

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No UC-17-10

(UNIT CLARIFICATION PETITION)

UNITED EMPLOYEES OF COLUMBIA)	
GORGE COMMUNITY COLLEGE,)	
LOCAL 4754, AFT, AFL-CIO,)	
)	
Petitioner,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
COLUMBIA GORGE COMMUNITY)	
COLLEGE,)	
)	
Respondent.)	
_____)	

On September 21, 2011, this Board heard oral argument on Petitioner's objections to a recommended order issued by Administrative Law Judge (ALJ) Wendy L. Greenwald on June 27, 2011, after a hearing held on January 5, 2011, in Salem, Oregon. The record closed on February 3, 2011, with the receipt of the parties' post-hearing briefs.

Eben Pullman, Field Representative, and Richard H. Schwarz, Executive Director, AFT-Oregon, Tigard, Oregon, represented Petitioner.

Michael Porter, Attorney at Law, Miller Nash LLP, Portland, Oregon, represented Respondent.

On June 25, 2010, the United Employees of Columbia Gorge Community College, Local 4754, AFT, AFL-CIO (Union) filed this unit clarification petition, under OAR 115-025-0005(2) and (3), seeking a determination that employees filling the following positions are public employees and the positions are included in the existing

bargaining unit under the contract recognition clause: payroll accountant; accountant; cost accountant; facilities services coordinator - purchasing, procurement, and facilities projects; network specialist; life skills project specialist; and student life advisor. The Columbia Gorge Community College (College) filed timely objections to the petition.

The issues in this case are:

1. Are the employees in the classifications of payroll accountant; accountant; cost accountant; facilities services coordinator - purchasing, procurement, and facilities projects; network specialist; life skills project specialist; and student life advisor included in the bargaining unit under the express terms of the contract recognition clause pursuant to OAR 115-025-0005(3)?

2. Are the employees in the classifications of payroll accountant or cost accountant excluded from the bargaining unit as confidential employees within the meaning of ORS 243.650(6)?¹

RULINGS

The Union objected to Findings of Fact 7 and 8 in the Recommended Order; these Findings of Fact were based on the statement of proceedings and findings this Board made in *Portland Community College Faculty Federation v. Portland Community College*, Case No. UC-34-87, 10 PECBR 700 (1988), of which the ALJ took official notice. The Union contends that the ALJ erred by using “a previous Board decision as evidence in reaching Findings of Fact 7 and 8 that was not submitted into evidence at the hearing and is not relevant to the issue before the Board.”

According to the Union, the College first cited the facts in *Portland Community College* in its post-hearing brief. The Union correctly notes that this Board will not permit submission of additional evidence after a hearing unless the party wishing to introduce the evidence moves to reopen the record and this Board grants the motion. *Cascade Bargaining Council v. Bend-LaPine School District No. 1*, Case No. UP-33-97, 17 PECBR 609, 610 (1998). Because the College never moved to reopen the record to submit the facts of the case as evidence, the Union contends that the ALJ improperly relied on these facts in the Recommended Order.

¹The College originally objected to the confidential status of the accountant position, but stipulated at the hearing that this was not a confidential position.

Under ORS 183.450(4), a hearing officer and agency may take notice of “judicially cognizable facts * * *.” An agency decision is a “judicially cognizable fact.” ORS 40.090(2) provides that judicially noticed law includes “[p]ublic and private official acts of the legislative, executive and judicial departments of this state * * *.” Agency decisions are official acts under this rule. *McGee Plumbing Inc. v. Building Codes Div.*, 221 Or App 123, 131-132, 188 P3d 420 (2008). *Utility Reform Project v. PUC*, 215 Or App 360, 365 n 1, 170 P3d 1074 (2007). Thus, the ALJ did not err by taking official notice of our decision in *Portland Community College Faculty Federation v. Portland Community College*.

We have, however, eliminated Finding of Fact 8 from this Order. Facts concerning classified employee positions at Portland Community College in existence in 1987 are not relevant to our consideration of the Union’s petition.

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

FINDINGS OF FACT

1. The Union is the exclusive representative of separate units of classified and faculty employees at the College. The College is a public employer.

2. The Union and the College are parties to two collective bargaining agreements, one covering classified employees (Classified Contract) and one covering faculty employees (Faculty Contract).

3. The Classified Contract, effective from July 1, 2009 through June 30, 2012, contains the following recognition clause:

“A. The Employer recognizes the Union as the exclusive representative for all classified employees of Columbia Gorge Community College, excluding casual employees, supervisory and confidential employees as defined in ORS 243.650(6) and (14).

“1. For the purpose of definition within this contract, ‘casual employees’ will be those employees working irregular schedules, short term, and performing sporadic work. Frequently decisions will be made daily about whether or not there is work for the next day.

