

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; )

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

Petitioner, )

v. )

MARION COUNTY, )

Respondent, )

Case No. UC-33-04. )

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RULINGS AND ORDER  
ON PETITION FOR  
RECONSIDERATION,  
REHEARING AND  
MOTION TO AMEND  
UNIT CLARIFICATION

On April 21, 2006, the Board issued its Order in these consolidated cases, *SEIU Local 503 v. Marion County*, Case Nos. UC-32/33-04, 21 PECBR 327 (2006). SEIU Local 503 sought to add temporary employees to its existing strike-permitted and strike-prohibited bargaining units of regular employees. The Employment Relations Board (ERB) dismissed the unit clarification petitions based on its consideration of the community of interest factors in ORS 243.682(1); and its further determination that, because of their irregular scheduling, temporary employees lacked a sufficient community of interest with the regular employees in the existing bargaining units.<sup>1</sup> On May 4, 2006, SEIU Local 503 filed a Petition for Reconsideration, Rehearing, and Motion to Amend the Unit Clarification Petitions.

In its Petition for Reconsideration, SEIU Local 503 seeks to exclude “casual temporary employees” of Marion County “with irregular work schedules” from its unit clarification petitions. The Union also requests a rehearing to show which temporary employee positions are subject to the amended unit clarification petitions, involve regular hours of work. In support of its request for rehearing, the Union states that the record in these unit clarification cases is currently insufficient to enable ERB to decide whether a majority of the employees in the units originally proposed by SEIU Local 503 work irregular hours.

Local 503 also asks that the Board adopt some sort of “bright line” test for determining “casual” employee status. Finally, Local 503 suggests that the Board remand these consolidated cases to an Administrative Law Judge to determine which temporary employees are casual and which are regular employees.

We grant reconsideration to correct certain clerical errors in our opinion, as set forth below. Otherwise, we decline to grant any of Petitioner’s petitions and motions.

Petitioner cites no cases which would prompt the Board to reconsider its dismissal of the existing unit clarification petitions, or to apply a new “bright line” test to unit clarification petitions. Nor does our dissenting colleague. We decline to do so.

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<sup>1</sup>Member Gamson dissenting.

In addition, Petitioner gives the Board no occasion to reconsider its conclusion that a majority of temporary employees do not share a sufficient community of interest with regular employees in the two existing bargaining units. Our dissenting colleague incorrectly concludes that the Board majority will require the parties in cases like this to litigate the specifics of every position. This has never been required by ERB. We do not introduce such a requirement here.

We also decline to grant Petitioner's motion to amend the existing unit clarification petitions. A unit clarification petition filed under OAR 115-25-005(4) seeks to add a defined and appropriate group of employees to an existing bargaining unit. The petition must be supported by a showing of interest of at least thirty percent of the group sought for inclusion. As Local 503 concedes, the current record does not allow the Board to determine which "temporary" employees work regular hours. Local 503 does not know who might be subject to the amended petitions. Nor does this Board.

That is precisely what Local 503 did initially. When Local 503 filed its unit clarification petitions in these consolidated proceedings, it sought to add an identifiable group of temporary employees to its strike-permissible and its strike-prohibited bargaining units. Local 503 said how many employees it wished to accrete to these units. It submitted a showing of interest, as required, in support of its petitions. ERB made an administrative determination that the petition was supported by a sufficient showing of interest. The case then went to hearing before the ALJ and the Board.

The County and the Union knew which class of employees SEIU Local 503 wanted to accrete, and how many individuals were contained in that class. This is reflected in the findings of fact made by the ALJ and the Board. The parties litigated whether the temporary employees had a sufficient community of interest to be added to the existing bargaining units. A majority of the Board judged the community of interest to be insufficient. We also declined to add those temporary employees who may have had regular work schedules—who are identified in our order—to the existing units, because to do so would not have led to bargaining units which were logical in definition and scope, *PCC Faculty Association v. PCC*, Case No. UC-13-00, 19 PECBR 129 (2004).

Petitioner does not ask the Board to add these identified positions to the existing strike-permitted and strike-prohibited bargaining units. Instead, the

Union now wants to abandon most of the positions which were the subject of the current unit clarification proceedings, and add only “regular” temporary employees to its existing bargaining units. Local 503 argues that this is necessary because the current record does not allow the Board to determine which “temporary” employees work regular hours. Local 503 concedes that it does not know who might be subject to the amended petitions. Nor does this Board.

