



reasonable expectation of teaching, research or other scholarly accomplishments; (3) classified staff; (4) confidential employees; and (5) all faculty, instructors or librarians in any other bargaining unit.”<sup>2</sup>

On June 25, 2018, Respondent Oregon Institute of Technology (Oregon Tech or University) filed objections to the petition asserting that its faculty Department Chairs are supervisory employees under ORS 243.650(23).

The issue is: Is the proposed bargaining unit of faculty Department Chairs appropriate under ORS 243.682(2)?

For the following reasons, we conclude that the proposed bargaining unit is appropriate.

## RULINGS

### Post-Enactment Testimony of HB 3170 Proponents

At hearing, Petitioner presented testimony of individuals involved in proposing and lobbying for the passage of HB 3170, now codified as ORS 243.650(23)(b)(A). To the extent that the testimony was offered for the purpose of proving legislative intent, we agree with the ALJ’s ruling that such testimony should not be considered in light of *Salem-Keizer Assn. v. Salem-Keizer Sch. Dist. 24J*, 186 Or App 19, 26, 61 P3d 970 (2002).<sup>3</sup> Although that case concerned post-enactment testimony of legislators, whereas the testimony here concerned the post-enactment testimony of non-legislators, the rationale in *Salem-Keizer Assn.* supports the ALJ’s ruling.

### Legislative History Submitted After Hearing

After hearing, with its post-hearing brief, Oregon Tech submitted 27 pages of legislative history regarding HB 3170, including statements of the proponents and witnesses at hearings on the bill before the Oregon House and Senate. The Association objected, arguing that it was inappropriate for Oregon Tech to introduce such evidence after hearing, citing OAR 115-010-0068(3) – (4). The ALJ properly denied the objection, ruling that legislative history is not part of the factual record of this case and could be submitted at any time in this process. *See State v. Gaines*, 346 Or 160, 167 n 3, 206 P3d 1042 (2009) (not treating legislative history as evidence, and reviewing legislative history not submitted by the parties).

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<sup>2</sup>The Association filed a second petition, RC-008-18, to certify a separate bargaining unit pursuant to ORS 243.682(2) and OAR 115-025-0000(4). The proposed unit was described as, “All full time faculty, instructors, and librarians working at .5 FTE or above at the Oregon Institute of Technology, but excluding employees in the following groups: (1) faculty employed as a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position; (2) faculty employed in an administrative position without a reasonable expectation of teaching, research or other scholarly accomplishments; (3) classified staff; (4) confidential employees; and (5) faculty chairs.” No objections were filed, and the bargaining unit was certified on June 27, 2018.

<sup>3</sup>We consider, however, other evidence offered by those witnesses—*i.e.*, testimony regarding matters other than legislative intent.

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

## FINDINGS OF FACT

### The Parties

1. The Association is a labor organization within the meaning of ORS 243.650(13). Pursuant to another petition granted on June 27, 2018, the Association also represents an Oregon Tech bargaining unit of “[a]ll full time faculty, instructors, and librarians working at .5 FTE or above” excluding the “faculty chairs” at issue here and some other Oregon Tech employees.

2. Oregon Tech is a public employer within the meaning of ORS 243.650(20). Oregon Tech has approximately 300 faculty. Approximately 150 faculty members hold ranked positions of instructor, assistant professor, associate professor, or professor, and they are either tenured or on tenure-track. Approximately 150 faculty members hold non-ranked positions, such as adjuncts and other part-time positions. There are approximately 15 academic Department Chairs, the subjects of this Petition.

### Oregon Tech Structure

3. Before 2015, Oregon Tech was governed by the Oregon State Board of Higher Education, the governing board for the seven public universities in Oregon. In April 2014, the State Board of Higher Education authorized Oregon Tech to establish a Board of Trustees, appointed by the Governor and approved by the Senate.

4. Effective July 1, 2015, Oregon Tech became an independent public body governed by its Board of Trustees. The Trustees approve Oregon Tech’s mission, programs, budgets, and strategies, and work with the State of Oregon’s Higher Education Coordinating Commission (HECC) to provide final approval for Oregon Tech’s mission and academic programs.

5. Oregon Tech has four primary campuses: Oregon Tech Klamath Falls Campus; Oregon Tech Wilsonville Campus; Oregon Tech Online Campus; and the Oregon Tech Extension in Salem, Seattle, and La Grande. At the time of hearing, approximately 5,500 students attended Oregon Tech.

6. Oregon Tech is divided into two Colleges: the College of Health, Arts and Sciences (HAS), and the College of Engineering, Technology and Management (ETM). The colleges are university-wide and extend to all campuses and operations. Oregon Tech is further divided into 15 academic departments, all of which operate within one of the two colleges.

### Personnel Structure of Oregon Tech

7. The President of Oregon Tech is the “executive and governing officer of the university,” the “President of the faculty,” and, under the Board of Trustees’ supervision, has the authority to direct the affairs of Oregon Tech. Ultimate authority resides with the Board of

Trustees. The current President of Oregon Tech is Dr. Nagi Naganathan, who began serving as president in 2017.

8. Oregon Tech also identifies the following positions as “Executives of the University”: (1) Provost (also referred to as Vice President for Academic Affairs); (2) Vice President for Finance and Administration; (3) Vice President for Student Affairs and Dean of Students; (4) Vice President for the Wilsonville Campus; (5) Associate Vice President for Strategic Partnerships and Government Relations; (6) Associate Vice President for Public Affairs; (7) Associate Vice President for Development and Alumni Relations; (8) Associate Vice President and Chief Information Officer for Information Technology; (9) Vice President for Enrollment Management; (10) Chief Human Resources Officer; and (11) Board Secretary.

