

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-25-09

(UNIT CLARIFICATION PETITION)

ASSOCIATION OF ENGINEERING)	
EMPLOYEES,)	
)	
Petitioner,)	RULINGS,
)	FINDINGS OF FACT,
v.)	CONCLUSIONS OF LAW,
)	AND ORDER
STATE OF OREGON, DEPARTMENT)	
OF TRANSPORTATION,)	
)	
Respondent.)	
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Neither party objected to a Recommended Order issued on August 25, 2010, by Administrative Law Judge (ALJ) Wendy L. Greenwald, following a hearing held on April 12, 2010, in Salem, Oregon. The record closed on May 19, 2010, upon receipt of the parties' post-hearing briefs.

Naomi S. Loo, Attorney at Law, Law Office of Michael J. Tedesco, Lake Oswego, Oregon, represented the Petitioner.

Francis J. Connell, III, Senior Assistant Attorney General, Department of Justice, Salem, Oregon, represented the Respondent.

On November 5, 2009, the Association of Engineering Employees (AEE) filed a unit clarification petition under OAR 115-025-0005(3). As amended on February 8, 2010, the petition seeks to determine whether 70 employees in the positions of compliance specialist 1, 2, and 3, who work at the State of Oregon (State), Department of Transportation (ODOT), are included in the existing AEE bargaining unit based on the express terms of the parties' collective bargaining agreement.

ODOT filed timely objections to the petition. It argues that 1) the petition did not comply with the filing requirements under OAR 115-025-0010(4); 2) a unit clarification petition is not appropriate because a question of representation exists; 3) a petition under OAR 115-025-0005(3) is not appropriate because it seeks to add positions that were transferred from the Public Utility Commission (PUC) to ODOT in 1996, and have been excluded from the AEE bargaining unit since that time; 4) AEE waived its right to seek to add these positions under OAR 115-025-0005(3) by failing to previously assert representation of these positions; 5) pursuant to Senate Bill 1149 (SB 1149), these positions cannot lawfully be added to the bargaining unit without a secret ballot election or other majority showing of interest; and 6) the employees in the positions at issue do not share a community of interest with the members of the existing bargaining unit.¹

The issue is: Are the positions of compliance specialist 1, 2, and 3 included in the AEE bargaining unit under the express terms of the collective bargaining agreement?

RULINGS

1. On November 5, 2009, in conjunction with this petition, SEIU Local 503, OPEU (SEIU) filed a separate but similar petition under OAR 115-025-0005(3). It asks us to determine whether the ODOT positions of office specialist 1 and 2, transportation service representative 2, and administrative specialist 2 which, like the positions at issue here, were transferred from PUC in 1996, are included in its bargaining unit. *See SEIU Local 503, OPEU v. State of Oregon, Department of Transportation*, Case No. UC-26-09, 24 PECBR ___ (decided this date). AEE and SEIU requested that the ALJ consolidate these petitions for hearing. The State objected to the consolidation because AEE's and SEIU's petitions addressed different groups of employees, consolidation would make the hearing unduly cumbersome and confusing, and the facts that these matters had in common were likely undisputed. Prior to the hearing, the ALJ ruled that the two matters would be consolidated for purposes of the hearing and recommended order to avoid repetition of facts, but that the testimony pertinent to each labor organization's case would be segregated. After the hearing, however, the ALJ severed the cases for purposes of the recommended order because AEE and SEIU presented different

¹We do not address ODOT's first or last objection in this order. Any issues regarding the sufficiency of the petition were resolved by AEE's amended petition. The issue of whether these positions share a community of interest with existing bargaining unit members is not appropriately considered 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).

legal arguments in support of their petitions. We adopt the ruling of the ALJ consolidating these cases for the purposes of hearing only, but severing them for issuance of the recommended orders.

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

FINDINGS OF FACT

1. AEE is the exclusive representative of a bargaining unit of State employees, including employees at ODOT, the Department of Forestry (Forestry), and the Parks and Recreation Department (OPRD). There are approximately 1,100 employees in the current AEE bargaining unit, the majority of whom work at ODOT. The State is a public employer.

