

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case Nos. UC-32/33-04

(UNIT CLARIFICATION)

SERVICE EMPLOYEES INTERNATIONAL )  
UNION LOCAL 503, )  
OREGON PUBLIC EMPLOYEES UNION, )  
 )  
Petitioner, )

v. )

MARION COUNTY, )  
 )  
Respondent, )

Case No. UC-32-04; )  
\_\_\_\_\_ )

SERVICE EMPLOYEES INTERNATIONAL )  
UNION LOCAL 503, )  
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RULINGS,  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

The Board heard oral argument on June 15, 2005, on objections filed by Petitioner to a recommended order issued by Administrative Law Judge (ALJ) Susan Rossiter on March 23, 2005. The hearing on these combined cases was conducted by ALJ Vickie Cowan on September 14 and 15, 2004, in Salem, Oregon. The record closed with the submission of briefs on November 30, 2004. Post-hearing, the combined cases were reassigned to ALJ Rossiter.

Joel L. Rosenblit, Attorney at Law, SEIU Local 503, OPEU, 1730 Commercial Street S.E., P.O. Box 12159, Salem, Oregon 97309-0159, represented Petitioner.

Thomas C. Gunn, Employee Relations Manager, Marion County, 555 Court Street N.E., P.O. Box 14500, Salem, Oregon 97309-5036, represented Respondent.

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On April 27, 2004, Service Employees International, Union Local 503, Oregon Public Employees Union (MCEA/SEIU) filed these petitions under OAR 115-25-005(4). In UC-33-04, MCEA/SEIU seeks to add approximately 175 temporary employees to a strike-permitted bargaining unit of Marion County (County) employees. In UC-32-04, MCEA/SEIU seeks to add approximately 30 temporary employees to a strike-prohibited bargaining unit of Marion County employees. The County filed timely objections, asserting that clarification of the temporary employees into the existing bargaining units was not appropriate because temporary employees did not share a community of interest with bargaining unit members. The County also objected to the petition on the grounds that the most appropriate bargaining units for temporary employees were those composed exclusively of temporary employees. The two cases were joined for hearing and for issuance of a recommended order.

The issues presented are: (1) whether it is appropriate to add temporary employees to the County's strike-permitted bargaining unit; and (2) whether it is appropriate to add temporary employees to the County's strike-prohibited bargaining unit.

For reasons set forth below we determine that it is not appropriate to add temporary employees to either of the MCEA/SEIU represented units, and dismiss both clarification petitions.

#### RULINGS

The ALJ's rulings were reviewed and are correct.

## FINDINGS OF FACT

1. MCEA/SEIU is a labor organization and the exclusive representative of two County bargaining units: a unit of approximately 640 strike-permitted employees in its County-wide unit (UC-33-04), and a unit of approximately 32 strike-prohibited employees in its Juvenile Department (UC-32-04). The County is a public employer.

2. MCEA/SEIU and the County are parties to a collective bargaining agreement which governs the employment relations of the two MCEA/SEIU bargaining units and is in effect from July 1, 2004 until June 30, 2006.<sup>1</sup>

The contract provides, in pertinent part:

### **“ARTICLE 1 -- UNION RECOGNITION**

**“Section 1. Recognition.** The County recognizes SEIU Local 503, OPEU/MCEA, Local 294 as the sole and exclusive bargaining representative for ALL regular employees except supervisory and confidential employees or employees represented by other labor organizations or employees considered prohibited from striking within the definition of ORS 243.736.

**“Section 2. Strike Prohibited Unit.** All regular employees of the Marion County Juvenile Department who are classified as Group Workers 1, 2 or 3 or work as ‘guards’ within the definition of ORS 243.736 except supervisory and confidential employees or employees represented by other labor organizations.

“\* \* \* \* \*

### **“ARTICLE 34 -- TEMPORARY EMPLOYEES**

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<sup>1</sup>At the hearing, the parties explained that the 2004-06 collective bargaining agreement had been ratified by both MCEA/SEIU and the County, but had not been signed. The parties stated that they had implemented all terms of the agreement, however.

**“Section 1. Definitions.**

- “A. Temporary Employee [*sic*] is a person who is employed by Marion County in a non-budgeted position to perform the following services:
  - “1. Seasonal or on-call relief;
  - “2. Filling a vacancy in a budgeted position due to:
    - “a. Sick leave, parental leave, vacation leave, military leave, or
    - “b. Shift work, injury or during recruitment.
  - “3. Special projects and extra work of limited duration.
- “B. Temporary employment is distinguished from permanent, part-time employment in that permanent, part-time employment relates to a budgeted position for which there are some benefits. Interns, practicum and work study students are not temporary employees provided the interns, practicum and work study students are paid by the schools or are otherwise not covered by the terms of this Agreement.
- “C. Temporary work is defined as that which is limited to nine hundred seventy five (975) hours based upon a thirty seven and one-half (37.5)-hour workweek or one thousand forty (1,040) hours based upon a forty (40)-hour workweek within a twelve (12)-month period.

**“Section 2. Policy.** No temporary employee can perform temporary work for more than nine hundred seventy five (975) hours or one thousand forty (1,040) hours in a twelve (12)-

month period commencing with the date of hire. A temporary employee may work more than twelve (12) months provided they do not exceed their yearly allocation of hours and they comply with the definitions set forth above. Once the temporary employee has performed temporary work for nine hundred seventy five (975) hours or one thousand forty (1,040) hours in any twelve (12)-month period, the temporary employee shall be terminated and the County will not hire another temporary employee in the same twelve (12)-month period unless the department is granted an extension by the Labor-Management Committee or the department has requested and the County has approved a budgeted position ”

3. County Personnel Rules regulate the employment relations of temporary employees, and are consistent with the provisions regarding temporary employees in the MCEA/SEIU collective bargaining agreement.

#### Working Conditions for MCEA/SEIU Regular Employees

4. A County department that wishes to hire a regular employee submits a hiring request to the County’s Human Resources Department (HR). HR may notify laid off employees of the open position, and may conduct an internal recruitment process, where current County employees are notified first about the job opening and given an opportunity to apply before the general public is able to do so.

HR accepts applications for all regular job openings, scores the applications, screens applicants, selects a group of eligible candidates for the position, and gives the list of eligible applicants to the appropriate department. The County department that wishes to hire the regular employee then interviews candidates from this list and selects an applicant for the position.

5. Under the terms of the collective bargaining agreement, regular employees in both MCEA/SEIU bargaining units receive health insurance benefits, holidays, paid vacations, and other types of paid and unpaid leave.

6. Regular employees in both MCEA/SEIU bargaining units participate in the Public Employees Retirement System (PERS) after six months of service to the County, and the County pays or “picks up” up the employee’s contribution to PERS as a pre-tax contribution.

## Working Conditions for Temporary Employees

7. From January 1, 2004 through September 1, 2004, the County employed a total of 491 temporary employees in 65 classifications; 357 of these temporary employees worked in the same job classifications as MCEA/SEIU represented employees.

During the month of August 2004, the County employed a total of 291 temporary employees; 217 of these employees worked in the same job classifications as MCEA/SEIU represented employees.

8. County departments that use temporary employees do not have specific temporary positions budgeted; instead, departments budget a certain amount of money to pay for the use temporary employees. A number of County departments regularly use temporary employees, including Juvenile, Health, Public Works, and Elections.

Managers of the departments that hire temporary employees are responsible for recruitment, selection, and hiring of all temporary employees.

9. Every County employee, whether hired as a temporary or regular employee, begins at Step I of the pay range for the appropriate job classification, unless an exception is requested by the County department hiring the employee and approved by the County personnel officer.

10. Temporary employees become members of the Public Employees Retirement System (PERS) after six months of service with the County.

Temporary employees receive no other benefits except holiday pay to which they are entitled if they are employed 30 days prior to the holiday.

11. The duties performed by temporary employees and regular employees in a particular job classification are substantially the same.

