with immediate legal representation during a deadly force incident."

14. During the summer of 2008, when the County conducted its annual review of the investigator position, Criminal Investigations Supervisor Coggins requested that the police duties, such as making arrests, transporting prisoners, and serving search and arrest warrants, be added to the criminal investigator's position description. That position description, which was issued in September 2003, listed the following duties for an investigator: "[c]onducts criminal investigations as assigned; * * * assists Deputy District Attorneys in all phases of case preparation; performs related work as required." The position description included the following example of duties for criminal investigators:

⁶The Association seeks only to represent the circuit court division investigators, who will be referred to as the criminal investigators hereinafter.

- “1. Assists in determining need for further investigation, plan of inquiry, outlines proposed scope, timing, and direction of investigation; conducts investigation; prepares reports on investigative assignments.
- “2. Analyzes cases scheduled for trial.
- “3. Prepares summaries and chronologies for trial presentation based on review of medical records, agency documents, psychological materials, and law enforcement information.
- “4. Identifies, selects, and locates relevant records, expert and lay witnesses to be subpoenaed.
- “5. Locates and interviews witnesses or potential witnesses; prepares reports on assessments of witness reliability; assures that necessary witnesses are subpoenaed to trial and verifies their availability; transports witnesses to and from court.
- “6. Examines, take measurements, and photographs crime scenes; evaluates physical evidence/criminology reports; prepares and organizes court exhibits and other evidence for trials.”

15. Managers from the County Human Resources (HR) Department and Risk Manager Mina Hanssen raised concerns about the County’s liability regarding the additional duties. Beginning in October 2008, Hanssen, DA office representatives, HR Manager Theresa VanDusen, and Senior HR Analyst Kathy Sharp unsuccessfully attempted to agree upon the criminal investigator’s job description. On December 15, 2008, Hanssen provided Chief Administrative Officer John Lattimer a formal report in which she stated that the criminal investigators’ duties of making arrests, serving search warrants, providing armed security in court, and carrying weapons, while limited in nature, created a significant increased risk of loss for the County. Hanssen recommended that the criminal investigators no longer perform these duties, which she believed could easily be performed by law enforcement officers.

16. The Association filed this petition on May 12, 2009.

17. On May 19, 2009, the Commissioners held a work session during which they discussed the criminal investigator’s position description and established a work group to make a recommendation regarding the position’s duties. After two or three sessions, the only recommendation the work group made was that the criminal investigators should not be transferred to the Sheriff’s Office because of supervision issues. At a subsequent work session on July 6, 2009, the Commissioners decided that

the investigators would continue working under their current job description and that the duties of making arrests, booking prisoners, transporting prisoners, executing search and arrest warrants, and providing court security would not be added to their job description. Coggins and the criminal investigators attended both of the Commissioners' work sessions.

18. On August 6, 2009, as a result of the Commissioners' decision, DA Walt Beglau and Senior HR Analyst Sharp directed the criminal investigators and Coggins to "discontinue enforcing state laws, making arrests, booking prisoners, transports, extradition, executing arrest warrants, executing search warrants, and providing court security and security escort." Sharp stated that it might be necessary for investigators who carried weapons to obtain concealed weapons permits. Beglau directed them to maintain their Department of Public Safety Standards and Training (DPSST) certification.

19. On August 11, 2009, Sharp issued a revised investigator position description, which is essentially the same as the September 2003 position description, except the general statement of an investigator's duties was modified to specify that an investigator "[a]ssists deputy district attorneys by conducting criminal investigations as assigned; * * * assists in all phases of case preparation; and performs related work as required." In addition, coordinating extraditions was added to the examples of duties for a criminal investigator, and the requirement that "[s]ome positions may require DPSST certification" was deleted from the necessary special requirements for the investigator position. Sharp also issued a revised criminal investigations supervisor position description, which is essentially the same as the prior position description, except that the necessary special requirements section no longer includes a requirement to maintain proof of personal liability automobile insurance, pass a drug and alcohol screening test, or have an advanced DPSST certification.

Criminal Investigator and Criminal Investigations Supervisor Duties

20. In 1985, the criminal case analysts primarily assisted the deputy DA's with trial preparation. Over time, the position changed to meet the needs of the approximately 22 police agencies in the County who either did not have necessary resources to carry out investigations or were overloaded with work. In working with some of the smaller police agencies in the County, the criminal case analysts often acted in the role of detective on a case, or assisted the local agency's detectives to complete their investigations. This work included interviewing witnesses, serving search and arrest warrants, participating in arrests, and working with interagency teams.

