

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-001-21

(REPRESENTATION)

IBEW LOCAL 89,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER CERTIFYING
	)	EXCLUSIVE REPRESENTATIVE
OREGON LEGISLATIVE ASSEMBLY,	)	(ELECTION RESULTS)
	)	
Respondent.	)	
	)	

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On January 13, 2021, Petitioner IBEW Local 89 filed a petition under ORS 243.682(2) and *current* OAR 115-025-0031(1)<sup>1</sup> to request an election for a bargaining unit comprised of the following classifications:

“Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees.”

On February 4, 2021, Respondent Oregon Legislative Assembly filed objections to the petition on multiple grounds. A hearing was conducted by Administrative Law Judge Jennifer Kaufman, and the matter was transferred to the Board. On April 6, 2021, the Board determined that Respondent’s objections were not valid and issued an Interim Order Directing an Election. That interim order is incorporated into and appended to this final order.

On May 6, 2021, the Board’s Election Coordinator sent ballots to eligible voters. One hundred and thirty-six valid ballots were returned by the deadline of May 27, 2021, which constitutes the date of the election.<sup>2</sup> OAR 115-025-0072(1)(b)(A). A tally of ballots was held on May 28, 2021. Before the tally, Respondent challenged 30 ballots on the basis that the employees

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<sup>1</sup>Effective January 7, 2021, the Board’s Division 25 rules were modified.

<sup>2</sup>Two ballots were deemed invalid and voided because they lacked the required signature on the ballot envelope.

who cast those ballots are supervisory employees under ORS 243.650(23)(a) or managerial employees under ORS 243.650(16), or both, and therefore were ineligible to vote. Pursuant to OAR 115-025-0073(2)(b), those ballots were impounded. The remaining 106 ballots were counted, with 75 ballots cast for IBEW Local 89 and 31 ballots cast for no representation. Because “the number of challenges will not affect the outcome of the election,” the Respondent’s challenges “will not be resolved,” pursuant to OAR 115-025-0073(2)(c).

On the same date as the ballot tally (May 28, 2021), the Election Coordinator provided the parties with the tally of ballots. OAR 115-025-0073(1). Objections to the conduct of the election (or conduct affecting the results of the election) were due within ten days of furnishing the ballot tally to the parties (*i.e.*, by June 7, 2021). OAR 115-025-0075(1)(a). No objections were filed. Accordingly, it is certified that

IBEW LOCAL 89

is the exclusive representative of a bargaining unit comprised of the following classifications:

“Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees.”

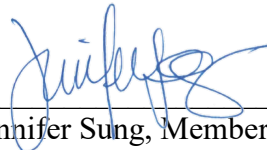
DATED: June 8, 2021.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-001-21

(REPRESENTATION)

IBEW LOCAL 89,	)	
	)	
Petitioner,	)	
	)	RULINGS,
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
OREGON LEGISLATIVE ASSEMBLY,	)	AND INTERIM ORDER
	)	DIRECTING AN ELECTION
Respondent.	)	
	)	

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Daniel Hutzenbiler, Attorney at Law, McKanna Bishop Joffe, LLP, Portland, Oregon represented Petitioner.

Tessa M. Sugahara, Attorney in Charge, and Jonathan Groux, Senior Assistant Attorney General, Oregon Department of Justice, represented Respondent.

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On January 13, 2021, Petitioner IBEW Local 89 (Petitioner or Union) filed a petition under ORS 243.682(2) and *current* OAR 115-025-0031(1)<sup>3</sup> to request an election for the following bargaining unit comprised of the following classifications:

“Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees.”

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<sup>3</sup>Effective January 7, 2021, the Board’s Division 25 rules were modified.

On February 4, 2021, Respondent Oregon Legislative Assembly (Branch or Respondent)<sup>4</sup> filed objections to the petition on multiple grounds. Because the petition sought to create a new bargaining unit of unrepresented employees, the matter was expedited under OAR 115-025-0065(1)(c) and assigned to Administrative Law Judge (ALJ) Jennifer Kaufman, who conducted a hearing on February 25, 2021. Pursuant to OAR 115-025-0065(7), the parties submitted post-hearing briefs on March 4, 2021. The matter was then transferred to the Board for the issuance of an order. *See* OAR 115-025-0065(2).

The issues are (1) whether the petitioned-for employees are excluded from the coverage of the Public Employee Collective Bargaining Act (PECBA); (2) whether the proposed bargaining unit is an appropriate bargaining unit; and (3) whether the petitioned-for employees are excluded on a classification-wide basis as confidential, managerial, or supervisory employees.

For the following reasons, we conclude that (1) PECBA does not exclude the petitioned-for employees from its coverage; (2) the proposed bargaining unit is an appropriate unit; and (3) the record does not establish that the petitioned-for employees are excluded on a classification-wide basis as confidential, managerial, or supervisory employees.<sup>5</sup> Therefore, we direct the Election Coordinator to conduct an election consistent with this order, to determine whether Petitioner should be certified as the exclusive representative of those employees.

### RULINGS

All rulings made by the ALJ were reviewed and are correct.

### FINDINGS OF FACT

#### The Parties and Structure of the Legislative Branch

1. International Brotherhood of Electrical Workers, Local 89 is a labor organization within the meaning of ORS 243.650(13).
2. The Legislative Branch is a branch of the State of Oregon. The Legislative Branch is a public employer within the meaning of ORS 243.650(20).
3. The Oregon Constitution expressly divides the powers of the government of the State of Oregon into three separate branches. Article III, Section 1 provides:

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<sup>4</sup>In their submissions to this Board, the parties used the phrase “Legislative Assembly” and “Legislative Branch” interchangeably to refer to the employer. For readability, we use the term “Legislative Branch” or the word “Branch” to refer to the employer, and the term “Legislative Assembly” to refer to the assembly of 90 elected members.

<sup>5</sup>As explained further below, consistent with our rules, and in a manner consistent with this order, both parties may challenge, on an *individualized* basis, the eligibility of *specific* employees to vote, based on an individual employee being a confidential, managerial, or supervisory employee. *See* OAR 115-025-0073(2). Any challenged ballot will be impounded, and the Board will only resolve a challenge if such a resolution is necessary to certify the results of the election. *Id.*

“The powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided.”

4. Article IV, Section 1 of the Oregon Constitution vests the legislative power of the state in a Legislative Assembly, which consists of a Senate and a House of Representatives. The Legislative Assembly consists of 90 elected members. The 90 elected members are comprised of 60 representatives, who serve two-year terms, and 30 senators, who serve four-year terms.

5. In addition to the 90 elected members of the Legislative Assembly, the Legislative Branch includes other offices, committees, and agencies. The Legislative Branch includes the parliamentary offices, which are the Office of the Secretary of the Senate and the Office of the Chief Clerk of the House.

6. In addition, the Legislative Branch includes the legislative agencies, which are Legislative Administration, the Legislative Counsel Office, the Legislative Fiscal Office, the Legislative Policy and Research Office, the Legislative Revenue Office, the Legislative Equity Office, and the Legislative Commission on Indian Services.

7. The Legislative Branch also includes committees referred to as statutory committees, joint interim committees, and joint interim task forces. One such statutory committee is the Legislative Administration Committee (LAC), which is established by ORS 173.710 and is a joint committee of the Legislative Assembly. The LAC consists of the Speaker of the House of Representatives, the President of the Senate, members of the House appointed by the Speaker, and members of the Senate appointed by the President. The committee is bipartisan. ORS 173.730 provides that no more than three House members of the committee shall be of the same political party and no more than three Senate members of the committee shall be of the same political party.

8. The LAC appoints a Legislative Administrator, who serves at the pleasure of the LAC and under its direction. *See* ORS 173.710. The Legislative Administrator is authorized by statute to perform administrative service functions for the Legislative Branch, including but not limited to accounting, data processing, personnel administration, printing, supply, space allocation, and property management. *See* ORS 173.720(1)(i).

9. The Legislative Administrator oversees the Legislative Administration agency, which is one of the agencies of the Legislative Branch. Legislative Administration oversees five functional areas: visitor services, information services, facility services, employee services, and financial services. Jessica Knieling is the Interim Human Resources Director and oversees Employee Services, one of the divisions of Legislative Administration. Knieling reports to the Legislative Administrator.

10. The Legislative Branch employs approximately 532 employees. The number of employees fluctuates because some employees are employed only for the duration of a legislative session. The employees employed by the Legislative Branch include the 180 petitioned-for

employees. The petitioned-for employees all work as what the Branch calls “personal staff” to one of the 90 elected members of the Legislative Assembly.

11. Each elected member is allocated an allowance provided in the Legislative Assembly budget to appoint personal staff. The Rules of the Senate for the 2021 session provide that a “member may appoint personal staff for a session or the interim or both, according to the allowance provided in the current Legislative Assembly budget.” Senate Rules 15.05(1). Compensation and benefits for personal staff “shall be determined by Legislative Administration.”<sup>6</sup> Similarly, the Rules of the Oregon House for the 2021 session provide that a “member may appoint personal staff for the session, the interim or both, according to the allowance provided[,]” and shall establish salaries payable to personal staff “in accordance with the policies and procedures as adopted by the Legislative Assembly.” House Rules 15.10(1)(a) and (b).

### The Legislative Branch Personnel Rules

12. Personnel administration in the Legislative Branch is governed by rules known as the Legislative Branch Personnel Rules (LBPRs). Under LBPR 1(6)(a), “[t]he authority for the personnel rules is derived from Article IV, section 11, of the Oregon Constitution, and, where otherwise not in conflict with the rules, ORS 173.005, 173.007, 240.200 and 240.245.”

13. The LAC holds the authority to review, amend, and adopt the LBPRs. At the staff level, Employee Services, the Legislative Administration division overseen by Knieling, facilitates the preparation and review of new or amended LBPRs. Before the adoption, amendment, or repeal of any personnel rule by the LAC, the Legislative Administrator must provide a copy of the changes to all legislative agency heads, parliamentarians, and leadership chiefs of staff at least 30 days before the rule’s effective date. The rules are subsequently considered and adopted by the LAC.<sup>7</sup>

14. When the LAC adopts the LBPRs, the adopted LBPRs apply only to the employees of the nonpartisan Legislative Administration agency (*i.e.*, employees in visitor services, information services, facility services, employee services, and financial services). The LBPRs apply to the remainder of the Legislative Branch only when they are subsequently adopted by a vote of both the House and the Senate.

15. Both the Senate and House have adopted the LBPRs for the current session of the Legislative Assembly. The Senate adopted Rules of the Senate for the Eighty-first Oregon Legislative Assembly (Senate Rules) on January 11, 2021. The Senate Rules govern numerous

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<sup>6</sup>The Senate Rules further provide that if a “member has a balance in the member’s staff allowance account at adjournment *sine die* of the preceding regular session, the member may use the balance during the interim for personnel or for legislative newsletters or other informational material.” Senate Rules 15.05(1)(b).

<sup>7</sup>In addition, the President of the Senate and the Speaker of the House of Representatives may establish an alternative procedure for considering modifications to the LBPRs, “except that no modification to a personnel rule may be made without notice and deliberation before committees of the Senate and the House or a joint committee of both houses.” LBPR 1(3)(c).

aspects of the proceeding of the Senate, including convening, voting, motions, debate and decorum, committees, bill sponsorship, and other topics. The Senate Rules incorporate the LBPRs and other rules and policies as follows:

“(1) The Legislative Branch Personnel Rules, as amended and in effect as of the last day of the Eightieth Legislative Assembly, are incorporated into the Senate Rules by this reference as rules of the proceeding of the Senate. The Respectful Workplace Policy, as adopted by the Joint Committee on Conduct on December 22, 2020, is incorporated into the Senate Rules by this reference as rules of proceeding of the Senate.

“\* \* \*

“(3) The Legislative Branch Personnel Rules, the Respectful Workplace Policy, and the Legislative Branch Contracting Rules apply to the nonpartisan offices of the legislative branch when both the Senate and the House of Representatives adopt the personnel rules, Respectful Workplace Policy, and contracting rules as rules of proceeding[.]” Senate Rules 18.01.

16. The House adopted Rules of the Oregon House of Representatives for the Eighty-first Legislative Assembly (House Rules). As the Senate Rules do with regard to the Senate, the House Rules govern numerous aspects of the proceeding of the House, including convening, voting, motions, debate and decorum, committees, concurrence, conference, and other topics. The House Rules incorporate the LBPRs and other rules and policies as follows:

“(1) The Legislative Branch Personnel Rules, as adopted by the House of Representatives on January 14, 2019, and August 10, 2020, and as adopted or revised by the Legislative Administration Committee on August 6, 2020, are incorporated into the House Rules by this reference as rules of proceeding of the House.

“\* \* \*

“(3) The Legislative Branch Personnel Rules and Legislative Branch Contracting Rules apply to the nonpartisan offices of the legislative branch.

“(4) The Respectful Workplace Policy as adopted by the Joint Committee on Conduct on December 22, 2020 is incorporated into the House Rules by this reference as a rule of proceeding of the House.” House Rules 2.03.

17. The LBPRs provide:

“The Legislative Branch Personnel Rules constitute rules of proceedings of the Legislative Assembly and may take precedence over conflicting provisions of state law to the extent that the rules expressly provide for such precedence. Section 4, *Mason’s Manual of Legislative Procedure* (2010 ed.)” LBPR 1(5)(a).

18. The LBPRs are intended to serve as uniform procedures for the employment practices in effect throughout the Branch. The policy statement in the rules states:

“It is the intent of the Legislative Assembly for the Legislative Branch Personnel Rules to encourage a high level of competence and professional capability by providing an orderly, efficient and equitable plan of personnel administration. In the development and application of these rules, continuing recognition must be given to the unique political and administrative requirements of the legislative process and the distinctive relationships among the various units of the Legislative Branch. The Legislative Branch Personnel Rules are intended to serve as uniform procedures that reflect current Legislative Branch employment practices.” LBPR 1(2).

However, some rules in the LBPRs expressly provide that they do not apply to the personal staff of elected members, as further described below. LBPR 2(28) defines “personal staff” as “an employee working directly for a legislative member and paid from the member’s services and supply budget.”