9. The Provost is the Chief Academic Officer of Oregon Tech. The Provost supervises academic programs in the two colleges (HAS and ETM) in collaboration with the Dean of each college and the Faculty Senate. The current Provost is Dr. Gary Kuleck, who was hired as Provost and Vice President for Academic Affairs, effective June 30, 2017. Dr. Kuleck had experience as an administrator in other universities that employed full-time department chairs (a model sometimes referred to by the parties as “professional chairs”).

10. The following positions report to the Provost and are part of the Provost Leadership Team (PLT): College Deans, Associate Provost, Vice President for Research, Associate Vice President for Strategic Partnerships & Government Relations, Director of Online Learning, Registrar, Director of Academic Agreements, Director of Library, and Director of Institutional Research.

11. The Vice President for the Wilsonville Campus is also an Associate Provost, and is the Wilsonville Campus Academic and Operating Officer (Campus Administrator). They are responsible for daily operations and administration of that campus.

12. The Vice President for Research (VPR) is Oregon Tech’s chief research officer, and promotes and oversees research, sponsored projects, and technology transfer. The VPR is responsible for advancement of Oregon Tech’s research mission by encouraging and facilitating excellence in scholarly, sponsored research, and innovation activities. The VPR’s major responsibilities include: (1) exercising signature authority over sponsored projects, grant-related agreements, intellectual property agreements, patentable subject matter, and research administration & IP regulatory compliance; (2) overseeing the Offices of Sponsored Projects & Grants Administration, Innovation & Technology Transfer, as well as the Graduate Council and Oregon Tech IRB; (3) representing Oregon Tech in external groups with the other Oregon VPRs; and (4) providing support to faculty in obtaining external funding by encouraging investment in research infrastructure and promoting scholarship on campus.

13. The Associate Vice President for Strategic Partnerships & Government Relations (AVPSG) promotes and oversees industry and government relationships at Oregon Tech. The AVPSG is responsible for promotion of Oregon Tech’s economic development mission by facilitating external relationships that benefit Oregon Tech’s mission. These include: (1) building long-term partnerships with businesses and industry associations; (2) providing support to secure

external funding through private sector partnerships for grants and sponsored projects; (3) working with faculty to develop collaborations with industry that lead to sponsored projects, commercialization and entrepreneurial opportunities; (4) building an alliance of local, state, and national support for Oregon Tech's policy and funding priorities; and (5) representing Oregon Tech on strategic partnership, industry affairs, and legislative advisory councils.

14. The Director of Online Learning has responsibility for developing and executing a strategy to create an "Oregon Tech Online Campus," providing online academic programs and student services. The Director of Online Learning has academic and operational responsibilities, and is responsible for advocating for resources and implementing best practices to deliver quality online education.

15. Oregon Tech has a Faculty Senate that is responsible for considering proposed changes in university policies, recommending policy changes to the President and President's Council, considering issues affecting the general welfare of the faculty, and establishing policies regarding academic freedom. Senate elections are conducted annually. All full-time faculty members with the academic rank of instructor or above are eligible to be elected.

16. The primary hierarchy on Oregon Tech's academic side is: President; Vice President; Provost/Vice President For Academic Affairs; Directors<sup>4</sup>; Dean (one for each college); Associate Dean (for the ETM college); and Department Chair.

#### College Deans, Associate Deans, and Directors

17. Oregon Tech has two College Dean positions, Dean of the College of ETM, and Dean of the College of HAS. The Deans report to the Provost. They are the chief academic and administrative officers for the academic activities of the departments in their College. College Deans are responsible for strategic planning; budgeting and fiscal management; negotiating the salary of all new faculty appointments; awarding tenure, rank, and merit salary increases; and approving fixed and tenure-track faculty positions when a budgeted faculty position becomes vacant. Deans have the authority to start a faculty search for any College Department, and can fill a vacancy but place the new faculty member in a different Department from the vacancy. They can award academic release time for new programs and strategic initiatives in their College. A Dean may remove a Department Chair who does not meet performance objectives after a vote of the department's faculty. The Deans also manage the accreditation and the external review of the College's programs and departments; collaborate with the Associate Provost/Wilsonville Branch Campus Administrator on Wilsonville related strategic priorities and Department Chair evaluations; and exercise authority over faculty-related operational matters such as office assignments, keys and access, and faculty travel funds.

18. At the time of hearing, Oregon Tech had one Associate Dean for ETM and was considering adding an Associate Dean position for HAS. The Associate Dean serves on the PLT.

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<sup>4</sup>Individual Directors exercise varying authority depending on their assigned work, but the parties do not differentiate between them. They are listed on Oregon Tech's organization chart as directly below the Provost, but, most, if not all, report to various Vice Presidents. Directors on the academic side report to the Provost/Vice President.

19. At the time of hearing, there were approximately 15 Directors and two Associate Directors. Six Directors are on the academic side of Oregon Tech. They report to the Provost/Vice President of Academic Affairs. Four Directors report to the Vice President of Finance and Administration. Five Directors and two Associate Directors report to the Vice President for Student Affairs/Dean of Students. The Director-level positions are in the areas of: Registrar and Directors of Academic Agreements, Academic Excellence and Assessment, Admissions, Athletics, Business Affairs, Campus Life, Financial Aid, Housing and Residence Life, Institutional Research, Integrated Student Health Center, Library, Online Learning, and Student Success Center.

### Faculty

20. Oregon Tech defines “faculty” as “those persons at OIT who hold state board appointments with a rank of professor, associate professor, assistant professor, instructor, research associate, [or] research assistant; and whose full-time equivalent is at least 50% teaching, research, or administration.” OIT-020-015 (Faculty Compensation Policy). Promotion in academic rank is sequential, and faculty typically spend four full years in a rank before applying for advancement. Promotion involves both peer and administrative assessment. The Provost makes the final promotion decisions, after consultation with the Oregon Tech President.