21. The criminal investigators and criminal investigations supervisor caseloads are primarily focused on the high profile cases, including murder, attempted murder,

Ballot Measure 11 crimes,⁷ sexual assault, and domestic violence. Investigators work on other cases as time allows. These employees generally do not become involved in a criminal investigation until after an arrest has been made. Once an arrest has been made, the local police agency has limited resources to conduct further investigation. At this point, the criminal investigators and criminal investigations supervisor conduct further investigation and research to assist the deputy district attorney in preparing a case for presentation before the grand jury, and in trial. These employees help determine the scope, timing, and direction of the investigation; identify, locate, and interview witnesses; examine data and materials; and prepare reports on the investigation. They also may examine and photograph crime scenes and evaluate physical evidence and criminology reports.

22. Criminal investigators and the criminal investigations supervisor also assist the deputy district attorneys in preparing for and presenting their case during a grand jury or trial. As part of this process, they may prepare and organize court exhibits and other evidence; serve subpoenas; and locate, transport, and assure that necessary witnesses are present. A criminal investigator is also generally present in the courtroom during a trial to ensure the presence of scheduled witnesses in a secure manner, and to be available to locate additional evidence or witnesses as needed.

23. Criminal investigators and the criminal investigations supervisor are also part of interagency teams, such as the Homicide Area Response Team (HART), along with the deputy district attorneys and detectives from other police agencies. HART team members are called out when a homicide has occurred, paired up with detectives from other agencies, and assigned specific duties in regard to the investigation, such as interviewing witnesses and examining the scene. During a bombing case in Woodburn, Coggins was assigned to work on a team with detectives from the Salem and Keizer Police Departments and a federal agent from the Bureau of Alcohol, Tobacco, and Firearms.

24. A minimum qualification for the criminal investigator position is three years' prior law enforcement experience, which includes criminal investigations. Dori Dammer, who was hired by the DA's office in 2003, previously worked as a police officer and detective for the Salem Police Department. Sarah Snyder worked as a police officer and detective for the Woodburn Police Department before she was hired by the DA's office in 2003. Jennifer Roberts, who previously worked for the Keizer Police Department as a police officer and detective, was hired by the DA's office in 2007. A minimum qualification for the criminal investigations supervisor position is five years law enforcement experience. Prior to working in this position, Coggins had worked for

⁷Ballot Measure 11 was an Oregon citizens' initiative passed in 1994 that requires mandatory minimum sentences for certain crimes.

the Sisters and Woodburn Police Departments. The DA's office recruits police officers from local law enforcement agencies to draw on their investigation experience and maintain a connection with those agencies.

25. Prior to August 2009, employees in the criminal investigator and criminal investigations supervisor positions were required to be certified by DPSST. Coggins, Dammer, Snyder, and Roberts all hold basic, intermediate, and advanced police officer certifications from DPSST. DPSST requires that police officers complete 84 hours of training every three calendar years to maintain their certification, including eight hours of training per year in firearms or use of force. Coggins has taken training to satisfy his DPSST requirement through DPSST, the Sheriff's Office, and the Salem and Keizer Police Departments.

26. Prior to July 2009, criminal investigators and the criminal investigations supervisor were authorized to and did carry weapons on duty. In September 2004, DA Penn adopted a Fire Arms Policy for the DA Investigation Team, under which employees authorized to carry a firearm were required to qualify every six months based on courses that met or exceeded DPSST standards. The policy provided that employees would purchase their own firearms, but that duty ammunition was provided by the Department. This policy was recognized by the current DA, but had not been updated since 2004. In the past, these employees were authorized (as police officers were) to carry their weapons on airlines when necessary for performance of their duties.

27. In September 2004, Penn adopted a Use of Force Policy for members of the DA's office which specified the lethal and non-lethal weapons that members of the department could utilize. Under the policy, department members could use force only where "necessary to effect an arrest, prevent an escape, to protect the life of the member or another person or to prevent serious injury to the member or another person." The administrative philosophy portion of the policy provided:

"District Attorney Investigators are not normally tasked with primary investigations and response to crimes in progress. As Police Officers, it is understood that situations may arise that require action to be taken by an Investigator. In these situations, Investigators should follow the use of force continuum as outlined below. It is the philosophy of the Marion County District Attorneys Office that Investigators of this office make a reasonable attempt to take a uniform Officer with them when conducting an Investigation in which it is known an arrest will be made. In those instances where no prior knowledge of an arrest being required is known, Investigators are encouraged to obtain assistance prior to making the arrest. In those instances where this is not possible, Investigators should make an effort to remove themselves from the situation and obtain assistance."

28. Since August 2009, the criminal investigators and the criminal investigations supervisor are no longer authorized to carry weapons on duty, unless carrying a weapon pursuant to a concealed weapon permit in the same manner other individuals would.

29. Criminal investigators and the criminal investigations supervisor all carry identification which states that they are a "Duly Sworn Law Enforcement Officer." They also carry badges, which indicate that they are DA Investigators.