19. The LBPRs provide that to “promote consistency in the interpretation of the personnel rules throughout the Legislative Branch, the appointing authority is encouraged to consult with Employee Services or with the Labor & Employment Section of the Department of Justice. Senate Rule 16.05 and House Rule 16.05 do not apply to requests for assistance made under this paragraph.” LBPR 1(8).

20. The Legislative Administrator is responsible “for the administration of the Legislative Branch personnel system.” LBPR 1(6)(c). At the direction of the Legislative Administrator, the Human Resources Director prepares, maintains, and administers the personnel rules, related policies, a classification system, a compensation plan, and recruitment and selection procedures. *See* LBPR 1(6)(d).<sup>8</sup>

21. Consistent with that rule, the Legislative Branch adopts and maintains a “branch-wide class specification plan” that groups branch positions “into broad, agency-wide classes whenever possible[,]” “reduces the total number of classes consistent with good management practices[,]” and ensures that classes of jobs are “discrete and internally consistent.” LBPR 3(2). Under the rules, Employee Services allocates new positions to the appropriate class. As described in more detail below, until January 1, 2021, members’ personal staff were classified in two classifications (a junior position of Legislative Assistant 2, and a senior position of Legislative Assistant 1).

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<sup>8</sup>For purposes of the State Personnel Relations Law (SPRL), officers and employees of the Legislative Branch are “exempt service” employees of the State of Oregon and generally are not subject to the SPRL or the rules and policies of the Oregon Department of Administrative Services or its Chief Human Resources Office. ORS 240.245; LBPR 1(4). However, ORS 240.245 provides that, for a position in the exempt service where the salary is not fixed by law, there shall be “a salary plan equitably applied to the exempt position and in reasonable conformity with the general salary structure of the state.” ORS 240.245.

22. The Legislative Branch also maintains a compensation plan that applies to all employees of the branch. The purpose of the compensation plan is “to provide a uniform and equitable system for establishing and assigning salary levels and administering pay to recruit and retain a high-quality workforce.” LBPR 4(1). For each class of work, a minimum and maximum pay rate, and intermediate rates as necessary, are established based on a market salary review that includes rates paid by other public and private employers for comparable work, Legislative Branch policies and financial conditions, unusual recruitment and retention circumstances, and other relevant salary and economic data. LBPR 4(2) authorizes the Senate President and the Speaker of the House of Representatives to review the compensation plan or any applicable market data and “amend, approve or deny any compensation plan changes,” provided that they comply with LBPR 4 and applicable law.

23. No individual member of the Legislative Assembly has the authority to change any of the terms and conditions of employment for personal staff that are set under the LBPRs.

#### The 2019-2020 Classification and Compensation Study and the New Legislative Assistant Classifications

24. In summer 2019, the Branch undertook a branch-wide review of its classification structure and compensation plan, in part to ensure pay equity compliance.<sup>9</sup> The Branch contracted with Segal Waters Consulting (Segal) to conduct a classification, compensation, and pay equity study. The primary goals of the study were to ensure that position responsibilities were updated and well documented, job descriptions were updated to accurately reflect the work performed by employees, classification levels were clearly distinct, and compensation for jobs in the Legislative Branch was “market competitive.”

25. Initially, Segal conducted a pilot project, called Phase I, in the Legislative Policy and Research Office in summer 2019. Thereafter, the study was expanded to Phase II. In Phase II, Segal analyzed all positions branch-wide, except elected and appointed officials.

26. As part of Phase II, Segal asked all Branch employees to complete a 28-page Job Description Questionnaire (JDQ) through an electronic, fillable form posted on the Branch’s intranet. The questionnaire asked employees to describe their job and “actual current duties, even if they differ” from the job description, and estimate how much time they spend on those duties. Employees were also asked to answer questions on the following topics: 1) whether their job involves using discretion and independent judgment; 2) the minimum work experience and other qualifications required to do the job; 3) the type and complexity of management and supervision responsibilities; 4) the types of personal interaction with others outside direct reporting relationships (which the JDQ called “human collaboration”); 4) the freedom to act and the impact of actions taken in the job; 5) the knowledge and skill level required by the job; 6) the fiscal responsibility of the job; 7) working conditions and physical effort; and 8) the difference between the job and others in the job series.

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<sup>9</sup>House Bill 2005, enacted in 2017, amended Oregon’s equal pay law, with most changes effective on January 1, 2019. *See* Or Laws 2017, Ch 197, Section 2.

27. Employees were required to complete the JDQ by October 18, 2019. Each employee’s supervisor could add comments to their own employees’ JDQs. The electronic interface did not allow supervisors to change employee answers.

28. Employee Services compiled and sent Segal all completed JDQs in late October 2019. Segal analyzed the JDQs and aggregated similarities across the answers to create a recommended classification structure that accurately represents common job duties.

29. Based on the JDQs, Segal made a number of job analysis recommendations, including developing a job titling convention, recommending changes to some titles to better reflect the work performed, consolidating some job titles for jobs with similar duties and responsibilities, and updating job descriptions. Segal also conducted a job evaluation to establish internal job equity, and evaluated the following factors to assess consistency in jobs across the branch: education, experience, management/supervision, freedom to act, human collaboration, fiscal accountability, technical skills, and working conditions.

30. Segal also conducted a market evaluation, comparing jobs in the Legislative Branch to peer employers, and conducted a pay equity analysis.<sup>10</sup> Ultimately, Segal recommended a classification system and a pay structure for jobs across the Legislative Branch, including the Legislative Assistants who comprise the personal staff of elected members.

31. For personal staff who serve elected members, Segal recommended four new Legislative Assistant classifications—Legislative Assistant I, II, III, and IV. The Legislative Assistant I position is the junior-level position and the Legislative Assistant IV position is the senior-level position in the series. Segal also recommended a new compensation plan for the four positions.

32. According to the job descriptions, each of the four levels in the Legislative Assistant classification family is distinguished from the other levels as follows:

- Legislative Assistant I: This position is the first level in the Legislative Assistant job family. Its primary responsibility is general administrative support for the smooth and efficient day-to-day operations of the member’s office.
- Legislative Assistant II: While the focus of this position is to provide day-to-day office support for the member, this position is distinguished from the Legislative Assistant I in that it is more involved in the research and analysis of issues in the review and development of legislation.
- Legislative Assistant III: This position is distinguished from the II level in that it conducts research, analysis, and advises the member on legislative strategy. The position exercises a wide range of independent discretion and independent actions when interacting with other

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<sup>10</sup>Segal used the following peer employers: the legislative branch of California; the legislative branch of Washington; the State of Oregon executive branch; the counties of Multnomah, Marion, Lane, Clackamas, and Washington; and the cities of Beaverton, Eugene, Portland, and Salem. Segal made geographic adjustments “based on cost of labor in the market.”

Legislative offices, members, and constituents. It is involved in the development of legislative strategies and advancement of the policy agenda and legislative goals of the office.

- Legislative Assistant IV: This position is the highest level in the Legislative Assistant job family. While many of the duties and responsibilities are similar to the level III position, it is distinguished from the III level in that it typically has responsibility for supervision of staff and interns. Like the Legislative Assistant III, the position supports the member in the research, analysis, and development of legislation, often involving highly complex issues. The position often represents the member in community events and legislative committees and interacts with little oversight with Legislative offices, members, the media, constituents, and the public in general.

33. The LAC adopted the classification structure recommended by Segal. The LAC also adopted a rule authorizing the presiding officers to approve the pay plan for the positions. The presiding officers approved the Segal-recommended compensation plan for the Legislative Assistants, effective January 1, 2021.

34. On December 2, 2020, Employee Services sent the elected members of the 2021 Legislative Assembly a memorandum asking each member to determine which duties the member would assign to personal staff in 2021 and inform Employee Services. Employee Services would then place the personal staff employees in the classification selected by the member, effective January 1, 2021. The memorandum stated, in part, “Enclosed are the Segal drafted descriptions for each of the four [Legislative Assistant] levels. These descriptions were developed from the dozens of JDQs submitted by [Legislative Assistants]. It is understood and expected that each office will have unique duties and expectations to serve the member and district. The structure developed captures the substantive differences in job evaluation factors.”

35. In the December 2 memorandum, Employee Services responded to questions that had “been raised about the distinguishing features of the level 4.” Employee Services explained:

“There are two significant distinctions. The level 4 position is supervisory with authority to hire, discharge, assign and evaluate work and discipline or effectively recommend these actions to the appointing authority. This is distinguished from the lead work duties inherent in the level 3 of training/orienting new employees, assigning and reassigning tasks to other employees, giving direction to other employees concerning day-to-day work procedures, communicating established standards of performance to affected employees, reviewing the work of other employees to ensure conformance to established standards and providing informal assessment of employees’ performance to the supervisor. Second, the level 4 regularly acts as a proxy for the member in matters of import. While all levels represent the member, the level four regularly makes independent decisions on behalf of the member on significant matters.”

## The Job Descriptions of the Legislative Assistant I through IV Positions

36. The job description of the Legislative Assistant I position states that the position provides “general administrative support to the Legislative Member’s Office by coordinating schedules, managing correspondence, and serving as the point of contact regarding questions, and concerns[,]” and “[g]reets and responds to all visitors in the office.” It describes the primary responsibility of the Legislative Assistant I as “general administrative support for the smooth and efficient day-to-day operations of the Member’s office.” With regard to “reporting relationships and team work,” the description states that the Legislative Assistant I “[m]ay be assigned to various areas across the Assembly.”

37. In addition, the job description for the Legislative Assistant I position states that the essential duties and responsibilities of the position include overseeing the day-to-day operations and functions of the Legislative Member’s office; acting as the primary point of contact for the Legislative Member’s office, including answering phone calls, greeting visitors, coordinating visits, assisting with requests, and responding to general inquiries; providing administrative support, such as answering phones and processing mail; maintaining the Legislative Member’s calendar and scheduling appointments and arranging business travel; receiving and pricing invoices and reimbursement requests; coordinating special events; overseeing all aspects of the office, including oversight of the budget; and responding to constituent requests and questions.

38. To perform the Legislative Assistant I job, the employee must have knowledge of legislative processes and practices, existing legislation and its ramifications, historical context of policies, and current bills in process. In addition, the employee must possess skill in effective verbal and written communication, data management, researching policy issues, office management, and event organization. The employee must have the ability to pay close attention to detail, manage time effectively and stay organized, multitask and manage multiple projects simultaneously, remain calm and flexible under pressure, understand complex legislative issues, and provide excellent customer service and maintain a friendly, welcoming, and professional disposition. The minimum job requirements for the position are a bachelor’s degree and one to three years of relevant experience, or an equivalent combination of education and experience.

39. The job description of the Legislative Assistant II position states that the position provides “general administrative support to the Legislative Member’s Office by coordinating schedules, correspondence, events and responding to questions or requests for information[,]” and “[p]repares draft communications, speeches and legislation.” It also states that the position conducts “research, policy analysis, and performs outreach and other Constituent Services[,]” and attends “Committee meetings and performs related duties as necessary.” With regard to “reporting relationships and teamwork,” the description states that the Legislative Assistant II may “be assigned to various areas across the Branch.”

40. The job description for the Legislative Assistant II position states that the essential duties and responsibilities of the position, like the Legislative Assistant I position, include overseeing the day-to-day operations and functions of the Legislative Member’s Office and acting as the primary point of contact for the Legislative Member’s office and answering phone calls,

greeting visitors, coordinating visits, assisting with requests, and responding to general inquiries. In addition, the job description lists as essential duties and responsibilities developing messaging, writing floor speeches, composing letters, drafting responses to legislation, writing press releases, drafting bills, and evaluating policies; researching and writing policy analyses and analyzing proposed legislation; monitoring and tracking bills; and assisting in developing and implementing communication and outreach strategies and managing social media.

41. The knowledge, skills, and abilities listed in the job description for the Legislative Assistant II job are the same as those listed in the Legislative Assistant I job description. The minimum job requirements are higher—a bachelor’s degree and three to five years of related experience or an equivalent combination of education and experience.

42. The job description for the Legislative Assistant III position states that the position “[s]upports day-to-day operations of the Legislative Member’s Office in the areas of policy development, legislative strategy, and constituent services[,]” and conducts research and policy analysis. It also states that the position performs “outreach, provides constituent services and coordinates schedules and events[,]” prepares “draft communications, correspondence, speeches, and legislation[,]” and [a]ttends Committee meetings and performs related duties as necessary.” With regard to “reporting relationships and teamwork,” the description states that the Legislative Assistant III may “be assigned to various areas across the Assembly.”

43. The essential duties and responsibilities listed for the Legislative Assistant III position include supporting the member in efforts to advance the policy agenda and legislative goals of the office and developing and implementing legislative strategies; providing counsel, guidance, and feedback on legislative and policy decisions; monitoring committee hearings and floor debates and reporting legislative action or developments; drafting letters, speeches, and testimony; researching bills, policies, current laws, and topics; working with legislative counsel to draft or amend legislation; attending and staffing work groups, task forces, meetings, tours, and other events on behalf of the office; scheduling and coordinating meetings, hearings, town halls, and other events and managing the schedule of the legislative member; contacting and arranging for speakers, presenters, and witnesses; arranging travel and lodging accommodations; managing external communications, including social media accounts, newsletters and press releases, and formulating and executing communication plans; interacting with the general public, constituents, lobbyists, business leaders, and other legislators, legislative staff, and interest groups to understand issues, draft legislation and help get legislation passed and signed into law; providing responsive constituent services, acting as a liaison to constituents, and helping to provide constituents with resources and solutions; managing the day-to-day activities of the office, including clerical tasks, record keeping, research and reports; acting as the primary contact for all visitors, and answering phones and emails.

44. The knowledge, skills, and abilities listed in the job description for the Legislative Assistant III job are the same as those listed in the Legislative Assistant I and Legislative Assistant II job descriptions. The minimum job requirements are the same as those for the Legislative Assistant II position—a bachelor’s degree and three to five years of related experience or an equivalent combination of education and experience.