2. The petitioned-for positions were previously located at PUC, working in motor carrier transportation regulation.² The PUC employees in those positions were originally represented as part of an SEIU-PUC agency-level bargaining unit. In 1981, the employees in the SEIU-PUC bargaining unit became represented as part of SEIU's statewide bargaining unit. In 1984, these PUC employees voted to decertify SEIU as their bargaining representative and became unrepresented employees.³

3. The recognition clause in the AEE-State 1992-95 Collective Bargaining Agreement provided:

"The Employer recognizes the Association as sole and exclusive bargaining agent for all employees within the appropriate bargaining units, both existing and to be determined in the future, for which the Association is certified or recognized, except temporary employees and those employees excluded by law or by determination of the Employment Relations Board.

²The record does not include the name of these positions while they were located at PUC. After the responsibility for motor carrier transport regulation was moved to ODOT, the positions carrying out these duties were classified as motor carrier specialists. The motor carrier specialists were later reclassified as compliance specialists.

³Although the PUC employees were part of the SEIU statewide unit when the decertification petition was filed, this Board allowed the petition to go forward based on the language in the 1983-85 SEIU-State Collective Bargaining Agreement. That Agreement recognized the prior agency bargaining units during the first 90 days of the agreement to allow the employees in each agency to file fair share or election petitions. *Solidarity v. Public Utility Commissioner and Oregon Public Employees Union*, Case No. C-143-83, 7 PECBR 6414, 6420 (1984).

"Classifications represented by the Association within the Oregon Department of Transportation (ODOT), the Parks and Recreation Department (PARKS) and the Department of Forestry (FORESTRY) is listed in Appendix A, including such other classes as may from time to time be determined as appropriate through the Employment Relations Board (ERB) process."⁴

The list of classifications in Appendix A attached to the agreement, did not include the motor carrier specialists or the compliance specialists.

4. In 1995, the Oregon legislature considered the adoption of SB 1149, the purpose of which was to transfer the responsibility for regulating motor carrier transportation from PUC to ODOT. On May 18, 1995, the Joint Committee on Ways and Means held a work session regarding a variety of issues related to SB 1149, including the impact of transferring unrepresented PUC positions into ODOT, whose employees were represented. At the beginning of the session, Theresa McHugh, from the Department of Administrative Services (DAS), addressed the committee regarding issues related to "the agreements necessary to make the collective bargaining changes, * * *."⁵ In response, Representative Johnson expressed frustration at DAS's lack of understanding of the issues. A transcript of the session shows the following discussion occurred:

"Johnson: * * * * * Collective bargaining – you talk about collective bargaining changes – there are no collective bargaining issues. PUC is non-union and you talk about there being collective bargaining. There is nothing. Not one single thing affecting collective bargaining. The leadership of the (inaudible) party to talk about how would he make it work when they become union. They don't have to become union. But you obviously didn't even know that in fact there is no collective bargaining party in PUC or you wouldn't – customer service [*sic*], talk about that.

"* * * * *

"McHugh: I am aware of the issues in terms of representation, Representative Johnson. I came [*sic*] and work now with an agency that

⁴The recognition clause in the contract between AEE and ODOT has not materially changed since the 1992-95 Agreement.

⁵McHugh's testimony at the May 18 Ways and Means Committee work session on SB 1149 begins on tape 133, side A, counter 028. Her testimony is transcribed in Exh. R-3 which was admitted into the record.

was merged this biennium and, in fact, merged a collective bargaining with an unrepresented unit and while I don't mean to imply it cannot be done, it clearly can. There are details in terms of communications and how you bring people into that, that we discovered as we went through the process that I think we have learned some lessons in terms of how to make that a smoother transition for employees and for work units so you have the least impact on productivity. So it's not to imply that it cannot be done.

"Johnson: Okay. They - what you describe and what we're describing is fairly different in that we're moving function, not people. And that's a very big difference in the process and that is caused by the need for - by the fact that the environment is totally different than ODOT vs. PUC. And so, it's a completely different animal than what you are describing by quite a bit in that if you move the way you're describing in what this bill does. Just so you know."

5. Effective July 19, 1995, the legislature adopted SB 1149 (Oregon Laws 1995, chapter 733), which reorganized the regulation of motor carrier transportation, transferred responsibility for such regulation from PUC to ODOT, and authorized ODOT to create new positions to fulfill the transferred responsibility. SB 1149 also provided that affected PUC employees were eligible for transfer, promotion, demotion, and reemployment into the new ODOT positions at ODOT's discretion. The transfer of the responsibilities and positions became effective January 1, 1996.