"B. *New and Modified Positions.* The Employer will notify the Union upon creation of new or modified classified positions and the Union and the Employer will meet to determine the appropriate unit placement and compensation of the job. The meeting to discuss unit placement of the position will be held within fifteen (15) working days from the time of the Employer's notice. Compensation issues will be resolved according to the provisions of Article XIV, Compensation. The Union can initiate discussions under this paragraph when it believes that the duties of a position have been modified so substantially that the position should be considered a new position and a new salary placement is appropriate."

4. Compensation for classified bargaining unit positions is provided for under Article XIV of the Classified Contract. That article establishes four wage levels for the positions of accounting specialist, administrative assistant, computer support technician, facilities services technician, instructional assistant, library assistant, and specialist. It also states that "[a]ll new or vacant positions will be filled at Step 1 of their respective level. Respective level is defined as the status quo."

5. The recognition clause in the Faculty Contract, effective from July 1, 2007 through June 30, 2010, provided that the College recognized the Union as the exclusive bargaining representative of the following employees:

- "1. Full-time instructors;
- "2. Part-time instructors who teach credit courses;
- "3. Part-time instructors who teach noncredit courses in adult basic education, GED, English as a second language, and vocational (professional/technical) education. The following employees are excluded from the bargaining unit:
 - "a. Instructors of other noncredit courses;
 - "b. Professional support staff;
 - "c. Administrators;
 - "d. Confidentials;

- "e. Supervisors;
- "f. Classified employees;
- "g. Faculty who teach less than a three-credit class or 30 hours per term; or
- "h. Instructors of courses that are subcontracted by or for business, industry, or agencies."

Background

6. The College was originally chartered in 1976 as a branch of Portland Community College (PCC). The faculty who worked at the College were PCC employees, who were included in the PCC faculty bargaining unit. The PCC faculty bargaining unit was represented by the PCC Faculty Federation, Local 227, an affiliate of the American Federation of Teachers (AFT). The PCC classified employees were represented by another AFT affiliate, Local 3922.

7. In 1987, the PCC Faculty Federation filed a petition seeking to add professional support staff positions to its current bargaining unit, which at the time consisted of full-time faculty, counselors, and librarians. *Portland Community College Faculty Federation v. Portland Community College*, Case No. UC-34-87, 10 PECBR 700 (1988).² Robert Nightingale, who worked for AFT and the PCC Faculty Federation, was one of the representatives for the PCC Faculty Federation in that proceeding. PCC was represented by its attorney, Donna Cameron. The petitioned-for "professional support staff" positions were defined by PCC as "lower level administrators who have less responsibility for budgeting and supervision than other administrators." *Id.* at 710. Among these positions were: a media relations specialist; coordinator of student affairs; admissions specialist; academic advisor specialist; management and commerce coordinator; teleconference specialist; and computer specialist (Tektronix location). Almost all of the petitioned-for positions required either a bachelor's or master's degree. In its decision, issued in June 1988, this Board clarified the PCC faculty unit to include all professional support staff employees, subject to a self-determination election.

²Finding of Fact 7 is based on the statement of proceedings and Conclusions of Law in our decision in *Portland Community College Faculty Federation v. Portland Community College*, 10 PECBR 700, of which we take official notice.

8. In 1989, the College became an independent community college and employed its own faculty. Soon after this, questions arose about the continuing representation of the College's faculty employees by the PCC Faculty Federation. Ultimately, AFT Executive Director Richard Schwarz, AFT Representative Nightingale, and College representatives negotiated an agreement under which the determination of whether the College's faculty employees would be represented by the Union was made subject to a secret-ballot election. The makeup of the College's faculty bargaining unit "mirror[ed] the unit that was already described in the PCC agreements." As a result of the election, the Union became the representative of the College's faculty employee bargaining unit.

9. At the time of this faculty representation election, the College's classified employees approached AFT to seek representation. In November 1990, Schwarz and Nightingale filed a petition with this Board on behalf of the Union seeking to represent a bargaining unit of "[a]ll classified employees employed by the employer," excluding supervisory and confidential employees. When it filed the petition, the Union intended the term "classified employees" to refer to all non-confidential, non-supervisory employees not included in the faculty unit.³ The College filed objections to the petition on the basis that administrative and casual employees should be excluded from the petitioned-for unit. By letter dated December 14, 1990, Cameron, the College's attorney, sent AFT Representative Nightingale an outline of an agreement that she believed the parties had reached on the definition of the classified bargaining unit. The letter stated that the parties agreed to add an exclusion for casual employees, identified potential confidential employees, and stated that "[a]dministrators will not be specifically added to the list of exclusions from the unit, but we understand that the intended unit does not

³The College argues that we should discount Schwarz's testimony that the Union intended to include all non-faculty employees within the term "classified employees" because it is inconsistent with his testimony that the parties' intended the College's faculty unit to mirror that of the PCC faculty unit, which included professional support staff, and the parties' agreement to exclude the administrative employees from the classified unit.