21. Faculty salary is determined in accordance with Oregon Tech policy OIT-020-015. Initial salaries are negotiated at the time of hire with the Provost and are not less than the floor salary established for the rank and discipline of the position. The Department Chair, in consultation with the search committee, may recommend a higher initial salary to the Provost based on market conditions, education, the individual’s experience, and comparable positions. Increases to base salary for faculty may occur through promotion, post-tenure review, cost-of-living adjustments, equity adjustments, and stipends, among other factors.

22. Tenure-track and tenured faculty members are evaluated in three categories of work: instruction (*i.e.*, teaching), professional development (*e.g.*, scholarship, applied research, publications, participation in professional organizations), and institutional and professionally related public service. Under Oregon Tech policy, one way that academic faculty members can fulfill institutional service expectations is by serving as a Department Chair. *See* OIT-21-040 (Faculty Evaluation Policy); OIT-20-030 (Indefinite Tenure Selection); OIT-20-035 (Post-Tenure Review). Other forms of institutional service include serving in the faculty senate and serving on various university committees (*e.g.*, promotion review committee, sustainability committee).

23. Each academic department has teaching or instructional workload requirements for faculty members. A faculty member typically is required to teach 12 workload units per term, which generally corresponds to 12 “lecture contact” hours, *i.e.*, the hours that a faculty member spends in the classroom delivering a course. *See* Oregon Tech Faculty Workload Guidelines 2017-2018. The normal, full-time faculty teaching load at Oregon Tech is 12 workload hours per term or 18 “contact” hours (the Oregon Tech Faculty Workload Guidelines 2017-2018 define “contact hour” “as 50 minutes of *scheduled* instruction” (emphasis in original)). A faculty member may receive “academic release time” from their teaching workload if their “service load is especially heavy,” such as when serving as a Department Chair, Program Director, or Faculty

Senate President. Oregon Tech Faculty Handbook; Oregon Tech Academic Release Time & Stipend Model; Academic Stipend and Release 2018-19 (indicating release time granted to faculty members by department).

### Department Chairs

24. Each of Oregon Tech's 15 academic departments is headed by a faculty member who serves as Department Chair. Each Department Chair reports to their College's Dean.

25. At the time that the petition in this case was filed (June 5, 2018), Oregon Tech's policy regarding Department Chair selection and evaluation (OIT-21-030) emphasized that a department chair's "first priority is to serve as teaching faculty." That policy also described the department chair as a position that "supports the teaching activities of the department, actively represents departmental needs to the dean, and serves as a communicative link between the administration and department faculty." That policy also characterized the department chair position as "an academic leader of the institution serving as a member of the Academic Council, providing input to the administration on academic policy and curriculum issues." The Academic Council plays an advisory role to the Provost; it does not vote, and the Provost has the discretion to accept or reject feedback from the Academic Council. The Academic Council is also a forum through which members receive information and training from the Provost. The prior policy also encouraged faculty "to rotate in the chair position" for the purpose of "provid[ing] new ideas and leadership."

26. After the filing of the petition, Oregon Tech changed the policy (OIT-21-030) in numerous ways. Most relevant to the issue before us, the policy removed the language that the chair's first priority was to serve as a teaching faculty, and removed the provision encouraging faculty to rotate the chair position. Dr. Kuleck testified that he had begun working on possible changes to the policy before December 2017, although he had not drafted any revisions by that time.<sup>5</sup>

27. Under the revised policy, faculty members serve as Department Chairs for four years, as opposed to three years under the prior policy.

### Department Chair selection process

28. Oregon Tech Department Chairs are selected according to policy OIT-21-030. As set forth above, that policy underwent a revision in 2018 that deemphasized the teaching role of the position and removed the stated preference for rotating the chair position. Department Chairs are generally selected internally from among the faculty in the department. An external candidate may be selected to serve as a department chair only when a faculty position is also open and could be filled with a new hire. Department Chairs are nominated and voted upon by the departmental faculty.

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<sup>5</sup>Although the process for revising the policy began before the petition was filed, the record establishes that the Oregon Tech administration initiated the revision process only after it became aware that the faculty were organizing.

29. Department Chairs may be reappointed if the faculty in the department and the Dean concur. Department Chairs are evaluated pursuant to the Faculty Evaluation Policy (OIT-21-040). Department Chairs receive an annual evaluation from the Dean and a Comprehensive Evaluation from the Dean in their fourth year serving as Department Chair. As part of the Comprehensive Evaluation, department faculty may recommend reappointment or non-reappointment of the Department Chair. Department Chairs may be removed by the Dean for unsatisfactory performance if two-thirds of voting departmental faculty vote for removal. When Department Chairs complete their term as chair or are removed from the chair appointment, they typically resume full teaching duties. Department Chairs who resign from that position before completing their term need not also resign as a faculty member.

#### Department Chair duties

30. Oregon Tech's August 2018 Guidelines on Department Chair Administrative Roles and Responsibilities state:

“The Chair, as departmental leader, liaison, and advocate, is a faculty member within an academic department who acts as supervisor for that academic department and as liaison between the academic department and the college and university administration. The Chair is the representative and advocate of the academic department's faculty, staff, and students, communicating information from administration to faculty and from faculty to administration.”

The August 2018 Guidelines also state that Department Chairs “[a]ctively participate in the dean's leadership team and conversely, serve as the dean's representative in the daily operations of the department.”

31. Oregon Tech Department Chairs report directly to a college Dean regardless of the department's physical location. Chairs of departments with a presence at the Wilsonville Campus also report directly to the local branch campus Administrator (Associate Provost) for Wilsonville-related matters and strategic priorities.

32. Department Chairs continue to have teaching duties, but receive release time to reduce their teaching workload. Most Department Chairs receive 0.5 FTE teaching release time.<sup>6</sup> For example, if a faculty member's workload requirement is normally 12 workload units per term, and they receive 0.5 FTE release time, they must continue to teach 6 workload units per term. The University's “Academic Release Time and Stipend Model” states that, “[g]iven the educational mission of the university, the maximum release time any faculty member can receive is 0.75 FTE.”