Petitioner nevertheless argues that this Board should let it use its initial showing of interest to support its amended petitions to accrete new groups of employees, even though these groups are very different from those employees it originally sought to add to its existing units. This turns the showing of interest requirement upside down.

The Board has no way to determine—administratively or otherwise—the sufficiency of the showing of interest on which SEIU Local 503 would now rely. In any event, the showings of interest submitted in support of the existing petitions cannot be used to support Petitioner’s amendments to those petitions. The employee groups involved are too different.<sup>2</sup>

For these reasons, we also decline to remand the above-named consolidated cases to an Administrative Law Judge. As it stands, the petitions were properly dismissed. As amended, the petitions are not properly before the Board.

We conclude that, in order to add new groups of employees to its existing units of regular County employees, SEIU must file new unit clarification petitions, supported by a sufficient showing of interest, seeking to add an identifiable group of employees—“regular temporaries” or otherwise—to each of the bargaining units. To hold otherwise would be inconsistent with ERB’s rules, practices, and decisional law, and would not effectuate the policies and procedures of the Public Employee Collective Bargaining Act (PECBA).<sup>3</sup>

Finally, we take the opportunity to correct errors in our order of April

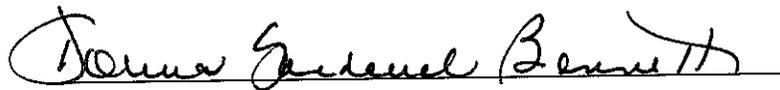
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<sup>2</sup> We do not decide whether, under appropriate circumstances, a showing of interest submitted in 2004 in support of the initial petition, could ever serve to support a unit clarification petition, amended in 2006, which seeks to accrete a different group of employees to an existing bargaining unit.

<sup>3</sup> Member Gamson’s “parade of horrors” goes well beyond the circumstances of this case, or the law applicable thereto. We reiterate that the only matters currently before the Board are consolidated unit clarification petitions filed under OAR 115-25-005(4)

16, 2004. Specifically, on p. 26 of the order, 21 PECBR 348, the first sentences of the last complete paragraph are corrected to read "As in *Brookings-Harbor School District N. 17, North Lincoln Hospital, PCC*, and cases cited therein, we did not rely on the number of hours worked by each employee, but on the regular and recurrent nature of his or her employment. In *Warrenton-Hammond*, we applied the same test 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."

DATED this 30<sup>th</sup> day of June 2006.



Donna Sandoval Bennett, Chair

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\*Paul B. Gamson, Board Member



James W. Kasameyer, Board Member

\*Member Gamson Dissenting.

This Order may be appealed pursuant to ORS 183.482.

Member Gamson, Dissenting

SEIU petitions for three alternative forms of relief: reconsideration, rehearing, or leave to amend. I would grant the petition.

Reconsideration

For the reasons expressed in my dissent (21 PECBR at 350-359), I believe the majority's decision to dismiss this case is wrong. I would grant reconsideration

and allow the petition to proceed.

### Rehearing

SEIU alternatively seeks a rehearing. I would also grant this motion. In its underlying opinion, the majority set a new standard for litigating questions about casual employees. For the first time, it requires SEIU to provide evidence on the working conditions of each of the 491 employees covered by the petition.<sup>4</sup> As a matter of fairness, it should allow SEIU an opportunity to present evidence which meets this standard.<sup>5</sup>

More basically, the majority loses sight of the primary purpose of a hearing in a unit clarification case. Under Board rules, hearings on a unit clarification petition such as this one “are for the purpose of developing a full factual record to be considered by the Board.” OAR 115-25-045(3). They are not adversarial proceedings where one party has the burden of proof. According to the majority, it cannot tell which employees are casual.<sup>6</sup> If that is the case, the majority should welcome the opportunity to see all the evidence so that it can determine the issues before it based on a full record.

### Leave to Amend

As a third alternative, SEIU asks to amend its petitions to expressly exclude temporary employees. I would also grant this request. Indeed, I do not believe it

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<sup>4</sup>Although the majority now purports to disavow such a requirement, that does not square with its initial decision. The parties presented reams of documentary, statistical and other evidence of employee working conditions. For example, SEIU proved that dozens of employees worked an average of at least 20 hours per week over a 12-month period. Even that was not enough to convince the majority that those employee schedules were neither irregular nor intermittent. The only evidence the majority found sufficient was from the three employees who testified in person and in great detail about their working conditions.

