

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-04-09

(UNIT CLARIFICATION)

OREGON AFSCME COUNCIL 75,)	
LOCAL 2831,)	
)	
)	Petitioner,
)	v.
)	
LANE COUNTY,)	
)	
)	Respondent.
_____)	

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

Neither party objected to a Recommended Order issued by Administrative Law Judge (ALJ) B. Carlton Grew on August 12, 2009, based on a joint stipulation of facts and accompanying exhibits submitted by the parties on May 4, 2009. The record closed on May 29, 2009, upon receipt of the parties' post-hearing briefs.

Allison Hassler, Legal Counsel, Oregon AFSCME Council 75, Eugene, Oregon, represented Petitioner.

Liane Richardson, Lane County Counsel, Eugene, Oregon, represented Respondent.

On February 18, 2009, Oregon AFSCME Council 75, Local 2831 (Union) filed a unit clarification petition under OAR 115-025-0005(3) seeking to include the Lane County Events Center employees in the Union's existing bargaining unit. The Union amended its petition on March 20, 2009, and Lane County (County) filed timely objections.

The issue is: Under the collective bargaining agreement and OAR 115-025-0005(3), are the Lane County Events Center employees included in the Union bargaining unit which consists of all temporary, probationary, and non-probationary employees in permanent positions (with exclusions not relevant here)?

RULINGS

The rulings of the ALJ were reviewed and are correct.

FINDINGS OF FACT¹

1. The Union, a labor organization as defined by ORS 243.650(13), represents employees of the County, a public employer as defined by ORS 243.650(20).

2. The parties are signatories to a collective bargaining agreement in effect until June 30, 2011.²

3. Article 1. Section 1 (Recognition) in the collective bargaining agreement provides in part:

“(A) For the purposes of collective bargaining with respect to wages, hours, benefits and other employment relations matters, the **COUNTY** recognizes the **American Federation of State and Municipal Employees Local 2831 (hereinafter the ‘union’) UNION** as the sole and exclusive representative of *all temporary, probationary and non-probationary employees in permanent positions* exclusive of those employed in a confidential or supervisory capacity, extra help employees (subject to Section 1 (B) below), those employees employed in classifications represented in other bargaining units, those employees employed in classifications listed in **Appendix A** or successor classifications, and all employees employed on June 30, 1987 in classifications listed in **Appendix B** or successor classifications, who do not voluntarily join the **UNION**. Nothing in this Agreement shall be construed to interfere with the rights of employees under the Public Employee Collectible [sic] Bargaining Act.

“(B) No extra help position shall exceed 520 hours in a fiscal year and no employee who is performing bargaining unit work in such extra help position shall work more than 520 hours in a fiscal year. Any

¹The Findings of Facts are derived from the parties’ joint stipulation of facts and exhibits.

²The collective bargaining agreement attached as an exhibit to the stipulation states that it was in effect from July 1, 2005 to June 30, 2008. We adhere to the 2011 date as agreed to by the parties in the text of their stipulation.

employee in an extra help position who works in excess of 520 hours in a fiscal year shall be considered as a temporary employee retroactive to the original date of hire.” (Boldface in original; italics added).

4. Appendix A to the parties’ agreement lists the following “Exempt Positions,” and where appropriate, notes the department in which the position is located: accounting analyst (SO),³ administrative analyst (SO), administrative assistant (County administration), administrative secretary (SO), assistant county counsels 1 through 4, board office specialists 1 and 2, community and economic development coordinator, data entry operator (HR), deputy medical examiner, emergency coordinator, executive assistant, internal auditor, juvenile counselors 1 and 2, law librarian, legal assistant, legal secretary 1 and 2 (County Counsel), management analyst 1 and 2, HR analyst 1 and 2, paralegal (County Counsel), performance development and diversity coordinator, HR assistant, HR technician, physician, psychiatrist, public health officer, public information officer (County Administration), public safety HR coordinator (SO), sr. administrative analyst (SO), sr. board office specialist, sr. legal secretary, sr. juvenile counselor, and sr. management analyst.

