

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-38-03

(UNIT CLARIFICATION)

CLACKAMAS COUNTY, )  
 )  
 ) Petitioner, )  
 )  
 ) v. )  
 )  
 ) OREGON AFSCME COUNCIL 75, )  
 ) LOCAL 350, )  
 )  
 ) Respondent, )  
 )  
 ) and )  
 )  
 ) CLACKAMAS COUNTY )  
 ) EMPLOYEES' ASSOCIATION, )  
 )  
 ) Incumbent. )  
 )  
 )

DISMISSAL ORDER

David W. Anderson, Assistant County Counsel, Clackamas County, 906 Main Street, Oregon City, Oregon 97045-1881, represented Petitioner.

Susan Skites, Council Representative, Oregon AFSCME Council 75, 123 N.E. Third, Suite 505, Portland, Oregon 97232, represented Respondent.

Kevin Keaney, Attorney at Law, Lloyd Center Towers, 825 N.E. Multnomah Street, Suite 960, Portland, Oregon 97232, represented Incumbent.

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Clackamas County (County) filed this OAR 115-25-005(3) unit clarification petition on September 24, 2003, asserting that AFSCME is the representative of employees formerly employed by the elected County surveyor who are now employed by the County in its Department of Transportation and Development (DTD).

On October 13, Clackamas County Employees' Association (CCEA) filed a timely objection to the petition. CCEA asserts:

(1) A CCEA grievance over a related issue is pending, so the petition should be dismissed;

(2) The County (which filed its petition under OAR 115-25-005(3)) does not have standing to file either an OAR 115-25-005(6) petition or an OAR 115-25-000(1)(d) redesignation petition, so it cannot obtain a transfer of employees between bargaining units;

(3) The affected employees' work remains unchanged, so they remain included in the CCEA bargaining unit;

(4) The affected employees oppose transfer from the CCEA bargaining unit to the AFSCME bargaining unit.

**Contract terms.** The County and CCEA are parties to a July 1, 2000-June 30, 2003 collective bargaining agreement; it remained in effect as of the date on which the County filed the subject petition. Article I of that agreement, "Recognition," provides that CCEA is the exclusive representative of all County employees, except certain categories. One category of employees excluded from the bargaining unit is "employees covered by other [collective bargaining] agreements." The contract contains a grievance procedure that ends in binding arbitration.

The County and CCEA agree that the CCEA bargaining unit, prior to January 2003, included a number of employees in the "land surveyor" classification (salary plan EA, pay grade 25, job code 001310, 37.5 hours per week, step 6 pay rate \$27,969.60).

The County and AFSCME are parties to a July 1, 2000-June 30, 2003 collective bargaining agreement; it remained in effect as of the date on which the County filed the subject petition. Article II of that agreement, "Recognition," provides that

AFSCME is the exclusive representative of "all employees of the County [DTD]," with certain inapplicable exclusions.

The AFSCME bargaining unit includes a number of different employees in the "land surveyor" classification (salary plan DTD, pay grade 25, job code 003310, 40 hours per week, step 6 pay rate \$27.4767).

**Background.** Before January 2003, the County surveyor was an elected position. About 15 employees reported to the surveyor; CCEA represented those employees. The surveyor was the head of a department independent of the DTD. CCEA represented the 15 employees in the surveyor's office.

As of January 2003, the County surveyor became an appointed position, and the County designated the surveyor's office as one division within the DTD. With that change, the County considers the 15 employees in the surveyor's office to be included in a bargaining unit represented by AFSCME.

On January 15, 2003, CCEA filed a grievance challenging the County's "transfer" of surveyor employees from its bargaining unit to the AFSCME bargaining unit. CCEA argued that the County's action violated Articles I (Recognition), XXI(1) (Existing Conditions), or XXI(6) (Reorganization) of the 2000-2003 CCEA-County collective bargaining agreement. In the grievance, CCEA asserted that "[t]he duties, responsibilities, and location of [the affected employees] working for the Surveyor remain the same as before the 'transfer.'" The County does not challenge that assertion. To remedy the alleged contract violation, CCEA sought a rescission of the "transfer" and a make-whole remedy for the affected employees.

The County argues, in its petition, that CCEA's grievance "will not resolve the issue because a grievance under the CCEA agreement will not reach the issue presented by the recognition clause of the AFSCME agreement." In response to CCEA's objections, on October 21, the County reiterated that the pending CCEA grievance will not resolve the issue of whether the surveyor's employees are included in the AFSCME bargaining unit. In addition, the County argued that a Board decision of this unit clarification petition is required to avoid the "potential for inconsistent and mutually exclusive decisions by different arbitrators considering the language of different contracts, and drawing their authority from different contracts."

Further, on October 28, the County stated:

“\* \* \* An additional consideration is the practical problem of whether the CCEA will advance a grievance to arbitration if ERB dismisses the unit clarification petition. CCEA is not likely to advance the grievance to arbitration unless the County takes steps such as stopping remittance to CCEA of the union dues deductions from the affected employees, and beginning remittance of the dues to AFSCME instead. Any such steps will be disruptive and preferably would be undertaken only after a decision is made on the issue.”

From that County statement, this Board infers that, as to the payment of dues and any fair share payments, the County continues to treat the surveyor’s employees as being represented by CCEA.<sup>1</sup>

**Board rule.** OAR 115-25-005(3) states:

“(3) When the issue raised by the clarification petition is whether certain positions are or are not included in a bargaining unit under the express terms of a certification description or collective bargaining agreement, a petition may be filed at any time; except that *the petitioning party shall be required to exhaust any grievance in process that may resolve the issue before such a petition shall be deemed timely by the Board.*” (Emphasis added.)

**Discussion.** The issue in this OAR 115-25-005(3) petition is whether the surveyor’s employees—who were represented by CCEA up to January 2003—are or are not included in the AFSCME bargaining unit.

CCEA filed a grievance challenging the County’s removal of the surveyor’s employees from the CCEA bargaining unit. In the words of this Board’s rule, an arbitrator’s opinion and award “may resolve the issue” of whether the surveyor’s employees are or are not included in the CCEA bargaining unit.

This Board will not speculate about what might happen after an arbitrator renders such an award. This Board’s rule provides simply that the party filing an OAR

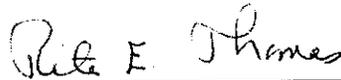
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<sup>1</sup>Compare *Yamhill County v. SEIU Local 503, OPEU and Yamhill County Employees Association*, Case No. RM-24-02, 20 PECBR 198 (2003), in which the public employer held such funds in escrow pending resolution of a question concerning representation

115-25-005(3) petition must exhaust "any grievance in process that may resolve the [representation] issue [presented by the petition] \* \* \*"

The CCEA grievance involves the issue presented by this petition; that grievance is pending. Under the circumstances, the County's petition is premature and untimely. If CCEA withdraws the grievance, or waives the grievance by failing to process it to arbitration, the County may re-file its petition.<sup>2</sup>

DATED this 9<sup>th</sup> day of February 2004.



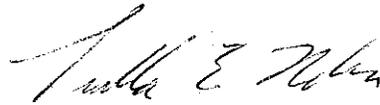
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Rita E. Thomas, Chair



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Paul B. Gamson, Board Member



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Luella E. Nelson, Board Member

This Order may be appealed pursuant to ORS 183.482.

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<sup>2</sup>Upon the filing of a timely petition, this Board may apply the analysis recently used in *Marion County Law Enforcement Association v. Marion County*, Case No. UC-37-02, 20 PECBR 398 (2003).