45. The job description for the Legislative Assistant IV position states that the position “[o]versees the day-to-day operations and administration of the Legislative Member’s Office, including supervision of interns and office staff.” In addition, the Legislative Assistant IV position assists “in the development of legislative strategies[,]” and conducts “extensive research and provides policy analysis and advice[,]” as well as prepares communications, correspondence, and speeches and attends committee meetings. Like the other Legislative Assistant positions in this series, the Legislative Assistant IV may “be assigned to various areas across the Branch.”

46. The essential duties and responsibilities listed for the Legislative Assistant IV position include supporting the member in efforts to advance the policy agenda and legislative goals of the office, and developing and implementing legislative strategies; providing counsel, guidance, and feedback on legislative initiatives and policy decisions; monitoring committee hearings and floor debates and reporting legislative action or developments, and tracking bills; and drafting letters, speeches, talking points, and testimony; researching bills, policies, current laws and topics, and creating reports based on findings; working with legislative counsel to draft or amend legislation; attending and staffing work groups, task forces, meetings, tours, and other events on behalf of the office; scheduling and coordinating meetings, hearings, town halls, and other events and managing the schedule of the member; contacting and arranging for speakers, presenters, and witnesses; managing external communications, including social media accounts, newsletters, and press releases, and formulating and executing communication plans; interacting with the general public constituents, lobbyists, business leaders, and other legislators, legislative staff, and interest groups to understand issues, draft legislation and help get legislation passed and signed into law; providing responsive constituent services, acting as a liaison to constituents, and providing constituents with resources and solutions; managing the day-to-day activities of the office, including clerical tasks, record keeping, research, and reports, and maintain and supply all office equipment, manage the budget, and arrange travel and lodging accommodations; acting as the primary contact for all visitors, and answer phones and emails; building and sustaining relationships with elected officials, community leaders, lobbyists, and various other outside groups; and hiring, training, supervising, and mentoring other employees or interns, and delegating responsibilities and duties.

47. The knowledge and abilities listed in the job description for the Legislative Assistant IV job are the same as those listed in the job descriptions for the other jobs in the Legislative Assistant series. The required skills are also the same, with one additional skill listed: skill in management and supervision of staff, volunteers, and interns. The minimum job requirements are higher than those for the Legislative Assistant II and III positions. The Legislative Assistant IV position requires a bachelor’s degree and five to seven years of related experience or an equivalent combination of education and experience.

48. Some personal staff use working titles rather than the classification assigned to their position. Common working titles for LA IVs include Legislative Director, Policy Director, and Chief of Staff. Employees or members may choose those working titles.

## Roles and Responsibilities of the Legislative Assistants

49. There is no testimony in the record from any employees in the Legislative Assistant I classification. The record indicates that the employees in the Legislative Assistant I classification are primarily engaged in general office support work, such as answering phones and email. In addition, Legislative Assistant I employees coordinate or assist with scheduling events and meetings for the elected member they support. Essentially, employees in the Legislative Assistant I position act as a gateway to the member.

50. Employees in the Legislative Assistant II classification perform the same duties as Legislative Assistant I employees, and in addition perform some research and analysis for their member. Anne Marie Backstrom, Legislative Assistant II in Representative Ken Helm's office, testified that she does scheduling and manages Representative Helm's calendar. She also attends meetings on behalf of Representative Helm when he is unavailable, takes notes, and reports back to him.

51. Backstrom also answers constituents' emails and responds to their calls and voicemails. She and the other employee in the office, Legislative Assistant IV Greg Mintz, divide the constituent-related work between them. Backstrom testified that when she is responding to constituents' emails, she uses Representative Helm's email account to respond (so that the constituent receives an email from Representative Helm). Otherwise, in her other work, such as scheduling meetings, she uses her own email account.

52. Backstrom also assists with some policy-related work, such as working with Legislative Assistants in other offices to obtain testimony for bills their members are working on together.

53. Backstrom testified that the work in their office is assigned directly by Representative Helm, who holds weekly staff meetings. When there are deliverables resulting from her work, Backstrom reports those directly to Representative Helm.

54. Backstrom had a phone call with Greg Mintz before she was hired in which he went over her resume with her. She subsequently was interviewed by both Representative Helm and Mintz. Later she was told that Representative Helm made the decision to hire her, although Mintz provided input to the decision. When the operation of the office was explained to Backstrom, she was told that Representative Helm makes hiring, firing, and disciplinary decisions.

55. Backstrom and Mintz work closely together. Backstrom considers her relationship with Mintz to be a "coworker relationship."

56. At the time of hearing, an intern was working in the office 30 hours per week for academic credit. Backstrom does not assign work to the intern. Backstrom has passed on information or tasks that are within the intern's assignments, and she has observed Mintz do the same.

57. Michael Greenblatt is a Legislative Assistant II who works in Representative Zack Hudson's office. Greenblatt is the primary staff person who handles scheduling in that office. Greenblatt also responds to constituents. He also works on policy issues, and Greenblatt and Emerson Hamlin, a Legislative Assistant III and the Chief of Staff to Representative Hudson, divide the bills that Representative Hudson's office is following. Greenblatt and Hamlin each work on the strategy and tasks related to advancing their assigned bills, such as contacting other representatives or senators who would support the bills.

58. Hamlin, a Legislative Assistant III to Representative Hudson, testified at hearing. She described her duties as generally consisting of office management, policy work, and constituent support. In the area of office management, she creates a budget for the office, orders supplies, and ensures that the office has adequate supplies.

59. With regard to policy work, Hamlin conducts research, talks with stakeholders about issues of importance to them, tracks committees and bills, arranges meetings with stakeholders, and works on strategy to help advance Representative Hudson's bills. Hamlin described the role of Legislative Assistants as working to advance their member's policy positions. She cannot independently determine or implement those positions; she is always acting on behalf of her elected member.

60. In the area of constituent support, Hamlin brainstorms with the other employee in the office, Greenblatt, about responses to constituents, drafts responses, schedules meetings with constituents, and meets with constituents.

61. As personal staff to Representative Hudson, Hamlin occasionally meets with people when Representative Hudson is unable to do so, but generally, Representative Hudson prefers to meet with people himself.

62. Hamlin testified that she works independently and generally receives only higher-level direction from Representative Hudson. However, in her previous role as personal staff to Representative Mitch Greenlick, she received more detailed instructions, which she attributed to her newness to the role and his long tenure as a legislator.

63. Hamlin assigns work to one intern, a university student, who works in Representative Hudson's office for eight hours per week. Hamlin does not supervise Greenblatt, the Legislative Assistant II, nor does she assign him work. Hamlin and Greenblatt receive direction directly from Representative Hudson, and work collaboratively.

64. Nolan Plese, a Legislative Assistant IV to Representative Pamela Marsh, testified that his job duties include a little bit of scheduling, handling constituent-related work, doing policy work on bills, helping to write testimony, and helping to schedule events, such as town halls, in the district.

65. Plese testified that he responds to constituents on behalf of Representative Marsh. In doing so, he often uses Representative Marsh's email account and drafts responses over her signature. He also uses her email account for other correspondence on behalf of the office. He

sometimes signs his own name, both in correspondence to constituents and to others. He generally collaborates with Representative Marsh on managing her email account.

66. With regard to policy work on bills, Plese testified that Representative Marsh generates most of the policy ideas. Plese conducts research and analysis, such as researching Oregon law and researching the law in other states. When they are ready to work with Legislative Counsel, he shares the draft request with Representative Marsh before working with Legislative Counsel. After he submits the draft request to Legislative Counsel, if Legislative Counsel has questions, he takes those questions back to Representative Marsh so that he can respond appropriately to Legislative Counsel based on how Representative Marsh wishes to proceed. Plese described his role as carrying out the directions and desires of Representative Marsh. In other work, he testified that he does not substitute his own judgment for Representative Marsh's judgment, but there are times when he "instinctively knows" what position she would take based on their prior discussions, and if so he makes a judgment on her behalf. If not, he checks with her to get direction.

67. In his Job Description Questionnaire, Plese described his job as follows: "Supporting the Representative to achieve policy and legislative goals, remain connected with her constituents and community leaders, establish and build relationships with relevant stakeholders, all within the fast paced and high stress environment of legislative session, and while working remotely during the interim. The position ultimately must be responsive to requests of the member, whether they be complex policy research, or scheduling enough time to eat lunch."

68. Paige Prewett, a Legislative Assistant III, also works in Representative Marsh's office on a part-time basis. Plese was not involved in the hiring of Prewett. Plese does not manage Prewett, or assign work to her; she gets her work assignments directly from Representative Marsh. He has never been held accountable for any decisions or errors by Prewett, and does not believe he would be. On one occasion, at Representative Marsh's direction, Plese attempted to secure an increase in Prewett's hours, but he was informed by Employee Services that it needed to receive an email directly from Representative Marsh in order to do so.

69. When Representative Marsh's office seeks to hire, Plese is sometimes involved.<sup>11</sup> On those occasions, Representative Marsh and Plese both look at resumes and select applicants for interviews. Plese schedules the interviews and sits in the interviews with Representative Marsh. Plese may ask questions during the interview. Representative Marsh makes her own hiring decision, although she sometimes asks for Plese's opinion.

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<sup>11</sup>When Plese testified about his involvement in the hiring process, he was not asked to limit his response to his involvement in the hiring of other employees (as opposed to interns), and he did not specify whether he was referring to the hiring of employees, interns, or both.

70. In addition to witness testimony from Hamlin, Backstrom, and Plese, the record includes 52 job description questionnaires related to the petitioned-for positions.<sup>12</sup> The JDQs for the petitioned-for employees in the record are distributed among the four classifications as follows:

Legislative Assistant I:	3 JDQs
Legislative Assistant II:	3 JDQs
Legislative Assistant III:	16 JDQs
Legislative Assistant IV:	30 JDQs

71. The JDQ included a section on discretion and independent judgment in which the employee was asked, “Does your job involve using discretion and independent judgment?” The JDQ also asked the employee to describe at least two examples of their use of discretion and independent judgment on the job.<sup>13</sup> In 43 of the JDQs in the record, the responding employee indicated that they use discretion and independent judgment in their positions. As an example, James Williams, Legislative Assistant IV to Senator Brian Boquist, gave “[d]rafting legislative bill requests for constituents and preparing testimony” and “[r]ecommending bill drafts for introduction to the legislative process” as examples of decisions or actions he takes that require discretion and independent judgment.

72. As another example, Jason Hitzert, Legislative Assistant IV to Representative (now Senator) Chris Gorsek, gave the following as examples of his use of discretion and independent judgment. “I’ve advised a number of Representatives on how to provide testimony on a given subject as well as providing talking points for committees and for the floor of the House.” In addition, he listed researching the prevalence of public health and natural hazards, and issues with training and equipping public safety officers by the Oregon Department of Public Safety Standards and Training. He also noted that he had worked with Representative Gorsek “to create strategies to work on issues over multiple sessions.” In the supervisor comments section, Representative Gorsek wrote, in part, that Hitzert “has the ability to deconstruct perspectives in order to anticipate the direction I want to go on any number of different issue areas which allows me to depend on him to use his discretion.”

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<sup>12</sup>In addition, the record includes two JDQs for positions not in the proposed unit, and several JDQs that appear to have been completed by individuals no longer employed by the Legislative Branch. The JDQs in the record comprise 1,723 pages.

<sup>13</sup>The JDQ referred to nine examples of actions that “may” constitute discretion and independent judgment, including “[m]aking decisions that affect the overall policies of the department or organization[.]” “[a]bility to depart from standard or division/department protocols without prior approval[.]” “[p]roviding consultation or expert advice to Oregon State Legislature senior leadership[.]” and “[c]ommitting Oregon State Legislature in matters that have a significant financial impact[.]” The JDQ also provided seven examples of actions that do not constitute discretion and independent judgment, including “[a]pplying technical knowledge to follow procedures (or to decide which procedures to follow)[.]” “[t]abulating data, conducting research or collecting facts and information[.]” and “[m]aking decisions that do not commit Oregon State Legislature in matters that have significant financial impact[.]” The JDQ did not specifically ask whether the responding employee exercises independent judgment while exercising “supervisory” authority over other employees.

73. As another example, Robert Unger, Legislative Assistant IV to Representative Paul Holvey, gave as examples of his use of discretion and independent judgment “[t]hinking on behalf of” the member when “meeting with advocates” and staff of the Legislative Branch, and considering, when scheduling meetings or events for the member, “how does this look to the public? Is this a beneficial meeting?” Later in the JDQ, when describing the consequence of an error for an employee in his position, Unger described his work as follows: “Legally we are an extension of the representative. Any direction I give to Legal Counsel, committee staff, agency requests for information/participation etc is taken as if the member has given that direction (which many times I am relaying an order from them[,]) but sometimes I need to take the initiative I know they would).”

74. As another example, Linda Heimdahl, a Legislative Assistant IV to Senator Kim Thatcher, gave “[a]bility to depart from standards or office protocols without prior approval[.]” and “[f]orming recommendations regarding changes to office policies or standards” as examples of her use of discretion and independent judgment.

75. The JDQ included a section entitled “Human Collaboration,” which seeks to measure “the job requirements of personal interaction with others outside direct reporting relationships as well as the impact the job has on organization, departmental or unit objectives, the output of services, or employee or customer satisfaction.” The JDQ asked the employee to choose one of five ranked levels of human collaboration: Level 1 (“work requires regular interaction involving exchange and receipt of information”); Level 2 (“Work may require providing advice to others outside direct reporting relationships on specific problems or general policies.”); Level 3 (“Interactions may result in decisions regarding implementation of policies.”); Level 4 (“Interactions and communications may result in recommendations regarding policy development and implementation”); and Level 5 (“Communications and discussions result in decisions regarding policy development and implementation.”).

76. In 43 of the JDQs in the record, the responding employee chose either Level 4 or Level 5 for “human collaboration,” indicating that they view themselves as making recommendations or decisions regarding policy development and implementation, as described in the JDQ question.