6. At the time SB 1149 was passed, the ODOT employees were represented by SEIU and AEE, but the PUC employees were not represented. SB 1149 addressed the merger of the unrepresented PUC employees into ODOT:

"The initial filling of positions created by the transfer of duties, functions and powers under this Act is not subject to the provisions of any collective bargaining agreement. Thereafter, the positions are subject to inclusion in a bargaining unit if petitioned for in accordance with ORS 243.650 to 243.782." Oregon Laws 1995, chapter 733, section 1(4).

7. In January 1996, pursuant to SB 1149, ODOT established the Motor Carrier Transportation Division (MCTD), which consisted, in part, of the newly-established positions that had been transferred from PUC. ODOT assigned these transferred positions an identification number beginning with 860 to indicate that these positions originally came from PUC. The transferred positions at issue in this petition were classified as motor carrier specialists. Pursuant to SB 1149, none of the employees

hired or transferred to fill the newly-established MCTD positions were included in the existing AEE or SEIU bargaining units, and the employees in these positions remain unrepresented by a labor organization up to the present time.

8. Since 1995, AEE and the State have negotiated seven collective bargaining agreements which covered ODOT employees represented by AEE. The recognition clauses in those agreements, including the agreement adopted after the transfer of the positions from PUC in 1996, did not materially change. AEE and the State attached a list of classifications to their agreements through 2003. Although the lists were not labeled Appendix A, AEE and the State intended these lists to be the Appendix A referenced in those agreements' recognition clauses. These lists did not include the classifications of motor carrier specialist or compliance specialist.

9. In 2002, the State conducted a classification study, the purpose of which was to minimize or eliminate agency-specific classifications. As a result of the study, the State created the general statewide classifications of compliance specialist 1, 2, and 3. Sometime after the State established the compliance specialist classification series, ODOT allocated the MCTD motor carrier specialist employees into the classifications of compliance specialist 1 (C5246U), compliance specialist 2 (C5247), and compliance specialist 3 (C5248). The U in the classification number for the compliance specialist 1 denoted that the classification is unrepresented. The reclassified MCTD compliance specialist employees remained unrepresented.

10. At the same time the MCTD motor carrier specialists were reclassified, ODOT reclassified an employee in a program tech 2 position in ODOT's Rail Division as a compliance specialist 3. This Rail Division employee, who had been represented by AEE as a program tech 2, continued to be represented by AEE after the reclassification.

11. AEE and the State did not agree on a collective bargaining agreement for the 2003-05 contract period, but operated under terms of employment implemented by the State. These terms were set out in a document entitled "2003-05 Collective Bargaining Agreements." The compliance specialist classifications were not included in the attached list of classifications, which AEE and the State intended to be Appendix A. Compliance specialists were also not included in a list of new and revised classifications in Article 53 of the agreement.

12. Effective October 1, 2005, AEE and the State executed their 2005-07 Collective Bargaining Agreement, which covered ODOT employees represented by AEE. Attached to this agreement was a document entitled "COMPENSATION PLAN," which AEE and the State intended to be the Appendix A referred to in the recognition clause. This plan consisted of a list of classification numbers and titles, including compliance

specialist 1 (class number C5246), compliance specialist 2 (class number C5247), and compliance specialist 3 (class number C5248). The plan also set out each classification's salary range. AEE and the State did not negotiate over the addition of the compliance specialist classification series to this compensation plan. The State added the compliance specialist series to Appendix A as part of its process of updating the list of classifications and respective salary ranges for employees represented by AEE. AEE and the State also did not include the compliance specialist series under the list of new and revised classifications in Article 53 in this agreement.

13. On November 16, 2007, AEE and the State executed their 2007-09 Collective Bargaining Agreement. The recognition clause in this Agreement provided in relevant part:

"The Employer recognizes the Association as sole and exclusive bargaining agent for all employees within the appropriate bargaining units, both existing and to be determined in the future, for which the Association is certified or recognized, except temporary employees and those employees excluded by law or by determination of the Employment Relations Board.