<sup>5</sup>I note that at hearing, SEIU attempted to provide this evidence. It asked the County to produce documents that detail the work schedules of the employees covered by the petition. (Tr. 17.) This evidence is uniquely in the employer’s possession. The County did not provide the evidence and the ALJ did not order the County to produce it. The majority should clarify what more it believes SEIU should have done. Under the majority ruling, I see no alternative to requiring each of the 491 employees to testify.

<sup>6</sup>The majority is inconsistent. At one point, it says it “does not know” who is included in the proposed unit. At another point, it asserts that the group involved in the original petition is “too different” from the group proposed in the amended petition, a determination it could make only if it knows who is included in each petition. It cannot be both ways.

should even be necessary for SEIU to request this relief. As I describe in my dissent, this Board frequently amends a petition on its own to conform to its determination of an appropriate unit. The clearest circumstance for exercising this authority is to exclude from the petition such categories as confidential, supervisory or casual employees. Early in these proceedings, the Board should have amended the description on its own to exclude casual employees.<sup>7</sup>

The majority states in conclusory fashion that it will not accept the showing of interest here because it was originally submitted for a different group. This ignores our practice. We frequently allow a party to rely on a showing of interest for a unit that is a smaller subset of the unit initially identified in the petition. *E.g., Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-03, 20 PECBR 745 (2004); *International Brotherhood of Electrical Workers, Local No. 569 v. Eugene Water and Electric Board*, Case No. RC-36-93, 14 PECBR 808, 817 (1993). The majority offers no principled reason to reject this authority.

Most alarming is the majority's concern that it cannot determine "who might be subject to the amended petitions."<sup>8</sup> It thus rejects SEIU's motion to amend, on grounds that it cannot tell if the showing of interest is adequate. We have never before required a party to provide a record (and presumably hold a hearing to create the record) to show who is covered by a petition so we can validate a showing of interest.

The majority's rationale has sweeping consequences. Nearly every petition filed with this Board contains a unit description that expressly excludes certain groups. Common exclusions are confidential and supervisory employees, temporary employees, casual employees, and employees in other bargaining units. SEIU petitions for "non-casual temporary employees," but excluding such groups as interns, practicum and work study students, employees in job classifications represented by other labor organizations, supervisory and confidential employees.

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<sup>7</sup>The majority glibly suggests that SEIU should file a new petition. Under Board rules OAR 115-25-005(4) and 115-25-015(4), the employees may need to wait as long as three years before they will be permitted to file again. This provides little relief to employees who want to vote now, and it does little to further the PECBA policy of guaranteeing employees the right to join a labor organization of their own choosing.

<sup>8</sup>The majority traps SEIU in a Catch-22. On one hand, it rejects the petition because it cannot tell who is excluded as casual. On the other hand, it denies SEIU a hearing that would allow it to show who is casual.

This is a garden-variety petition. This is no more or less specific than dozens of others filed with this agency each year. At the showing of interest stage, we *never* know which particular employees fall under these generic exclusions, so SEIU's proposed amendment is no different from any other in this regard.<sup>9</sup> The majority nevertheless requires a specificity of this petition that it has not before required of other petitions.

Similarly, we have never before required proof or permitted litigation to determine who is covered by the petition and which showing of interest cards are from an employee in an excluded group.<sup>10</sup> Questions about which employees are properly included in the group are typically resolved at later stages, such as an objection to the petition, a challenge to a ballot, or at some other later stage. The majority cites no authority and gives no reason for requiring SEIU to prove such matters at the showing of interest stage.

The majority's rationale necessarily leads to one of two conclusions. Either the Board will hereafter require proof in all cases to support the showing of interest, or else it is holding this petitioner to a higher standard than any other. I find either possibility unacceptable. I would follow our normal routine and send the amended petition to our Elections Coordinator to process in due course.

The PECBA promises employees the right to join labor organizations of their choice. ORS 243.656(5) and 243.662. The majority denies the employees here the opportunity to exercise this fundamental right. I therefore dissent.



Paul B. Gamsont, Board Member

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<sup>9</sup>The employees' desires are ultimately determined by an election, not by the showing of interest. A showing of interest is merely a procedural device to insure that we do not waste time and resources on proceedings instituted by a union that has little or no chance to be elected the exclusive representative. Because no ultimate rights are determined by the showing of interest, we have not previously required the level of precision at this stage that we do at later stages after a hearing.

<sup>10</sup>Similarly, the NLRB does not permit parties to litigate the showing of interest. *See How To Take a Case Before the NLRB* §5.12(a) and (f) (BNA, 6<sup>th</sup> ed 1992).