77. The JDQ also included a section entitled “Management and Supervision Responsibilities,” which asks the employee to identify one of five ranked levels for “nature of supervision”: Level 1 (no responsibility for the direction or supervision of others); Level 2 (occasional direction of helpers, assistants, seasonal employees, interns, or temporary employees); Level 3 (providing guidance and the potential to oversee another employee); Level 4 (supervising and monitoring performance for a regular group of employees (one or more full-time employees)); Level 5 (managing and monitoring work performance by directing multiple groups of employees across more than one business function within an organization unit); Level 6 (managing and monitoring work performance of an organizational unit).<sup>14</sup>

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<sup>14</sup>The JDQ did not define any of the terms relevant to our analysis, such as the terms “supervise,” “manage,” “direct,” “assign,” or “employee.” The JDQ was not intended to address the PECBA exclusions

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78. In 33 of the JDQs in the record, the responding employee chose Level 4, 5, or 6 for their level of supervision responsibilities.<sup>15</sup> In the same section, the JDQ asked the responding individual to identify the number and type of positions over which they exercise managerial or supervisory responsibility, and then to identify those employees by job title and name. Although the JDQ used the term “employee,” the JDQ did not define “employee” or direct the responding individual to limit their response to paid employees. In the section that asked for job titles and names, many of the responses include “interns” or “policy interns.”

79. The record indicates that there is variation among the staffing composition and levels in the elected members’ offices. There is evidence that some petitioned-for employees are in offices with more than one other paid employee (including full-time, part-time, seasonal, and temporary employees). For example, Renee Perry, Legislative Assistant IV to Representative Shelly Boshart Davis, indicated that she supervised two Legislative Assistant IIs and one intern. Devon Norden, Legislative Assistant IV to Representative Dacia Grayber, indicated that she supervised two Legislative Assistant IIs and four interns.

80. Other employees, however, identified only one other employee in their office. As examples, Evan Sorce, Legislative Assistant IV to Representative Paul Evans, indicated that he supervised only one employee—a Legislative Assistant II. Sarah Wallan, a Legislative Assistant IV to Representative Kim Wallan, indicated that she supervised only one Legislative Assistant II, as well as three interns. In other instances, the record is unclear whether an identified subordinate is a paid employee. For example, Greg Mintz, a Legislative Assistant IV to Representative Ken Helm, indicated that he supervised only one Legislative Assistant, but he also listed a worker identified as a “research fellow,” as well as five interns.

81. Among the employees who selected Level 4 or higher when asked to indicate the nature of their supervisory responsibilities, some indicated that they have such responsibility over only interns. For example, Becca Byerley, Legislative Assistant IV to Representative Marshall Wilde, selected Level 4 for the nature of supervision, indicated that she supervises five “regular part-time employees,” and identified those five individuals as two “policy interns” and three “interns.” Similarly, Brandon Jordan, Legislative Assistant III to Representative Wilde, selected Level 4 for nature of supervision, and indicated that he supervises four “regular part-time employees,” specifically, two “policy interns” and two “interns.”

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for confidential, managerial, or supervisory employees, and did not incorporate the statutory definitions of PECBA, or otherwise direct the responding employees to conform their answers to those statutory definitions. The JDQ did not direct the employees to limit their responses regarding supervisory and managerial responsibilities to other paid employees, and many of the completed JDQs indicate that the employees considered “interns” when responding.

<sup>15</sup>Not all 33 individuals who indicated they have supervisory or managerial responsibilities are included in the list of petitioned-for employees.

82. Five of the employees who selected Level 4 or higher when asked to indicate the nature of their supervisory responsibilities also indicated in the “independent judgment” section of the JDQ that they do *not* exercise independent judgment when performing their jobs.<sup>16</sup>

83. When Plese completed his JDQ, he selected Level 4 for the nature of his supervision responsibilities. Plese indicated that he has such responsibility for one “part-time, seasonal, or temporary employee.” In the related open comment section, he wrote, “During legislative session, provide training, hiring input, and supervision to additional staff member and occasionally interns.” At hearing, Plese testified that he selected Level 4 after considering his responsibility with respect to both employees and interns. He explained that Representative Marsh directs the work of staff and interns, but some individuals, such as interns, require a little more direct supervision, in which case, he will “check in” to make sure they are “on task,” and answer any questions they may have. He testified that he stated he has “hiring input” because he is involved in the process, but that he has no authority to hire. Plese has no access to confidential information regarding other employees.

#### Wages, Benefits, Hours, and Other Employment Conditions in the Legislative Branch

84. Employees of the Legislative Branch, including the Legislative Assistants, are employees of the State of Oregon. All Legislative Branch employees are paid through the Executive Branch Department of Administrative Services (DAS) payroll processing services, for which the Legislative Branch pays an assessment to DAS. Like all State of Oregon employees working for entities that use DAS payroll processing services, Legislative Branch employees can access and review their pay stubs on a DAS-managed web site.<sup>17</sup>

85. The ten-step pay plan for Legislative Assistants establishes the following pay ranges for personal staff, effective January 1, 2021. The Legislative Assistant I classification begins at \$37,911 per year (Step 1) and tops out at \$56,867 per year (Step 10). The Legislative Assistant II classification begins at \$42,597 per year (Step 1) and tops out at \$63,896 per year (Step 10). The Legislative Assistant III classification begins at \$50,734 per year (Step 1) and tops out at \$76,101 (Step 10). The Legislative Assistant IV classification begins at \$60,425 per year (Step 1) and tops out at \$90,637 (Step 10).

86. The LBPRs establish branch-wide standards for compensation and salary administration. Typically, an employee is hired for a six-month introductory period (which may be extended by the appointing authority). After completion of the introductory period, an employee

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<sup>16</sup>Those employees are Andrea Dominguez, Rebecca Wright, Nolan Plese, Katherine Ryan, and Evan Sorce.

<sup>17</sup>The Legislative Branch remits payment to the State of Oregon Workers Compensation Division for each hour worked by its employees. The Workers Compensation Division administers the Workers Compensation Law that, with some exceptions, requires application of the law to all workers employed in Oregon. *See* ORS 656.023, 656.005(27), and 656.005(28). The Workers Compensation Division is part of the Department of Consumer and Business Services, part of the Executive Branch. The Workers Compensation Division regulates disputes over Workers’ Compensation benefits for the employees of the Legislative Branch, including the petitioned-for employees.

normally receives a one-step salary increase if the increase does not exceed the maximum rate in the range. LBPR 4(6)(b). Employees typically receive an annual one-step merit increase on the employee's salary eligibility date when the employee's base rate of pay is less than the maximum rate for the employee's salary range. LBPR 4(7).

87. Like other State of Oregon employees, the Legislative Assistants, as well as other Legislative Branch employees, receive health insurance benefits through the Public Employees' Benefit Board (PEBB) and retirement benefits through the Public Employees Retirement System (PERS).

88. The Legislative Assistants also earn paid vacation and sick leave, as do the other employees in the Legislative Branch. Vacation and sick leave accruals are generally transferrable when employees move to other State of Oregon employers. The LBPRs provide that Legislative Branch employees may request to be paid for up to a maximum of 120 hours of vacation leave in lieu of time off once per fiscal year provided that the employee has a balance of 40 hours of accrued vacation leave remaining after the payout. The LBPRs specifically provide, however, that personal staff are not eligible to request vacation payout in lieu of time off. LBPR 14.

89. The LBPRs provide for 10 paid holidays, plus one day of holiday special leave when granted by the presiding officers. LBPR 18(1). However, holidays during a legislative session are handled differently under the LBPRs. Specifically, an appointing authority (including each individual member, with respect to that member's personal staff) may designate a holiday as a required working day when the holiday occurs during legislative sessions, legislative days, or the period required for preparation for those periods. LBPR 18(4) provides, "When the Legislative Assembly is in session or a legislative day occurs on a holiday, employees are expected to work if asked to do so by their appointing authority."

90. All employees of the Legislative Branch, including personal staff, are covered by LBPR 15, which governs family and medical leave. Employee Services administers family and medical leave for all employees of the branch. In addition, the LBPRs require Employee Services to "assist members of the Legislative Assembly" in "complying with the requirements of FMLA and OFLA," including procedures under which employees of "member offices may request and receive FMLA and OFLA leave." LBPR 15(11)(b).

91. All employees (except temporary employees) of the Legislative Branch, including personal staff, are covered by LBPR 17, which governs leave other than vacation, sick, and family medical leave. Under the rule, an appointing authority may grant paid administrative leave to an employee ineligible to receive overtime compensation. LBPR 17(2)(a). Employees receive 24 hours of personal business leave upon completion of six months of employment in the Legislative Branch. Employees also receive jury duty and witness leave, military leave to the extent required by law, bereavement leave, and leave to address domestic violence, harassment, sexual assault, or stalking. Each appointing authority also has the discretion to grant leave without pay.

92. Elected members may hire their personal staff through direct appointment. An open competitive recruitment or limited internal recruitment process is not required. LBPR 32(1)(b). Once the member has made a hiring decision, the member is required to provide the successful

applicant's application to Employee Services for record keeping purposes. Employee Services is not, however, otherwise involved in the elected members' hiring decisions.<sup>18</sup> Under LBPR 32, all employees, interns, and externs appointed as personal staff "serve at the pleasure of the member[.]" and apply for employment "in the manner prescribed by the member of the Legislative Assembly."<sup>19</sup>

93. Elected members may hire, supervise, and evaluate family or household members as personal staff, and some do so.<sup>20</sup> Knieling testified that the Branch does not document which employees are related to or reside in the same household as an elected member, but she believes approximately 12 of the Legislative Assistants are family members of elected members. Otherwise, LBPR 24 governs family and personal workplace relationships, and broadly speaking, permits the employment of qualified relatives of legislative employees only if the employment does not create a conflict of interest. Under LBPR 24, an employee may not initiate or participate in an employment action involving a relative, or supervise or evaluate a relative. However, LBPR 24 applies only to the legislative agencies and parliamentary offices. It does not apply to members of the Legislative Assembly, personal staff, leadership office staff, or caucus office staff.

94. Elected members, leadership offices, and caucus offices may consider political affiliation when hiring employees. LBPR 5(1)(c). For personal staff positions, commitment to advancing the elected member's policy and legislative agenda is considered an essential job requirement. Other than positions with elected members, leadership offices, and caucus offices, all employment decisions, programs, and practices within the Legislative Branch are conducted or administered without regard to political affiliation.

95. All Legislative Branch employees, including personal staff, may be terminated without cause at the discretion of the appointing authority or designee. Employment is at will, both during and after completion of an introductory period. The "appointing authority" is the person who has "authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge or discipline an employee." LBPR 2(3). Each elected member is the appointing authority for that member's own personal staff.

96. Personal staff of elected members report to their elected member or, as contemplated by the Legislative Assistant IV job description, potentially to a Legislative Assistant IV. There is no shared supervision of personal staff above the level of the elected member. Personal

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<sup>18</sup>LBPR 32 also provides that, after it receives an application, Employee Services notifies the Legislative Equity Officer of the start date of the new employee, intern, extern, or volunteer, and the Legislative Equity Officer provides training, and copies of harassment and respectful workplace policies.

<sup>19</sup>For open competitive and limited internal recruitments elsewhere in the Branch, Employee Services is responsible for determining which applicants meet the minimum qualifications for positions in Legislative Administration, and legislative agencies and parliamentary offices determine which applicants meet the minimum qualifications for positions in those agencies and offices.

<sup>20</sup>ORS 244.177(2) provides, "A member of the Legislative Assembly may appoint, employ, promote, discharge, fire or demote, or advocate for the appointment, employment, promotion, discharge, firing or demotion of, a relative or member of the household to or from a position on the personal legislative staff of the member of the Legislative Assembly."

staff are not accountable to any elected member other than the legislator on whose staff they serve. On occasion, an employee in one of the Legislative Assistant classifications will work for two members and divide their time between the members, but this is not common.

97. All Legislative Branch employees, including personal staff, are subject to the same LBPR concerning corrective action. LBPR 9 provides that an appointing authority may, but is not required, to take corrective action, which may include verbal or written warnings or reprimands, nonmonetary sanctions, or monetary sanctions (such as a salary reduction, a paid or unpaid suspension, or a written work plan). Any employee who receives corrective action may submit a written response to be included in that employee's personnel record. An elected member may discipline or terminate personal staff for partisan or political reasons.

98. The work hours of personal staff are, generally speaking, the business hours of the Legislative Assembly and other hours as assigned by the elected member. The LAs' hours are variable, depending in part on whether the Legislative Assembly is in session. Individual assembly members also have discretion to require LAs to work different hours. One senator noted in an employee's JDQ that, during session, work hours may range from 7:00 a.m. to 8:30 p.m. and work days may include Saturday and Sunday. One Legislative Assistant IV wrote in his JDQ that an essential knowledge, skill, or ability to perform his job is the "[a]bility and willingness to work irregular hours (on-call 24/7)." The working hours for personal staff may also be determined by the type and amount of constituent services or community outreach assigned or expected by the member. For example, Diane Linthicum, Legislative Assistant IV to Senator Dennis Linthicum, indicated in her JDQ that her job requires extensive time, travel, and hours away from home because of the 20,000 square miles included in the senator's district.

99. When the Legislative Assembly is in session, the personal staff typically work in offices in the capitol building.<sup>21</sup> The record also indicates that there is a group of legislators in the Portland metropolitan area who share office space, and Legislative Assistants, including Legislative Assistant IV Nolan Plese, work in that shared office space for some portion of time. The record does not indicate how many of the Legislative Assistants employees work remotely or work at times in a member's office in the district, and if so how frequently they do so.

100. Under the LBPRs, all employees of the Legislative Branch are eligible to work remotely pursuant to a mobile work agreement. Each appointing authority has the discretion to determine whether to permit an employee to perform mobile work through a mobile work agreement. As an example, Plese works remotely during the interim between sessions. An appointing authority may terminate a mobile work agreement at any time at the appointing authority's discretion. LBPR 26.

#### Interchange and Promotional Ladders

101. The Legislative Assistants regularly interact with other personal staff in other members' offices, including across the different political parties. For example, Hamlin testified that she frequently works with staff in other offices, including across political party. Backstrom

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<sup>21</sup>The work location changed during the COVID-19 pandemic, when personal staff worked remotely.

also frequently interacts with Legislative Assistants in other members' offices to schedule events and meetings. Plese testified that he interacts with Legislative Assistants "almost daily," on policy, scheduling, or when there is a shared constituent issue that members are working together on. According to the testimony of all three Legislative Assistants who testified, Hamlin, Backstrom, and Plese, LAs recognize that they are employees of the State of Oregon. The LA position requires them to put their personal policy views aside and work with people with whom they disagree. The elected officials may oppose each other on legislative matters, but LAs do not personally oppose, or conflict with, each other as a result. LAs generally understand that they are all performing a common job. LAs generally are collegial with each other, and often assist each other, for example, by sharing information about how the legislative branch operates, or sharing ideas about how to operate the office or conduct constituent events.