12. Temporary employees and regular employees have common supervision.

13. Of the temporary workers employed by the County from January 1 through September 1, 2004, approximately 17 percent of these individuals had worked for the County in temporary positions during four or more of the past six years. Approximately 39 percent of the temporary workers employed in 2004, had worked for the County in temporary positions during two or three of the past six years.

14. Temporary employees who wish to apply for regular positions with the County must participate in the application and selection process established by the County's HR. Under the terms of the 2004-2006 MCEA/SEIU collective bargaining agreement, temporary employees are eligible to apply for positions through the internal recruitment process offered to regular employees.<sup>2</sup>

15. Between January 1, 1999 through December 31, 2003, the County hired approximately 277 people to regular positions in the MCEA/SEIU bargaining units. About 75 of these people, or 27 percent, had previously worked for the County as temporary employees during this same time period.<sup>3</sup>

#### Use of Temporary Employees in the Juvenile Department

16. The County Juvenile Department uses a large number of temporary juvenile relief workers to replace regular employees in a variety of programs and positions, including Detention, the Guaranteed Attendance Program (GAP), the Day Reporting Center (DRC), Alternative Programs (AP), GED Program, intake probation officer, and probation officer. The juvenile relief worker classification does not exist as a regular classification in any of the County's four bargaining units, and juvenile relief workers have their own salary schedule.<sup>4</sup>

17. Juvenile relief workers substitute for regular employees in the group worker 2, alternative worker 2 and 3, GED teacher, intake probation officer, and probation officer job classifications when regular employees are on leave, or attending meetings or workshops. Juvenile relief workers may also be called to work when the youths in the Juvenile Department need extra attention, or when a regular job is temporarily vacant during the recruitment process conducted by the County HR.

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<sup>2</sup>Prior to the implementation of the 2004-2006 MCEA/SEIU collective bargaining agreement, temporary employees were not eligible to apply for positions through the internal recruitment process.

<sup>3</sup>These figures are based on an analysis made by Andy Boeger, senior researcher for SEIU, based on data provided to him by the County. At the hearing, Boeger testified that these figures may not be entirely accurate or complete. Because the County had no employment records available for the period before January 1, 1999, the figures do not show anyone was employed as a temporary worker before that date. Also, the figures may not show everyone who began work for the County as a temporary employee, was hired as a regular employee, and subsequently quit or whose employment was terminated between January 1, 1999 and December 31, 2003.

<sup>4</sup>The juvenile relief worker classification was created in 2002. Prior to that year, temporary workers in the Juvenile Department were called group workers 1.

18. Juvenile relief workers are recruited, screened, and hired by Juvenile Department managers. Once hired, they are placed on an "on-call" list which is made available to Juvenile Department staff. Managers in the County Juvenile Department contact qualified juvenile relief workers on this list when there are needs to fill particular jobs. There are approximately 63 juvenile relief workers on the "on-call" list.

Juvenile relief workers must have all the qualifications of the regular employees they are replacing, except for certification in the Law Enforcement Data System and certification as a notary. Juvenile relief workers will only be called to work in positions for which they have the appropriate qualifications; some may be called to work in a number of different jobs. If qualified, a juvenile relief worker may replace a regular employee in both the strike-permitted and the strike-prohibited bargaining units.

19. Juvenile relief workers do much of the same work as do the regular employees who they are replacing. Juvenile relief workers are not assigned to serve as lead staff, however, and those working in the Detention Program are not required to conduct groups, though they may choose to do so voluntarily. Juvenile relief workers in the Alternative Programs do not serve as the primary staff person for a youth, and do not participate in staffing meetings with other Juvenile Department staff to discuss a treatment plan for a particular youth. Juvenile relief workers do not have office days; group workers 2 are assigned one office day every two weeks.

20. The majority of juvenile relief workers do not have regularly scheduled work hours, and may work anywhere from 6 to more than 1,040 hours per year.

A juvenile relief worker may have regularly scheduled hours for a period of time if replacing an employee on an extended leave, or if filling a vacant position while the County hires a regular employee for the job. Some juvenile relief workers may also work regularly scheduled hours to meet recurring needs for additional staff.

For example, Travis Grimm has been employed as a juvenile relief worker since September 2002. He works in the Alternative Programs, supervising youths who work for the County in order to earn money to pay restitution. During the summer, when more youths are participating in the Alternative Programs, Grimm works 40 regularly scheduled hours a week. During the school year, he works approximately 30-40 hours a week, but his scheduled hours are neither regular nor consistent. Grimm has worked the following hours during the following years: in 2004, he worked 1,125 hours; in 2003, he worked 1,852 hours; and, in 2002, he worked 319.25 hours.

Roy Gleason has been employed as a juvenile relief worker in Alternative Programs since November 1999. He drives a van that picks up and transports youths to the Alternative Programs. Gleason's hours are regularly scheduled, though he works more during summer and school vacations. His position is funded through money received biennially by the Juvenile Department from the State of Oregon Youth Authority. Gleason has worked the following hours during the following years: in 2002, he worked 1,563 hours; in 2001, he worked 1,663 hours; in 2000, he worked 570 hours; and, in 1999, he worked 145 hours.

21. From January 1, 1999 and September 1, 2004, juvenile relief workers were employed as follows:

- 4 worked for 6 years during this period;
- 9 worked for 5 years during this period;
- 20 worked for 4 years during this period;
- 34 worked for 3 years during this period;
- 103 worked for 2 years during this period; and,
- 177 worked for 1 year during this period.

22. Juvenile relief workers are encouraged to apply for regular positions for which they are qualified. Experience gained as a juvenile relief worker often gives applicants an advantage in the application and interview process used by HR to hire regular employees.

Between January 1, 1999 and January 1, 2003, the County hired 14 people for group worker 2 positions; the group worker 2 is a position in the MCEA/SEIU bargaining unit. Nine of those hired had worked for the County as juvenile relief workers. Also between January 1, 1999 and January 1, 2003, the County hired four people for alternative program worker positions, a position in the MCEA/SEIU bargaining unit. Three of those hired had worked for the County as juvenile relief workers.

#### Use of Temporary Employees in the Health Department

23. The County Health Department employs temporary workers in a variety of positions, including mental health specialist (MHS) and mental health associate (MHA). Both the MHS and MHA positions are job classifications in the MCEA/SEIU bargaining unit. MHSs and MHAs work at the 24-hour Psychiatric Crisis Center (PCC) and in other mental health programs of the Health Department.

MHSs diagnose and assess mentally ill clients, and are required to have a Master's degree in a human services field. MHAs assist clients to obtain needed treatment and services, and are not required to have a Master's degree.

Temporary MHSs and MHAs perform the same work as regular employees do in these job classifications.

All MHAs at PCC, except for one, are temporary employees. Most of the MHSs at PCC are regular employees.

24. Temporary MHSs and MHAs are recruited, screened, and hired by Health Department managers. The qualifications for temporary MHS and MHA positions are the same as those for regular MHS and MHA positions. If applicants for the temporary positions meet the criteria for the job, they are placed in a pool and called to work when needed.

25. At PCC, temporary MHSs and MHAs are mainly scheduled to work late evenings and weekends; they do not replace regular employees, but work days and hours when County managers feel it would be difficult or impractical to schedule regular employees. At PCC, temporary MHSs and MHAs are guaranteed at least two hours of work for every shift they are called to work. After two hours at PCC, they may be asked to continue working or may be allowed to leave so long as they remain on call and available to return to PCC if a need for their services arises.

Temporary MHSs and MHAs at PCC and in other mental health programs are also called to work to replace regular employees who are on leave, or to fill regular positions that are temporarily vacant during the County HR recruitment process.

Temporary MHSs and MHAs may have regularly scheduled work hours if replacing an employee on leave, or filling a vacant position. Otherwise, their scheduled work hours vary from month to month.

26. Many temporary MHSs and MHAs have been employed by the County for a number of years. For example, Edwin Schultze has worked for the County as a temporary MHS since approximately 1991.