33. Workload units correspond only to the hours that a faculty member spends in a classroom or laboratory providing instruction to students (*e.g.*, delivering a lecture). Workload units do not include time that academic faculty spend on other job duties, such as advising students,

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<sup>6</sup>Some chairs receive less than this amount, and some receive more (up to the .75 FTE maximum release time). The chairs allot the amount of release time for themselves, as well as for other types of allowed release time (*e.g.*, program coordinator), within a release-time formula set by the Academic Release Time & Stipend Model.

and work in the areas of institutional service and professional development. There is no explicit workload unit assigned to other faculty job requirements, such as research or professional development. When faculty members receive release time from their instructional workload units to serve as department chairs, that release time corresponds to their teaching workload, not other job requirements such as research and professional development.

34. At the time of hearing, Kenneth Usher, a professor in the Natural Sciences department, was serving a 3-year term as department chair that started in 2017. He had served as department chair for one previous term, from 2011-2014. He estimated that his weekly work hours were fairly evenly split between his teaching and typical faculty duties and his administrative duties as department chair. He was elected to the chair position by the department faculty. Natural Sciences also has an associate chair, which shares the administrative duties of the chair position. Professor Usher expects to return to a regular faculty position at the end of his term.

35. Cristina Negoita, a professor in the Mathematics department serves as Program Director for Applied Math. She previously served as department chair from 2010-2013. When she served as department chair, she continued to teach half of the department's minimum workload units. She also continued to advise students and perform academic research.

36. Department Chairs oversee their department as a whole, including the work of faculty, staff, and graduate assistants. They coordinate the development, revision, and evaluation of courses. Consistent with their department's budget and mission, they also decide which courses are provided and when, and determine the number of sections for each course. Chairs assign faculty to teach courses, and they may hire additional adjunct faculty or assign overload to current faculty to ensure that needs caused by student enrollment are met. They allocate release time and authorize stipends to faculty for work as program directors, special assignments, publications, and presentations. Chairs make recommendations for faculty hires and promotions. They also oversee the development of department objectives with the department faculty and the Dean.

37. Department Chairs appoint program directors, allocate release time and stipends within Oregon Tech policy, convert unused release time to professional development funds, allocate Graduate Assistantships (GA), request the hiring of Adjunct Faculty, provide input on the department's budget, and request additional release time for new program initiatives.<sup>7</sup>

38. Department Chairs may make recommendations to the Dean about the department's budget, but final decision-making authority over the budget rests with the Dean and Provost. Department Chairs have some authority to purchase equipment without approval from the Dean. At the April 13, 2018, meeting of the Academic Council, Budget and Resource Planning Director Stephanie Pope gave the department chairs an overview of Oregon Tech's new budget model, which gives chairs the final authority to approve faculty travel funds and manage professional development funds, and also manage expenditure of overload funds (used when there is unanticipated student over-enrollment, and more courses are offered than originally planned).

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<sup>7</sup>Program directors have administrative responsibility for programs of study within a department. Program directors are represented as part of the non-chair faculty bargaining unit represented by the Association.

Under the new budget model, the department chair is expected to manage the department budget in a fiscally responsible manner, and surplus funds remaining at the end of the fiscal year are rolled-over to the department's budget for the next year. Oregon Tech anticipates that it will take several budget cycles to fully implement the new budget model.

#### Supervision exercised by Department Chairs<sup>8</sup>

39. Department Chairs have independent authority to hire and fire Teaching Assistants (TAs) in their department, but do not have independent ability to hire or fire faculty. They may request that Oregon Tech hire adjunct faculty, but they must submit a Request for Adjunct Faculty form to a dean for approval.

40. Department Chairs may have a supervisory file for a faculty member to be used during the academic year, but must return the file to the faculty member at the end of the year.

41. Department Chairs are responsible for assembling a five-member Promotion Review Committee (typically composed of other department faculty members) to consider and make recommendations on faculty promotions. The Department Chair is responsible for attaching a letter of support/non-support to the committee's written decision and forwarding both to the College Dean. The College Dean then submits a recommendation to the Provost. The Provost, in consultation with the President, makes the final decision on faculty promotions.

42. Department Chairs are responsible for reviewing documentation that may support a faculty member's performance bonus and providing a recommendation to the Dean. However, witnesses did not recall any instance where such a bonus was awarded.

#### Policies governing Department Chairs and Unclassified Administrators

43. Oregon Tech has a Faculty Compensation Policy (OIT-020-015), which applies to all instructional faculty, and a separate compensation policy for "unclassified administrators," OIT-20-044 (Compensation Plan for Unclassified Administrators). Faculty members serving as Department Chairs are subject to the Faculty Compensation Policy.

44. Department Chairs are paid a stipend for their work as chair, in accordance with the Faculty Compensation Policy. That policy provides that stipends are extra compensation given for "administrative duties such as serving as department chair or program coordinator/director." Another Oregon Tech policy, OIT-23-060 (Salary Stipends for Academic Administrators), describes the stipend for Department Chairs as "an extra annual salary stipend for academic administrative duties assigned to the Department Chairs." If a faculty member serving as department chair stops serving in that capacity, even temporarily, such as while on sabbatical

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<sup>8</sup>Oregon Tech objected to what it viewed as omissions in the recommended order regarding traditional supervisory authority of Department Chairs, specifically concerning hiring practices, performance evaluations, and promotions. However, we do not deem those facts as essential to our decision, because the 2017 amendments to PECBA extended collective bargaining rights to certain university faculty who possess traditional supervisory authority, and the omitted facts do not address whether the primary focus of the Department Chairs is administrative versus academic (as discussed in our conclusions of law).

leave, they stop receiving the stipend (*i.e.*, they are paid only their “established base salary”). The annual stipend for Department Chairs ranges from \$2,007.00 to \$6,255.00, depending on the amount of release time taken from instruction duties and the department.

45. Unclassified administrators are paid salaries (not stipends) established for their administrative positions in accord with OIT-20-044 (Compensation Plan for Unclassified Administrators).

