

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-36-04

(UNIT CLARIFICATION)

LABORERS' LOCAL 483,)	
)	
Petitioner,)	
)	RULINGS,
v.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
CITY OF PORTLAND,)	AND ORDER
)	
Respondent.)	
_____)	

A hearing on the unit clarification petition filed by Laborers' Local 483 was held before Administrative Law Judge (ALJ) B. Carlton Grew on September 9, 10, and 14, 2004, in Portland, Oregon. The hearing closed with the submission of supplemental briefs on January 18, 2005.

Damon Mabee, Field Representative, Laborers' Local 483, 1125 S.E. Madison Street, Suite 206, Portland, Oregon 97214, represented Petitioner.

Lory J. Kraut, Deputy City Attorney, City Attorney's Office, City of Portland, 1221 S.W. 4th Avenue, Suite 430, Portland, Oregon 97204, represented Respondent.

Post-hearing, this case was reassigned to ALJ Susan Rossiter, who issued her proposed order on January 31, 2005. Neither party filed objections to the proposed order. We therefore adopt it and dismiss these proceedings.

Laborers' Local 483 (Union) filed this petition on April 30, 2004, under OAR 115-25-005(4). The petition sought to add approximately 83 employees who work with the City of Portland (City) under contractual arrangements made with S. Brooks

& Associates, d.b.a. Brooks Staffing (Brooks). The City filed timely objections to the petition, asserting that the employees in question were not "public employees" within the meaning of ORS 243.650(19), and that if they were found to be "public employees," they did not share a community of interest with the employees represented by the Union.

The issues presented are whether the employees proposed for inclusion in the bargaining unit are "public employees" subject to the Public Employee Collective Bargaining Act, and if so, whether the proposed bargaining unit is an appropriate one.

RULINGS

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

FINDINGS OF FACT

1. The City is a public employer. The Union is a labor organization and the exclusive representative of a group of City employees who are employed in the Bureau of Parks and Recreation (Parks).

2. The Union and City were parties to a collective bargaining agreement which was in effect from July 1, 2001 through June 30, 2004. Under the terms of that agreement, the Union is the exclusive representative of permanent, temporary, and emergency employment employees working full or part time in the classifications of recreation leader and recreation coordinator I and II. Recreation support employees, also known as part-time seasonal employees, work for the City for no more than 860 hours in a calendar year and are excluded from the bargaining unit.

3. The City charter authorizes temporary appointments "for the purpose of meeting emergency, non-recurring and short-term workload needs of the City." Temporary appointments may be made "for a seasonal period not to exceed five (5) months in duration." The City equates 5 months of employment to 860 work hours per year.

4. Parks operates City recreation programs, which include 11 community centers, 13 swimming pools, a music center, an art center, and numerous sports facilities. During summer, the busiest season, Parks offers about 7,000 different programs, classes, and activities.

For the 2004-05 fiscal year, the proposed budget for Parks includes a staff of 426.71 FTE of whom 79.33 FTE are employed as recreation leaders and recreation coordinators I and II. Parks uses an average of 1,500 seasonal part-time employees to staff its programs.

5. Recreation leaders perform a variety of jobs. Those assigned to community centers are responsible for greeting visitors to the Parks facilities, receiving payments, registering people for classes and activities, answering phone calls, and monitoring the fitness centers maintained by Parks. Recreation leaders may teach classes, substitute teach for absent instructors, or perform light custodial work. Recreation leaders who work in the aquatic centers serve as lifeguards, teach classes, and open and close the facilities.

Recreation coordinators I and II coordinate activities in a particular recreation program area, develop and plan programs based on community need, and organize, implement, and evaluate programs.

Both recreation leaders and recreation coordinators hire part-time seasonal employees to work as instructors for classes and activities, and direct and assign the work of Parks and Brooks employees, and volunteers.

6. For several years, the City has contracted with personnel agencies to provide employees to work at Parks for more than 860 hours per year. For 2001-02, the City contracted with Comprehensive HR to provide workers. Under the terms of the contract with Comprehensive HR, the City recruited, screened, and recommended particular applicants to Comprehensive HR for hire. The City set wages for the Comprehensive HR employees, and disciplined and terminated employees when necessary.

In March 2002, Comprehensive HR notified the City that it was facing bankruptcy and could no longer fulfill its contractual obligations. The City temporarily placed all the Comprehensive HR employees on the City payroll until a new personnel agency could be arranged through the contract bid process. On May 28, 2002, the City signed a contract with The Personnel Department to provide employees to Parks.