The original College faculty bargaining unit description is not in evidence, however. As a result, we do not know what changes, if any, have occurred since the parties agreed to the original bargaining unit description. Accordingly, we will not discount Schwarz's testimony on the grounds that it is inconsistent.

involve administrators. Paul Newell and Linda Quackenbush are not considered part of the proposed unit.”⁴

10. In early January 1991, the College and the Union signed a consent election agreement for a bargaining unit of “[a]ll classified employees of Columbia Gorge Community College, excluding casual employees and supervisory and confidential employees as defined by ORS 243.650(6) and (14).” (Emphasis in original.) The Union won the election and on February 26, 1991, this Board certified the Union as the exclusive representative of this bargaining unit of employees.⁵

History of Petitioned-For Positions

11. In 1993, Sandra Buchanan was hired as the chief financial officer (CFO) of the College and head of the College’s business office. When Buchanan was hired, there were three full-time and two part-time employees in the business office, including classified bargaining unit member Mayrie Cox, who was initially employed in the position of accountant.⁶ At the time of the hearing, Cox worked as an account specialist. During her employment at the College, Cox has served as the Union’s president, treasurer, and grievance officer.

12. Payroll Accountant. In 1995, the College created a payroll accountant position in the business office. The position was created so the business office would have an employee with a degree who could perform duties under generally accepted accounting principles (GAAP), provide expertise and skills necessary to interpret regulations, assist in policy development, and develop new tracking mechanisms for certain benefits and

⁴There is no evidence regarding the positions held by Newell or Quackenbush in 1990, when the parties agreed to exclude them from the bargaining unit. When Chief Financial Officer Sandra Buchanan was hired in 1993, Newell was an information technology professional responsible for maintaining the College’s networks, providing software support, and maintaining the computer lab and computers at off-site facilities. Quackenbush was a special projects coordinator working in the College president’s office. Quackenbush managed the College’s facilities, which at that time were rented; managed the phone system; supervised the College’s custodial/maintenance employees; and was involved in hiring and other human resources activities.

⁵*United Employees of Columbia Gorge Community College v. Columbia Gorge Community College*, Case No. RC-71-90 (1991).

⁶Mayrie Cox’s last name was previously York.

leaves. The College did not place this position in the Union's classified bargaining unit because it considered it to be a professional position.

13. The most recent revision of the job description for the payroll accountant position occurred in September 2000. According to that description, the position requires a bachelor's degree in accounting, business administration, computer science, economics, or a closely related field with significant accounting and computer course work; and experience in public sector computerized accounting systems preparing payroll or significant government accounting course work. The position is paid on a salary basis and is categorized as exempt from overtime.

14. Diana Trubachik has worked in the payroll accountant position since 2000. Trubachik has a bachelor's degree in management and an associate's degree in accounting technology. Prior to that, Trubachik worked as a payroll clerk and a senior accountant. In her position, Trubachik meets with new employees to obtain their payroll information and review benefit options; processes payroll; maintains employee leave accruals and balances; manages workers compensation issues and audits; assists with the budget; monitors, advises, recommends, and assists in implementing IRS and other federal requirements; and assists with payroll and accounts receivable audits. The payroll accountant is also required to interpret policies and regulations of the Bureau of Labor and Industries, Public Employee Retirement System, and family medical leave laws; assist with risk management; exercise independent judgment; and ensure compliance with GAAP.

15. Trubachik meets with CFO Buchanan, Chief Talent, and Strategy Officer Robb Van Cleave two or three times during the collective bargaining process to assist them in preparing and evaluating economic proposals. Trubachik determines the cost of proposed wages and benefits, accesses the impact on the College's finances, prepares financial information, and makes suggestions for alternative wage and benefit proposals.

16. General Ledger Accountant. During September 2000, the College created a general ledger accountant position to address an increase in the business office's work related to a significant growth in contracts and grants. The College posted the position, which required a bachelor's degree, as an unrepresented professional position.

17. After the general ledger accountant position was posted, bargaining unit employee Cox became aware that the position included some duties she was performing. Since she did not have a bachelor's degree, Cox became concerned that she might be laid off. In late September or early October 2000, the Union filed a grievance over the College's creation of the general ledger accountant as a professional unrepresented

position to replace a job that had previously been a bargaining unit position. The Union asserted that the position included the bulk of bargaining unit employee Cox's accounting specialist duties, violated the Classified contract recognition clause, and was an attempt by the College to remove duties from the bargaining unit.

18. By memorandum dated October 17, 2000, Director of Resource Development Bob Cole rejected the grievance on the basis that the College was only obligated to notify the Union about new classified positions and the general ledger accountant was a "[p]rofessional position that is outside the bargaining agreement." Cole explained that the new position

"involves professional level expertise and requires a Bachelor of Arts degree; an educational level not called for in any classified position. This position is also similar to the Payroll Accountant position that has been in place for more than five years at CGCC and has never been in the classified bargaining unit. * * * The classified unit also does not include several other professional level non-faculty positions. We have never treated the recognition clause of the agreement as covering these positions.