46. Oregon Tech considers Department Chairs to be “unclassified academic employees with faculty rank,” as described by the OAR 580-021-0050, rather than “administrative staff.” OIT-21-321 (Grievance Procedure for Faculty). Oregon Tech has a separate grievance procedure for “administrative staff.” OIT-21-320 (Grievance Procedure for Administrative Staff). Oregon Tech defines “administrative staff” as “employees with primary job functions in the areas of administration, services, or research (rather than in the area of classroom instruction) with the exception of the President.” *Id.*; Administrative Council of OIT, Charter & Bylaws. Department Chairs are subject to the Faculty Grievance Procedure, not the Grievance Procedure for Administrative Staff.

47. According to the revised version of OIT’s policy regarding Department Chair Selection and Evaluation (OIT-21-030), Department Chairs are evaluated as teaching faculty, under the Faculty Evaluation Policy, for their teaching work, and, for their administrative responsibilities, using the Guidelines on Department Chair Administrative Roles and Responsibilities (adopted in August 2018). Department Chairs are eligible for merit pay under OIT-20-016 as “instructional faculty.”

48. Unclassified administrators are evaluated pursuant to OIT-20-043 (Performance Appraisal of Unclassified Administrators). College Deans are evaluated pursuant to OIT-21-031 (College Dean Evaluation Policy).

49. Instructional faculty members, including those serving as a Department Chair, may apply for promotion pursuant to Oregon Tech policy OIT-20-040 (Academic Rank and Promotion for Instructional Faculty). Tenure-track faculty members, including those who are serving as a Department Chair, are reviewed in accord with the Oregon Tech policy OIT-20-030 (Indefinite Tenure Selection). Tenured faculty members, including those who are serving as a Department Chair, are reviewed in accord with Oregon Tech policy OIT-20-035 (Post-Tenure Review). Under all of those policies, if a Department Chair is the subject of review, the same process applies, except that the college Dean plays the role normally played by the Department Chair.

50. Unclassified administrators may be hired with or without academic rank. Unclassified administrators may hold or be granted academic rank pursuant to OIT-20-031 (Academic Rank and Tenure for Unclassified Administrators). They may obtain academic rank after hiring (but not rank advancement), by meeting certain conditions, including teaching at least .25 FTE. They are not eligible for tenure in their administrative position.

## CONCLUSIONS OF LAW

Under the Public Employee Collective Bargaining Act (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. However, “supervisory employees” are not “public employees” and cannot be appropriately included in a bargaining unit. ORS 243.650(19); *Office and Professional Employees International Union, Local #11 v. City of Hillsboro*, Case No. RC-4-99 at 6-7, 18 PECBR 269, 274-75 (1999). Here, the Association petitions to create a bargaining unit of faculty department chairs employed by Oregon Tech. Oregon Tech contends that those faculty department chairs are “supervisory employees,” and therefore, not “employees” under PECBA. For the following reasons, we conclude that the department chairs are not supervisory employees, and that the proposed unit is appropriate.

To determine supervisory status, we look to the statutory definition of the term “supervisory employee” in ORS 243.650(23). This case requires us to interpret, for the first time, amendments to that definition enacted by the legislature in 2017. Referred to as “HB 3170,” those amendments changed the supervisory status of certain faculty at Oregon’s seven public universities. As amended, ORS 243.650(23)(c)(C) provides that the term “‘supervisory employee’ does not include \* \* \* [a] faculty member of a public university \* \* \* who is not a faculty member described in” ORS 243.650(23)(b). And, ORS 243.650(23)(b)(A) provides that the following university faculty members are supervisory employees: “a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position.” The dispute in this case is whether Oregon Tech department chairs qualify as a “head or equivalent position.”<sup>9</sup> If so, those employees are supervisory employees, and the petition must be dismissed; if not, they are public employees entitled to be represented, and the petition must be granted. We turn to our standards for statutory construction to resolve this issue.

When this Board interprets and applies statutes, our goal is to determine and give effect to the legislature’s intent. ORS 174.020. *See also Comcast Corp. v. Dept. of Rev.*, 356 Or 282, 295-297, 337 P3d 768 (2014) (citing *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) (“Our goal in interpreting a statute is to determine what meaning the legislature intended in drafting the statute.”)). In doing so, we apply the analysis supplied by *PGE*, 317 Or 606, as modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). 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 still unable to determine the legislature’s intent, we then apply maxims of statutory construction. *Id.*

We begin with the text and context of the statute, which includes prior versions of the statute and its amendments. *Kohring v. Ballard*, 355 Or 297, 307-08, 325 P3d 717 (2014) (tracing history of venue legislation); *State v. Ziska/Garza*, 355 Or 799, 806, 334 P3d 964 (2014) (“Analysis of the context of a statute may include prior versions of the statute.”).

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<sup>9</sup>There is no argument that the petitioned-for position is “a president, vice president, provost, vice provost, dean, associate dean, assistant dean \* \* \* or equivalent position” within the meaning of the statute.

Before HB 3170 was enacted in 2017, the supervisory status of university faculty (and most other public employees) was determined by the standard provided in ORS 243.650(23)(a), which defined “supervisory employee” for the purposes of PECBA. Under that definition, an individual is a supervisory employee if they possess any one of 12 indicia, modeled after the National Labor Relations Act. The legislature had previously amended subsection (23) to carve out two categories of employees from the definition of “supervisory employee”: nurses (including charge nurses) and certain firefighters. PECBA expressly exempted public university faculty from the definition of “managerial employee,” but not “supervisory employee.”<sup>10</sup>

As noted above, when the legislature enacted HB 3170, it again amended PECBA’s definition of “supervisory employee” in ORS 243.650(23). Specifically, HB 3170 added two paragraphs that respectively determine whether a public university faculty member is included in the definition of “supervisory employee” or excluded from that definition. The first new paragraph, ORS 243.650(23)(b), specifies which university faculty are included in the definition of “supervisory employee,” and the second paragraph, ORS 243.650(23)(c), specifies which faculty are excluded from that definition. Employees who are excluded from the definition of supervisory employee are, effectively, “public employees” with collective bargaining rights under PECBA. As amended, ORS 243.650(23) provides, in relevant part:

“(a) ‘Supervisory employee’ means 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. \* \* \*

“(b) ‘Supervisory employee’ includes a faculty member of a public university listed in ORS 352.002 [listing Oregon Tech as one of the ‘public universities’ in the State of Oregon] or the Oregon Health and Science University who:

“(A) Is employed as a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position; or

“(B) Is employed in an administrative position without a reasonable expectation of teaching, research or other scholarly accomplishments.