102. Such interactions between Legislative Assistants are also reflected in the JDQ responses. For example, Alexa Jakusovsky, a Legislative Assistant IV to Representative Lisa Reynolds, wrote in her JDQ that she interacts "regularly" with legislative offices, as well as other members and constituents.

103. The petitioned-for employees also interact regularly with other Branch employees in legislative agencies and offices across the Branch. For example, multiple employees indicated in their JDQs that they worked with employees in the Legislative Counsel's office on bill drafting. Plese indicated that he had contact with Legislative Counsel daily during session and weekly during the interim. The petitioned-for employees also work with other Legislative Branch offices as well, including the Legislative Policy and Research Office (LPRO) and the Legislative Fiscal Office. For example, MacKenzie Carroll, a Legislative Assistant IV to Representative Andrea Salinas, indicated in her JDQ that she communicates "regularly with LPRO Committee staff." Jessica Snook, Legislative Assistant IV to Representative Jami Cate, wrote in her JDQ responses that she accompanies LPRO staff to the committee or House floor "to assist in testimony or carrying of a bill." Plese indicated that he works daily during the session and weekly during the interim with the LPRO, Legislative Revenue Office, and Legislative Fiscal Office.

104. The record does not indicate the specific employment histories for all the petitioned-for employees, such as whether they have transferred between members' offices, promoted in one member's office, transferred or promoted within the Legislative Branch, or worked in another branch of the State of Oregon. The record, however, does establish that LAs move between assembly member offices, as well as between different parts of the legislative branch or across branches of the State. The administration of such employee movement is fairly simple because the state uses a single personnel system, Workday.

105. The total number of LAs typically fluctuates from approximately 90, when the legislature is not in session, to 180, when the legislature is in session.

106. The record indicates that approximately 28 percent of the petitioned-for employees have a continuous service date of 2017 or earlier, indicating that they have a continuous employment relationship with the State of Oregon of at least three years. Approximately 25 percent have a continuous service date of 2018-2019, and approximately 33 percent were hired in 2020.

107. Some personal staff have worked for multiple elected members over time.<sup>22</sup> LAs who are hired on a temporary basis, *e.g.*, for only one legislative session, must search for other open positions if they would like a year-round position or would like to continue working for the Branch. They are more likely to find another LA position if they search for openings in other assembly members' offices, and some LAs have secured new positions by doing so. Hamlin testified that she previously worked for Representative Mitch Greenlick before moving to Representative Hudson's office. Hamlin has also observed other Legislative Assistants work in multiple elected members' offices. Plese previously worked for Senator Diane Rosenbaum, and before that for the senate majority caucus; he presently works for Representative Pam Marsh. It is not common for personal staff to move from an office in one political party to an office in the other political party.

108. The JDQs also indicate that at least some of the LAs have worked for multiple members over time. For example, Andrea Dominguez works as a Legislative Assistant IV in Representative Mark Owens's office; previously, she worked as personal staff to Cliff Bentz.<sup>23</sup> Alexa Jakusovsky previously served as personal staff for Representative Akasha Lawrence Spence; she now works for Representative Lisa Reynolds.

109. There is little information in the record regarding promotion from one level of LA to another, presumably because the LA I-IV classification system was implemented only recently. However, there is some evidence in the JDQs that LAs may be promoted from one level to another. For example, Devon Norden, Legislative Assistant IV to Representative Dacia Grayber, indicated on the JDQ that there are two other LAs in the office, but commented, "Typically one LA2 and couple of interns depending on the time of year. Current office make-up is a little different as I am transitioning out of this position and my LA2 will be taking my place."<sup>24</sup> Additionally, Knieling testified that LA promotions occur both within the same office and across offices.

110. To transfer or promote to a different LA position, *i.e.*, to move from an LA position in one office to an LA position in another office, an LA must apply for an open position in an assembly member's office and be selected by that assembly member. When LAs transfer from one elected member's office to another, or between different positions within the legislative branch, all aspects of their compensation and benefits, including leave accruals, remain the same.

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<sup>22</sup>The Branch does not track the movement of LAs from one office to another. However, Hamlin testified without rebuttal that it is common for LAs to move from one office to another, and the examples provided in the record tend to corroborate that testimony.

<sup>23</sup>Senator Bentz resigned from the Oregon State Senate in January 2020 to campaign for Oregon's Second Congressional District; he was elected to represent the Second Congressional District on November 3, 2020. See <https://bentz.house.gov/about> (visited March 31, 2021).

<sup>24</sup>At the time that the JDQs were completed, the prior classification system with only two LA levels was still in use.

## The Petition

111. On December 8, 2020, the Union filed a representation petition with this Board pursuant to ORS 243.682(2) and former OAR 115-025-0000(4) seeking certification as the exclusive representative pursuant to the card check process. That petition was assigned Case No. RC-010-20. In Case No. RC-010-20, the Union sought to represent the following bargaining unit:

“LA1’s and LA2’s supporting elected officials in the Oregon Legislative Assembly, and the following titles in the Senate and House Leadership offices: Constituent Services, Office Manager/Scheduler, Legislative Assistant, Outreach Director, Community Outreach Director, Legislative Aide, Office Manager, and District Director, excluding supervisory and confidential employees.”

112. On December 29, 2020, the Respondent filed objections to the petition.

113. Also in December 2020, as described above, the Legislative Branch was preparing to implement a new classification structure and compensation plan for the employees who were then classified as Legislative Assistant 1s and 2s, as the culmination of the Segal compensation, classification, and pay equity analysis. In the new classification structure, effective January 1, 2021, the petitioned-for LA1s and LA2s in Case No. RC-010-20 were allocated to four new classifications, Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV.

114. In December 2020, the Legislative Branch hired additional employees who would also be placed in the new classifications to prepare for the 2021 legislative session, as it typically does in the months preceding a legislative session.

115. On January 13, 2021, the Union, relying on the fact that the Legislative Assembly had hired additional employees who “would be included in the proposed unit,” filed a motion to amend the petition to change the bargaining unit description to the following description:

“Legislative Assistant I’s, Legislative Assistant II’s, Legislative Assistant III’s, and Legislative Assistant IV’s supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees.”

116. Subsequently, on January 14, 2021, in accordance with OAR 115-025-0051, the Union withdrew the petition in Case No. RC-010-20.

117. In the meantime, on January 13, 2021, the Union filed a representation petition with this Board pursuant to ORS 243.682(1) seeking certification as the exclusive representative following an election. That petition, assigned Case No. RC-001-21, is the petition at issue in this case. The Union seeks to represent the following bargaining unit:

“Legislative Assistant I’s, Legislative Assistant II’s, Legislative Assistant III’s, and Legislative Assistant IV’s supporting elected officials in the Oregon Legislative

Assembly, excluding supervisory, managerial, confidential, and caucus employees.”

118. On February 4, 2021, the Respondent filed objections to the petition in Case No. RC-001-21.

### CONCLUSIONS OF LAW

1. This Board has jurisdiction over this matter.

Under PECBA, “[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.” ORS 243.662. To exercise that right, an employee or a labor organization may obtain voluntary recognition from the employer, ORS 243.666(1), or may file a petition with this Board to obtain certification of a labor organization as the exclusive representative of a petitioned-for group of public employees. ORS 243.682 through ORS 243.686. This Board’s jurisdiction over representation matters under PECBA extends only to “public employers” and “public employees.”<sup>25</sup> Here, the Branch concedes that it is a public employer, but asserts that it is not a “public employer” within the meaning of PECBA. To determine whether the Branch is a “public employer” as defined under PECBA, we must turn to the statutory text.

Before doing so, it is not lost on this Board that it is the legislature that, through statute, defines the scope of this Board’s authority. Certainly, if the legislature had included in PECBA a provision that excludes Branch employees from the definition of “public employees” or excludes itself from the definition of a “public employer,” this Board would, without hesitation, recognize and adhere to such statutory language. As set forth below, however, those statutory exclusions are absent. Using the principles of statutory construction developed by the courts, we ultimately conclude, for the reasons set forth below, that PECBA includes the Branch as a public employer and includes the petitioned-for employees as “public employees.”<sup>26</sup>

When this Board interprets and applies statutes, our goal is to determine and give effect to the legislature’s intent. ORS 174.020. In doing so, we apply the analysis supplied by *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Our goal in interpreting a statute is to determine what meaning the legislature intended in drafting the statute. *Comcast Corp. v. Dep’t of Revenue*, 356 Or 282, 295-97, 337 P3d 768 (2014) (citing *PGE*, 317 Or at 610). Because the words chosen by the legislature are the best evidence of its intent, we first review the text and context of the statute in question. *Gaines*, 346 Or at 171-72. We then review any relevant legislative history. *Id.* If we are

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<sup>25</sup>The Board has jurisdiction under a separate statute for certain employers who do not meet the jurisdictional standards of the National Labor Relations Board under the National Labor Relations Act. *See* ORS 663.005(3)(i), (4)(f).

<sup>26</sup>We address the statutory exclusions of supervisory, managerial, and confidential employees later in this order.

still unable to determine the legislature’s intent, we then apply maxims of statutory construction. *Id.*

Here, ORS 243.650(20) defines “public employer” as, among others, “the State of Oregon.” Relatedly, ORS 243.650(19) defines “public employee” as “an employee of a public employer,” and then expressly excludes “elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under Article I, section 41, of the Oregon Constitution, or persons who are confidential employees, supervisory employees or managerial employees.” The Legislative Branch, including the Legislative Assembly, is part of the State of Oregon. The Branch concedes that the petitioned-for employees are not expressly excluded from the definition of “public employee,” even as that statute expressly excludes the assembly members (by excluding “elected officials”). Because we can only interpret PECBA, not amend it, we cannot insert an exclusion for Branch employees that the legislature omitted. Our role is “simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted.” ORS 174.010.

We also note that the legislature has expressly excluded both Legislative Assembly officers and employees from the coverage of the State Personnel Relations Law (SPRL). ORS 240.200(4) (defining “exempt service” as including “officers and employees of the Legislative Assembly”); ORS 240.245 (providing that the exempt service is not subject to SPRL, except for a requirement that salary plans be “equitably applied” to exempt positions “in reasonable conformity with the general salary structure of the state”). With respect to PECBA, however, the legislature expressly excluded only “elected officials,” not employees working directly under elected officials. The fact that the legislature expressly exempted employees from SPRL—but not PECBA—also weighs in favor of the conclusion that the legislature did not intend to exclude Branch employees from the coverage of PECBA.<sup>27</sup> Thus, based on the words that the legislature chose in enacting PECBA, which is the best evidence of legislative intent, we conclude that the Legislative Branch is a public employer and that the petitioned-for employees are public employees (except to the extent that they may be confidential, supervisory, or managerial within the meaning of PECBA).

In arguing for a different result, the Branch asserts that we should look to the Legislative Branch Personnel Rules (“LBPRs”), rather than PECBA itself, as the initial starting point to answer whether *PECBA* excludes the Branch or its employees from *PECBA*. Specifically, the Branch argues that, because the Oregon Senate and Oregon House of Representatives enacted the LBPRs under the constitutional rulemaking authority (Article IV, Section 11), instead of the constitutional legislative authority, this case “does not involve statutory construction but the primacy of the Legislature’s constitutional authority to establish rules regarding its operations.”

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<sup>27</sup>We also note that when the legislature has sought to exclude an elected official’s staff or an entire employer from the coverage of a chapter of the Oregon Revised Statutes, it has done so expressly. See ORS 177.050(3) (“Except as provided in subsection (4) of this section, ORS chapter 240 does not apply to the office of the Secretary of State.”); ORS 178.060(3) (“Except as provided in subsection (4) of this section, ORS chapter 240 does not apply to the office of the State Treasurer.”); ORS 656.753(1) (“Except as otherwise provided by law, the provisions of ORS 279.835 to 279.855 and 283.085 to 283.092 and ORS chapters 240, 276, 279A, 279B, 279C, 282, 283, 291, 292 and 293 do not apply to the State Accident Insurance Fund Corporation.”).

However, the Branch does not cite any authority for the proposition that an exercise of the rulemaking authority “preempts statutory construction.”

In any event, the Branch argues that the rules of statutory construction “may prove useful” in this case, and that application of those rules shows that the legislature intended to exclude the Branch and its employees from PECBA. The Branch points out that the LBPRs do not expressly state that PECBA applies to it or its employees. From that silence, the Branch contends that we should conclude that the LBPRs impliedly establish a legislative intent to exclude the Branch and its employees from PECBA.

We disagree with the premise of the Branch’s assertion that we should look to the LBPRs, rather than PECBA itself, as the initial starting point to answer whether *PECBA* excludes the Branch or its employees from *PECBA*. Moreover, even if we started with the LBPRs, we would not conclude that the legislature intended to exclude Branch employees from PECBA. Rule 1, section 5, of the LBPRs addresses the “application of certain labor laws,” and states that the LBPRs “constitute rules of proceedings of the Legislative Assembly and may take precedence over conflicting provisions of state law to the extent that the rules *expressly provide* for such precedence.” LBPR Rule 1(5)(a) (emphasis added). Rule 1, section 4, of the LBPRs expressly provides that all legislative branch officers and employees are exempt from SPRL. LBPR Rule 1(4)(a). And, Rule 1, section 5, expressly provides that all legislative branch employees, “other than legislative librarian positions,” are exempt from the Fair Labor Standards Act. LBPR Rule 1(5)(b). However, none of the LBPRs *expressly* provide that any legislative branch employees are exempt from PECBA.