"Classifications represented by the Association within the Oregon Department of Transportation (ODOT), the Oregon Parks and Recreation Department (OPRD) and the Department of Forestry (FORESTRY) are listed in Appendix A, including such other classes as may from time to time be determined as appropriate through the Employment Relations Board (ERB) process."

Attached to the 2007-09 Agreement is a document entitled "AEE NEW CLASSIFICATION PLAN," which the parties intended to be the Appendix A referred to in the recognition clause. The plan consisted of a list of class numbers, titles, and salary ranges. This plan included the compliance specialist classification series.

14. Dawn Nicholson has worked as the AEE co-executive director since October 2007. She previously worked in ODOT's Human Resources Department. While employed at ODOT, Nicholson became aware that the employees in the compliance specialist classifications at MCTD were unrepresented. The MCTD employees worked in a different building than other ODOT employees represented by AEE.

15. In January 2008, Nicholson notified the AEE executive board at its quarterly meeting that she believed the unrepresented MCTD compliance specialists should be included in the AEE bargaining unit. Prior to this, Michael Tedesco, an attorney who has represented AEE in negotiations since 1995, was not aware of the unrepresented MCTD compliance specialists.

16. In early 2008, AEE representatives set up a table at the MCTD facility and provided information about AEE to the MCTD compliance specialists. On April 24, 2008, AEE filed a grievance pursuant to Article 36 of the AEE-State 2007-09 Agreement, asserting that the MCTD compliance specialists are, or should be, included in the bargaining unit under the recognition clause. On June 23, 2008, the State denied the grievance at step 3. AEE did not appeal this grievance to arbitration.

17. On January 26, 2010, subsequent to the filing of this petition, AEE and the State executed their 2009-11 Agreement, which covers ODOT employees represented by AEE. The recognition clause in the 2009-11 Agreement is identical to that in the 2007-09 Agreement. AEE and the State mistakenly failed to attach a list of classifications, a compensation plan, or an Appendix A to this Agreement.

18. There are currently 70 employees in the petitioned-for compliance specialist positions. These 70 compliance specialists all work at MCTD, and are currently unrepresented. Sixty-six of the 70 compliance specialists have the number 860 in their position identification numbers, which reflects that their positions originally came from PUC. Of the remaining four compliance specialists, two are in positions that originally came from PUC but were later abolished and reestablished as compliance specialist positions; and the other two are in positions that did not come from PUC, but are performing the same functions as the positions that came from PUC.

19. There is currently one employee in a compliance specialist 3 position in the ODOT Rail Division who is represented by AEE. In addition, three unrepresented ODOT management service employees currently work in compliance specialist 3 positions, including two managers in Technical Services and one manager at MCTD.

20. The Appendix A classification plan, which was attached to the 2007-09 AEE-State Agreement, also includes an administrative specialist 2 classification. Some ODOT employees who work in administrative specialist 2 positions are represented by SEIU. Three ODOT employees who work in administrative specialist 2 positions in the audit section of the MCTD are currently unrepresented.⁶

⁶There is no evidence in the record that AEE represents any employees in the administrative specialist 2 classification at ODOT. We note that Kermit Meling, a witness in the SEIU companion case (UC-26-09), testified that SEIU represents all of the ODOT employees in the administrative specialist 2 classification, except for the unrepresented administrative specialist 2 employees sought under its petition.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The MCTD compliance specialists are not included in the AEE bargaining unit under the express terms of the parties' collective bargaining agreement.

DISCUSSION

AEE seeks to determine whether the petitioned-for employees are included in its bargaining unit under OAR 115-025-0005(3), which 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.”

AEE asserts that the MCTD compliance specialists are included in its bargaining unit based on the express language of the AEE-State contract recognition clause. It contends that because the recognition clause establishes AEE as the exclusive representative for the positions listed in Appendix A, and because Appendix A lists the compliance specialist classification series, these positions are clearly and unambiguously included in the AEE unit. AEE also points out that if this Board has any doubts about the inclusion of the compliance specialists based on the recognition clause, such doubts are to be resolved in favor of inclusion. *Salem Education Association v. Salem School District 24J and Oregon School Employees Association*, Case Nos. C-262-79 and C-2/73-80, 6 PECBR 4557 (1981). Finally, AEE argues that even if the positions at issue under this petition are subject to the representation limitations established in SB 1149, AEE has met the requirements of SB 1149 by filing this petition.