"[A]s the college grows, it is necessary to periodically create new positions. Some will be classified positions, some will be faculty positions, and some will be professional positions. When the new position is a classified position, we will certainly meet and bargain over the placement and compensation. But in this case the Employer has created a Professional position."

19. Sometime after the grievance was filed, then-Union Grievance Steward Dan Ropek, Cox, and CFO Buchanan met to discuss the general ledger accountant position. By e-mail to Buchanan dated October 23, 2000, Ropek confirmed his understanding based on their meeting that neither Cox's duties nor pay would be impacted by the new position, but also stated that the Union was still concerned about the College's method for organizing new positions, the use of professionals to do work previously done by classified employees, the professional/classified employee ratio, and the prioritization of positions hired versus needed. Ropek indicated that if Buchanan helped him "to see your position more clearly, I believe that the problems that we are currently having may be quickly resolved."

20. By memorandum dated October 24, 2000, Director Cole responded to Ropek's e-mail. Cole explained the distinctions between what the College identified as

(1) administrators; (2) faculty, who provide instruction or teach; (3) staff, who provide support services to college programs; and (4) professional employees, who

“are responsible for program outcomes, they often have the responsibility of supervising other college employees, and they are expected to participate in the development of policies and procedures for the college. They work independently. They might have some teaching assignments, but their primary responsibilities are outside the classroom.”

Cole further notified Ropek that “[t]here are 27 classified employees, 4 confidential employees, 17 professional staff, and 6 administrators working for the college.”

21. Cox was satisfied with the assurances Buchanan provided about her position and the Union withdrew the grievance.

22. At some point, the College eliminated the general ledger accountant position after it was unable to find a suitable candidate.

23. In April 2001, the Union filed a petition with this Board seeking to merge the faculty and classified bargaining units at the College into one bargaining unit. A hearing was held on the petition on June 21, 2001. In its order dismissing the petition, this Board made the following findings of fact regarding the classified bargaining unit existing at that time:

“25. The classified bargaining unit includes all classified employees of the College, excluding casual, supervisory, and confidential employees.

“26. The classified unit includes a wide range of jobs such as custodians, groundskeepers, laboratory aides, library assistants, instructional assistants, accounting personnel, secretaries, and computer support technicians.

“27. A college degree is not required for a classified position. Job qualifications require the requisite skills to perform the functions of the position.

“28. The majority of classified employees are employed 12 months per year. They normally work 40 hours per week, Monday through Friday. They are paid on an hourly basis and receive overtime for all hours worked in excess of 40 per week.” *United Employees of Columbia Gorge Community*

College v. Columbia Gorge Community College, Case No. UC-19-01,
19 PECBR 452, 456 (2001).

24. Accountant. In 2003, the College added an unrepresented accountant position in the business office. The current accountant position requires a bachelor's degree in accounting and experience with public sector computerized accounting systems, or significant accounting and computer course work. The accountant is paid on a salary basis and is categorized as exempt from overtime. Regina Sampson has held this position since 2009. Sampson has a bachelor's degree in accounting and previously worked as a staff accountant, audit manager, director of accounting and human resources, and controller.

25. The accountant is responsible for understanding, researching, and applying GAAP standards, and working independently with program managers regarding contracts and grants. Some of the essential functions of the position include preparation of financial statements, general ledger journal vouchers, and monthly general ledger account and bank statement reconciliations; research and analysis; performance of contract and grant accounting, invoicing, and reporting; providing fiscal support for grant proposals; assisting the CFO with monitoring contracts, grants, agreements, leases, budget variances, and capital project activity; and assisting the CFO with budget preparation and state and federal reporting.

26. Foundation Coordinator. In July 2004, the Union filed a grievance over the College's failure to meet with the Union to determine the appropriate unit placement and compensation for several secretary positions and a new foundation coordinator position. In regard to the foundation coordinator position, the College denied the grievance on the basis that the position "is a professional staff position. It is not a classified position." After the parties resolved the issues related to the secretarial positions, the Union notified the College it was withdrawing the grievance regarding the foundation coordinator position without conceding to the College's interpretation or application of the Classified Contract.

27. Network Specialist. In 2004, the College created the position of network specialist. The position description states a preference for a bachelor's degree in computer systems, and requires industry certifications with extensive job experience and two years of experience in Novell Netware Network installation and maintenance. The position is paid on a salary basis and is categorized as exempt from overtime. Christian McQuade has been employed in this position since January 2005. McQuade has six years toward a degree in biology and geography, but no degree. On taking the position, the College required McQuade to obtain a network administrator certification, which he received in

March 2005. McQuade previously worked as a field engineer and site manager in the aerospace industry and a project manager for an internet service provider, coordinating the installation of fiber optics in homes and businesses.