“(c) ‘Supervisory employee’ does not include:

“(A) A nurse, charge nurse or nurse holding a similar position if that position has not traditionally been classified as supervisory;

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<sup>10</sup>See ORS 243.650(16). Because a university, college, or community college faculty member is expressly excluded from the definition of “managerial employee,” such faculty members qualify as “public employees” even if they possess managerial authority. HB 3170 did not amend ORS 243.650(16).

“(B) A firefighter prohibited from striking by ORS 243.736 who assigns, transfers or directs the work of other employees but does not have the authority to hire, discharge or impose economic discipline on those employees; or

“(C) A faculty member of a public university listed in ORS 352.002 or the Oregon Health and Science University who is not a faculty member described in paragraph (b) of this subsection.”

HB 3170 also amended ORS 243.682(1)(a) to add the following provision:

“Unless a labor organization and a public employer agree otherwise, the board may not designate as appropriate a bargaining unit that includes:

“(A) A faculty member described in ORS 243.650(23)(c)(C) who supervises one or more other faculty members; and

“(B) Any faculty member who is supervised by a faculty member described in subparagraph (A) of this paragraph.”

The legislature did not define any of the terms used in ORS 243.650(23)(b)(A), including “head,” the term disputed by the parties in this case. Nonetheless, the text and context of subparagraph (23)(b)(A) provide some broad guidance regarding how the legislature intended those terms to be interpreted and applied.

As a threshold matter, based on the text of ORS 243.650(23)(b)(A), we conclude (and the parties agree), that job titles alone do not determine the supervisory status of a particular position. Although subparagraph (23)(b)(A) identifies eight supervisory job positions by job title (*e.g.*, “president”), it also provides that a university faculty member is a supervisory employee if they are employed in an “equivalent position.” Accordingly, each job title must refer to a specific university position that is commonly associated with a particular set of authorities and category or categories of university-specific work; if that were not the case, we would not be able to determine whether a differently titled position is functionally “equivalent” to one of the enumerated positions. Thus, by including the phrase, “or equivalent position,” the legislature made a faculty member’s job title neither controlling nor dispositive. For example, if an individual has the authority and performs the work traditionally associated with a university vice president, then that individual is a supervisor under (23)(b)(A) regardless of the job title that the university chose to assign to that individual’s position. Conversely, a university’s decision to give an individual the job title of “provost” or “head” does not mean that their position is supervisory under PECBA if that individual does not actually have the authority and perform the work traditionally entrusted to a provost or head. Thus, the fact that the disputed positions here are titled “department chairs” at Oregon Tech does not answer the question of whether those positions are supervisory.

Although each title listed in subparagraph (23)(b)(A) refers to a particular set of university authorities and duties, neither the statute nor its legislative history specifies what those are for each term. As the court explained in *Comcast*, when the legislature does not define a statutory term, “we ordinarily look to the plain meaning of a statute’s text as a key first step in determining what

particular terms mean[,] \* \* \* frequently consult[ing] dictionary definitions of the terms, on the assumption that, if the legislature did not give the term a specialized definition, the dictionary definition reflects the meaning that the legislature would naturally have intended.” 356 Or at 295-96. However, “[a]n exception to that approach arises when the legislature uses technical terminology—so-called ‘terms of art’—drawn from a specialized trade or field.” *Id.* at 296. “In that circumstance, we look to the meaning and usage of those terms in the discipline from which the legislature borrowed them.” *Id.* (citing examples). We “determine[] the meaning of those terms based on how they are used and understood in the specialized field, trade, or profession, and using sources that best accord with the legislature’s intent.” *Id.*

In this case, the statutory provision at issue applies only to seven specific public universities, and within that provision, the legislature identified eight types of university faculty positions by job title (*e.g.*, “provost”).<sup>11</sup> We conclude that the legislature drew those eight terms from “a specialized field, trade, or profession,” namely, that of university faculty. However, we have been unable to find, and neither party has identified, a definitive source material that can provide us with working definitions for those terms of art. *Cf. Mueller v. PSRB*, 325 Or 332, 339, 937 P2d 1028 (1997) (in the context of determining Psychiatric Security Review Board’s jurisdiction, phrase “personality disorder” is a “term of art as to which the DSM-III was the definitive source”).

Although the legislature did not individually define each of the terms of art used to identify the eight supervisory positions, the text, context, and legislative history of HB 3170 provide some insight into what the legislature understood those terms collectively to mean, and where the legislature drew the line between supervisory and non-supervisory faculty members.