When the City began its contract with The Personnel Department, it followed the same procedures it had used with Comprehensive HR in regard to the recruitment, screening, hiring, compensation, and termination of contract employees. After this Board issued its ruling in *LIUNA, Local 483 v. City of Portland*, Case No. RC-22-02, 20 PECBR 208 (2003), however, the City changed its practices concerning

contract employees. The Personnel Department, rather than the City, began to recruit, interview, and screen prospective employees for Parks. The Personnel Department set wages and issued paychecks to employees at Parks, and had responsibility for the evaluation, discipline, and termination of these employees.

7. On September 23, 2003, the City issued an invitation to bid on the contract to provide employees to Parks. On March 23, 2004, the City signed a contract with Brooks to provide 60 to 120 temporary workers to Parks through March 31, 2005. Brooks is a private corporation; its management is completely independent of the City. Brooks provides temporary employees to a number of public and private employers.

Prior to the execution of the contract with the City, Brooks sent notices to all employees who had been contracted through The Personnel Department to work at Parks. These employees were invited to apply for positions with Brooks. Brooks staff conducted meetings at a number of Parks facilities to tell contract employees about Brooks, to inform them about open positions, and to accept applications from interested individuals. All employees who had contracted to work at Parks through The Personnel Department were hired by Brooks.

8. Under the terms of the contract with the City, Brooks provides approximately 60 to 85 employees who work at Parks in the following positions: instructor, lifeguard, front desk worker, office staff, building technician, skating rink attendant, fitness room attendant, gym supervisor, child care worker, recreation service representative, party/event coordinator, facility attendant, personal trainer, gym attendant, and building supervisor.

A Parks supervisor who needs the services of an employee under the Brooks contract contacts Lynn Sanders, the Brooks employee assigned to work with the Parks account. The Parks supervisor provides Sanders with a description of the open position as well as a suggested salary. Brooks staff then recruit, screen, and interview qualified applicants for the position. Brooks staff also check the criminal records of applicants. After the selection process is completed, the employee is sent to work at Parks.

9. Employees who work at Parks under the contract with Brooks submit all payroll forms and weekly time sheets to Brooks staff. Parks supervisors sign these time sheets to verify the hours worked. Brooks employees receive weekly paychecks from Brooks. Salaries are set by Brooks, based on suggested rates provided by the City; these suggested rates are based on the type of job performed and the employee's experience. Under the terms of the contract with the City, Brooks can bill the City for employee salary increases of no more than 50 cents per employee per year.

Employees working at Parks receive a manual prepared by Brooks, which contains relevant City rules and policies regarding employee behavior and conduct on the job. Employees must sign a form to indicate that they have read and understood the manual, and that they are willing to comply with the rules contained in it.

Brooks employees are eligible to receive holiday pay and vacation benefits; the amount and receipt of these benefits is based on employees' work schedules and the number of hours worked. Employees may purchase health care benefits through a plan offered by Brooks.

10. Salaries, benefits, and working conditions for Union bargaining unit members are established by the collective bargaining agreement. Bargaining unit members are paid biweekly, and receive medical, dental, vision, and life insurance benefits. Bargaining unit members are required to pay a portion of the cost of these benefits in accordance with the contract provisions.

Bargaining unit members receive a minimum of nine paid holidays and vacation days; the amount of vacation provided is based on length of service. Employees are also provided with sick leave and leave for personal reasons, such as funerals.

11. Brooks employees perform work which is the same as or identical to the work performed by part-time seasonal employees at Parks. Brooks employees work in the same Parks community centers, swimming pools, and facilities as do the other Parks employees.

Although Brooks employees and part-time seasonal employees may perform some of the same duties as those performed by members of the bargaining unit, bargaining unit members have greater responsibility for the overall operation of Parks programs. Examples of the tasks done by bargaining unit members include directing the operation of a fitness center, coordinating all youth sports for a facility, preparing brochures to publicize Parks classes and programs, organizing and maintaining computer records, and depositing money collected for Parks fees and classes.

12. Parks managers establish work schedules for, and assign duties to, all employees, including part-time seasonal, Brooks, and permanent workers. All Parks employees schedule use of leave and other time off from work with their supervisors. Brooks employees must also request and receive approval for use of vacation days from Brooks staff. A Brooks employee who is unable to work, or will be late to work, is expected to contact a Brooks staff member.