Lisa Westlund was hired as a temporary MHA 1 by the County in July 2001; she continued working as an MHA for the County, either as a temporary County employee or through a contract with an employment agency, until April 2002. At that time, Westlund was promoted to a position as a MHS and worked in that position, either through a contract with an employment agency or as a temporary County employee, until August or September 2004. At that time, Westlund was hired by the County for a regular MHS position.

27. Temporary MHSs and MHAs are often encouraged by their supervisors to apply for regular positions. Their temporary experience with the County Health Department gives them an advantage in the process used to hire regular employees.

Between January 1, 1999 through January 1, 2003, the County hired 16 people to regular positions as MHA; 10 of those hired had worked for the County as temporary employees. Also between January 1, 1999 through January 1, 2003, the County hired 12 people to regular positions as MHS; 9 of those hired had worked for the County as temporary employees.

In 2004, the County hired an unusually large number of regular MHAs to staff the newly-created cottage program, which provides housing and treatment to patients released from the Oregon State Hospital. Approximately 8-10 MHAs were hired for the cottage program; most of those hired had worked for the County as temporary employees.

#### Use of Temporary Employees in Other County Departments

28. The County Public Works Department regularly hires temporary employees for positions as operations maintenance workers. The operations maintenance worker position is a classification in the MCEA/SEIU County-wide bargaining unit.

Temporary operations maintenance workers work in seasonal construction jobs. They are not required to have the same types of licenses, such as Commercial Driving Licenses and Ferry Licenses, as regular employees do.

Regular employees in the Public Works Department may have irregular work schedules, and varied work assignments, based on the needs of the Department.

Between January 1, 1999 and September 1, 2004, two temporary operations maintenance workers were hired to permanent operations maintenance worker positions.

29. The County employs temporary workers as deputy County clerks, law clerks (District Attorney), and public works aides. These positions do not exist as regular job classifications in any of the County's four bargaining units. Employees who work in these four job classifications work in departments with MCEA/SEIU represented employees.

30. The County employs 17 Human Services trainees; 16 of these workers are temporary employees, and one was recently hired as a regular employee in the MCEA/SEIU County-wide bargaining unit. The temporary Human Services trainees work

in departments where employees are represented both by MCEA/SEIU and the Federation of Parole and Probation Officers.

31. The employees' desires, as indicated by the showing of interest, favor inclusion in the unit.

### CONCLUSIONS OF LAW

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

2. It is not appropriate to add temporary employees to either of the MCEA/SEIU bargaining units.<sup>5</sup>

### DISCUSSION

In deciding whether a proposed bargaining unit is appropriate, this Board must "consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees." ORS 243.682(1). Community of interest factors include similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, and common supervision. OAR 115-25-050(2). All of these factors are considered when we decide whether to add employees to an existing bargaining unit pursuant to a unit clarification petition. *AFSCME Local 189 v City of Portland, BOEC*, Case No. UC-12-91, 13 PECBR 302, 307 (1991).

When a union seeks to add casual, substitute, or temporary employees to a bargaining unit of permanent employees, this Board expands its community of interest analysis to determine whether the casual, substitute, or temporary employees have some reasonable expectation of recurring employment. *Id* We have refused to add casual employees to a unit of full-time regular employees when the ongoing relationship is not sufficient. We have reasoned that in situations where the casual employees have a "tenuous

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<sup>5</sup>At hearing, both parties treated the two MCEA/SEIU bargaining units as a single entity. Although the same contract covers the two units, there are significant differences between the strikeable and the non-strikeable units; and significant differences in community of interest factors between temporary employees who work in the Juvenile Department and elsewhere. In the Juvenile Department, temporary workers do not share the same job classifications as regular employees. They are not required to have all of the training and certifications as regular employees. They do not necessarily perform the same duties as the regular employees they replace. Temporary Juvenile Department employees also have their own pay scale. We apply the same community of interest analysis to both of the MCEA/SEIU units, unless otherwise noted.

employment relationship” with the employer, they will have bargaining priorities which are significantly different from those of the other regular employees *City of Portland*, 13 PECBR at 308, quoting *Mid-Valley Bargaining Council v. Greater Albany Public Sch. Dist. 8-J*, Case No. C-17-81, 6 PECBR 4766, 4777 (1981). In determining whether temporary employees have only a tenuous employment relationship, we give great weight to the regularity and continuity of their assigned work schedules. As we stated in *Lane Community College Employees Federation, Local 2417, AFT, AFL-CIO v. Lane Community College*, Case No. UC-19-97, 17 PECBR 423 (1997):

“While the *amount* of FTE employment is not particularly significant, the *regularity* of less than .5 FTE employment is a defining characteristic for inclusion of personnel in the .5 FTE and more bargaining unit. A less than .5 FTE employee, who is regularly employed by the College, most likely shares the same degree of interest in continuing employment that is common among personnel employed from .5 FTE to full time. We define a ‘regular’ less than .5 FTE employee as one whose employment generally continues on at least a roughly predictable basis through most of the year in a manner similar to the employment of bargaining unit personnel who are employed .5 FTE but less than full time.” *Id.*, at 429.

In *Lane County*, the labor organization sought to clarify an existing classified bargaining unit of .5 FTE or more so as to include employees who worked less than .5 FTE. The parties stipulated to the exclusion of casual employees. We held that only “regular” employees who work less than .5 FTE could be clarified into the existing unit.

MCEA/SEIU argues however, that the working conditions for temporary employees are analogous to those of part-time County employees, who *are* included in the County bargaining units. According to MCEA/SEIU, the employment arrangements for temporary employees and regular part-time employees are virtually indistinguishable: both temporary and part-time employees work less than full-time for the County during a period of many years. MCEA/SEIU makes two additional arguments for inclusion of temporary employees in both bargaining units: (1) its main unit includes a certain number of regular on-call employees who work irregular hours, and (2) regular employees in its Juvenile Department bargaining unit have on occasion performed on-call work as well.

MCEA/SEIU’s position is neither well-taken, nor supported by the record. We find that the employment relationship between temporary employees and the County is too

tenuous to warrant their inclusion in either MCEA/SEIU bargaining unit. We do not need to distinguish between the County-wide unit and the strike-prohibited unit.

The parties have agreed that a temporary employee is a person employed by the County in a non-budgeted position in order to provide seasonal or on-call relief, to fill short-term vacancies in budgeted positions or during recruitment, or for special projects and extra work of limited duration. The record shows that temporary employees in both units do share a number of community interest factors with regular employees. The majority of temporary employees in the County-wide unit work in the same locations and in the same job classifications as other members of the MCEA/SEIU bargaining units.<sup>6</sup> In the Juvenile Department, regular and temporary employees do not share job classifications, but both work in the same locations. A majority of temporary employees in both units perform work that is the same or substantially similar to that performed by the regular employees whom they replace. Temporary and regular employees share common supervision. Temporary and regular employees may work side by side. The qualifications required for the various County job classifications in the MCEA/SEIU County-wide unit are, in great part, the same for both temporary and regular employees. Both regular and temporary employees participate in PERS after six months of service to the County.

Nevertheless, temporary employees are treated differently than regular employees in many ways. Most temporary employees substitute for regular employees when the latter are unavailable for work. This means they are at work only when the regular employees, whom they replace, cannot be. Others work hours and shifts that regular employees do not. In the Juvenile Department, temporary employees are not required to maintain the same certifications as permanent employees. The same is true for temporary maintenance workers in the Public Works Department. In the Juvenile Department temporary employees do not share job classifications, or wage rates, with permanent employees. Although the County employs temporary workers as deputy County clerks, law clerks, and public works aides, these workers do not share job classifications with permanent County employees.

Successive labor contracts between the parties have limited the number of hours a temporary employee can work, to less than half-time. With few exceptions,

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<sup>6</sup>On the other hand, of the seventeen Human Service trainees employed by the County, sixteen are currently temporary employees. Temporary employees who substitute for some Deputy County Clerks and for some public works positions have different job classifications than regular employees. In the Health Department, temporary employees may replace regular employees, but also may be hired to work at odd shifts and times. All Health Department MHAs, save one, are temporary employees; while all Health Department MHAs, save one, are regular employees.

temporary employees work irregular schedules at irregular times. Temporary employees are eligible for holiday benefits after thirty days of employment, and are eligible for PERS after their first six months. With these exceptions, temporary employees receive none of the employment benefits that regular full- or part-time employees do. They have no health insurance, paid vacations, or any other types of leave.