In determining whether the LBPRs indicate a legislative intent to exclude Branch employees from PECBA, we find it significant that the LBPRs expressly provide that Branch employees are not covered by SPRL and the FLSA, but do not say the same regarding PECBA. That structure does not persuade us that the LBPRs’ silence regarding PECBA should be construed as evidence that the legislature intended for Branch employees to be excluded from PECBA. Further, we also note that there is no inherent conflict between the adoption of personnel rules and collective bargaining. Although the Legislative Branch is a unique employer because of its constitutional authority to enact statewide legislation, we also note that many public employers have rulemaking authority, and it is commonplace for public employers to both adopt personnel rules and engage in collective bargaining. Accordingly, we decline to infer from the fact that the legislature adopted the LBPRs an intention to exclude Branch employees from PECBA.

In reaching our conclusion, we reiterate that the simplest way to clarify any confusion as to whether the Branch and its employees are subject to PECBA is for the legislature to enact such language in a statute. For this Board to insert such an exclusion into the statute, when the legislature itself has not done so, would exceed our authority and be an inappropriate function of this agency, which is to follow the statutory definitions and directives made by the legislative branch.

The Branch also argues that permitting collective bargaining would permit a “challenge to the legislatively adopted LBPRs and improperly subvert[] the Oregon Legislature’s constitutional authority” under Article IV, Section 11.<sup>28</sup> But the Branch does not explain how collective bargaining would “subvert” its authority and, in any event, the Branch, like all public employers, would have the option to condition any collective bargaining agreement on ratification by the Assembly. Further, as explained above, the legislature retains its authority to amend PECBA to exempt some or all of its employees from PECBA, or to exempt specific subjects from mandatory collective bargaining. Accordingly, we do not agree that permitting the petitioned-for employees to engage in collective bargaining necessarily subverts the legislature’s rulemaking authority in a manner that compels us to interpret PECBA as excluding the petitioned-for employees from its coverage, despite the absence of any such express exclusion.

Relatedly, the Branch also asserts that the LBPRs “do not harmonize” with PECBA. At the outset, we note that this assertion is largely based on policy arguments as to whether PECBA is an appropriate fit with the structure of how the Branch operates. It is the legislature, however, that determines statutory policy, not this Board. As an administrative agency, we administer the statute as enacted by the legislature; it is beyond our authority to create that policy in the first instance, and it would be inappropriate for us to usurp that role, which rightfully belongs to the legislature. Thus, the question of whether it is good policy for the Branch and its employees to be subject to PECBA is one for the legislature to answer, not this Board.

With that observation in mind, we turn to the Branch’s arguments regarding the fit between the LBPRs and PECBA. The Branch first argues that because it is composed of 90 elected officials, its employees are hired for political reasons and may be dismissed for purely political reasons. The LBPRs, the Branch argues, “contemplate this highly personalized and politically motivated arrangement, which likewise permits the hiring and firing of family members under a carve out from the ethics laws that apply to public officials.” The Branch argues that this Board’s rulemaking authority “and its ability to hear appeals and overrule politically motivated personnel actions under ORS 240.560(3) cannot be reconciled with what is permitted by the 90 elected officials in regards to the subject employees.”

To begin, the statute cited in this argument, ORS 240.560(3), is part of the State Personnel Relations Law, not PECBA. As noted above, the legislature has already addressed the issue regarding SPRL appeals by expressly exempting Branch employees from the coverage of SPRL. Moreover, any lack of harmony between the LBPRs and SPRL does not speak to any purported disharmony between the LBPRs and PECBA, because SPRL and PECBA are substantively distinct. Unlike SPRL, PECBA does not, in and by itself, impose any standard for the discipline or discharge of employees. PECBA only provides a process by which employees may collectively bargain with their public employer regarding their terms and conditions of employment. PECBA does not require either party to agree to any particular contractual term or type of term, and a change to the petitioned-for employees’ employment terms would occur only if the Branch and the Union mutually agreed to it in the course of good faith collective bargaining. Consequently,

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<sup>28</sup>The Branch’s objections to the petitioned-for unit do not include any contention that the application of PECBA to the legislative employees is unconstitutional. Accordingly, we understand the Branch to be arguing only that the potential effect of collective bargaining on the application of the LBPRs to represented employees is a policy consideration that should affect our statutory interpretation of PECBA.

we cannot assume that, because the legislature determined that Branch employees should not be subject to SPRL, it would make the same policy determination with respect to PECBA. Again, if the legislature agrees that, as a policy matter, the structure of the Branch or the political nature of the Legislative Assembly is an ill fit with all or some of the statutory requirements of PECBA, the legislature may enact a statute that reflects that policy determination; we, as an administrative agency, may not.

The Branch next argues that PECBA does not contain a designated bargaining representative for the legislative branch, whereas PECBA does provide for a designated bargaining representative for state agencies (ORS 243.696(1)) and the judicial branch (ORS 243.696(2)). In the absence of such a designated collective bargaining representative, the Branch argues, PECBA cannot be harmonized with the operational structure of the Branch. How the Branch might elect to conduct collective bargaining with its employees is beyond the scope of our inquiry here, and we would be overstepping our bounds to suggest what that structure might look like, or to require the Branch to designate a particular position or positions to perform that function.<sup>29</sup> The Branch, through its legislative authority, rulemaking authority, or some other mechanism can determine how it will be represented for purposes of collective bargaining (in the event that the petitioned-for employees vote for the Petitioner to be their exclusive representative). That such a determination has not yet been made does not persuade us that the legislature intended that the Branch is not a public employer or that its employees are not public employees within the meaning of PECBA.

Finally, the Branch asserts that it “cannot deliberate regarding management prerogatives behind closed doors and with limited representatives as other public employers routinely do,” citing Article IV, Section 14, of the Oregon Constitution, and that, as a result, it “will be constitutionally prevented from negotiating with a bargaining unit in any meaningful way.”<sup>30</sup> We do not determine whether that interpretation of the constitution is correct, because even assuming that it is, this argument sets forth only additional logistical and policy concerns about how and whether the Branch and its employees should be subject to PECBA. Those concerns may or may not be good policy reasons for excluding the Branch and its employees from PECBA. We reiterate that such a policy determination can be made only by the legislature, and it is inappropriate for this Board to make such a policy determination and then base our interpretation of PECBA on that policy instead of the statutory text.

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<sup>29</sup>The Branch notes that there is currently a bill before the legislature (SB 759) that would designate the Legislative Administrator as the collective bargaining representative of the Branch. Because that bill has not been enacted as a statute, it is not appropriate for us to consider it when interpreting PECBA in this matter.

<sup>30</sup>The Branch acknowledges that “some decisions regarding collective bargaining issues could receive input from the Legislative Administrator and [the Legislative Administration Committee (LAC)],” but argues that “neither the LAC nor the Legislative Administrator can bind the entire Oregon Legislative Assembly under a Collective Bargaining Agreement unilaterally without violating the Oregon Constitution.” However, the record also shows that the legislature has a process by which it reviews and decides whether to adopt recommendations made by the Legislative Administrator or LAC regarding employees’ terms and conditions of employment. Further, the Branch does not cite a constitutional provision that prohibits the Branch from honoring the terms of a collective bargaining agreement or from collectively bargaining in good faith with its employees.

In sum, we conclude that the statutory text and context do not exclude the Branch as a public employer or its employees as public employees under PECBA. We further conclude that it is beyond our authority to read the policy arguments advanced by the Branch into the statute. Therefore, we conclude that we have jurisdiction over this matter.

2. The petitioned-for bargaining unit is an appropriate bargaining unit.

We turn to the Branch's argument that the petitioned-for group of employees does not constitute an appropriate bargaining unit. PECBA defines an "appropriate bargaining unit" broadly as any "unit designated by [this] Board or voluntarily recognized by the public employer to be appropriate for collective bargaining." ORS 243.650(1). "[A] bargaining unit may consist of all of the employees of the employer, or any department, division, section or area, or any part or combination thereof, if found to be appropriate by the Board." OAR 115-025-0050(1).

PECBA also expressly provides that we may determine a unit to be appropriate in a particular case "even though some other unit might also be appropriate." ORS 243.682(1)(a). Therefore, PECBA does not require a petition to set forth the most appropriate unit, only an appropriate unit. *Id.*; see also *Oregon AFSCME Council 75 v. Douglas County*, Case No. CC-004-14 at 31, 26 PECBR 358, 388 (2015).

When determining whether a unit is appropriate for collective bargaining, we 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)(a); see also *Douglas County*, CC-004-14 at 30-31, 26 PECBR at 387-88; *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001).<sup>31</sup> Moreover, when making an appropriate unit determination, we have "discretion to decide how much weight to give each factor" in any particular case. *OPEU*, 173 Or App at 436; see also *OSEA v. Deschutes County*, 40 Or App 371, 376, 595 P2d 501 (1979). Thus, "our analysis of the propriety of a proposed unit is necessarily fact-driven, with the outcome depending on the specific facts and circumstances of the workplace and workforce at issue." *Douglas County*, CC-004-14 at 31, 26 PECBR at 388.

A threshold requirement for an appropriate unit is that the petitioned-for employees share a community of interest with each other. See, e.g., *Oregon AFSCME Council 75 v. Washington County*, Case No. RC-30-03 at 12, 20 PECBR 745, 756 (2004); *Oregon AFSCME, Council 75 v. City of Corvallis*, Case No. RC-41-03 at 11, 20 PECBR 684, 694 (2004). Additionally, where there is a contention that the proposed bargaining unit is inappropriate because it excludes certain employees, we consider whether the petitioned-for employees share a sufficiently distinct community of interest such that the proposed unit may be deemed appropriate. See, e.g., *Washington County*, RC-30-03 at 12, 20 PECBR at 756. A proposed unit of employees may have a sufficiently distinct community of interest to constitute an appropriate unit, even if they also share a community of interest with excluded employees. See, e.g., *id.* at 12-13, 20 PECBR at 756-57; *City of Corvallis*, RC-41-03 at 11-16, 20 PECBR at 694-99.

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<sup>31</sup>Those statutory factors are not exclusive, and we may also weigh other non-statutory factors, including our administrative preference for certifying the largest possible appropriate unit. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. Here, the Branch does not object on the ground that the proposed unit is too small and that a larger group of Branch employees would be an appropriate unit.

We begin by examining the community of interest, wages, hours, and working conditions of the proposed unit. “Community of interest” has long been understood to depend on factors such as similarities of duties, skills, and benefits; interchange or transfer of employees; promotional ladders; and common supervisors. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. Here, the Branch acknowledges that the employees “shar[e] the same compensation scheme, partak[e] in PERS, PEBB, other benefits,” “shar[e] a common work infrastructure,” and share in “the same type of work.” The petitioned-for Legislative Assistants are all subject to the LBPRs, which determine their terms and conditions of employment, including compensation (including shift differentials), vacation and sick pay, and the administration of pay upon demotion or promotion. The petitioned-for employees receive similar pay and benefits and perform largely similar job duties. They also frequently interact with each other in performing those job duties. As detailed in the job descriptions, the knowledge, skills, and abilities to perform the job are identical across all four classifications, with the single exception that the job description for the LA IV position states only one additional skill not listed in the other three classifications: “management and supervision of staff, volunteers, and interns.”<sup>32</sup> LAs sometimes transfer to different assembly members’ offices, and when they do so, they retain their accrued compensation and benefits. Occasionally, although not often, two assembly members share supervision of a single LA. Additionally, LAs may be promoted from one level in the LA classification series to another, such as from an LA I to an LA II, either while remaining in the same office or when hired by one member from another member’s office. Such commonalities in terms and conditions of employment weigh in favor of a conclusion that the petitioned-for LAs share a community of interest.

We recognize that each legislator has discretion to determine how to structure and manage their office, within the limits of the LBPRs and the budget set by the Legislative Assembly. Because of that discretion, there may be some variation in some of the working conditions of the petitioned-for employees. For example, pursuant to LBPR 13(1), each elected member has sole authority to assign and reassign job duties, work location, and work schedule “at any time.” In addition, the LBPRs give members the sole authority to determine whether to grant paid administrative leave, authorize remote work, and use (or forego) corrective action and disciplinary measures. The record also indicates that, to some degree, the geographic size of a member’s district or the amount of the member’s constituent outreach may affect an LA’s schedule and working hours. For example, Diane Linthicum, Legislative Assistant IV to Senator Dennis Linthicum, indicated in her JDQ that the geographic size of the senator’s district required “extensive time, travel and hours away from home[.]” There is also evidence in the record that some LAs work in different office locations when the legislature is not in session, with some LAs in the Portland area working out of office space shared by multiple elected members. Further, each elected member supervises their own office, and Employee Services does not monitor elected members’

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<sup>32</sup>As discussed below, this reference to the ability to “manage and supervise” in the LA IV job description does not establish that the LA IVs are categorically managerial or supervisory employees under PECBA.

workplaces to ensure that employees' duties, work schedules, and work assignments are handled similarly across member offices.<sup>33</sup>

However, even assuming that some differences in assembly members' exercise of discretion and district office locations cause some LA working conditions to vary, such differences do not necessarily mean that the petitioned-for employees do not share a community of interest.<sup>34</sup> When we analyze the community of interest factor, we examine the employees' *collective bargaining* interests, not more general interests. *See, e.g., State of Oregon, Mental Health Division, Fairview Training Center v. American Federation of State County and Municipal Employees, Council 75*, Case No. C-1-84 at 23, 8 PECBR 6666, 6688 (1984) (contrasting the "labor relations" community of interest with more general interest in the mission of the employer); *Revenue Hearing Officers Association v. Oregon Department of Revenue and Oregon Public Employees Union, Local 503*, Case No. C-155-83 at 6, 7 PECBR 6086, 6091 (1983) (when evaluating community of interest, we evaluate the "collective bargaining interests" of employees). The purpose of our analysis is to ensure that the resulting bargaining unit will work "for the mutual benefit of all included employees." *See United Employees of Columbia Gorge Community College v. Columbia Gorge Community College*, Case No. UC-19-01 at 7, 19 PECBR 452, 458 (2001). Unit determinations that ensure a sufficient community of interest "help effectuate policies of [PECBA] by decreasing potential sources of labor unrest and increasing equality of bargaining power." *Id.* (citing *AFSCME Council 75 v. State of Oregon and AOCE*, Case No. UC-37-97 at 8-9, 17 PECBR 767, 774-75 (1998)).

