



ODOT filed timely objections to the petition. It asserts that 1) the petition does 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 SEIU seeks to add positions which have been excluded from the SEIU bargaining unit since 1996; 4) SEIU waived its right to add these positions under OAR 115-025-0005(3) by failing to previously assert representation of these positions; and 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.<sup>1</sup>

The issue is: Are the positions of office specialist 1 and 2, transportation service representative 2, and administrative specialist 2 included in the SEIU bargaining unit under the express terms of the bargaining unit certification?

### RULINGS

1. On November 5, 2009, in conjunction with this petition, the Association of Engineering Employees (AEE) filed a separate but similar petition under OAR 115-025-0005(3). It asks us to determine whether the ODOT employees in the positions of compliance specialist 1, 2, and 3 which, like the positions at issue here, were transferred from the Public Utility Commission (PUC) in 1996, are included in its bargaining unit. *See Association of Engineering Employees v. State of Oregon, Department of Transportation*, Case No. UC-25-09, 24 PECBR \_\_\_ (2011) (decided this date). AEE and SEIU requested that the ALJ consolidate these petitions for hearing. ODOT 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 these cases for purposes of the recommended order because AEE and SEIU presented different legal arguments in support of their petitions. We adopt the ALJ's ruling which consolidates these cases for purpose of hearing only, but severs them for issuance of the recommended orders.

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<sup>1</sup>Issues regarding the sufficiency of the initial petition were addressed by SEIU in its amended petition.

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

### FINDINGS OF FACT

1. SEIU is the exclusive representative of a bargaining unit of approximately 19,500 State employees in at least 41 agencies and commissions. The State is a public employer. SEIU's bargaining unit includes ODOT employees in a variety of classifications, including the classifications of office specialist 1 and 2, transportation service representative 2, and administrative specialist 2.

2. SEIU has represented a bargaining unit of employees at ODOT since 1967.<sup>2</sup>

3. On February 16, 1977, this Board clarified SEIU's bargaining unit to include:

"all classified employes of the Department of Transportation; excluding those employes of the Department of Transportation in the Motor Vehicle Division Unit and excluding those employes in the Engineering and Allied Unit; and further excluding therefrom, supervisors and confidential employes and all others excluded by law and Board Order."<sup>3</sup>

4. In 1981, the State and SEIU entered into a collective bargaining agreement in which the parties agreed to merge all of their existing agency-level bargaining units into a single statewide bargaining unit of all State employees represented by SEIU. The agency bargaining unit at ODOT was merged into this statewide bargaining unit.

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<sup>2</sup>The union currently known as SEIU has changed its name several times since 1967. It was originally known as the Oregon State Employees Association, and then became the Oregon Public Employees Union, Local 503, before taking its current name. For ease of reference, we use the name SEIU throughout this order.

<sup>3</sup>We take official notice of the certification of representative issued by this Board as a result of the election ordered in *Association of Engineering Employees v. Department of Transportation*, Case No. C-136-75, 2 PECBR 875, 885 (1976). This certification was attached to the petition, but was not included as an exhibit by the parties. The Engineering and Allied Unit referred to in the certification was AEE's prior name.

5. The recognition clause in the SEIU-State 1995-97 Collective Bargaining Agreement provided in part:

“Section 1. The Employer recognizes the Union as the exclusive bargaining representative for all classified and unclassified employees in positions represented by the Union in the Agencies listed in Section 2 below. This recognition does not apply to exempt, CETA, temporary, supervisory, managerial and confidential employees as defined by law or as determined by the Employment Relations Board \* \* \* .”

“Section 2.

“(a) The Employer and the Union have established a single bargaining unit of employees represented by the Union and employed by the Oregon Youth Authority/Department of Youth Authority \* \* \* .”

“(b) The Employer and the Union have established a single bargaining unit which is not prohibited from striking. This unit is made up of employees located at the following agencies: \* \* \* Department of Transportation \* \* \* .”