5. The 15 Lane County Events Center employees in dispute are:

Clint Barnt – Facility Maintenance Worker
Lonnie Dickinson – Security Guard
Tommy Fisher – Senior Events Worker
Timothy Jenkins – Operations Event Worker
Julie Kenyon – Senior Cashier
Gary Knapp – Program Specialist/Sport Specialist
Thomas Kochevar – Facility Technician
Allison Petsch – Program Specialist/Figure Skating Specialist
Randall Ross – Senior Event Worker
Paul Rylko – Operations Event Worker
Thomas Frances – Unclassified Part-Time/Driver
Lee Heany – Unclassified Part-Time/Skate Guard
Kyle Malstrom – Unclassified Part-Time/Facility Technician
Joanna McDonald – Unclassified Part-Time/Cashier
Robin Weaver – Unclassified Part-Time/Office Support Assistant

6. In the early 1990s, the Events Center employees and their work were

³“SO” designates positions in the Sheriff’s office; “HR” designates positions in human resources.

contracted out to Lane County Fairgrounds. Lane County Fairgrounds was an independent entity governed by a five-person board of directors and an executive director. During the time the Events Center employees worked for Lane County Fairgrounds, they were never represented by the Union or any other labor organization. The Union never attempted to organize the employees of Lane County Fairgrounds.

7. On June 25, 2008, the Lane County Board of Commissioners signed an order assuming full control of the Lane County Events Center and Fairgrounds for all purposes except for the planning and production of the annual Lane County Fair.

8. On December 10, 2008, the Lane County Board of Commissioners signed an order creating new classifications with adjusted salaries within the County's classification and compensation system for the Events Center employees. The order states in part:

"WHEREAS, Human Resources has completed an analysis of the required classifications for the Lane Events Center employees [;]

"WHEREAS, it is the intent of Lane County to properly classify positions with regard to duties and compensation; and

"WHEREAS, Human Resources has evaluated the non-represented positions * * * and has identified and/or drafted proposed classifications * * * and recommends that these positions be incorporated into the current classification and compensation system plans for non-represented employees; and

"* * * * *

"IT IS HEREBY RESOLVED AND ORDERED, that, that [*sic*] the new classifications, adjusted salary ranges and fringe benefits package be as follows, and it is further [*sic*]

"Cashier	Grade A10	* * *
"Facility Assistant	Grade A11	* * *
"Cashier, Sr.	Grade A11	* * *
"Facility Technician	Grade A11	* * *
"Operations/Events Worker	Grade A11	* * *
"Security Guard	Grade A11	* * *
"Operations/Events Worker, Sr.	Grade A12	* * *
"Facility Maintenance Worker	Grade B21	* * *

“ORDERED that Event Center employees be reclassified to proposed and existing Lane County classifications, where appropriate, and it is further

“ORDERED that Event Center employees shall maintain their current merit eligibility dates, and it is further

“ORDERED that affected employees shall be placed on the Lane County non-represented Compensation plan effective December 16, 2008 at their current salary, but shall move to the next step when their merit review justifies it.” (Emphasis in original.)

9. As a result of the decisions of the County Board of Commissioners, employees working for the Events Center are now County employees. Events Center employees receive the same benefit package as all other County employees. All human resources and payroll functions for Events Center employees are performed by the County.

10. The facility maintenance worker’s job is “[t]o plan, coordinate, and perform building and physical plant maintenance work in Lane County facilities; to perform difficult and responsible types of maintenance duties including electrical work, repair of complex systems and equipment and facilities preventative maintenance; and to perform related duties as assigned.”

The duties of the facility maintenance worker include: maintain/monitor compressor rooms, ice slab, dehumidification unit, ice resurfacer; monitor the heating, ventilation, and air conditioning systems in County buildings; monitor, adjust, and repair plumbing, heating, and electrical systems; monitor and repair equipment, furnishings, and fixtures; provide routine preventive maintenance for building structures, equipment, and systems; report structural or equipment damage to management; monitor and adjust HVAC system; service, maintain, and repair motors, filters, belts, coils, valves, and air conditioning systems; service, repair, and maintain restrooms and plumbing fixtures; monitor operation of mechanical systems such as chillers, boilers, cooling towers, fans, pumps, air compressors, and well tank systems; and service and repair building structures, including roofs, windows, doors, floors, walls, ceilings, and lighting.