Moreover, as noted above and as acknowledged by the Branch, although each member has broad authority to manage their own office and the personal staff who work in it, the petitioned-for employees are covered by a common compensation plan and a common classification structure, and receive the same health, retirement, and paid vacation and sick leave benefits. Pay and benefits

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<sup>33</sup>LAs who testified explained that assembly members may have different supervisory or management styles, which one LA testified may result in "subtle differences" in how they choose to run their offices. A few employees indicated in their JDQs that every legislative office operates differently. For example, Linda Heimdahl, Legislative Assistant IV to Senator Kim Thatcher, wrote in her JDQ that "[e]very legislative office is different" and you "cannot compare one office to another." Kimberly Goddard-Kropf, Legislative Assistant I to Representative Rachel Prusak, wrote that "Every office is different, and each legislative aide has a unique relationship with their member." However, those employees did not provide specific examples of differences in the JDQs or testify at hearing, and the conclusory comments in the JDQs standing alone are insufficient to establish that there are significant differences in LAs' terms and conditions of employment across offices.

<sup>34</sup>Generally, when a group of employees share the same basic terms and conditions of employment (such as compensation and benefits), that is sufficient to establish that the employees have a shared community of interest, including on a classification- or state-wide basis. *See, e.g., Or. AFSCME Council 75 v. State*, 304 Or App 794, 469 P3d 812, *rev den*, 367 Or 75, 472 P3d 268 (2020). In some cases, we have held that differences in supervision or location are sufficient to establish that a particular group of employees have a sufficiently distinct community of interest to justify the creation of a separate bargaining unit, even though those employees also share a community of interest with other employees excluded from the proposed unit. *See, e.g., Washington County*, RC-30-03 at 12-13, 20 PECBR at 756-57; *City of Corvallis*, RC-41-03 at 11-16, 20 PECBR at 694-99. However, such differences generally do not cause the larger group of employees who share basic employment terms to *lack* a shared community of interest. *Id.*

are substantial collective bargaining interests. Further, the petitioned-for employees share a common workplace (the state capitol), even though some may have other work locations, and share an overriding purpose—serving as gatekeepers for their elected members to stakeholders, constituents, and other interested parties. The LAs’ duties also share sufficiently common features that the Legislative Branch created a four-position uniform classification structure, organized to reflect the common duties, that applies to all members’ offices. Significantly, there is also a high degree of interchange among the petitioned-for employees. They work with each other frequently in the shared work of moving the members’ legislative priorities forward, and the record contains evidence that movement of employees between members’ offices is not uncommon. We conclude that these commonalities are sufficient to find that the petitioned-for employees share a community of interest.

The Branch nonetheless contends that these employees do not share a sufficient community of interest, based on its assertion that each LA is “solely loyal to” the elected official for whom the LA performs work. The Branch is correct that members expect their LAs to advance the hiring member’s policy and legislative goals, and not negate those goals. That job requirement, which the Branch describes in its briefing as “loyalty,” and which it characterizes as essential to the members, does not undermine a conclusion that the petitioned-for employees have sufficient community of interest to make collective bargaining on behalf of the group mutually beneficial for the employees. In fact, the legislative assistants testified that, although their job is to implement the directives of the particular assembly member who hired them, they are all employees of the State of Oregon. The LAs also consistently testified that, even when assembly members have opposing views regarding proposed legislation, the LAs do not consider themselves to be in personal conflict with each other. Any differences that arise from LAs’ responsibility to loyally represent the views of their respective elected members are outweighed by the commonalities in the terms and conditions of employment that are at the core of our analysis.

Further, if we were to accept the Branch’s assertion that the LAs have such divided loyalties that they cannot share a community of interest regarding their terms and conditions of employment, then each member’s office must comprise its own bargaining unit, or there is no appropriate unit that can include Legislative Assistants. As to the former, such a result would be inconsistent with this Board’s “well-established policy of disfavoring the fragmentation of public workplaces.” *Oregon Workers Union v. State of Oregon, Department of Transportation and Service Employees International Union Local 503, Oregon Public Employees Union*, Case No. RC-26-05 at 11, 21 PECBR 873, 883 (2007). “Our nonfragmentation policy also helps public employers[,]” because it “promotes workplace stability, and prevents the undue burden which would fall on public employers if they had to engage in bargaining sessions for the many splinter groups on a round-robin basis.” *Id.* (quotation marks and citation omitted); *see also Association of State Professional Employees v. Department of Revenue and Oregon Public Employees Union*, Case No. RC-55-95 at 8, 16 PECBR 615, 622 (1996) (related administrative preference for largest possible unit is “particularly significant” in state cases).

As to any contention that LAs cannot organize and collectively bargain at all, as we explained above, the legislature has not stated in PECBA that the Branch or some or all of its employees are excluded from PECBA, and we cannot insert an exclusion into PECBA where the legislature has not included one. If the legislature determines that the issues raised by the Branch

in this matter warrant exclusion of the LAs from PECBA, it has the authority to statutorily enact such an exclusion, but, to this point, the legislature has not done so. And we, as previously stated, lack the authority to make that policy decision, which is reserved for the legislature.<sup>35</sup>

The Branch does not advance any other arguments as to why the petitioned-for employees lack a community of interest, and, as noted above, it acknowledges that the traditional factors that we weigh show a shared community of interest among these employees. Accordingly, we find that the petitioned-for employees share a sufficient community of interest to constitute an appropriate bargaining unit. With respect to the factor of the desires of the employees, the employees have submitted a sufficient showing of interest in representation by the Petitioner for this Board to conduct a secret-ballot election to determine that ultimate employee choice. The factor of the history of collective bargaining does not play a meaningful role here, as there is no history with respect to this employer and these employees. For these reasons, we find the petitioned-for unit to be an appropriate unit. As described below, this Board will conduct an election to determine whether the employees wish to be represented by the Petitioner.

3. The record does not establish a classification-wide supervisory, managerial, or confidential exclusion for the petitioned-for group of employees.

We turn to the final set of Branch objections, which assert that the LA Is, IIs, IIIs, and IVs are not public employees under ORS 243.650(19) because they are “supervisory,” “managerial,” or “confidential” employees. Representation proceedings are investigatory, not adversarial, and there is no burden of proof. OAR 115-010-0070(5)(a). “Nevertheless, in disputes concerning whether employees are ‘public employees,’ there must be sufficient evidence establishing that a statutory exclusion applies.” *Id.*

In this case, the Branch contends that all of the petitioned-for LAs are statutory supervisors, managers, or confidential employees, on classification-wide bases. Before addressing the merits of those contentions, we address a procedural issue. Under our rules, “[q]uestions concerning public employee status” generally are not “decided in proceedings to determine the appropriate bargaining unit for a representation matter, unless the representation matter cannot be certified without the resolution of such questions.” OAR 115-025-0020(4). *See also* ORS 243.682(2)(b)(E) (resolution of dispute over an appropriate unit “may occur after an election is conducted”). Here, because the Branch asserted that the proposed unit was not appropriate, as well as asserted that not one employee in the proposed bargaining unit is a “public employee” under PECBA, we scheduled an expedited hearing before conducting the election because it was not clear whether the representation matter could “be certified without the resolution of such questions” on public-

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<sup>35</sup>To the extent that the Branch argues that the petitioned-for employees do not share a community of interest because some of the petitioned-for employees are family members of the elected legislator who hired them, as permitted by ORS 244.177(2) (carve-out from government ethics limitations on hiring family members for “the personal legislative staff of the member of the Legislative Assembly”), we also disagree. We acknowledge that those individuals could potentially have different collective bargaining priorities than other employees (*e.g.*, job security provisions may be less important to those employees than to others in the bargaining unit). We do not conclude, however, that such differences in priorities resulting from personal relationships to elected members are sufficient to outweigh the commonalities among the petitioned-for employees.

employee status. OAR 115-025-0020(4). For the reasons described below, we conclude that the Branch has not established that, on a classification-wide basis, any of the petitioned-for classifications are confidential, managerial, or supervisory. That means that this Board will conduct an election among eligible employees in the proposed unit, which we have found appropriate. Consistent with our rules, and in a manner consistent with this order, both parties may challenge, on an *individualized* basis, the eligibility of *specific* employees to vote, based on an individual employee being a confidential, managerial, or supervisory employee. See OAR 115-025-0073(2). Any challenged ballot will be impounded, and the Board will only resolve a challenge if such a resolution is necessary to certify the results of the election. *Id.* If the resolution of challenged ballots is dispositive, the Board will conduct a hearing to resolve those individualized challenges. *Id.* With that framework in mind, we proceed to our analysis as to whether the record establishes that the entire classifications of LA Is, IIs, IIIs, and IVs are excluded as non-public employees under ORS 243.650(19).

### Confidential Employee Exclusion

We begin with the Branch's assertion that all of the petitioned-for employees are not public employees because they are "confidential employees." Under ORS 243.650(6), a "[c]onfidential employee" means "one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." Under this definition, "[c]onfidential employee status is a narrow technical concept, determined by an employee's direct and specific involvement in collective bargaining matters, rather than work in conformance with the broad, generally-held concept of 'confidential' secretarial duties." *AFSCME Local 1724, Council 75, AFL-CIO v. City of Eugene*, Case No. UC-10-85 at 9, 9 PECBR 8591, 8599 (1986) (*Eugene*). Further, "[t]his Board seeks to avoid the proliferation of confidential employees." *Service Employees International Union Local 503, Oregon Public Employees Union v. Oregon Cascades West Council of Governments*, Case No. UC-16-04 at 8, 20 PECBR 786, 793 (2004) (*Oregon Cascades*); *Oregon AFSCME, Council 75 v. Benton County*, Case No. C-210-82 at 18, 7 PECBR 5973, 5990 (1983) (Board seeks to avoid proliferation of confidential employees that "has no justification other than the convenience of management").

To determine the confidential status of an employee, we apply a three-part test: (1) does the allegedly confidential employee provide assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining; (2) does the assistance relate to collective bargaining negotiations and administration of a collective bargaining agreement; and (3) is it reasonably necessary for the employee to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies? *Oregon Cascades*, UC-16-04 at 8, 20 PECBR at 793.

The first part of the test focuses on the individual whom the allegedly confidential employee assists, and requires a showing that the individual performs "all three functions" listed in the statute: *i.e.*, "formulates, determines, and effectuates employer policies in the area of collective bargaining." *Eugene*, UC-10-85 at 9, 9 PECBR at 8599 (emphasis in original).

The second part of the test focuses on the purportedly confidential employee, and requires a showing that the employee gives assistance, in a confidential capacity, that is directly related to collective bargaining. *Eugene*, UC-10-85 at 10, 9 PECBR at 8600. Our analysis focuses on whether the employee in question actually acts as a confidential employee, not whether the employee's job description is sufficient to establish confidential status. *Group of Unrepresented Battalion Chiefs Employed by the City of Medford v. City of Medford, and International Association of Fire Fighters, Local 1431 v. City of Medford*, Case Nos. CC-002-14 & CU-003-14 at 23 n 17, 26 PECBR 294, 316 n 17 (2014). Additionally, the employee at issue "must *currently* act in a confidential capacity." *Id.* at 23, 26 PECBR at 316 (emphasis in original). "[M]ere access to information regarding labor negotiations is not sufficient to establish assistance in a confidential capacity." *Eugene*, UC-10-85 at 10, 9 PECBR at 8600.

At the outset, we note that the Branch asserts that all 180 employees are "confidential," which is a broad proposition, particularly given the narrowness of this statutory exception and the strict criteria required to satisfy this exception. Here, the Branch has not provided sufficient evidence to establish any of the three parts of the confidential employee test on a classification-wide basis.

First, the Branch must show that each employee provides assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining. The Branch, however, has not established that predicate fact. Rather, the Branch has premised much of its objections on the *lack* of any individual (or group of individuals) who do or can actually formulate, determine, and effectuate management policies in the area of collective bargaining. The Branch nevertheless asserts that all 90 elected officials in the legislature "actually formulate, determine, and effectuate management policies in the area of collective bargaining" based on the fact that elected officials must at times take policy positions on public sector collective bargaining with respect to those officials' responsibilities as *legislators*. The confidential employee exclusion, however, is concerned with an individual's authority and responsibilities as a public employer's collective bargaining representative. Here, the Branch has not effectively established that every elected official will actually formulate, determine, and effectuate management policies in the area of collective bargaining with represented Branch employees (*e.g.*, by serving as the Branch's collective bargaining representative at the bargaining table with the represented employees, or by determining the Branch's bargaining positions). Relatedly, although the petitioned-for employees undoubtedly provide assistance to their elected officials, it has not been established that such assistance relates to collective bargaining or the administration of a collective bargaining agreement between the Branch and any the petitioned-for employees. Finally, the Branch has also not established that it would be reasonably necessary for all approximately 180 employees to provide confidential assistance as it relates to collective bargaining between the Branch and those same employees. Therefore, we do not conclude that every petitioned-for classification is excluded from being a public employee based on confidential employee status. If the proposed unit is certified, this conclusion would not preclude the Branch from challenging ballots based on the confidential employee exclusion, or from filing a unit clarification petition to exclude from the bargaining unit individual employees who actually become "confidential employees," as that term is defined by PECBA.

## Managerial Employee Exclusion

We turn to the Branch's contention that some of the petitioned-for employees are managerial employees.<sup>36</sup> Under ORS 243.650(16), a "[m]anagerial employee" means "an employee of the State of Oregon \* \* \* who possesses authority to formulate and carry out management decisions or who represents management's interest by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties." Additionally, a "'managerial employee' need not act in a supervisory capacity in relation to other employees." ORS 243.650(16). The managerial employee exclusion was added to PECBA by Senate Bill 750 in 1995. Unlike the supervisory and confidential exclusions, the managerial exclusion applies only to employees of the State of Oregon and the Oregon public universities listed in ORS 352.002. The exclusion is based on the judicially implied exception to the National Labor Relations Act, which grew out of the concern that "an employer is entitled to the undivided loyalty of its representatives." *NLRB v. Yeshiva University*, 444 US 672, 682 (1980). Managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* (quoting *NLRB v. Bell Aerospace Co.*, 416 US 267, 288 (1974)). They must "exercise discretion within, or even independently of, established employer policy and must be aligned with management." *Yeshiva University*, 444 US at 683.