ODOT objects to the petition on the basis that AEE is really attempting to add positions to the bargaining unit which have been historically excluded from the bargaining unit since the transfer of these positions to ODOT in 1996. ODOT argues that the parties never intended these employees to be in the AEE bargaining unit, that under SB 1149 these positions cannot lawfully be added to the AEE bargaining unit without a petition requiring a majority showing of interest or a secret ballot election, and that AEE waived its right to represent these employees by not previously seeking to represent them during the past 14 years.

Standard of Review

OAR 115-025-0005(3) was adopted subsequent to this Board's consideration of a variety of unit clarification issues in *Salem School District 24J and Oregon School Employees Association*, 6 PECBR 4557. In regard to issues presented under a subsection (3) petition, we explained:

"This 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." *Id.* at 4572-73.

In *Oregon AFSCME Council No. 75 v. Housing Authority of Portland*, Case No. UC-19-92, 13 PECBR 730 (1992), we reviewed our application of OAR 115-025-0005(3) since its adoption. We clarified that

"[u]nder subsection (3), the question presented is whether the positions sought are or are not included under the express terms of the certification or of the collective bargaining agreement. Accordingly, the focus in such cases is very narrow. Where the parties have an honest disagreement about the scope of the unit based on the interpretation of the certification description or contract recognition language, a subsection (3) petition gives the parties a vehicle to resolve the disagreement. *See, e.g., AFSCME Council 75 v. Clatsop County*, Case No. UC-72-91, 13 PECBR [619 (1992)].

"A subsection (3) petition does not *add* positions to a bargaining unit. The positions are already in or out based on the certification description and/or collective bargaining agreement. This Board merely interprets the certification or recognition language to determine the *status* of the positions. In general, if the facts indicate the petition is an attempt to expand the unit, the petition is not appropriate under subsection (3) and will be dismissed." 13 PECBR at 735. (Emphasis in original, footnotes omitted.)

We analyze the language of a collective bargaining agreement to determine whether certain positions are included in a unit as follows:

“This Board interprets collective bargaining agreements in the same manner as do courts. The overriding rule in the construction of contracts is the intention of the parties. We look to the language of the contract and to other relevant circumstances, including the course of conduct of the parties in their performance of the contract, to determine intent.” *Oregon Public Employees Union, SEIU, Local 503 v. State of Oregon, Oregon State Hospital*, Case No. UC-37-96, 17 PECBR 434, 440 (1997).

However, we later clarified that “we will examine the parties’ prior actions or practice as an aid to contract interpretation *only if* the contract language is ambiguous” and, where we find that the contract language unambiguously includes the employees in the bargaining unit, we will “not consider how the parties conducted themselves in the past.” *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09, 23 PECBR 416, 425 (2009) (Emphasis in original).

Analysis

We conclude that the employees in the MCTD compliance specialist positions are not included in the AEE bargaining unit based on the express language of the AEE-State collective bargaining agreement. The recognition clause in the 2007-09 agreement is the same as the recognition clause that was in effect when SB 1149 was adopted in 1995. That recognition clause contains a specific bargaining unit exclusion for “those employees excluded by law.” Under SB 1149, the petitioned-for positions were clearly excluded by law from the AEE bargaining unit at the time the positions were transferred to ODOT.⁷

AEE asserts that the MCTD compliance specialists became included in the AEE bargaining unit under the express language of the 2005-07 and 2007-09 agreements, when the compliance specialist classifications were added to Appendix A. However, SB 1149 also provided that “[t]hereafter, the positions are subject to inclusion in a bargaining unit if petitioned for in accordance with ORS 243.650 to 243.782.” No petition to include the MCTD compliance specialists in the AEE unit was filed prior to this petition. Under SB 1149, the inclusion of the compliance specialist classification in Appendix A alone did not bring these positions into the AEE bargaining unit.

⁷For an analysis of SB 1149, see *SEIU Local 503, OPEU v. State of Oregon, Department of Transportation*, Case No. UC-26-09, 24 PECBR ____ (2011) (decided this date).