The hiring process for temporary employees is entirely separate from that for regular employees. Permanent employees are hired through the County's Human Resources Department procedures, with managers only making the final hire from a list prepared by Human Resources. Managers of the departments that hire temporary employees are responsible for the recruitment, selection, and hiring of temporary employees. The number of temporary employees has fluctuated widely over the years. The County does not fix a specific number of temporary employee positions: rather, each County department is given a budget for temporary employees. Finally, although a number of temporary employees have gone on to become regular employees, temporary employees have to apply for, be interviewed, and be hired into regular jobs. Temporary employees do not transfer into regular positions. Under the terms of the current collective bargaining agreement, temporary employees participate in the internal posting process, and may apply for vacant positions before the jobs are offered to the general public.

In *AFSCME, Council 75 v. City of Burns*, Case No. UC-32-86, 9 PECBR 9004 (1986), we considered whether it was appropriate to clarify a bargaining unit of police, fire, and ambulance employees to include two part-time dispatchers. In making our decision, we analyzed the difference between regular part-time employment and casual employment. We noted that “[r]egular part-time employment involves an ongoing, stable, and substantial employment relationship characterized by recurring employment for a significant amount of time over a period of extended rather than limited duration. Casual employment, on the other hand, involves temporary, limited, or irregular service of the type that does not establish a fixed and regular employment relationship subject to meaningful collective bargaining.” *City of Burns*, 9 PECBR at 9006-07. We found it appropriate to include one part-time dispatcher in the bargaining unit, because he had some work hours that were regularly scheduled each week, and worked a substantial number of hours—an average of 80 hours per month. We refused to add another part-time dispatcher to the bargaining unit, however, because he had no regularly scheduled work hours and the amount of his work hours fluctuated greatly.

Applying the factors set forth in the *Burns* case, we find that working conditions for temporary County employees do not have the characteristics of an “ongoing, stable, and substantial employment relationship,” 9 PECBR at 9006, that would persuade us to include them in either MCEA/SEIU bargaining unit. The record shows that the amount of hours worked by temporary employees varies greatly, and the majority of them have no

regular work schedules. Regular work schedules for temporary employees last only for limited periods. Juvenile Relief Worker Travis Grimm, for example, has had a regular work schedule only during the summer months. Other temporary workers, such as the MHAs and MHSs, testified that they had regularly scheduled work hours only when they replaced regular employees on extended leaves or filled vacancies while the County hired regular employees for the jobs. Although Juvenile Relief Worker Roy Gleason has had some type of regular work schedule for the past five years, the number of hours he has worked has fluctuated from year to year. Because Gleason's position is completely dependent on the County's receipt of continued state funding, he has no firm assurance of continued employment.

The facts of this case are very similar to those in *AFSCME Council 75 v. Multnomah County Juvenile Division*, Case Nos. RC-16-92/UC-47-92, 14 PECBR 202 (1992). In that case, we refused to clarify a bargaining unit of workers in a county juvenile detention facility by adding on-call juvenile group workers to it. We noted that the on-call juvenile group workers served as substitutes, filling in for absent regular workers or providing extra coverage when needed; their work hours were irregular, and the number of hours worked by each on-call worker often fluctuated greatly. Although over 50 percent of the regular group workers had once been on-call group workers, we did not find this statistic sufficient to demonstrate that on-call group workers had an expectation of recurring employment. We concluded that continued employment for the on-call juvenile group workers was uncertain, since it was dependent entirely on management's discretion and contingent on the needs of the employer. *Multnomah County*, 14 PECBR at 208-09.

County temporary workers have employment arrangements very similar to those of the on-call juvenile workers in *Multnomah County*. Temporary employees in both County units have irregular work hours, and the number of hours worked by each employee often fluctuates greatly. Continued employment of County temporary workers is uncertain, as it was for the on-call juvenile group workers in Multnomah County. Although approximately twenty seven percent of County temporary employees have been hired into regular positions in the MCEA/SEIU bargaining units since 1999, this does not establish that temporary employees have a reasonable expectation of recurring employment with the County. We reached the same result in *Multnomah County*.

MCEA/SEIU argues that we should follow our decision in *OPEU v. State of Oregon, Department of Administrative Services*, Case No. UC-22/23-99, 18 PECBR 452 (2000), *aff'd* 173 Or App 432, 22 P2d 251 (2001), where we found it appropriate to add temporary employees to two large bargaining units of state workers—one strike-prohibited and the other strike-permitted. It is true, as in *Department of Administrative Services*, that the

temporary workers in this case share a number of community of interest factors with the employees in the bargaining units to which they seek to be added.

Important to our determination to add temporary employees to the bargaining unit in *Department of Administrative Services*, however, were the characteristics of the existing bargaining units of state employees, which included a variety of different appointments—permanent, part-time, seasonal, limited duration, and intermittent. In that case, seasonal employees filled positions that “occurred, terminated, and recurred, periodically or irregularly.” Intermittent employees performed seasonal and part-time jobs on an “irregularly fluctuating basis,” and were expected to work only when work was available. 18 PECBR at 466. Employees on limited duration appointments could be hired for up to two years. Limited duration appointments were contingent on continuation of a grant, contract, award, or specific legislative funding. We noted that it was quite possible that a temporary State employee could work longer than a limited duration employee who was included in the existing bargaining unit. We concluded that it was appropriate to add temporary employees to existing bargaining units that already included employees “with very different employment arrangements regarding duration and availability of work \* \* \*” 18 PECBR at 467.

In the case before us, the MCEA/SEIU bargaining unit contains no such variety of employment arrangements, since MCEA/SEIU represents only regular County employees. Even if a small number of permanent employees in the two MCEA/SEIU bargaining units do on occasion work irregular hours, the fact remains that MCEA/SEIU currently represents only regular County employees.<sup>7</sup> We find it inappropriate to add temporary employees to a unit that lacks the diversified employment relationships that existed in *Department of Administrative Services*. MCEA/SEIU argues that, in so doing we are adding a new requirement which must be met in order to clarify a bargaining unit to include temporary employees.

That is not the case. We decide this case based on the considerations set forth in ORS 243.682(1) and in OAR 115-25-050(2). In *Department of Administrative Services*, we relied on the composition of the existing bargaining units to *support* our conclusion that

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<sup>7</sup>Insofar as bargaining history can be a factor in unit clarification cases such as this, MCEA/SEIU and the County have never agreed to include temporary employees in the bargaining unit. Nor is there any evidence that the County has included temporary employees in other County bargaining units.

clarification of temporary positions into those units was appropriate. We did not add a new requirement. Our disposition of this case is consistent with our past decisions.<sup>8</sup>

Ordinarily, we decline to grant petitions to include casual, substitute, or temporary employees into existing units of permanent or regular employees. For example, in *OACE v. Brookings- Harbor School District No. 17*, Case No. RC-66-85, 8 PECBR 8206 (1985), the school district made extensive use of substitute employees. These employees were employed to fill in for regular full and part time employees who were required to be absent from work by reason of sickness, family emergency, vacation or other leaves. Substitutes performed some, but not all of the duties of the employees they replaced. They shared the same line of supervision as regular employees. They were eligible to receive PERS benefits. None worked substantial hours for the District. Relying on our previous decisions concerning substitute teachers, including *Mid-Valley Bargaining Council (OEA-NEA) v. Falls City School District*, Case No. C-139-80, 5 PECBR 4152 (1980), this Board declined to include substitutes in a bargaining unit of regular and part time employees. Citing to *OSEA, Chapter 137 v. Scio School District*, Case No. C-171-83, 7 PECBR 6530 (1984), we concluded that

“\* \* \*duration of employment is a critical factor in determining community of interest between substitutes and regular employees but not in determining the community of interest among substitutes for purposes of allowing separate bargaining unit status.” 8 PECBR at 8212.