13. The work of Brooks employees at Parks is periodically reviewed. Parks supervisors receive evaluation forms from Brooks, which they fill out and submit to Brooks staff. The information contained in these evaluations is not shared with employees; it is primarily used by Brooks to assess the quality of the service provided by Brooks to Parks.

Brooks employees may be terminated by Brooks for a variety of reasons, including: inadequate performance; failure to report for work; providing false information on the employment application; abusive, violent, or harassing behavior; sexual harassment; working under the influence of drugs or alcohol; inappropriate use of Parks resources and technology; and falsification of time sheets.

A Parks supervisor cannot terminate the employment of a Brooks worker, but can tell Brooks not to send an employee back to Parks. Brooks has terminated two employees; one for failing to provide correct information on an employment application and another for a drug issue. Both of these employees had worked for Parks as contract employees with The Personnel Department and had been subsequently hired by Brooks. The employees were terminated soon after they were hired by Brooks.

Parks supervisors report any problems with Brooks employees to the Brooks staff, who are responsible for administering any needed correction or discipline. Parks supervisors have received forms prepared by Brooks on which they are asked to record performance problems involving Brooks employees. No Brooks employees have been disciplined.

14. Bargaining unit members serve a 180-day probationary period; during this period, they receive three written evaluations.

Bargaining unit members who have completed their probationary period may only be disciplined or discharged for just cause. Under the terms of the collective bargaining agreement, bargaining unit members may grieve discharge, discipline, and any other grievance or complaint "that might arise out of the application of this Agreement" through a grievance procedure that culminates in binding arbitration.

15. Part-time seasonal employees may be terminated at any time and for any reason by the City.

16. Parks policy prohibits employees who have worked 860 or more hours during a calendar year on City payroll from continuing to work for Parks during the same calendar year through employment by a temporary employment agency.

From 2000 through 2003, several individuals who were employed by Parks as part-time seasonal workers were warned by their Parks supervisors when they were close to working 860 hours in a calendar year. Their supervisors told these individuals to go to the employment agencies that had contracted with the City to provide employees to Parks, and apply for jobs with the agencies. These individuals were subsequently hired by the employment agencies, and returned to their previous work assignments at Parks.

During 2004, three people were employed in violation of City policy regarding employment by an employment agency. These individuals worked at Parks for 860 hours or more as Brooks contract employees, and were also employed by the City. In one case, this violation of Parks policy was unintentional. The Parks supervisor who hired the employee on the City payroll was unaware that the employee was also working for Brooks.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. Employees working for Parks under contract with Brooks are not included in the Union bargaining unit under the terms of the collective bargaining agreement.

In order to determine whether the employees at issue in this case are included in the Union bargaining unit under the terms of the collective bargaining agreement, we must first determine whether they are employees of the public employer or an independent contractor. *City of Portland Planning and Engineering Employees Association v. City of Portland*, Case No. UC-58-95, 16 PECBR 879, 885 (1996) AWOP 148 Or App 635, 939 P2d 678, 679 (1997).

This Board has adopted the "right to control" test used by the Oregon appellate courts to determine whether an individual is an employee or independent contractor. *Hillcrest-MacLaren Education Association v. Hillsboro and MacLaren Schools*, Case No. UC-39-89, 12 PECBR 19 (1990). In applying the "right to control" test, we focus on the relationship between the business entity and the individual, and analyze the following principal factors: (1) evidence of the right to, or the exercise of, control; (2) method of payment; (3) provision of equipment; and (4) the right to fire. *City of Portland*, 16 PECBR at 886, citing *McQuiggin v. Burr*, 119 Or App 202, 207, 850 P2d 385 (1993).

In *City of Portland*, 16 PECBR 879, we analyzed the employee status of individuals who were provided to the City of Portland's Bureau of Environmental Services (BES) by two engineering consulting firms, Crane & Meseth and CWEC. We applied the "right to control" test to analyze the relationship among the contract employees, the engineering consulting firms, and the City, and concluded "that the City has neither the right to control nor actually exercises control over the most significant employment conditions for the contract employees at BES." *City of Portland*, 16 PECBR at 886. We noted that Crane & Meseth and CWEC recruited, hired, evaluated, disciplined, and discharged the workers, paid their salaries and insurance benefits, and granted leave. We determined that the City controlled few of the important employment conditions for contract employees. The City interviewed and chose candidates for job vacancies from a small group selected by Crane & Meseth and CWEC, scheduled work days and hours, and provided daily technical supervision of the contract employees' work.