28. McQuade is responsible for establishing and maintaining the College's communication servers and networks, and for ensuring the confidentiality of user accounts and passwords. McQuade developed and redesigned the College network between its facilities in Hood River and The Dalles; he also coordinated with local internet providers and technicians. McQuade is involved in the selection of network providers based on the project specifications, the best service, and the proposed cost, which is established by the provider using trends for internet traffic generated by the College.

29. Student Life Advisor. In 2007, the College created the position of student life advisor. The student life advisor is a part-time position which oversees student organizations, such as the student council and Phi Theta Kappa society. The position requires a bachelor's degree and preferred experience in conducting student leadership or other college training programs, program planning, and program development. It is categorized as exempt from overtime.

30. Shayna Dahl has worked as the student life advisor since September 2007. Dahl has a bachelor's degree in psychology and a master's degree in family and marital therapy. Dahl mentors and oversees the student organizations' officers on a daily basis, ensuring that they follow proper procedures; teaches and assists with program and event planning; coordinates organization fund raising activities and retreats; and assists in the development of new student organizations. Dahl acts independently in her position and is supervised by the Student Services Officer.

31. Facilities Coordinator - Purchasing, Procurement, and Facilities Specialist. In 2007, the College created the position of facilities coordinator - purchasing, procurement, and facilities specialist which performs duties related to facility project management and procurement administration. The position requires an associate's degree in construction, business, finance, accounting, or equivalent, or an equivalent combination of education, training, and experience; and a minimum of two years procurement or project management experience or training, or the equivalent related education, training, and experience. The position is paid on a salary basis and categorized as exempt from overtime.

32. Kayleen Warner-Arnes, who has a bachelor's degree in environmental studies, has worked in this position since February 2007. Warner-Arnes acts as the

College's procurement officer. She is involved in the development, evaluation, and administration of bids and contracts, and provides support to staff on contracts and vendor issues. She works with project managers to ensure that applicable specifications, rules, regulations, bonding requirements, insurance, and payment information are included in staff proposals/requests. She also presents requests for services over \$75,000 to the College's Board for approval, recommends whether a proposed purchase has met College and federal requirements, and may consult with the College attorney on procurement. Recently, the position was expanded to include responsibility for sustainability coordination at the College.

33. Life Skills Project Specialist. The College created the position of Life Skills Project Specialist in March 2007. The position has been vacant since June 13, 2008. The College has no plan to fill this position.⁷

34. Cost Accountant. In October 2009, the College created the position of cost accountant. The cost accountant position requires a bachelor's degree in accounting or business administration with significant accounting course work, and experience in working in the public sector with computerized accounting systems or significant accounting and computer course work. The position conducts analysis on payroll items, participates in the development of policy and procedures, and exercises independent judgment and discretion in carrying out duties within general parameters. The cost accountant position is paid on a salary basis and is categorized as exempt from overtime.

35. Sid Spaulding was hired as the cost accountant at the time the position was created. He has a two-year degree in accounting and previously worked at the College as an account specialist, which is a represented position. Some of the essential functions of the cost accountant position include preparing and maintaining cost accounting records related to printing, postage, utilities, and other areas; preparing payroll cost accounting analysis and general ledger journal vouchers; performing cost accounting analysis and reconciliation; handling IRS activity and unclaimed property reporting; recording property tax receipts and account reconciliation; assisting in the control of fixed assets, preparing final budgets and financial statements; performing cash management functions; auditing bookstore deposits and preparing journal entries; organizing and filing accounting data; preparing and collecting materials for the financial audit and required adjustments; preparing reconciliations of the cash till and daily cash; and developing, recommending, and following business office procedures and College policies. Spaulding has not been involved in discussions, analysis, or preparation of proposals related to collective bargaining.

⁷The parties introduced no additional evidence regarding this position.

36. In September 2009, the Union questioned the College about positions it treated as excluded from both the faculty and classified bargaining units. On September 25, 2009, Union President John Copp asked Chief Talent and Strategy Officer Van Cleave to provide him information regarding all unrepresented employees. On November 5, Van Cleave provided Copp a list of 40 unrepresented positions and the reason each position was treated as unrepresented. During a later discussion with Van Cleave, Copp, and AFT-Oregon Field Representative Eben Pullman, the Union identified a number of these unrepresented positions that it believed should be in the classified bargaining unit.

37. On January 4, 2010, after additional communications between the parties, the Union filed a grievance over the College's failure to include the petitioned-for positions in the bargaining unit. The College denied the grievance on the basis that the Union's complaint was not grievable; the grievance was not timely since all of the positions, except the cost accountant, had existed prior to 2007; and the positions at issue were not classified positions, but either professional or confidential positions. The College explained that

“[p]rofessional staff at the college are responsible for program outcomes, they often have the responsibility of supervising other college employees, and they are expected to participate in the development of policies and procedures for CGCC. They work independently at a level that is consistent with the definitions in federal law for positions that are exempt from overtime requirements. They might have some teaching assignments, but their primary responsibilities are outside the classroom.