11. The senior operations/events worker’s job is “[t]o perform a variety of custodial duties and light equipment operation at Lane County facilities.”

The duties of the senior operations/events worker include: direct staff to prepare buildings for events; provide technical assistance; set up and remove tables, staging, and other structures for conventions, meetings, and events; inspect set up/take down activities; monitor equipment, make minor adjustments, and report irregularities to management; report major structural and equipment damage; operate light equipment (forklifts and tractors); perform custodial duties before, during, and after events; monitor HVAC systems; and inspect and make minor repairs to equipment, furnishings, and fixtures.

12. The operations/events worker's job is "[t]o perform a variety of custodial duties and light equipment operation at Lane County facilities; and to perform related duties as assigned."

The duties of the operations/events worker include: set up and remove tables, staging, and other structures for conventions, meetings, and other events; operate light equipment (forklifts and tractors); perform custodial duties before, during, and after events; open and lock gates and doors; clean parking lot; inspect and make minor repairs to equipment, furnishings, and fixtures; and assist user groups, public, and visitors to the County facility.

13. The senior cashier's job is "[t]o sell admission tickets and provide information to the public using or visiting County facilities; and to perform a variety of customer service and office duties and to perform other related duties as assigned."

The duties of the senior cashier include: greet the public and provide program information; answer telephones; sell and redeem admission tickets; complete cash, check, and credit card transactions; resolve ticketing problems; reconcile and balance shift reports; provide daily sales reports; prepare and make bank deposits; reconcile petty cash; prepare mailings; and maintain work logs.

14. The cashier's job is "[t]o sell admission tickets and provide information to the public utilizing Lane County facilities; and to perform a variety of routine customer service duties as assigned."

The duties of the cashier include: greet the public and provide program information; answer telephones; sell and redeem admission tickets; complete cash, check, and credit card transactions; resolve ticketing problems; reconcile and balance shift reports; prepare and make bank deposits; stock inventory and prepare restocking orders; and provide appropriate services for facility clients.

15. The program specialist's job is to "perform specialized complex program assistance and a variety of program support duties for assigned program area(s). Requires specialized knowledge and experience in program or operational area; assists in collecting, organizing and preparing detailed program information, research, studies, and reports; and performs related duties as assigned."

The duties of the program specialist include: monitor compliance of internal and external requirements relative to the program operations; provide complex and specialized clerical and administrative activities; provide internal and external customers with technical assistance and information; gather and assemble data; assist in providing management with reports; assist in conducting research studies; survey program practices in other jurisdictions; participate in technical phases of special studies, surveys, investigations, and research projects; and prepare graphic charts.

16. The facility technician's job is "[t]o perform a variety of unskilled and semi-skilled work at a specialized facility; to operate and provide routine maintenance of specialized equipment utilized at a facility; and to perform related duties as assigned."

The duties of the facility technician include: inspect and operate specialized equipment; perform basic maintenance of facility and equipment; prepare equipment for customers; issue and maintain recreational equipment; perform cleaning activities and minor maintenance; open and close facility, secure doors and lights; operate forklift, minor power tools, and basic hand tools; and assist customers with information and assistance.

17. The facility assistant's job is "[t]o perform a wide variety of duties relevant to the use of a specialized facility; to provide information and instruction pertaining to use of equipment and program activities relevant to the facility; and to perform related duties as assigned."

The duties of the facility assistant include: provide information and instruction; monitor facility activities' compliance to rules and regulations; assist in providing customer service; provide first aid; and assist in cleaning facility areas.

18. The office support assistant's job is "to perform a variety of moderately difficult office support duties with increasing independence."