6. Prior to 1981, SEIU represented a separate agency-level bargaining unit of employees at PUC, which included employees who worked in the area of motor carrier transportation regulation. In 1981, the SEIU-represented employees at PUC also became part of SEIU’s statewide bargaining unit. In 1984, these PUC employees voted to decertify SEIU as their bargaining representative and became unrepresented employees.<sup>4</sup>

7. In 1995, the Oregon legislature considered SB 1149, the purpose of which was to transfer the task of 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. One issue concerned the impact of the transfer of the unrepresented PUC positions into ODOT, whose employees were represented. At the beginning of the session, Theresa McHugh from the State

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<sup>4</sup>Although 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 SEIU-State 1983-85 Collective Bargaining Agreement that recognized the prior agency bargaining units during the first 90 days of the agreement for the purpose of allowing the employees in each agency to file fair share deauthorization or election petitions. *Solidarity v. Public Utility Commissioner and Oregon Public Employees Union*, Case No. C-143-83, 7 PECBR 6414, 6420 (1984).

Department of Administrative Services (DAS) addressed the committee regarding issues related to “the agreements necessary to make the collective bargaining changes \* \* \*.”<sup>5</sup> In response, Representative Johnson expressed frustration at DAS’s lack of understanding of the issues:

“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 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.”

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<sup>5</sup>McHugh’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.

8. 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 this regulation from PUC to ODOT, and authorized ODOT to create new job positions to perform the transferred responsibility. SB 1149 also provided that affected PUC employees were eligible for transfer, promotion, demotion, and reemployment into the new positions at ODOT's discretion. The transfer of responsibilities and positions became effective January 1, 1996.

9. When SB 1149 was passed, the employees at ODOT were represented by SEIU and AEE, but the PUC employees were unrepresented. SB 1149 addressed the merger of the unrepresented 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).

10. In January 1996, pursuant to SB 1149, ODOT established the Motor Carrier Transportation Division (MCTD). MCTD consisted of both existing SEIU-represented ODOT positions and the newly-established positions which had been transferred from PUC. The transferred positions included the classifications of office specialist 1 and 2, transportation service representative 2, and administrative specialist 2. ODOT assigned the transferred positions an identification number beginning with 860 to indicate that these positions originally came from PUC. Pursuant to SB 1149, the employees in the transferred positions were not included in the existing AEE or SEIU bargaining units, and until these proceedings, all parties treated them as unrepresented. The other MCTD employees, those who worked at ODOT at the time of the transfer and were represented by SEIU, continued to be represented by SEIU.

11. Since the 1995-97 Agreement, SEIU and the State have negotiated seven collective bargaining agreements which covered ODOT employees. The recognition clauses in these agreements, including the clause in the 2009-11 SEIU-State Collective Bargaining Agreement, did not materially change during those negotiations. The pertinent portions of the recognition clause are quoted in Finding of Fact 5.

12. There are currently 85 employees in the positions subject to this petition. ODOT established them as new positions in MCTD when it assumed PUC's responsibilities. Two of the these 85 positions, Dorothy Sebastian's administrative specialist 2 position (#8600086) and Vicky Busenberg's office specialist 2 position (#8600800), are currently located in ODOT's Financial Services Division.

13. Of the 85 current employees who work in the positions transferred to ODOT in 1996, 23 employees worked in these positions at PUC prior to the transfer and were employed by ODOT at the time of the transfer; two employees were hired into the transferred positions in March 1996; and 60 employees were placed or hired into these positions sometime after May 1998. Of the 60 employees hired or placed in these positions after May 1998, 11 employees previously worked in positions represented by SEIU, but were transferred, demoted, promoted, or reassigned into these unrepresented positions.

14. As of March 2010, SEIU represented approximately 340 employees in the classifications of office specialist 1 and 2, transportation service representative 2, and administrative specialist 2 at ODOT. SEIU represents all of the ODOT employees in the positions of office specialist 1 and 2, transportation service representative 2, and administrative specialist 2, except for those employees who work in MCTD, the two employees in financial services, and the four employees in HR.

#### CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The positions transferred from PUC to ODOT in 1996 are not included in the SEIU bargaining unit under the express terms of the bargaining unit certification description.