Similarly, in *Teamsters Local 223 v. North Lincoln Hospital*, Case No. RC-11-96, 16 PECBR 672 (1996) we determined that “per diem” employees were not appropriately included in a unit of regular hospital employees. In that case, the hospital sought inclusion of these employees in the bargaining unit, while the union sought to exclude them as casuals

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<sup>8</sup>Since these unit clarification cases are filed under OAR 115-25-005(4), and seek only to add unrepresented temporary employees to existing MCEA/SEIU bargaining units, we do not consider whether the petitioned-for employees could constitute appropriate, stand-alone bargaining units. This Board has held that employees who have a “casual” relationship with the employer are not excepted from coverage under the Public Employees Collective Bargaining Act, and may form their own bargaining units separate from regular employees of the same employer. See *Beaverton Education Association v. Beaverton School District 48J*, Case No. RC-72-93, 15 PECBR 210 (1994). In *Multnomah County*, the union filed both a unit clarification petition, seeking to add on-call juvenile group workers to an existing bargaining unit; and, in the alternative, a representation petition which sought to form a bargaining unit composed solely of on-call juvenile group workers. As noted above, this Board found that it was inappropriate to add the on-call group workers to the existing bargaining unit. We did, however, find that a bargaining unit composed only of on-call juvenile group workers was appropriate.

or substitutes. Per diem employees occupied the same job classifications, were expected to do the same work, had to meet the same educational and licensing requirements, and were subject to the same terms of employment and working conditions. However, they were paid differently, received no benefits, and the hours worked by most per diem employees fluctuated, depending on Hospital staffing needs. We stated that

“This Board has approved separate bargaining units for substitute employees. *Beaverton Education Association v Beaverton School District*, Case No. RC-72-93, 15 PECBR 210 (1994); *AFSCME Council 75 v. Multnomah County Juvenile Justice Division*, Case Nos. RC-36-92/UC-42-92, 14 PECBR 202 (1992). We typically have declined to add substitute employees to existing bargaining units of regular employees. *AFSCME, Council 75 v. Coos County Juvenile Department*, Case No. UC-70-85, 8 PECBR 8329 (1985); *Mid-Valley Bargaining Council v. Greater Albany Public School District*, Case No. C-17-81, 6 PECBR 4766 (1981).

“Our decisions in these cases focus on the lack of community of interest between substitutes and regular employees, based on substitute employees’ irregular or intermittent work hours and lack of reasonable expectation of recurring employment.” 16 PECBR at 683.

In concluding that per diem employees were not appropriately included in a bargaining unit with regular employees, we relied on the following factors: only a few per diem employees had a regular recurring work schedule, nearly half averaging less than 10 hours per month; and many of the positions were training positions, with employees moving into regular positions when vacancies occurred. “Of greater significance” we stated, were

“the differences between per diem and regular employees in employment relations matters, where their interests are not merely diverse but often directly at odds with those of regular employees. They receive no benefits; their pay scales are significantly different; the number of hours they work is contingent to some degree on the level of regular employee staffing. On balance, the factors favoring exclusion outweigh the factors favoring inclusion.” *Id*

In *PCC Faculty Association v PCC*, Case No. UC-13-00, 19 PECBR 129 (2004), the association sought to clarify an existing unit of full-time faculty and educational/technical specialists (ETS) and part-time faculty, to include unrepresented part-time ETS and certain unrepresented casual professional employees. The College opposed inclusion of these positions on the basis that the unit was not logically defined, and involved employees who did not share a community of interest with other unit employees. We concluded that, while it was appropriate to add the part-time ETS to the existing unit, it was not appropriate to include casual professionals.

As a threshold matter, we first noted that “a proposed addition to a bargaining unit must be logical in definition and scope,” and went on to state that

“In *Oregon Public Employees Union v. Executive Department, State of Oregon*, Case No. UC-59-87, 10 PECBR 456, 471 (1988), this Board held that it was appropriate to permit accretions of unrepresented employees to an existing unit so long as the unit remained logically defined:

“\* \* \* Petitions seeking the addition of employees to the OPEU bargaining unit will be allowed as long as they concern a *logically defined group or class of employees* (as opposed to interested individuals or fragments of a group) and the defined group does not have a community of interest distinct from that of the employees in the [existing] unit.” (Emphasis in original, citation omitted). 19 PECBR at 140.

Part-time ETS were accreted to the existing unit because they constituted a clear and distinct class of employees; and, although they worked somewhat different hours than full-time ETS, they otherwise had a clear community of interest with bargaining unit employees, particularly part-time faculty.

On the other hand, casual professionals were not appropriately accreted because they did not “have a reasonable expectation of recurring employment,” *AFSCME Local 189 v. City of Portland, BOEC*, Case No. UC-12-91, 13 PECBR 302, 303 (1991); and did not constitute a logically defined group or class. The hours worked by casual professionals were different from those of other employees, and varied widely. These employees were hired and assigned in a “loose, decentralized fashion.” Moreover, the proposed unit description was “arbitrary.” We stated that

“In deciding whether to add part-time employees to an existing bargaining unit, we have rejected suggestions that we base the decision on the number of hours worked. Instead, we have focused on the regularity of employment. *Lane Community College Employees Federation v. Lane Community College*, Case No. UC-19-97, 17 PECBR 323 (1997). In that case, the college objected to the inclusion of part-time employees who worked more than half-time and those who worked less than half-time. We defined regular employment as ‘employment [that] generally continues on at least a roughly predictable basis through most of the year in a manner similar to the employment of bargaining unit personnel who are employed .5 FTE but less than full time.’” 17 PECBR at 329.

According to this Board, the evidence did not show predictability in the amount, duration, or constancy of the categories of casual professionals which the association sought to include in the existing unit. Therefore, casual professionals did not exhibit the regularity of employment necessary for inclusion in the existing Portland Community College bargaining unit.

Based upon the standards established in the cases cited above, we have no hesitation in dismissing the petitions of SEIU Local 503 in these consolidated cases. The result we reach in this case is entirely harmonious with, a substantial body of Board decisions over the years—a number of which we have cited earlier in this opinion.

Member Gamson disagrees with both our reasoning and our result. The dissent relies in part on the Board’s decision in *OSEA v. Warrenton-Hammond School District*, Case No. RC-47-86, 9 PECBR 9034 (1986).

Warrenton-Hammond involved very different facts than are present here. In that case, OSEA sought to represent a bargaining unit of approximately 25 classified employees of the District, including casual employees. At hearing, OSEA amended its petition to exclude casuuls. The parties then agreed to exclude as casual employees two substitute bus driver positions, two substitute kitchen helper positions, and one substitute teacher’s aide position. The issues for hearing were whether an additional substitute bus driver position, along with two substitute kitchen helper positions and a substitute teacher’s aide position, should be excluded from the unit as casual employees. The District sought to exclude these four positions, based primarily on the small number of hours each worked.

We declined to do so. Relying on *Brookings-Harbor School District No. 17*, the Board reasoned that

“Employees who work only on an intermittent, irregular basis with no reasonable expectation of recurring employment will be excluded from a bargaining unit as casual employees. On the other hand, employees who work a limited number of hours but do consistently work on a recurring and fairly regular basis, will not be excluded as casual employees. E.g. Oregon School Employees Association, Chapter 137 v. Scio School District, Case No. C-171-83, 7 PECBR 6530 (1984) (regular weekend employee with varying assignments not excluded as casual).

“In the instant case it is clear that employees in all of the positions in question have had consistent recurring employment with the District over a substantial period of time. The employees work each month of the school year and the numbers of hours worked per month have not varied radically over the course of the year. Some of the positions in question involve regularly scheduled hours five days per week for the entire school year. These employees at issue have a substantial and continuing employment relationship with the District. *The fact that on-call employees have been given the option to decline specific call-in hours apparently has not resulted in a pattern of intermittent, irregular employment.*” (Emphasis supplied) *Id.*, at 9037.