First, the text and context of the statute show that the legislature intended, by enacting HB 3170, to extend collective bargaining rights to some faculty members who would have qualified as “supervisory employees” under the prior version of the statute – including faculty members who *supervise other faculty members*. Specifically, in addition to amending the definition of “supervisory employee,” HB 3170 added ORS 243.682(1)(a), which expressly provides that faculty members who “supervise \* \* \* other faculty members” may not be in the same bargaining unit as faculty members whom they supervise (unless the employer and labor organization agree otherwise). The legislature would not have needed to add that provision to PECBA, which addresses potential conflicts of interests between faculty member supervisors and their supervisees, unless the legislature was extending collective bargaining rights to faculty members who supervise other faculty members. The legislative history confirms that the primary

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<sup>11</sup>Although the statute uses the potentially open-ended term “includes” before listing the types of positions that are supervisory in paragraph (23)(b), after reading the text in context, we do not interpret the term “includes” as conveying an intent that the accompanying list be read as merely exemplary and non-exclusive. Specifically, the statute circularly defines *non-supervisory* faculty members by cross-referencing paragraph (23)(b): if a faculty member is not in one of the positions described in (23)(b) (including their equivalent positions), they are, by definition, *not* a supervisor. ORS 243.650(23)(c)(C). Because the legislature drew the line between supervisory and non-supervisory faculty members by cross-reference, we conclude that the list of supervisory positions in (23)(b) is properly read as an exhaustive list.

purpose of HB 3170 was to extend collective bargaining rights to some portion of those faculty members who have been deemed “supervisory employees” under the prior version of the statute.<sup>12</sup> The legislative history also confirms that the legislature was aware that HB 3170 would extend collective bargaining rights to some faculty members who supervise other faculty members, and that the purpose of ORS 243.682(1)(a) was to allay concerns about the potential conflict of interest that the amendment could create.<sup>13</sup> Thus, pursuant to HB 3170, faculty members who possess one or more of the 12 traditional indicia of supervisory status may be, but are not necessarily, “supervisory employees” under paragraph (23)(b).<sup>14</sup>

Second, the text, context and legislative history of the HB 3170 amendments establish that the legislature intended for the new dividing line between supervisory and non-supervisory university faculty members to correspond with the line between those with a primary focus on administration and those with a primary focus on academics, *i.e.*, “teaching, research, or other scholarly accomplishments.” ORS 243.650(23)(b)(B). Beginning with the text, the amendments expressly exclude university faculty members employed in two types of positions: the eight positions listed in ORS 243.650(23)(b)(A), or “an administrative position without a reasonable expectation of teaching, research or other scholarly accomplishments,” as described in ORS 243.650(23)(b)(B). Although the legislature did not define the positions listed in subparagraph (A), a maxim of statutory construction, *noscitur a sociis*, “tells us that the meaning of an unclear word may be clarified by the meaning of other words used in the same context.” *Johnson v. Gibson*, 358 Or 624, 629-30, 369 P3d 1151, 1154 (2016) (where statute defined

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<sup>12</sup>See, e.g., Staff Measure Summary, House Committee on Business and Labor, HB 3170A, April 17, 2017; Staff Measure Summary, Senate Committee on Education, HB 3170B, June 1, 2017; Staff Measure Summary, Senate Committee on Rules, HB 3170B, June 14, 2017; Transcript of Audio, Senate Committee on Education, HB 3170A, May 18, 2017, at p. 2:7-11 (statement of LPRO analyst Lisa Gezelter, “House Bill 3170 extends collective bargaining rights to certain public university faculty members whose duties have an academic rather than an administrative focus.”).

<sup>13</sup>See HB 3170 amendment A3, dated May 26, 2017 (amending HB 3170 to add provision amending ORS 243.682(1)(a)); Transcript of Audio, Senate Committee on Education, HB 3170A, May 18, 2017, at p. 4:6-12 (statement of Senator Michael Dembrow, explaining, anticipated bill amendment would clarify that “we don’t intend for faculty who are supervising other full-time faculty” as part of the same bargaining unit); *id.* at p. 10:6-12:22 (testimony of Donna Chastain, Oregon State University, opposing a prior version of the bill “as it is currently written,” and stating: “I wanted to clarify \* \* \* the role of our research and academic faculty \* \* \* in the supervision of their team members. Their team members may include other academic faculty, professional faculty, postdoctoral scholars, research associates, graduate assistants, and undergraduate students. \* \* \* Many of the academic and research faculty complete the full range of the PECBA duties with the authority to use independent judgment that require acting on behalf of the employer first \* \* \*”).

<sup>14</sup>The Association agrees that, under the amended statutory definition, a university faculty member who has traditional supervisory authority is not necessarily a “supervisory employee,” but contends that such authority remains a threshold requirement for supervisory status. Conversely, Oregon Tech contends that a university faculty member can now qualify as a “supervisory employee” even if they have no traditional supervisory authority. Because we decide this case on other grounds, it is unnecessary to resolve this statutory interpretation issue, and we decline to do so.

“owner” as including “a tenant, lessee, occupant or other person in possession of the land,” court concluded, “it is likely that the legislature intended that ‘occupant[s]’ and ‘person[s]’ in possession of the ‘land’ have the same type of control as tenants and lessees”). *See also Pendergrass v. Fagan*, 218 Or App 533, 539, 180 P3d 110, *rev den*, 344 Or 670 (2008) (“[T]he meaning of each term in the list is determined in light of the common characteristics of other terms in the same list.”). Thus, here, it is likely that the legislature intended the positions in subparagraph (A) of paragraph (23)(b) to share some characteristics with the positions in subparagraph (B): namely, a focus on administration, as opposed to academics (*i.e.*, teaching, research, or other scholarly accomplishments). That interpretation is also confirmed by the legislative history.

Specifically, every Staff Measure Summary described the effect of HB 3170 as follows:

**“WHAT THE MEASURE DOES:** Extends collective bargaining rights to certain public university faculty members whose duties consist of an academic, rather than administrative, focus.”

Staff Measure Summary, House Committee on Business and Labor, HB 3170A, April 17, 2017; Staff Measure Summary, Senate Committee on Education, HB 3170B, June 1, 2017 (WHAT THE MEASURE DOES: Extends collective bargaining rights to certain public university faculty members whose duties have an academic rather than administrative focus.”); Staff Measure Summary, Senate Committee on Rules, HB 3170B, June 14, 2017 (same) (collectively, “HB 3170 Staff Measure Summaries”).