AEE argues that it has now met the requirements established in SB 1149 to clarify these employees into its bargaining unit by filing the present petition under OAR 115-025-0005(3). SB 1149 does provide for the inclusion of these employees into a bargaining unit as a result of a petition and does not, in itself, prohibit petitions filed under OAR 115-025-0005(3). However, SB 1149 states that a petition to include the employees in the transferred positions must be filed “in accordance with ORS 243.650 to 243.782.” Therefore, the issue is not whether a subsection (3) petition is appropriate under SB 1149; it is whether a subsection (3) petition seeking to include these positions, which had previously been excluded under SB 1149, is appropriate under the Public Employee Collective Bargaining Act (PECBA), rules, and case law.

Under the applicable PECBA authority, a subsection (3) petition is not appropriate in this case. The positions at issue here were not initially, and have never been, included in the AEE unit. Thus, AEE is really seeking to add these previously unrepresented employees to its bargaining unit under this subsection (3) petition. Yet, OAR 115-025-0005(3) “was not intended, nor has it been applied, as a vehicle to expand bargaining units or as a tool to add unrepresented positions to bargaining units.” *Portland Association of Teachers v. Portland School District 1J*, Case No. UC-44-01, 19 PECBR 939, 945 (2002). Consistent with our prior cases, we will not use subsection (3) to add positions to the AEE bargaining unit.

AEE contends that under our decision in *Lane County*, 23 PECBR 416, we should not even consider that these employees were previously excluded from the bargaining unit under SB 1149. In the *Lane County* case, we concluded that the petitioned-for employees were included in the bargaining unit based on the express terms of a contract recognition clause. In reaching our decision in that case, we applied the general rules of contract interpretation we had identified 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)). Based on our analysis, we decided that since the contract language was clear and unambiguous, we would not consider the parties’ prior actions or conduct.

Our decision in *Lane County* is distinguishable from the present case for two reasons. First, as we previously pointed out, the recognition clause in this case specifically provides for a bargaining unit exclusion of “all others excluded by law.” Accordingly, based on the language of the recognition clause itself, we are required to consider any exclusions from the bargaining unit established by law. As such, pursuant to SB 1149, the petitioned-for employees clearly have been and are currently excluded from the bargaining unit. Therefore, even under the express language of the recognition

clause, AEE is seeking to add positions to its bargaining unit which were previously excluded. Subsection (3) cannot be used to add unrepresented positions to an existing bargaining unit. *Lane County*, 23 PECBR at 424.⁸

In addition, unlike the recognition clause in *Lane County*, the contract language here can reasonably be given several plausible interpretations, and thus is ambiguous.⁹ *Portland Fire Fighters' Association v. City of Portland*, 181 Or App 85, 91, 45 P3d 162, *rev den*, 334 Or 491 (2002). Accordingly, we can consider "other relevant circumstances, including the course of conduct of the parties in their performance of the contract," to determine the parties' intent. *Oregon State Hospital*, 17 PECBR at 440. Based on the text of the disputed provision as a whole and other extrinsic evidence, we conclude that the parties did not intend to include the MCTD compliance specialists in the AEE bargaining unit by adding the compliance specialist series to Appendix A.

AEE argues that we should find the compliance specialists are clearly included in the bargaining unit based on the second paragraph of the parties' recognition clause and the attached Appendix A. However, we must consider the text of the disputed provision as a whole. *Lincoln County School District*, 21 PECBR at 29. The first paragraph of the recognition clause provides that the State has recognized AEE as the "sole and exclusive bargaining agent for all employees *within the appropriate bargaining units*, both existing and to be determined in the future, for which the Association is certified or recognized, * * * ." (Emphasis added.) Yet, these existing "appropriate bargaining units" are not defined in the recognition clause or elsewhere in the contract, either directly or by reference to any other document. Furthermore, neither party produced evidence regarding the scope of the existing bargaining unit. Therefore, the exact scope of these "appropriate bargaining units" of which AEE is the "sole and exclusive bargaining agent" is unclear.

⁸A union can petition to add unrepresented employees to an existing bargaining unit under OAR 115-025-0005(4). Subsection (4) requires the petition to be accompanied by a showing of interest from at least 30 percent of the unrepresented employees. If the Board determines that it would be appropriate to add the unrepresented employees to the existing unit, it will conduct a secret ballot election of the unrepresented employees. If a majority of those voting favor inclusion in the existing bargaining unit, the Board will clarify the bargaining unit description to include those positions.