#### DISCUSSION

In 1984, the employees who worked at PUC voted to decertify SEIU as their exclusive bargaining representative. As a result of the vote, these employees became unrepresented. The PUC employees were still unrepresented in 1995 when the legislature transferred some of PUC's duties to ODOT. SEIU represents employees at ODOT. The legislature recognized that the PUC employees had voted against union representation, and it ensured that the transfer would not change their unrepresented status. The transfer legislation stated that "[t]he initial filling of positions created by the transfer of duties \* \* \* 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" the Public Employee Collective Bargaining Act (PECBA). Oregon Laws 1995, ch 733, section 1(4).

SEIU filed this unit clarification petition under OAR 115-025-0005(3). It asserts that under the certification description, some of the positions transferred from PUC are included in the SEIU bargaining unit. 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.”

SEIU argues that the express terms of the bargaining unit certification description include the positions of office specialist 1 and 2, transportation service representative 2, and administrative specialist 2, which were transferred from PUC to ODOT in 1996.<sup>6</sup> That certification description, which this Board issued in 1977, established a bargaining unit of

“all classified employes of the Department of Transportation; excluding those employes of the Department of Transportation in the Motor Vehicle Division Unit and excluding those employes in the Engineering and Allied Unit; and further excluding therefrom, supervisors and confidential employes and all others excluded by law and Board Order.” *Association of Engineering Employees v. Department of Transportation*, Case No. C-136-75, 2 PECBR 875, 885 (1976).

ODOT objects to the petition on the basis that SEIU is really attempting to add positions to the bargaining unit which have been historically excluded since the transfer of these positions to ODOT in 1996. ODOT argues that the parties never intended to include these employees in the SEIU bargaining unit, that under SB 1149 these positions cannot lawfully be added to the SEIU bargaining unit without a petition requiring a majority showing of interest or a secret ballot election, and that SEIU waived its right to represent these employees by not seeking to represent them during the past 14 years. We agree that under SB 1149, the existing certification description does not include the transferred PUC positions, and we accordingly will dismiss the petition.

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<sup>6</sup>SEIU relies solely on a 1977 certification description for an ODOT agency-level bargaining unit, even though SEIU and the State later agreed to a recognition clause for a statewide bargaining unit of employees that includes ODOT. SEIU concedes the contract's recognition clause is ambiguous in regards to the employees at issue here. However, since ODOT does not object to SEIU's reliance on the 1977 certification, we assume that the parties still use this certification to define the bargaining unit. We are not presented with, and do not decide, the impact, if any, of a recognition clause that differs from an earlier Board certification description.

## Standard of Review

This Board adopted OAR 115-025-0005(3) after it considered a variety of unit clarification issues in *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). In that case, we explained that in regard to issues presented under a subsection (3) petition,

“[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.” *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.)

Under subsection (3), the issue is not whether the employees *should be* added to the bargaining unit; we decide only whether the employees *are already included* in the unit

based on the express terms of the certification or contract description. *Oregon AFSCME Council 75, Local 2831 v. Lane County*, Case No. UC-04-09, 23 PECBR 416, 424 (2009).

### Analysis

We apply these principles and conclude that the positions transferred from PUC to ODOT in 1996 are not included in the SEIU bargaining unit based on the express language of the certification description. We begin by examining the language of the certification description. It establishes SEIU as the exclusive bargaining representative for

“all classified employes of the Department of Transportation; excluding those employes of the Department of Transportation in the Motor Vehicle Division Unit and excluding those employes in the Engineering and Allied Unit; and further excluding therefrom, supervisors and confidential employes and all others excluded by law and Board Order.”

SEIU focuses on the portion of the description which designates it the exclusive bargaining representative for “all classified employes of the Department of Transportation.” If that were the entire description of the bargaining unit, SEIU’s argument might have merit. But it is not the entire description. It also contains a number of exclusions from the unit, including “all others excluded by law.” ODOT asserts that SB 1149 is a law that specifically excludes the positions transferred from PUC from the SEIU bargaining unit.

Thus, to interpret the phrase “all others excluded by law” as contained in the certification description, we must in turn interpret SB 1149 to determine if it creates such an exclusion. To interpret a legislative enactment, we first consider its language, in context, along with any pertinent legislative history the parties offer; if the language remains ambiguous after this analysis, we apply maxims of statutory construction. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

Accordingly, we begin by examining the language of SB 1149. It states in pertinent part:

“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).