This Board, in its first case construing PECBA's managerial employee exclusion, described the exclusion as follows:

"[S]ection (16) sets up an alternative definition of 'managerial employee' as an employee of the state (1) 'who possesses authority to formulate and carry out management decisions' or (2) 'who represents management's interest by taking or effectively recommending discretionary actions that control or implement employer policy.' Both alternatives are modified by the statement that such an employee must have 'discretion in the performance of these management responsibilities beyond the routine discharge of duties.'"

*Department of Justice v. Oregon Association of Justice Attorneys*, Case No. UC-64-95 at 5, 16 PECBR 777, 782 (1996).

Here, there is no dispute that the petitioned-for employees are employees of the State of Oregon, and not the individual elected member on whose personal staff they serve. The Branch also does not appear to contend that every petitioned-for employee actually has authority to take or effectively recommend discretionary actions that control or implement the Branch's policy as an employer. Rather, the Branch appears to contend that every elected member is part of Branch management, and that because LA IIIs and IVs seek to carry out their own individual member's policy objectives, the LAs have sufficient authority to qualify as managerial employees under

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<sup>36</sup>In its objections, the Branch objected that "some" of the petitioned-for employees are managerial employees. In its post-hearing brief, it cited as examples only LA IIIs and IVs, and consequently we limit our discussion here to LA IIIs and IVs.

PECBA. We need not decide whether every elected assembly member has sufficient authority over the Branch's policies *as an employer* to qualify as "management" for purposes of PECBA,<sup>37</sup> because, even assuming that they do, this record does not establish that all the LA IIIs and LA IVs, on a classification-wide basis, exercise the level of discretion required by ORS 243.650(16) to also qualify as managerial employees. For an LA to be excluded as a managerial employee, that LA would need to have the authority to take discretionary actions (or effectively recommend them), that are outside the scope of their professional duties *and* control or implement the Branch's policies *as an employer*. To the extent that LA IIIs and IVs have the authority to take or effectively recommend discretionary actions regarding proposed legislation, this record does not establish that all LA IIIs and IVs exercise that authority outside the scope of professional duties routinely performed by LA IIIs and IVs. "Although all professional employees exercise their professional judgment on behalf of their employer when carrying out their duties, *only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.*" *Oregon Association of Justice Attorneys*, UC-64-95 at 8, 16 PECBR at 784 (quotation marks and citation omitted; emphasis added). Further, the record does not establish that all LAs exercise non-routine authority regarding the Branch's *employer* policies, as opposed to other types of legislative policies. Although there may be individual LAs who actually exercise managerial authority, the record does not establish that all employees in the LA III and IV classifications should be categorically excluded as managerial employees.

#### Supervisory Employee Exclusion

Finally, we turn to the Branch's objection that LA IIIs and IVs are "supervisory." Under ORS 243.650(23)(a), a "[s]upervisory employee" is "any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment." The issue of supervisory status requires the resolution of three questions, each of which must be answered in the affirmative for an employee to be deemed a supervisory employee: (1) whether the employee has the authority to take action (or to effectively recommend action be taken) in any of the 12 listed activities; (2) whether the exercise of that authority requires "the use of independent judgment"; and (3) whether the employee holds the authority in the interest of management. *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 22, 25 PECBR 996, 1017 (2014) (citing *Deschutes County Sheriff's Association v. Deschutes County*, Case No. UC-62-94 at 12, 16 PECBR 328, 339 (1996)). The enumerated supervisory functions in ORS 243.650(23)(a) are read in the disjunctive, such that an employee is a "supervisory employee" if the employee has authority under one of the 12 statutory criteria. *Portland Police Commanding Officers Association*, UC-017-13 at 22, 25 PECBR at 1017.

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<sup>37</sup>The record establishes that the Branch makes its employer policies through the assembly of the elected members or by statutorily delegating some authority to the Legislative Administration Committee and the Legislative Administrator. See ORS 173.710 ("The Legislative Administration Committee hereby is established as a joint committee of the Legislative Assembly. The committee shall select a Legislative Administrator who shall serve at the pleasure of the committee and under its direction."); ORS 173.720 (prescribing the duties of the Legislative Administrator).

The Branch asserts that LA IIIs and IVs have the authority to hire, promote, discharge, assign, or responsibly to direct, or to effectively recommend such action. For the reasons discussed below, we conclude that the record does not establish that either LA IIIs or IVs actually have any such authority on a classification-wide basis.

To begin, we note that the Branch relies on evidence that purportedly shows LAs supervise “other employees or interns.” However, PECBA defines a “supervisor” as one with authority to act, or effectively recommend action, regarding only “other employees.” ORS 243.650(23)(a). The term “other employees” includes only employees “who work for a wage or salary.” *Laborers’ International Union, Professional Law Enforcement Officers Association, Aurora, v. City of Aurora*, Case No. CC-06-10 at 11, 24 PECBR 38, 48 (2010) (authority over volunteer reserve officers does not establish supervisory status). Thus, when determining whether an employee is a statutory supervisor or manager, we “examine only their authority regarding *paid* employees.” *Teamsters Local 223 v. City of Gold Hill*, Case No. UP-63-97 at 10, 17 PECBR 892, 901 (1999) (emphasis in original). See also *Laborers International Union of North America, Local 483 Law Enforcement Professional Association v. City of Gervais*, Case No. UC-16-08 at 18, 23 PECBR 143, 160 (2009). Thus, in this case, we consider the authority of LAs to supervise only other employees, not interns.

Without counting interns, the record indicates that each assembly member office typically has one, and at most two, LAs working on a regular basis throughout the year. In some offices, a second LA works year-round, and in others, a second or third LA works only when the legislature is in session. Currently, there are 180 employees in the petitioned-for unit. If, as the Branch asserts, there is one employee with supervisory authority in each of the 90 member offices, that would mean that those 90 LAs each exercise such authority over only one other employee. “[T]he provisions of the PECBA generally require that an alleged supervisor have control over multiple workers in order to be excluded from PECBA coverage.” *City of Forest Grove v. City of Forest Grove Employees Local 3786*, Case No. UC-29-96 at 8, 17 PECBR 171, 178 (1997) (“ORS 243.650(23) itself speaks of supervisors as persons who have charge of other employees by directing them or adjusting their grievances, thus indicating that a true supervisor manages more than one other employee.”). “While it may be appropriate in a rare case \* \* \* to exclude an employee who supervises only one other worker,” under such circumstances, the evidence concerning supervisory status must be “overwhelming.” *Id.*

In this case, for evidence of supervisory status, the Branch relies exclusively on the LA job descriptions and questionnaires that were designed for the purposes of a classification, compensation, and pay equity study (not to determine the employees’ supervisory status under PECBA).<sup>38</sup> Both the job descriptions and the JDQs (even though completed by the employees themselves) are largely conclusory and non-specific, and therefore insufficient on their own to establish supervisory status. See *Portland Police Commanding Officers Association*, UC-017-13 at 23, 25 PECBR at 1018 (“Mere inferences and conclusory statements regarding supervisory authority are insufficient to render an employee a supervisor.”).

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<sup>38</sup>The Branch’s witnesses, Knieling and Eledge, acknowledged that they lacked personal knowledge of the purported authority exercised by LAs, and that their testimony was based on the job descriptions and questionnaires.

For example, the Branch contends that LA IVs are supervisors because the list of essential duties in the LA IV job description includes: “Hires, trains, supervises, and mentors other employees or interns.” This description alone does not establish supervisory status, for several reasons. Because the common understanding of the term “supervise” is much broader than the statutory definition, the mere use of that term in a job description or title is insufficient to establish supervisory status under PECBA. *See, e.g., City of Union v. Laborers’ International Union of North America, Local 121*, Case No. UC-9-08 at 4, 22 PECBR 872, 875 (2008) (concluding that public works superintendent was not supervisor despite job description stating that essential job functions include “[s]upervise subordinate employees including assigning and reviewing work, evaluating performance, scheduling work, recommending disciplinary actions and hiring/termination decisions”). Additionally, the LA IV job description refers to the supervision of “interns,” but, as noted above, the supervision of interns is not relevant to our analysis here.<sup>39</sup> Similarly, “training” and “mentoring” are not one of the 12 indicia of supervisory status under PECBA. *See* ORS 243.650(23)(a); *Laborers’ International Union of North America, Professional Law Enforcement Officers Association, Aurora v. City of Aurora*, Case No. CC-06-10 at 11, 24 PECBR 38, 48 (2011) (officer’s role in training employees does not confer supervisory status). Although “hiring” authority is supervisory under PECBA, the record does not establish that all LA IVs actually make or effectively recommend hiring decisions for other employees. For example, one LA IV testified that he does not making hiring decisions, and that his role in the hiring process is limited to scheduling and participating in interviews and sharing his opinion about the interviewees. To the extent he shares his opinion, there is no specific evidence establishing that he has done so regarding employees (as opposed to interns), or that his input rises to the level of “effective recommendation.”<sup>40</sup>

The Branch also contends that the questionnaires establish that LA IIIs and IVs are supervisory because some employees in those classifications indicated that they “supervise” other employees. However, the questionnaire’s description of supervisory authority did not conform to PECBA’s definition of “supervisor.” For example, the questionnaire did not direct the employees to consider only their authority regarding other employees, and as a result, many of their responses refer to their authority over interns, which is not relevant to their status as supervisors under PECBA. For another example, the questionnaire did not direct the employees to indicate whether they use independent judgment when exercising their purported supervisory authority, which is a requirement for supervisory status under PECBA.<sup>41</sup> The questionnaire also did not indicate

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<sup>39</sup>For this reason, the testimony of an LA III regarding the assignment of work to interns does not, as the Branch contends, establish that LA IIIs are statutory supervisors.

<sup>40</sup>We also note that the LA job descriptions indicate that the LA III classification is *not* supervisory. The LA III job description does not state that the LA III possess any supervisory authority. And, the LA IV job description states that the level IV “is distinguished from the III level in that it has responsibility for supervision of staff and interns.” That is, according to the Branch’s job descriptions, the LA III classification *lacks* responsibility for supervision of staff.

<sup>41</sup>The questionnaire, in a section separate from the supervisory authority section, asked the employees to indicate whether they exercise independent judgment when performing their job duties. Some  
(Continued ... )

whether any supervisory authority was exercised in the interest of management, as opposed to the interest of the LA in the routine performance of the LA's duties. Consequently, the mere fact that some LAs indicated that they have supervisory authority in their questionnaire responses does not establish that they are "supervisors" as that term is defined under PECBA.<sup>42</sup>

### Conclusion

In sum, we conclude that we have jurisdiction over this matter and that the petitioned-for unit is an appropriate unit. Further, none of the petitioned-for classifications are categorically supervisory, managerial, or confidential.<sup>43</sup> Accordingly, we will direct the Election Coordinator to conduct a secret, mail-ballot election as set forth below. Because this matter was heard on an expedited basis, the Board will grant any petition for reconsideration that is filed within 14 days of our final order. OAR 115-025-0065(2)(g). Because, however, we are only directing an election to be conducted, this order is not a final order. *Klamath Co. v. Laborers Inter. Union*, 21 Or App 281, 534 P2d 1169 (1975). *Cf. Linn-Benton-Lincoln Educ. Ass'n/OEA/NEA v. Linn-Benton-Lincoln ESD*, 152 Or App 439, 448, 954 P2d 815 (1998) (a *post-election* certification order is a "final order"). After the election is conducted, the Board will issue a final, post-election order certifying the results of the election. At that point, both parties will have 14 days to request reconsideration of that final order. OAR 115-025-0065(2)(g).

### ORDER

1. An appropriate bargaining unit is:

"Legislative Assistant I, Legislative Assistant II, Legislative Assistant III, and Legislative Assistant IV supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees."

2. The Election Coordinator shall conduct a secret, mail-ballot election in the above-bargaining unit to allow eligible employees to express their desires for or against Petitioner IBEW Local 89 as their exclusive representative. Eligible employees are those employed in the

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(Continued ... )

of the LAs who indicated that they "supervise" indicated that they do *not* exercise independent judgment. Further, the questionnaire generally asked whether the employee exercises independent judgment when performing their job duties; it did not ask specifically whether the employee exercises independent judgment *when supervising* other employees. The exercise of independent judgment in the performance of work is common and does not make an employee a statutory supervisor. Rather, supervisory status turns on the use of independent judgment *when exercising supervisory authority* over other employees. *IAFF Local 851 v. Lane Rural Fire/Rescue*, Case No. RC-7-03 at 8, 20 PECBR 512, 519 (2003).

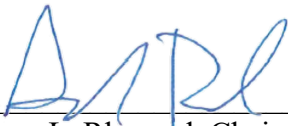
<sup>42</sup>The amount of variation in the questionnaire responses also weighs against a finding that all of the employees in the LA III and LA IV classifications are categorically supervisory.

<sup>43</sup>As noted above in this order, either party may challenge the ballot of a specific employee on an individual basis, consistent with this order.

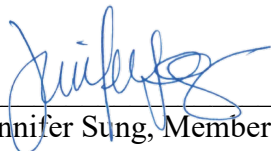
classifications above on the date of this order and who are still employed on the date of the election. The date of the election is the date that the Election Coordinator determines mail ballots are due. The choices on the ballot shall be IBEW Local 89 or No Representation.

3. Within 20 days of the date of this order, the Branch shall provide the Election Coordinator with an alphabetical list of the names of eligible voters, along with their home addresses, job classifications, and, if known, personal email addresses and telephone numbers.<sup>42</sup> OAR 115-025-0071(2). The Board will provide IBEW Local 89 with the list. *Id.* Within 20 days of this order, the Branch shall also provide the Election Coordinator with a set of mailing labels, with the addresses of eligible voters, in alphabetical order.

DATED: April 6, 2021.

  
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Adam L. Rhynard, Chair

  
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Lisa M. Umscheid, Member

  
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Jennifer Sung, Member

This is an interim order not subject to appeal under ORS 183.482.

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<sup>42</sup>Consistent with this order, the list must include *all* employees in the petitioned-for classifications, regardless of whether the Branch believes that an individualized challenge may be warranted during the election.