“In addition, the positions generally require a bachelor's degree, while classified positions require a high school diploma or associate's degree.”

38. The Union eventually withdrew its grievance and proceeded with this petition.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The employees in the classifications of payroll accountant; accountant; cost accountant; facilities services coordinator - purchasing, procurement, and facilities projects; network specialist; life skills project specialist; and student life advisor are not

included within the bargaining unit under the express terms of the contract recognition clause.

DISCUSSION

The Union has petitioned to add a number of positions to its classified bargaining unit, asserting that these positions are included in its bargaining unit under the express terms of the parties' contract recognition clause pursuant to OAR 115-025-0005(3). The College objects to the petition on the basis that (1) the positions sought are not classified employees, but are confidential, administrative, or professional positions excluded from the bargaining unit by law or under the parties' recognition clause; (2) the positions do not share a community of interest with bargaining unit employees;⁸ (3) the petition should be denied under the doctrine of laches⁹ because many of the positions have existed for years and the Union was aware of, but failed to challenge, these positions' unrepresented status; and (4) the Union should be estopped from seeking to include the accountant position because it previously filed, but failed to pursue, a grievance on this position. We begin our analysis of the parties' contentions by reviewing our standards for adding positions to a bargaining unit under the express terms of a collective bargaining agreement.

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.”

The purpose of a subsection (3) petition is very narrow. A subsection (3) petition is a vehicle for parties to resolve an honest disagreement over whether certain positions

⁸We do not address the College's objection asserting a lack of community of interest between the petitioned-for positions and the bargaining unit employees because this issue is not appropriately raised under a subsection (3) petition. *Marion County v. Marion County Employees Association Local 294, SEIU Local 503*, Case No. UC-12-02, 19 PECBR 781, 783 (2002).

⁹Laches is “[t]he equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim, when that delay or negligence has prejudiced the party against whom relief is sought.” *Black's Law Dictionary* 879 (7th ed 1999).

are or are not already included in an existing bargaining unit based on the certification description or the contract recognition language. A subsection (3) petition does not add positions to a bargaining unit;¹⁰ we will dismiss a subsection (3) petition if we find it is an attempt to expand the unit by adding positions that are not already covered by the parties' agreement. *Oregon Public Employees Union, SEIU, Local 503 v. State of Oregon, Oregon State Hospital*, Case No. UC-37-96, 17 PECBR 434, 440 (1997); *Oregon AFSCME Council No. 75 v. Housing Authority of Portland*, Case No. UC-19-92, 13 PECBR 730, 735 (1992); *Oregon AFSCME Council 75 v. Clatsop County*, Case No. UC-72-91, 13 PECBR 619, 622 (1992).

To decide if positions are included in a bargaining unit under subsection (3), this Board interprets the language of the certification description or recognition clause. We address contract interpretation issues under a subsection (3) petition in the same manner that we address other contract interpretation issues. *Oregon AFSCME Council 75, Local 2831 v. Lane County*, 23 PECBR at 425. Our goal is to discern the parties' intent. To determine that intent, we apply the three-part analysis described in *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)).

Under our three-part analysis, we first examine the text of the disputed language in the context of the document as a whole. If the provision is clear, the analysis ends and we enforce that clear language. If the provision is ambiguous, we next examine extrinsic evidence to attempt to resolve the ambiguity. As part of this extrinsic evidence, we consider "other relevant circumstances, including the course of conduct of the parties in their performance of the contract." *Oregon Public Employees Union*, 17 PECBR at 440. The manner in which parties have conducted themselves under a contract is evidence of their intent. *Tarlow v. Arntson*, 264 Or 294, 300, 505 P2d 338 (1973). However, "we will examine the parties' prior actions or practice as an aid to contract interpretation *only if* the contract language is ambiguous." *Oregon AFSCME Council 75, Local 2831 v. Lane County*, 23 PECBR at 425. (Emphasis in original.) We may also look to the parties' bargaining history as evidence of their intent. *Oregon AFSCME Council 75, Local #3997 v. Deschutes County*, Case No. UP-32-09, 24 PECBR 290, 303 (2011). Finally, if the contract language remains ambiguous, we apply appropriate maxims of contract construction.

¹⁰A union may petition to add unrepresented positions to a bargaining unit under OAR 115-025-0005(4). Such petitions require a 30 percent showing of interest, must be filed during the contract open period (in most cases), are subject to the election and certification bars, and require an election. An employer may also object to such a petition on the basis that the positions the union seeks are not appropriately included in the bargaining unit under the factors listed in ORS 243.682.