The facts here demonstrate even more strongly than those in *City of Portland*, 16 PECBR 879, that the individuals who work at Parks under contractual arrangements with Brooks are not City employees. Brooks staff members recruit, screen, and select candidates for vacancies at Parks, and evaluate, discipline, and terminate employees when necessary. Parks managers schedule work days and hours for Brooks employees, and direct the daily work of these individuals. Based on the record, we conclude that Brooks controls the most significant employment conditions for contract workers, and that they are not City employees.

We next consider whether Brooks and the City are joint employers; if the City is found to be a joint employer, then the positions at issue can be clarified into the bargaining unit. In making a determination regarding joint employer status, this Board considers whether "each of the two employers has a significant role in determining the essential terms and conditions of employment of the employees in question." *City of Portland*, 16 PECBR at 887, quoting *Boire v. Greyhound Corp.*, 376 US 473, 55 LRRM 2694 (1964). We examine the record to determine if the public employer, over which we have jurisdiction, has sufficient control over the terms and conditions of employment to enable it to bargain effectively. *Board of Trustees of Memorial Hospital v. NLRB*, 624 F2d 177, 104 LRRM 2825 (10th Cir 1980).¹

¹This Board has continued to follow the governmental control test used in *Board of Trustees of Memorial Hospital v. NLRB*, 624 F2d 177, 104 LRRM 2825 (10th Cir 1980), even though this case was overruled in *Aramark v. NLRB*, 179 F3d 872, 161 LRRM 2441 (10th Cir 1999). In *Aramark*, the *en banc* court held that the governmental control test was not a jurisdictional prerequisite required by the National Labor Relations Act (NLRA). The court held that the clear

As noted above, Brooks has control over the most significant working conditions for contract employees: recruitment, selection, hiring, evaluation, discipline, discharge, and determination of wages and benefits. The City's role is limited to that of scheduling and assigning work, providing equipment and the worksite, and supervising contract employees on a daily basis. The City's responsibilities in regard to the use of contract employees are not enough for us to conclude that it is a joint employer.

Finally, we consider the Union's argument that the City is, in fact, the true employer of the Brooks contract employees. According to the Union, many (if not most) of the Brooks employees were originally hired by Parks as part-time seasonal workers; when they had worked the 860 maximum number of hours permitted to temporary employees, they were instructed by Parks' supervisors to apply for jobs with the employment agencies that had contracted with Parks. These employees were subsequently hired by the employment agencies, and returned to their original work assignments at Parks. We do not find the Union's argument supported by the facts in the record.

The City demonstrated that changes have been made in the procedures for using contract employees; the changes began some time in 2003, after this Board issued its ruling in *City of Portland, supra*, 20 PECBR 208. Prior to that time, the City exercised substantial control over the conditions of employment for contract workers in Parks. After this Board issued its ruling, the City changed its practices to give the employment agency it was then using, The Personnel Department, greater control over the working conditions of contract employees at Parks. When Brooks began providing workers to Parks in March 2004, Brooks initiated a recruitment, application, and selection process for interested employees who were working at Parks through the previous contract with The Personnel Department. Although all employees contracted to work at Parks through The Personnel Department were hired by Brooks, they were not *automatically* retained: two employees were subsequently terminated by Brooks. Based on the record before us, we conclude that Brooks exercised independent judgment in making decisions about the major employment conditions of the contract employees who work at Parks.

language of the NLRA exempted *only* government entities and wholly owned government corporations from the jurisdiction of the NLRA, and not private entities that contracted with the government. The court in *Aramark* concluded that the NLRB properly exercised its discretion in asserting jurisdiction over a private corporation that contracted with the government to provide food service workers to a school and a university. We continue to employ the governmental control test from *Board of Trustees*, however, as the most useful means of determining the employment relationship between a governmental entity and a private corporation

We find that the employees working at Parks through the contract with Brooks are not employed by the City, and that the City is not a joint employer of these employees. The contract employees are not included in the bargaining unit under the terms of the collective bargaining agreement, and the petition will be dismissed.

ORDER

The petition is dismissed.

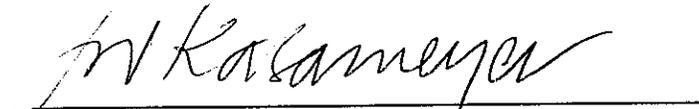
DATED this 21 day of March 2005.



Paul B. Gamson, Chair

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Rita E. Thomas, Board Member



James W. Kasameyer, Board Member

This Order may be appealed pursuant to ORS 183.482.

*Board Member Thomas absent on date of signing.