As in *Brookings-Harbor School District N. 17, North Lincoln Hospital, PCC*, and cases cited therein, we. In *Warrenton-Hammond*, we applied the same test as we apply in this case. The Board did not rely on the number of hours worked by each employee, but on the regular and recurrent nature of his or her employment. Indeed, as the emphasized portion of the last quote suggests, had the additional substitute bus driver exercised the option to decline call-ins, and thereby created a “pattern of intermittent, irregular employment,” that driver might have been excluded from the unit as a casual employee, as were the other two substitute bus drivers. We view the decision in that case as consistent with, and supportive of, the result we reach today.

In his dissent, Member Gamson also looks to the Labor Management Relations Act, 29 U.S.C. sec. 158 et seq. and to cases from other states. He would adopt the National Labor Relations Board’s approach to defining casual employees; and would establish a

“bright line” test based solely upon the number of hours an employee works in a given period.

The majority views existing Board case law as sufficient. We see no need to adopt the approach of the NLRB, nor to establish our own “bright line” test based upon the number of hours an employee works.

The difference between the approach taken by the NLRB and by this Board is structural in nature. The NLRB’s unit clarification rules are totally different from ours. The NLRB does not allow accretions to existing bargaining units when, as here, the petition raises a “question concerning representation:” that is, when an employee vote is required. *NLRB Rules and Regulations, Sec. 101.17*. ERB’s approach diverged from that of the NLRB when we adopted OAR 115-25-005 in 1980, as is evident from the cases cited by the majority earlier in this analysis.

Member Gamson does not actually apply the NLRB’s formula. He would leave that for another day.<sup>9</sup> In any event, we do not agree that this record contains facts sufficient to support the result Member Gamson would have us reach, even if we did consider how to apply NLRB standards to our cases.

The dissent takes the majority to task for not designating a unit different from that for which SEIU Local 503 petitioned, in order that those temporary employees who do work regularly scheduled hours might be clarified into “the unit described in the petition.” Only Three employees are identified: Travis Grimm, Roy Gleason, and Lisa Westland.<sup>10</sup> Grimm and Gleason are both employed as juvenile relief workers in the Juvenile Department. Their wages, hours, and working conditions are not typical of other employees in that department, let alone employees in other County units.<sup>11</sup>

OPEU filed two unit clarification petitions. Grimm and Gleason’s wages, hours, and working conditions are not comparable to County employees in Petitioner’s county-wide, strike-permitted unit. Finally, Grimm and Gleason do not constitute a “logically defined group or class of employees,” but rather are “interested individuals or fragments of

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<sup>9</sup>Dissent, p. 32, n. 33

<sup>10</sup>Westland is no longer a temporary employee. She was hired as a regular employee in September or October, 2004. (Union’s Post-hearing brief, p. 17)

<sup>11</sup>They are not “on-call” employees, for instance; and see Findings of Fact 16-20.

a group.” As such, they may not be clarified into an existing bargaining unit. *OPEU v Executive Department*.

ORDER

The petitions are dismissed.

DATED this 21<sup>st</sup> day of April 2006.

  
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Donna Sandoval Bennett, Chair

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\*Paul B. Gamson, Board Member

  
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James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

\*Member Gamson, Dissenting:

I agree with the majority on one general principle, but little else: Casual employees lack a community of interest with regular employees, and groups with such divergent interests should not be included in the same bargaining unit.

The controlling question here is whether the petitioned-for employees are casual. “Casual” is a term of art in labor law: “Employees who work only on an intermittent, irregular basis with no reasonable expectation of recurring employment will be excluded from a bargaining unit as casual employees.” *OSEA v. Warrenton-Hammond School District*, Case No. RC-47-86, 9 PECBR 9034, 9037 (1986). Thus, we must decide if the work history of the petitioned-for employees is so intermittent and irregular that they should be excluded from the bargaining unit of regular employees.

The majority dismisses the entire petition even though a substantial number of the petitioned-for employees are not casual and are appropriately included in the unit with

regular employees. Those employees who are not casual are entitled to a self-determination election, and the majority errs in denying them this right.

I view the analytical technique the majority uses as the source of its error. It attempts to match the facts of this case with the facts of our earlier cases. "Fact matching" is especially ill-suited to fact-intensive and workplace-specific cases like these. There are hundreds of public sector employers in Oregon. They have developed a huge variety of organizational and operational patterns, so comparing one workplace to another is often comparing apples and oranges. As here, a pending case is unlikely to align perfectly with one that we have already decided, and the majority offers no guidance as to what factual differences are significant. Another problem with fact matching is that our prior cases in this area are not a model of consistency and thus do not provide predictable guidance.<sup>12</sup>

More importantly, this case demonstrates that a fact-matching analysis does not work in a group this large and varied. Such an analysis forces the majority to generalize about the petitioned-for group and treat the individuals in the group as though all their circumstances were the same.<sup>13</sup> Thus, my colleagues dismiss the entire petition based on their characterization of working conditions for "the majority" of employees and for "most" employees. Such generalizations, however, are clearly inaccurate for a significant number of individuals and result in erroneously excluding some employees who should be included. I would modify the description of the petitioned-for group to expressly exclude casual employees, and would find it appropriate as so modified.

I will first review the facts to demonstrate that some of the petitioned-for employees should not be excluded as casual. I will then review NLRB caselaw which suggests an alternative analysis that treats each employee individually and thereby avoids the majority's erroneous exclusions.

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<sup>12</sup>*Compare, e.g., Mid-Valley Bargaining Council v. Greater Albany Public School District 8-J*, Case No. C-17-81, 6 PECBR 4766 (1981) (Board *excludes* substitute teachers from the regular teacher bargaining unit regardless of how regularly the substitutes work) with *OSEA v. Warrenton-Hammond School District*, Case No. RC-47-86, 9 PECBR 9034, 9037 (1986) (Board *includes* a substitute bus driver in the unit with regular employees even though the substitute driver had no regularly scheduled work hours and averaged fewer than 10 hours per week).

<sup>13</sup>Under a fact-matching analysis, the only logical alternative to reliance on broad generalizations is for the parties to separately litigate, and for this Board to separately decide, the individual working conditions for each of the 491 employees covered by the petition. Although this alternative is logically possible, it is obviously unworkable.

## I

The petitions seek to add 491 employees to existing bargaining units that contain both full-time and part-time regular employees. The petitioned-for employees work in a large number of County departments and do a wide variety of jobs in 65 separate classifications.

Based on the record, it is nearly impossible to generalize about the varied mix of employee longevity and the regularity, frequency and number of hours they work. Some of the petitioned-for employees are new and some have worked as “temporary”<sup>14</sup> employees for 6 years or more. A number of employees have regularly scheduled hours,<sup>15</sup> although many do not.<sup>16</sup> Some work as replacements for regular employees who are temporarily absent, but some are not replacements and work instead at times or in positions where no regular employees are scheduled.<sup>17</sup> The regular employees’ collective bargaining agreement restricts the petitioned-for employees to 1,040 hours per year, but there is a procedure through which the County can ask a labor-management committee to authorize additional hours for an employee who has worked the maximum.<sup>18</sup> The County requests an extension of hours for

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<sup>14</sup>“Temporary” is the employer’s label. We are not bound by it. Under NLRB law, an employee is considered temporary, and thus ineligible to vote, only if the employee has a date certain for termination. *NLRB v New England Lithographic Co.*, 589 F2d 29, 32, 34 (1<sup>st</sup> Cir. 1978); *Emco Steel, Inc*, 227 NLRB 989 (1977); *Pennsylvania Glass Sand Corp*, 102 NLRB 59 (1953). I found no evidence that employees here had a date certain for termination, so despite the employer’s label, they are not “temporary” as that term is used in labor law. Indeed, I know of no definition of “temporary” that would include the 170 employees who have worked 2 to 6 years in their positions. (FF 21 )

The majority nevertheless identifies the employees here as “temporary,” and it uses that label interchangeably with “casual” as though those terms mean the same thing. They do not. Compare the above definition of “temporary” with the definition of “casual” in *Warrenton-Hammond School District*, 9 PECBR at 9037. This conceptual muddle may be another reason the majority reaches the wrong result.