The Union argues that the language in the parties' contract recognition clause is clear and unambiguous: it defines the represented group as all classified employees and specifies the limited categories of employees excluded from this group. The Union contends that because the recognition clause does not specifically exclude professional employees from the bargaining unit, these employees are included. According to the Union, the clear language of the contract recognition clause makes it unnecessary to consider any extrinsic evidence.

The College, however, argues that the recognition clause is ambiguous because it does not define the term "classified employee." The College contends that the parties intended this term to apply only to employees who perform clerical or manual labor, and never intended it to apply to employees who have greater responsibility, exercise independent judgment in their work, are exempt from overtime under the Fair Labor Standards Act (FLSA), and work in positions that require a college degree. The College asserts that extrinsic evidence—the parties' discussions at the time they agreed to the recognition clause and their subsequent conduct—demonstrate that the parties never intended to include the professional positions at issue in the classified bargaining unit.

We begin our consideration of the College and Union positions by analyzing the parties' contract recognition clause in the context of the contract as a whole. That clause establishes a bargaining unit of "all classified employees of Columbia Gorge Community College, excluding casual employees, supervisory and confidential employees * * *." The term "classified employees" is not defined in the recognition clause: it specifies which employees are *excluded* from the bargaining unit, not which ones are included.

Contract provisions other than the recognition clause provide no help in determining what the parties intended by the term "classified employees." Although the contract compensation section lists bargaining unit positions, both the recognition clause and the compensation clause specify the process for adding new positions to the bargaining unit. Therefore, the list of positions in the compensation article is not a complete list of all bargaining unit positions.

In construing an agreement, "[w]e generally give words their ordinary meaning." *Oregon AFSCME Council 75 v. State of Oregon, Department of Corrections*, Case No. UP-05-06, 22 PECBR 224, 232 (2008). Courts often rely on the dictionary to provide the meanings of a word in its ordinary usage. *State v. Moore*, 174 Or App 94, 98, 25 P3d 398 (2001). However, relevant dictionary meanings of the term "classified" do not assist us in interpreting what the parties intended by using this word. *Webster's Third New International Dictionary* 417 (unabridged ed 2002) defines "classified" as **l a** : consisting of classes **b** : divided into classes or placed in a class." The word "class" is then

defined as “a group, set, or kind marked by common attributes or a common attribute.” (*Id.* at 416.) For the definition of “classified employee,” *Roberts Dictionary of Industrial Relations* 119 (revised 1994), refers us to the term “classified service,” which is defined as “[a] system of jobs categorized into a structured hierarchy and usually made part of a civil service system.” Thus, we cannot determine from the text and context of the contract, or from dictionary definitions, what the parties intended by their use of the term “classified employee.”

Contract language “is ambiguous if it can reasonably be given more than one plausible interpretation.” *Portland Fire Fighters’ Assn. v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491 (2002). Here, each party offers a plausible interpretation of language in the recognition clause. We conclude that the contract language is ambiguous and move to the second step of our analysis to consider extrinsic evidence of the parties’ intent.

The parties’ past practice provides the most reliable evidence of intent. *Deschutes County*, 24 PECBR at 301. A past practice is established by a course of conduct that is clear and consistent, occurred repetitively over a long period of time, and is acceptable to both parties. *Oregon AFSCME Council 75, Local 2831 v. Lane County Human Resources Division*, Case No. UP-22-04, 20 PECBR 987, 993 (2005). Acceptability means that the parties had knowledge of the conduct and regarded it as correct and customary or it “may be implied from long acquiescence in a *known* course of conduct.” *Id.* at 994 (Emphasis in original). We also consider the existence of mutuality in the creation of the practice. Mutuality means that the practice arose from a joint understanding of the parties, either in the inception or execution of the contract. *Id.* at 993.

The parties’ past practice provides reliable evidence that the parties never intended to include professional positions in the classified employees’ bargaining unit under the terms of the contract recognition clause. Since at least 2000, the Union has known that the College did not consider professional employees to be part of the classified bargaining unit.¹¹ In October 2000, in the context of a Union grievance over the creation of the general ledger accountant position, the College specifically notified the Union that it considered the newly-created position to be professional and excluded from the Union bargaining unit. In the course of discussions about the grievance, the College provided

¹¹It may be true, as the Union argues, that current Union President Copp was not aware that professional employees were excluded from the classified bargaining unit until November 2009. However, the Union is held to the knowledge of its former officers and representatives, who were certainly aware of the College’s position that professional positions were excluded.

the Union with a definition of “professional” employees, explained its position that these employees were not part of the Union bargaining unit, and identified 17 unrepresented professional College positions. (Findings of Fact 19 through 21). After the Union resolved its specific concerns about how the general ledger accountant position might affect a current bargaining unit employee, it withdrew its grievance and never objected to the other positions the College asserted were professional and excluded from the Union bargaining unit. In 2004, the Union again failed to object to the College’s determination that a position was professional. Although the Union initially grieved the College’s decision to treat a new foundation coordinator position as an unrepresented professional, it ultimately withdrew its challenge to the College’s exclusion of the position from the classified bargaining unit.