30. Criminal investigators and the criminal investigations supervisor have all been required to sign the criminal justice code of ethics and swear oaths of office to "support the Constitution of the State of Oregon and the laws thereof."

31. Prior to July 2009, criminal investigators and the criminal investigations supervisor were occasionally involved in making arrests, transporting arrested prisoners, and booking these prisoners at the jail on an as needed basis. In preparing her risk analysis, County Risk Manager Hanssen found that the four criminal investigators had participated in approximately 3.5 arrests per investigator per year since 2005. Since July 2009, these employees no longer perform these duties.

32. Prior to July 2009, criminal investigators and the criminal investigations supervisor wrote search warrants, including the required affidavits, and presented them to judges for signature after having them reviewed by a deputy district attorney. Since July 2009, these employees no longer write or serve search or arrest warrants.

33. Prior to July 2009, criminal investigators and the criminal investigations supervisor worked with the Sheriff's Office to provide court security. While in court, Coggins has been ordered by the judge numerous times to take someone into custody. Since July 2009, these employees no longer provide court security.

34. Criminal investigators and the criminal investigations supervisor are required to be certified for access to LEDS (law enforcement data base).

35. Criminal investigators and the criminal investigations supervisor are assigned a call sign number and have access to the Willamette Valley Communication System through the Salem Police Department and the Sheriff's Office frequencies.

36. When the criminal investigators and the criminal investigations supervisor are involved in an investigation with another police agency, such as the Salem or Keizer Police Departments, they generally have unfettered access to that department in the same manner as the department's own police officers and may carry weapons into the

department. Deputy Chief of criminal investigations for the Salem Police Department, Steve Bellshaw, considers the criminal investigators and the criminal investigations supervisor to be police officers.

37. Criminal investigators and the criminal investigations supervisor wear plain clothes while on duty and drive unmarked vehicles without cages.

38. Detectives in other police agencies, such as the Salem Police Department, generally wear plain clothes, drive unmarked police cars without cages, generally carry a weapon and a minimum amount of equipment, and do not patrol the streets.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The representation petition is untimely and will be dismissed.

DISCUSSION

The petition in this matter was filed under OAR 115-025-0000(1)(a), which provides that “[a] petition for an election to certify a public employee representative may be filed by any labor organization claiming to represent 30 percent of the public employees in an alleged appropriate bargaining unit.” If the employees at issue are already represented by a labor organization, the petition may be subject to a contract bar. Under a contract bar, a written collective bargaining agreement with a term of up to three years bars any election involving employees covered by the contract for its entire term. ORS 243.692(1); OAR 115-025-0015(2). Where a contract bar exists, the open period for filing a representation petition is not more than 90 days and not less than 60 days before the end of the contract period. ORS 243.692(3); OAR 115-025-0015(4).

The representation petition in this matter is untimely due to the contract bar. The petitioned-for employees have been part of the SEIU bargaining unit since 1997. On the date the petition was filed, May 12, 2009, SEIU and the County were parties to a collective bargaining agreement, which was executed on July 23, 2008, which covered that bargaining unit. The agreement was effective through June 30, 2010. This agreement operates as a contract bar for a representation election for any employees covered by that agreement unless: (1) “[u]nusual circumstances exist under which the contract is no longer a stabilizing force” and an election is needed to “restore stability to the representation of employees in the [bargaining] unit”(ORS 243.692(2)(a) and (b)); or (2) the petition was filed during the open period. The parties do not allege the

existence of any unusual circumstances which would require an election, and we do not consider this exception to the contract bar doctrine. Nor was the petition filed during the open period.

The Association contends, however, that this Board cannot dismiss the petition as untimely because the Elections Coordinator, an agent of this Board, previously determined that the petition was timely. The Association notes that the Elections Coordinator initially notified the Association that she would ask this Board to dismiss the petition as untimely unless the Association presented "clear and convincing evidence" that the petition was timely. The Association asserts that since the Elections Coordinator served the petition after the Association presented its argument that the petition is timely, this Board has already concluded that the petition is timely. According to the Association, the parties cannot now "collaterally attack" the petition as untimely. The Association misconstrues this Board's authority in the representation process.

The procedure used here is mandated by statute and administrative rule. Based on an investigation, the Elections Coordinator determined that a question of representation existed. OAR 115-025-0025(2). The petition was then served, and the parties filed objections. These objections properly challenged the appropriateness of the unit and the timeliness of the petition. As required by law, the ALJ scheduled a hearing on the objections. *OACE v. Eaglepoint School Dist. No. 9*, 99 Or App 347, 350, 782 P2d 432 (1989); ORS 243.682(2); OAR 115-25-045. The ALJ issued her Recommended Order, and the matter came before us for issuance of the Final Order. There has been no prior final determination that the petition is timely so there is nothing that a party can "collaterally attack." We appropriately exercise our authority to decide that the petition is untimely and dismiss it.