<sup>15</sup>Findings of Fact (FF) 20 and 25; Transcript (Tr.) 17, 59, 78-79, 130-131, 185, 199, 228-229. I include transcript citations for facts that are different from or in addition to those included in the majority’s Findings of Fact

<sup>16</sup>At hearing, the Union asked the County to produce evidence regarding the number of employees who were assigned to a regular schedule. Tr. 17 The County did not provide such evidence.

<sup>17</sup>FF 25; Tr. 55, 78-79, 140, 185, 228

<sup>18</sup>Tr. 26, 28.

2 or 3 employees per month,<sup>19</sup> and about one-third of the requests are granted.<sup>20</sup> This means the County annually requests extensions for 24 to 36 employees who have worked 1,040 hours in a year,<sup>21</sup> and 8 to 12 of the requests are granted. As a result, employees in the petitioned-for group work anywhere from 6 to 1,852 hours per year.

The record contains examples. The County hired Travis Grimm in 2002 and has scheduled him to work regularly since then. His hours were extended to exceed 1,040. He works a set schedule in the summer, and averages 30-40 hours per week for the rest of the year. He performs the same work as regular employees and most of the time is not merely filling in for an absent regular employee.<sup>22</sup> He is assigned his own desk and computer and is in charge of another temporary staff member.<sup>23</sup>

Roy Gleason has worked steadily for the County for about four years. He has regularly scheduled hours throughout the year and received extensions to work more than 1,040 hours.

Lisa Westlund works in the mental health division as a mental health specialist (MHS 1).<sup>24</sup> She works 37-40 hours per week, and since August 2003 has been assigned her own case load of approximately 50 clients.<sup>25</sup>

I note that even under the majority's fact-matching analysis, at least some of the employees in the petitioned-for group are not casual (although their analysis does not provide guidance for determining which ones). In *Oregon School Employees Association v. Warrenton-Hammond School District 30*, Case No. RC-47-86, 9 PECBR 9034 (1986), the

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<sup>19</sup>Tr. 73

<sup>20</sup>Tr. 72

<sup>21</sup>The majority posits that the regular employees in the Petition constitute "fragments of a group." This assertion is based on the majority's assumption that there are only two or three employees on the record who worked substantial hours over a significant period of time. At a minimum, this assumption ignores the 24 to 36 employees who work at least 1,040 hours in a year. They average 20 hours per week over a 12-month period.

<sup>22</sup>Tr. 169, 185.

<sup>23</sup>Tr. 174.

<sup>24</sup>Tr. 233.

<sup>25</sup>Tr. 239, 237, 255.

issue was whether a substitute teacher's aide and a substitute bus driver were casual employees who should be excluded from the bargaining unit of regular employees. The order does not say whether the substitute teacher's aide had any regularly scheduled hours, but it is clear that her hours fluctuated. In the first 6 months of the year, she worked 35, 44, 50, 38, 31 and 7 hours, respectively. This is an average of 7.8 hours per week. The Board determined that these hours were numerous and regular enough that the employee was not excluded from the bargaining unit as casual.

The substitute school bus driver had no regularly scheduled hours. She worked only when she was called in, and she had the right to refuse a particular call. For the six-month period, she worked 30.5, 58, 22.25, 40.5, 71, and 35.5 hours. This is an average of 9.9 hours per week. This Board concluded that the lack of regularly scheduled hours "has not resulted in a pattern of intermittent, irregular employment," 9 PECBR at 9037, and she was therefore appropriately included in the bargaining unit.

*Warrenton-Hammond School District* stands for the proposition that the lack of regularly scheduled hours for a substitute employee does not automatically result in a "casual" designation, so long as the employment history is not irregular or intermittent. Here, it is clear that those employees who worked only 6 hours in a year are casual and intermittent. But those employees who worked 1,040 hours or more in a year could do so only if they regularly worked a substantial number of hours over a significant period of time. They average 20 hours per week over a 12-month period. If the employees in *Warrenton-Hammond School District* who averaged only 7.8 and 9.9 hours per week over a six-month period were not casual, then surely the employees here, who average more than twice the number of hours over twice the period of time, are not casual either. I am unable to distinguish some of the employees here from those in *Warrenton-Hammond School District* who we decided were *not* casual.<sup>26</sup>

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<sup>26</sup>The majority asserts that *Warrenton-Hammond School District* supports its conclusion. It explains that the bus driver there was not casual because she did not exercise her right to turn down calls so frequently that it made her work pattern irregular or intermittent. This tautological reasoning merely recites the definition of casual—the employee was not excluded as casual because she did not work irregular or intermittent hours. It entirely misses the point of *Warrenton-Hammond School District*, which is to quantify the phrase "irregular or intermittent." We held that a substitute employee with no regularly scheduled hours, who worked an average of 9.9 hours per week over a six-month period, did *not* have an irregular or intermittent work pattern. The majority fails to reconcile the holding in *Warrenton-Hammond School District* with its holding here which excludes employees who average more weekly hours (20) over a longer period of time (12 months).

It is clear that a number of employees covered by the petition are not casual under any reasonable definition of that term. They are a substantial, integral and continuing part of the County workforce.

## II

Thus, the petition proposes to add both regular and casual employees to the existing bargaining unit of regular employees. The inclusion of casuals means the petition as written does not describe an appropriate unit. That, however, does not end the inquiry. We are not stuck with a petition on a take-it-or-leave-it basis. The statute makes it this Board's job to designate the appropriate bargaining unit. ORS 243.682(1). Cases confirm this Board's authority to determine whether a unit different from the one described in the petition would be appropriate. A recent example is *Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-03, 20 PECBR 745 (2004). There, we found that the appropriate bargaining unit was smaller than the one sought in the petition. We ordered the employer to provide a list of employees in the unit we deemed appropriate, and we ordered an election provided that the showing of interest was sufficient for the unit as we designated it. *See also, International Brotherhood of Electrical Workers, Local No. 569 v. Eugene Water and Electric Board*, Case No. RC-36-93, 14 PECBR 808, 817 (1993) (this Board has authority to add or delete classifications from the bargaining unit proposed in the petition).

Under this authority, we should designate as appropriate the unit described in the petition, but *excluding casual employees* (as we define casual). The employer should submit a new list, and if the showing of interest is sufficient, we should order an election.

Of course, this approach works only if we have a clear and objective definition of "casual." We borrowed the concept of "casual employees" from the National Labor Relations Board (NLRB) and said we will refer to the experience of the NLRB on questions regarding casual employment. *Salem Federation of Classified Employees v. Salem School District 24J*, Case No. C-169-83, 7 PECBR 6187, 6194-6195 n. 3 (1983).<sup>27</sup> I therefore turn to an examination of NLRB cases.

The NLRB uses a bright-line standard for determining casual employment: an employee is properly part of the regular unit (*i.e.*, is not casual) if the employee worked an average of at least 4 hours per week in the quarter preceding the eligibility date for the

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<sup>27</sup>The majority does not consider NLRB precedent. It is unclear if the majority intends by its silence to overrule *Salem Federation of Classified Employees*.

election. The NLRB has applied this particular formula since at least 1969.<sup>28</sup> *The May Dep't Stores Co.*, 175 NLRB 514 (1969), *supplemental order* 181 NLRB 710 (1970); *Allied Stores of Ohio, Inc.*, 175 NLRB 966, 969 (1969). The NLRB continues to use that formula today. *E.g.*, *New York Display & Die Cutting Corp.*, 341 NLRB No. 121 (2004);<sup>29</sup> *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003).

We should rely on NLRB's experience and adopt a similar approach.<sup>30</sup> Doing so would be consistent with our caselaw. In *Oregon School Employees Association v. Warrenton-Hammond School District 30*, which I discussed at length earlier, this Board applied an analysis generally similar to the one the NLRB uses. That is, we considered each employee individually to determine if they worked a substantial number of hours over a significant period of time.