SEIU concedes that this language prevented employees hired into the transferred positions from becoming members of the SEIU bargaining unit. It argues, however, that

the ban applies only to those initially hired into the positions. It points out that 60 of the 85 employees currently in the disputed positions are not initial hires, but rather are employees who replaced the initial hires. According to SEIU, those 60 employees are members of its bargaining unit, and anyone who thereafter replaces one of the remaining initial hires also becomes a bargaining unit member. This is not a plausible interpretation of SB 1149.

First, the statute expressly applies to “positions.” It is “positions” that are excluded from the bargaining unit. SEIU’s argument relies not on the positions, but rather on the status of the employees who fill the positions. This is contrary to the plain language of SB 1149.<sup>7</sup>

Second, the structure of SB 1149 belies SEIU’s argument. SB 1149 begins with a statement that the “initial filling of positions” created by the transfer of duties from PUC are not subject to a collective bargaining agreement. It then provides that “thereafter,” positions can be included in a bargaining unit only if petitioned for under the Public Employees Collective Bargaining Act (PECBA). “Thereafter” means “after that \* \* \*: from then on: THENCEFORTH.” *Webster’s Third New Int’l Dictionary* 2372 (unabridged ed 1971). Thus, based on the plain meaning of the words used in SB 1149, the “initial filling of the positions” is not subject to a collective bargaining agreement, and from then on, *i.e.*, after the initial filling, the positions can become part of a bargaining unit only through a petition filed under the PECBA. There is no moment in time after the initial filling of the positions when they could become subject to collective bargaining without a petition filed under the PECBA. SEIU’s argument that the positions automatically became part of the bargaining unit after they were initially filled but before any petition was filed is contrary to the plain language of SB 1149.<sup>8</sup>

The final question is whether to grant SEIU’s petition under subsection (3). As described earlier, the only question under subsection (3) is whether the positions in question—here, the positions transferred from PUC to ODOT under SB 1149—were already included in the bargaining unit under the language of the certification description. *Housing Authority of Portland*, 13 PECBR at 735; *Lane County*, 23 PECBR at 424.

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<sup>7</sup>The legislative history confirms this interpretation. Representative Johnson made clear that the bill involved “moving function, not people.”

<sup>8</sup>Legislative history supports the interpretation that the transferred positions do not become unionized without any action by the employees. Representative Johnson stated during a work session on SB 1149, “They don’t have to become union.” This is contrary to SEIU’s argument that employees hired to replace the initial hires for the transferred jobs automatically became members of the bargaining unit.

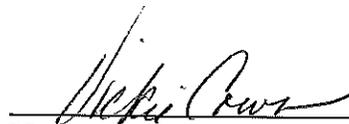
The certification description for the SEIU bargaining unit does not include those "excluded by law." For the reasons discussed above, SB 1149 excludes the transferred PUC positions from the SEIU (or any other) bargaining unit, except through a petition filed under the PECBA.<sup>9</sup> Subsection (3) "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). These positions were not initially, and have never been, included in the SEIU unit under the certification description. Subsection (3) is not the proper vehicle to add these unrepresented positions to the SEIU bargaining unit.<sup>10</sup> Accordingly, we dismiss the petition.<sup>11</sup>

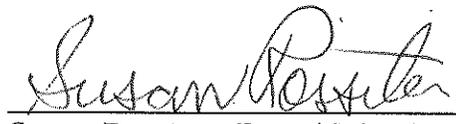
ORDER

The petition is dismissed.

DATED this 12 day of May, 2011.

  
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Paul B. Gamson, Chair

  
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Vickie Cowan, Board Member

  
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Susan Rossiter, Board Member

This Order may be appealed pursuant to ORS 183.482.

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<sup>9</sup>SEIU concedes, as it must, that the mere act of filing a petition does not place the positions in its bargaining unit; SEIU must also prevail on the petition.

<sup>10</sup>A 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.

<sup>11</sup>Because we conclude that subsection (3) is not the appropriate way to add these employees to the SEIU bargaining unit, we do not need to consider ODOT's other objections.