The duties of the office support assistant include: perform a wide variety of office assistance, general clerical work, typing, filing, proofreading, recording information, answering the telephone, and assist the public; type agendas, forms, lists, memoranda,

notices, court documents, property descriptions, reports, correspondence, minutes, and purchase orders; prepare, review, and proof documents; set up and maintain files; collect, sort, date, and distribute mail; serve as receptionist, greet the public, and provide information; operate a variety of office equipment; index and cross file documents; arrange for reproduction of documents; and perform specialized clerical duties.

19. The security guard's job is "[t]o provide a visual security presence; to patrol and monitor the buildings and grounds of Lane County facilities to ensure the personal safety and security of staff, visitors, and property; to secure grounds and buildings; and to perform related duties as assigned."

The duties of the security guard include: monitor entrance and departure of employees, visitors, and others in order to guard against theft and maintain the safety and security of the premises; monitor for suspicious occurrences and enforce rules and regulations; respond to and investigate reported situations; call authorities to investigate suspicious occurrences, security violations, and emergencies; provide information and directions; explain rules and regulations; maintain contact with events representative to address security concerns; open and close facility; maintain logs and paperwork; and respond to incidents and emergencies in accordance with procedures.

20. The positions of driver and skate guard are unclassified, and employees in those positions are either part-time or temporary employees under the collective bargaining agreement.

CONCLUSIONS OF LAW

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

2. The Lane County Events Center employees are included in the existing Lane County-AFSCME Council 75, Local 2831 bargaining unit of all temporary, probationary, and non-probationary employees in permanent positions (with exclusions not relevant here).

DISCUSSION

OAR 115-025-0005(3) provides:

"When the issue raised by the clarification petition 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, a petition may be filed at any time; except that the petitioning party shall

be required to exhaust any grievance in process that may resolve the issue before such a petition shall be deemed timely by the Board.”

Under OAR 115-025-0005(3), the issue is not whether the employees should be added to the bargaining unit; we decide only whether the employees are already in the unit based on the language of the certification or the collective bargaining agreement. *Marion County v. Marion County Employees Association Local 294, SEIU Local 503*, Case No. UC-12-02, 19 PECBR 781, 782 (2002). To resolve a petition under subsection (3),

“[t]his Board generally will look only to the express language of the certification description or of the collective bargaining agreement in deciding whether the disputed positions are included or excluded. The express terms of the certification or agreement clearly must not include the disputed positions for this Board to find that they are excluded from the unit. Doubts will be resolved in favor of inclusion in the unit.” *Salem Education Association v. Salem School District 24J*, Case Nos. C-262-79, C-2-80, and C-73-80, 6 PECBR 4557, 4572-4573 (1981). *See also Marion County Law Enforcement Association v. Marion County*, Case No. UC-37-02, 20 PECBR 398, 402 (2003).

The contract language at issue here is clear and unambiguous regarding the employees in dispute. It recognizes the Union as “the sole and exclusive representative of *all* temporary, probationary and non-probationary employees in permanent positions” in the County, excluding specified positions. (Emphasis added.) The positions at issue here are not listed among the exclusions. The employees in dispute hold permanent positions. We conclude that under the express language of the collective bargaining agreement, Events Center employees are part of the Union bargaining unit.⁴

The County argues that the Union waived its right to represent Events Center employees because it failed to assert such representation rights when those employees worked for the County between the 1970s and the early 1990s; failed to demand to bargain in the early 1990s over the contracting out of Lane County Events Center work; and failed to file this action until February 18, 2009, even though the Events Center employees returned to the County work force eight months earlier in June 2008.

A petition under OAR 115-025-0005(3) does not seek to add employees to the bargaining unit; it instead asks whether the employees in dispute are already part of the unit based on the language of the certification or the collective bargaining agreement. *Oregon AFSCME Council No. 75 v. Housing Authority of Portland*, Case No. UC-19-92, 13

⁴Neither party argues that individual Events Center positions differ from each other in any way relevant to this petition.