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<sup>28</sup>The general approach is even older. In *McCabe, Hamilton & Renny, Ltd.*, 3 NLRB 547, 549 (1937), the NLRB held that in order to insure employees the full benefits of the right to self-organization, longshoremen who worked more than 75 hours in the 6 months before the decision are not casual and are part of the bargaining unit. This is an average of slightly less than 3 hours per week. Although the specific numbers are different from the current formulation, the NLRB has generally relied for nearly 70 years, without apparent difficulty, on the hours worked over an extended period to determine casual employment. The NLRB's long and successful history with this approach should ease the majority's concerns about whether the approach is workable.

<sup>29</sup>The issue in *New York Display* was whether an employee was casual or regular part-time. The NLRB considered not only the length but the regularity of employment. It stated:

“Regularity does not necessarily mean a fixed schedule; rather, this requirement can be satisfied by evidence that an employee has worked a substantial number of hours within the period of employment prior to the eligibility date and there is no showing that such work has been only on a sporadic basis. The standard frequently used by the Board to determine the regularity of part-time employment is to examine whether the employee worked an average of 4 or more hours a week in the quarter preceding the eligibility date.” (Citations omitted).

<sup>30</sup>In addition to the NLRB's long experience with a numerical formula, a number of states have adopted some variation of the NLRB's bright-line numerical approach. The Michigan Employment Relations Commission held that employees who work at least four hours per week are considered regular part-time employees. *Swartz Creek Community Schools*, 1986 MERC Lab. Op. 358 (1986); the New Jersey Employment Relations Commission defines a casual employee as one who works less than one-sixth the average number of hours worked by regular full-time and part-time employees. *Mt. Olive Board of Education*, 8 NJPER 102 (1982) and *Township of Cranford*, 12 NJPER 17214 (1986); a Rhode Island court upheld that state labor board's definition of a casual employee as one who works 16 weeks or less per year. *City of Providence School Department v. Rhode Island State Labor Board*, 117 LRRM 2953 (2005); and a Minnesota statute defines casual employees as those who work the lesser of 14 hours per week or 35% of the normal work week in the relevant unit. Minnesota Public Employment Labor Relations Act, Section 179A.03, subdivision 14(e).

The majority chides me for “disregarding settled ERB precedent.” To the contrary, it is the majority that ignores precedent. Specifically, they ignore *Warrenton-Hammond School District* with essential facts that are indistinguishable from those here. They also ignore *Elvin v. OPEU*, 313 Or 165, 832 P2d 36 (1992), where the Supreme Court directed us to consider NLRB cases prior to 1973 when interpreting the PECBA.<sup>31</sup> They further ignore the holding in *Salem Federation of Classified Employees* which says we will refer to the NLRB’s experience on questions concerning casual employment. The majority’s refusal to consider NLRB decisions ignores settled precedent.

The majority attempts to justify its refusal to consider NLRB precedent on grounds that “[t]he NLRB’s unit clarification rules are totally different from ours.” Any differences, however, are merely procedural. The underlying substantive question is the same for both agencies: are the employees at issue appropriately part of the bargaining unit? To answer this question, both the NLRB and this Board consider whether the employees are casual, and the majority offers no reason why *procedural* differences should lead to different *substantive* results on the issue.<sup>32</sup>

To the contrary, as the majority points out, this Board adopted its unit clarification rules in 1980. Three years *later*, we held in *Salem Federation of Classified Employees* that we should look to NLRB cases on issues concerning casual employment. The fact that we decided *Salem Federation of Classified Employees* after we adopted the rules conclusively demonstrates that we did not intend the rules to prevent us from looking to NLRB decisions on the issue of casual employment.

Using the NLRB’s objective numerical standard to identify casual employees has a number of advantages. It is clear, easy to apply and provides the parties with practical guidance that is absent in the majority’s approach. It would allow labor and management to determine on their own whether an employee is excluded, often without the need for litigation. On those few occasions when litigation was still necessary, it would be far less time-consuming. This would further the core PECBA policies of maintaining labor peace and

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<sup>31</sup>The PECBA is similar to the NLRA in structure, language and purpose. *Elvin v. OPEU*, 313 Or 165, 175 n.7, 832 P2d 36 (1992). As a consequence, we interpret the PECBA by looking at how the NLRA was interpreted prior to 1973, the year the PECBA was enacted *Id.* at 177-178, 179. The 4-hour rule is a pre-1973 interpretation of the NLRA and is entitled to great weight

<sup>32</sup>I note that our procedures concerning unfair labor practice and duty of fair representation cases are also significantly different from those in the private sector, but we nevertheless regularly consult and follow private sector precedent on substantive issues in these areas. The majority fails to explain why procedural differences regarding unit clarifications prevent us from seeking guidance from the NLRB on substantive issues concerning casual employment.

providing a prompt resolution of labor disputes. It would also treat each employee as an individual, thereby ensuring that no employee is wrongly denied the statutory right to an election solely because some others in the group are ineligible. In short, a numerical standard establishes a clear, objective, reasonable, practical and more accurate alternative to “fact-matching.” I would use the NLRB standard to identify the employees who should be excluded as casual.<sup>33</sup>

### III

I turn to the remainder of the analysis. It bears remembering that the question of whether an employee is casual addresses only one of the statutory factors—the community of interest. Casual employees are *excluded* from a unit of regular employees because they do not share a community of interests. The PECBA and our rules also require us to consider a number of other factors when determining an appropriate bargaining unit. ORS 243.650(1) and 243.682(1); OAR 115-25-050. To be *included* in the unit, an employee may not be casual, and must additionally meet the other statutory standards.

Here, nearly all of the factors favor inclusion of those employees who are not casual. The petitioned-for employees generally do the same work as the regular employees; they work at the same job sites; they predominantly work in the same job classifications; they are required to have the same or similar qualifications; they have regular contact with each other on the job; their work is integrated with regular employees rather than separate; they are under the same chain of supervision as regular employees; they are hired at the same initial wage rate as regular employees, and if they work consistently, can advance on the wage scale;<sup>34</sup> they get the same hiring preference for internal recruitments as regular employees;

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<sup>33</sup>If we were to adopt the NLRB formula, we could then discuss whether any adjustments were needed to accommodate the unique policies and history in Oregon. I would suggest a discussion of whether the formula should apply to substitute teachers. We have a long history of excluding substitutes from bargaining units of regular teachers. They instead form separate substitute units. *Mid-Valley Bargaining Council v. Greater Albany Public School District*, Case No. C-17-81, 6 PECBR 4766 (1981). Reversing this long-standing pattern might cause unnecessary disruption and instability.

The unique statutory overlay for substitute teachers might also require different treatment. The law specifically defines a substitute teacher, ORS 342.815(8), and it sets a wage rate for substitutes, ORS 342.610. The existence of a statutorily guaranteed wage indicates that substitutes may have different bargaining priorities than regular teachers who have no such guarantee. *Mid-Valley Bargaining Council*, 6 PECBR at 4777.

<sup>34</sup>Tr. 149-150

they are in the same pool for promotions;<sup>35</sup> and the showing of interest cards accompanying the petition indicate the employees' desires to be part of the existing unit. Once casual employees are eliminated from the balance, these factors weigh heavily on the side of inclusion.

#### IV

The majority uses the wrong analysis and consequently reaches the wrong result. It dismisses this petition even though it includes a group of employees who are appropriately part of the regular unit.<sup>36</sup> I believe this group is statutorily entitled to vote on whether to join the bargaining unit. I therefore dissent.



Paul B. Gamson, Board Member

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<sup>35</sup>Tr. 47

<sup>36</sup>I agree with the majority's suggestion that the petitioned-for employees could appropriately form their own separate unit. Under the majority's decision, however, such a unit would include both casual and regular employees. Ironically, this results in precisely the mixture that the majority identifies as the factor that led it to deny this petition. The majority should let the regular employees join the regular unit, leaving only those employees who are truly casual to form their own unit.