The Association argues, however, that the petition is not barred by the SEIU collective bargaining agreement because the recognition clause of that agreement specifically excludes strike-prohibited employees. The Association asserts that this Board should determine that the criminal investigators and criminal investigations supervisor are strike-prohibited employees and are excluded from the SEIU bargaining unit under the language of the contract recognition clause. Based on these findings, the Association contends that we should hold that this petition is not barred by the SEIU agreement.

It is neither appropriate nor necessary to decide if the petitioned-for employees are strike-prohibited. It is undisputed that the criminal investigators and criminal investigations supervisor have long been part of the SEIU bargaining unit. The criminal investigators themselves recognized that they were represented by SEIU when, in June 2008, they contacted SEIU to ask if SEIU would provide them with immediate legal assistance in deadly force incidents. When SEIU and the County negotiated their current collective bargaining agreement, neither party raised any issue regarding criminal

investigators' status as bargaining unit members. Although the parties altered the description of the SEIU bargaining unit in their 2008-2010 collective bargaining agreement, this change did not affect the criminal investigator and criminal investigations supervisor positions. Both the County and SEIU continued to treat these employees as represented by SEIU and covered by the terms of the SEIU collective bargaining agreement. Therefore, we conclude that these employees are represented by SEIU and the contract bar does apply.

The Association argument—that the employees at issue are not members of the bargaining unit—is based entirely on its novel interpretation of the recognition clause. The Association's assertion is contrary to the County and SEIU's contractual agreement, their bargaining history, and their past and present relationship which demonstrate that the criminal investigators have been and continue to be part of the SEIU bargaining unit. *See Trade Wind Transp. Co., Ltd.*, 168 NLRB 860 (1968) (the terms of the collective bargaining agreement, the parties' past bargaining history, and the employer's present bargaining relationship with the union are evidence that the disputed employees are part of a bargaining unit) and *Hyatt House Motel, et al.*, 174 NLRB 1009 (1969) (a group of employees, who worked for the employer when the bargaining unit was established and who have been historically excluded from the bargaining unit, may not be accreted to the bargaining unit).

In addition, if we were to accept the Association's interpretation of the recognition clause, we would reach a result that is contrary to the purposes and policies of the PECBA. Two of the fundamental purposes of the PECBA are to promote peaceful dispute resolution through collective bargaining agreements and to allow public employees the right to freely choose their bargaining representative. ORS 243.656 (5). The PECBA contract bar doctrine, which is very similar to one included in the National Labor Relations Act (NLRA),⁸ furthers these goals by giving parties a reasonable period of stability after they enter into a collective bargaining agreement. At the same time, the doctrine recognizes the employees' rights, at reasonable times, to change their exclusive representative. *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958). The Association's position would disrupt the balance the contract bar seeks to achieve between stable labor relations and employee free choice. It would leave few limits on employees' ability to attempt a change in their bargaining representative during the life of a collective bargaining agreement.

⁸Because of the similarities between the NLRA and the PECBA, decisions of the National Labor Relations Board provide guidance to interpreting the PECBA. *Elvin v. OPEU*, 313 Or 165, 175 and n 7, 832 P2d 36 (1992); *AFSCME Local 189 v. City of Portland*, Case No. UP-7-07, 22 PECBR 752, 799 n 13 (2008).

The Association's petition is untimely under the contract bar doctrine and is dismissed.

Even if we accept the Association's request to determine if the criminal investigators are strike-prohibited, however, we would conclude that they are not. Under ORS 243.672(1)(g), police officers are prohibited from striking. The focal duties of a police officer are to enforce all state criminal laws and maintain public order. *AFSCME Local 2505 v. OLCC*, Case No. UC-68-86, 9 PECBR 9128 (1986), *aff'd* 91 Or App 385, 389, 755 P2d 148 (1988). An employee whose exercise of peace officer duties (such as stops, arrests, and searches) is occasional and incidental to the employee's primary job is not a police officer. *Clackamas County v. Federation of Oregon Parole*, Case No. UP-91-91, 13 PECBR 538, 545 (1992), *aff'd* 124 Or App 395, 862 P2d 114 (1993).

Here, the focal duties of the criminal investigators are to assist County law enforcement agencies in investigating cases and to assist the District attorneys in preparing for and presenting cases at trial. Before 2009, the investigators' occasional exercise of peace officer duties—making arrests, transporting and booking prisoners, and providing court security—was incidental to their primary job. Since 2009, the criminal investigators have exercised *no* police officer duties. Accordingly, the criminal investigators and criminal investigations supervisor are not strike-prohibited police officers.

ORDER

The petition is dismissed.

DATED this 1 day of February, 2011.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.