PECBR 730, 735 (1992); *In the Matter of the Petition for Declaratory Ruling Filed Jointly by the Oregon Nurses Association, American Federation of State, County and Municipal Employees, and Oregon Department of Administrative Services*, Case No. DR-2-97, 17 PECBR 309, 314 (1997). Although the County does not articulate its argument in precisely this fashion, it essentially asserts that the Union is improperly attempting to use this subsection (3) petition to add employees to the bargaining unit. Under this argument, the Union's prior inactivity regarding these employees demonstrates that the Union understood the contract's unit description to exclude the Events Center employees. See *Tarlow v. Arntson*, 264 Or 294, 300, 505 P2d 338 (1973) (how the parties conduct themselves under a contract is evidence of their intent); *Goodman v. Continental Casualty Co.*, 141 Or App 379, 389, 918 P2d 438 (1996) (the parties' conduct in performing a contract can be persuasive evidence of the contract's meaning). In such a case, a party will not have "an honest disagreement about the scope of the unit based on the interpretation of * * * contract recognition language." *Oregon AFSCME Council No. 75 v. Housing Authority of Portland*, Case No. UC-19-92, 13 PECBR 730, 735 (1992). Therefore, a dispute in which "positions that historically had been treated as excluded from the unit [prior to the most recent contract negotiations] but which arguably fell under the recognition clause" is not subject to a unit clarification petition under OAR 115-025-0005(3). *Marion County v. Marion County Employees Association Local 294, SEIU Local 503*, Case No. UC-12-02, 19 PECBR 781, 782 n 3 (2002). The County argues that in light of the prior understanding that the employees were excluded, including them would improperly allow a petition under subsection (3) to add employees to the bargaining unit.

We reject the County's waiver argument. First, we will examine the parties' prior actions or practice as an aid to contract interpretation *only if* the contract language is ambiguous. *Lincoln County Education Association v. Lincoln County School District*, Case No. UP-14-04, 21 PECBR 20, 29 (2005) (citing *Yogman v. Parrott*, 325 Or 358, 937 P2d 1019 (1997)). As discussed earlier, the contract language at issue here unambiguously includes the Events Center employees in the bargaining unit description. We therefore will not consider how the parties conducted themselves in the past.

Second, the record does not establish a waiver. The County points to the time between the 1970s and the 1990s when the Events Center employees worked for the County. The stipulated record in this case does not contain information about the relationship between the Lane County Events Center workforce and the bargaining unit prior to the contracting out of that work. Therefore, the evidence does not suggest that during this time, the Union waived its opportunity to represent the Events Center workers. The County next points to its decision to contract out the work in the early 1990s. The action or inaction of the Union while the Events Center employees were employed by a different employer is not germane to our decision here.

The issue that remains is whether the Union's delay in seeking to represent these employees between June 2008 and February 2009 is sufficient to constitute a waiver of its right to represent them. The petition was timely filed under the pertinent rules. The County does not assert that it was harmed or unfairly prejudiced by the delay. We conclude that in these circumstances, the eight months between the return of these employees to County employment and the filing of this action, all during the term of the same collective bargaining agreement, is not sufficient delay to constitute a waiver of the Union's right to bring this petition.

We conclude that the express terms of the recognition clause of the parties' contract include Lane County Events Center employee positions. Therefore, the Lane County Events Center employees are included in the existing Lane County - AFSCME Council 75, Local 2831 bargaining unit.

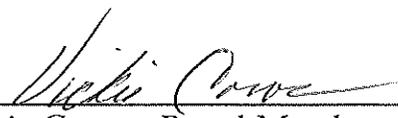
ORDER

The Lane County Events Center employees working in the positions of senior cashier, unclassified part-time cashier, senior events worker, events worker, facility maintenance worker, facility technician, unclassified part-time facility technician, operations event worker, program specialist/figure skating specialist, program specialist/sport specialist, security guard, unclassified part-time driver, unclassified part-time office support assistant, and unclassified part-time skate guard are included in the existing Lane County - AFSCME Council 75, Local 2831 bargaining unit.

DATED this 25th day of November 2009.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.