The Union argues that it did not concede its objections to the College’s exclusion of professionals when it withdrew these grievances. However, the evidence shows that the Union has never previously objected to the College’s exclusion of the entire category of professional positions from the bargaining unit. Until recently, it has objected only to the exclusion of specific professional positions from the bargaining unit. In fact, the Union’s conduct in the 2000 grievance over the general ledger accountant position indicates an understanding that professional employees were not part of the bargaining unit. In his correspondence with the College about the grievance, Union steward Ropek objected to the number of excluded professionals and the transfer of Union bargaining unit work to them; he never, however, contested their status as unrepresented employees.

In addition, based on the evidence introduced by the parties at a hearing on the Union’s 2001 merger petition, this Board held that the category of “classified employees” within the classified bargaining unit included positions such as “custodians, groundskeepers, laboratory aides, library assistants, instructional assistants, accounting personnel, secretaries, and computer support technicians” that did not require college degrees, were paid on an hourly basis, and were eligible for overtime. *United Employees of Columbia Gorge Community College v. Columbia Gorge Community College*, 19 PECBR at 456. This description of the positions in the classified bargaining unit included no reference to the professional employees, even though the Union was clearly aware of the existence of these employees.

We also note that these same parties have recognized the category of “professional support staff” as separate and distinct from the category of “classified employees” under the list of positions excluded from the faculty unit. The parties’ separate use of the terms “classified employees” and “professional support staff” in the faculty bargaining unit description to which they agreed is consistent with their past practice of treating professional positions as excluded from the classified employee bargaining unit.

Thus, the parties' course of conduct in excluding professional employees from the classified bargaining unit constitutes a past practice. The practice is clear, consistent, and long-standing: since at least 2002, the College has excluded professional employees from the Union bargaining unit. The Union knew about the practice as a result of the grievances it filed regarding the College's creation of new professional positions. The Union's acceptance of the practice may be inferred from its acquiescence: the Union did not pursue its grievances about or object to the College's exclusion of professional employees from the Union bargaining unit.

The parties' bargaining history offers no support for the Union's position that the parties intended the recognition clause to include all non-faculty employees, unless specifically excluded under the contract. The recognition clause is based on a bargaining unit description to which the parties agreed to as part of their negotiations for a consent election agreement. There is no evidence that the parties discussed the inclusion or exclusion of "professional support staff" during these negotiations or that such positions even existed at this time. The only relevant discussions involved two employees who the parties agreed were administrators and not part of the classified employee bargaining unit. The parties also agreed that there was no need to specifically provide for the exclusion of these administrators in the description itself. At most, these negotiations indicate that the parties did not intend to limit the exclusions from the bargaining unit only to positions specifically mentioned in the recognition clause.

In conclusion, the extrinsic evidence establishes that the parties did not understand or intend that "professional employees" were included in the classified bargaining unit under the express terms of the parties' contract recognition clause. The final issue then is whether the petitioned-for positions are professional employees and, therefore, excluded from the classified bargaining unit. The Union limited its argument to the issue of whether professional positions as a category were included in the bargaining unit and did not address the status of the specific positions at issue. However, since we have determined that professional employees are excluded from the bargaining unit, we must determine whether the employees for whom the Union has petitioned are professionals.

We begin by reviewing our decision in *United Employees of Columbia Gorge Community College v. Columbia Gorge Community College*, 19 PECBR 452, which provides us with guidance in determining who is a classified employee. In that case, we found that classified employees work in positions such as custodians, groundskeepers, laboratory aides, library assistants, instructional assistants, accounting personnel, secretaries, and computer support technicians. The positions classified employees filled do not require a college degree, and the employees were paid on an hourly basis and entitled to overtime.

The positions at issue here have little in common with the classified positions we considered in *Columbia Gorge Community College*. All of the petitioned-for positions are paid on a salary basis and are categorized as ineligible for overtime. All the positions, except the network specialist, require an associate's or bachelor's degree. While the network specialist position does not require a college degree, the job description does state a preference for a bachelor's degree. We conclude that the petitioned-for positions are professional ones and not included in the Union bargaining unit. We will dismiss the petition.¹²

ORDER

The petition is dismissed.

SIGNED AND ISSUED this 17th day of November, 2011.

*Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Chair Gamson not available.

¹²Since we dismiss the petition on this basis, we need not address the College's other objections. We also do not address the status of the life skills project specialist position. Neither party introduced specific evidence regarding the requirements or responsibilities of that position. In addition, the College represented that the position was vacant and it has no intention of filling the position in the future.