⁹The recognition clause in *Lane County*, which this Board found to be clear and unambiguous, provided that the union was "the sole and exclusive representative of all temporary, probationary, and non-probationary employees in permanent positions." 23 PECBR at 424.

The second paragraph of the recognition clause provides that “[c]lassifications represented by the Association within [ODOT, OPRD, and FORESTRY] are listed in Appendix A, including such other classes as may from time to time be determined as appropriate through the Employment Relations Board (ERB) process.” One plausible interpretation of paragraph two is that AEE represents all of the employees in the classifications listed in Appendix A. However, while the parties used the term “all employees” in paragraph one, they did not include that term in paragraph two. We assume that the parties understood the meaning of the words they chose. Appendix A does not provide further clarity. It is essentially a compensation plan that includes a list of class titles and their respective numbers and salary ranges. Taking into account the absence of the term “all employees” from the second paragraph, and the text of the recognition clause as a whole, another plausible interpretation is that the parties intended that AEE would represent the positions listed in Appendix A that are also within the existing “appropriate bargaining units” referred to in paragraph one. Therefore, whether the parties intended that all employees in all of the classifications listed in Appendix A are included in the AEE bargaining unit is unclear.

Having concluded that the contract language is ambiguous, we next attempt to interpret the contract language by examining the extrinsic evidence of the parties’ intent. *Lincoln County School District*, 21 PECBR at 29. As part of our consideration of extrinsic evidence, we examine “the parties’ prior actions or practice as an aid to contract interpretation.” *Lane County*, 23 PECBR at 425. In addition, we consider the parties’ bargaining history in attempting to resolve ambiguities. *Association of Oregon Corrections Employees v. State of Oregon, DOC*, Case No. UP-33-03, 20 PECBR 890 (2005), *rev’d and rem’d*, 209 Or App 761, 149 P3d 319 (2006), *order on remand*, 23 PECBR 222, 240 (2009), *appeal pending*. We also consider “the legal landscape at the time the parties entered their agreements.” *Id.*, 23 PECBR at 239.

In considering the parties’ actions and practice, we find it significant that not all employees in the classifications listed in Appendix A are represented by AEE. Some employees in the administrative specialist 2 classification, which is included in Appendix A, are either represented by SEIU or are unrepresented. In fact, there is no evidence in the record that AEE represents any of the ODOT employees in this classification. We recognize that the administrative specialist 2 is only one classification in Appendix A. However, this evidence does not support AEE’s interpretation that it represents all of the employees in all of the classifications listed in Appendix A.

There also is no bargaining history to support AEE’s interpretation. No evidence of the parties’ bargaining discussions regarding the recognition clause itself was introduced at the hearing. There is also no evidence of bargaining history concerning an agreement to add the compliance specialist series to Appendix A. We do know that the

compliance specialist series was not included under the list of new or revised classifications in Article 53 either at the time it was added to Appendix A or in subsequent contracts. The only evidence regarding the addition of the compliance specialist series to Appendix A is that it was an administrative action taken by the State to update Appendix A to reflect the compensation to be paid to compliance specialist employees represented by AEE. This evidence does not support AEE's interpretation.

A number of other factors in this case also weigh against an interpretation that the parties intended the petitioned-for positions to be included in the bargaining unit under the parties' recognition clause. The petition seeks to clarify the status of 70 historically-unrepresented employees. These employees work in an area separate and distinct from other AEE employees. In fact, the current AEE representatives were not even aware of these employees at the time the compliance specialist classifications were added to Appendix A. As a result, it is difficult for us to believe that it was the intent of the parties to bring this group of MCTD compliance specialists within the AEE bargaining unit when the compliance specialist classifications were added to Appendix A. Therefore, we conclude that the MCTD employees are not included in the AEE bargaining unit under the express language of the parties' collective bargaining agreement, and accordingly, we dismiss the petition.

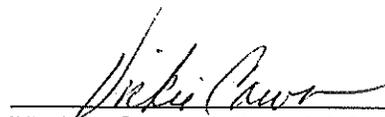
ORDER

The petition is dismissed.

DATED this 12 day of May, 2011.



Paul B. Gamson, Chair



Vickie Cowan, Board Member



Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.