Every Staff Measure Summary also provided the following explanation:

“House Bill 3170[] excludes from the definition of ‘supervisory employee’ those faculty members of public universities who are not high-level administrators or who have a reasonable expectation of teaching, research or other scholarly accomplishments. By excluding them from the definition of ‘supervisory employee,’ faculty members with an academic focus would be permitted to organize under PECBA.”

*Id.*

Additionally, Senator Dembrow, a sponsor and the carrier of the bill, submitted a floor letter stating, in part:

“The Details: Administrators Excluded[.] The bill **only applies to faculty**. It does not apply to *administrators* like presidents, vice presidents, provosts, vice provosts, deans, associate deans, assistant deans, heads, or equivalent positions. It **does not** apply to faculty employed in an administrative position without a reasonable expectation of teaching, research, or other scholarly accomplishment. It also prevents supervisors from being in the same bargaining unit as those they supervise.”

Senator Michael Dembrow floor letter, June 26, 2017 (boldface in original; italics added).

Senator Dembrow described the dividing line drawn by HB 3170 in the same manner, in a June 26, 2017, speech on the floor of the Senate, stating:

“House Bill 3170 B \* \* \* excludes from the definition of supervisory employees those faculty members of public universities who are not high-level administrators or who have a reasonable expectation of teaching, research, or other scholarly accomplishments. By excluding them from the definition of supervisory employee, faculty members with an academic focus would be permitted to organize under the Collective Bargaining Act.”

Transcript of Video, Senate Floor, HB 3170, June 26, 2017, at p. 3:1-10 (statement of Senator Michael Dembrow).

Testimony by HB 3170’s proponents describe the bill’s purpose and effects in the same manner. For example, Marcus Swift, Director of Political and Legislative Affairs, AFT-Oregon, stated in testimony before the House Committee on Business and Labor,

“HB 3170 seeks to amend the definition of supervisor in Oregon’s Public Employee Collective Bargaining Act (PECBA), only as it pertains to public universities (this does not include community colleges) and only as it pertains to faculty who have an academic focus. PECBA already grants collective bargaining rights to some workers with supervisory authority, including nurses and fire fighters. Charge nurses have had the right to join a union since 1995, a process which has worked well. This would simply add a third category for public university faculty.

“The bill is also clear about who cannot join a union: public university administrators. This clear cut definition will ensure that a separation remains between true supervisors with administrative authority, and faculty who are focused on teaching and research.”

House Committee on Business and Labor, HB 3170 (April 12, 2017) (letter submitted by Marcus Swift). Alan Bakalinsky, President, Associated Oregon Faculties, also submitted testimony to the House committee, and described the dividing line drawn by HB 3170 in the same manner: “HB 3170 seeks to amend the definition of supervisor in Oregon’s Public Employee Collective Bargaining Act (PECBA), only as it pertains to public universities (this does not include community colleges) and only as it pertains to faculty who have an academic – not administrative – focus.” House Committee on Business and Labor, HB 3170 (April 12, 2017) (letter submitted by Alan Bakalinsky).

AFT-Oregon’s Swift provided similar written testimony to the Senate Committee on Education, stating that the bill “seeks to create a line between faculty with a research and academic focus and administrators who truly are supervisors \* \* \* HB 3170 will allow all teaching and research faculty at public universities to have a voice in their workplace \* \* \*.” Senate Committee

on Education, HB 3170 (May 18, 2017) (letter submitted by Marcus Swift). *See also id.* (letter submitted by Alan Bakalinsky).<sup>15</sup>

After considering the text of the statute, in context, along with the legislative history, we conclude that in enacting HB 3170, the legislature intended to permit “faculty members with an academic focus \* \* \* to organize under PECBA,” even if they possess supervisory authority and would not be permitted to organize under the previous definition of “supervisory employee.” Staff Measure Summary, Senate Committee on Rules, HB 3170B, June 14, 2017. To achieve that intent, the legislature identified eight positions at Oregon’s public universities that the legislature understood had an administrative, rather than academic, focus: president, vice president, provost, vice provost, dean, associate dean, assistant dean, head. The legislature provided that faculty members in those eight positions, or equivalent positions, as well as “administrative position[s] without a reasonable expectation of teaching, research or scholarly accomplishments,” would remain “supervisory employees” under PECBA. ORS 243.650(23)(b). All other university faculty members would be carved out from the definition of “supervisory employee,” and therefore would gain the right to organize. ORS 243.650(23)(c). Accordingly, we conclude that in enacting HB 3170, the legislature intended the phrase, “[i]s employed as a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position,” to mean public university faculty members in positions with an administrative, rather than academic, focus.

Before we apply this definition to the facts of this case, we address Oregon Tech’s statutory interpretation arguments. Oregon Tech argues that, because the dictionary definition of “head” includes “one in charge of a department,” the legislature must have intended “head” to mean any “department chair” position, and our analysis should end there. For the reasons stated above, we do not rely on the dictionary definition, because the terms at issue are terms of art. And, in any event, the dictionary is “only the starting point for [a] textual analysis, and should not be used as the ending point.” *State v. Gonzalez-Valenzuela*, 358 Or 451, 462, 365 P3d 116 (2015) (quotation marks and citation omitted). *See also State v. Cloutier*, 351 Or 68, 96, 261 P3d 1234 (2011) (“In construing statutes, we do not simply consult dictionaries and interpret words in a vacuum. Dictionaries, after all, do not tell us what words mean, only what words *can* mean, depending on their context and the particular manner in which they are used.” (emphasis in original)).

Thus, in *Gonzalez-Valenzuela*, 358 Or at 464-74, for example, the court noted that dictionary definitions of the terms “maintain” and “conduct” permitted a broad interpretation of the statute’s scope, but it construed those terms more narrowly after considering their context and legislative history. *See id.* at 464 (“[T]he dictionary definitions of ‘maintain’ and ‘conduct’ lack a requirement of duration and regularity, that fact means only that ‘maintain’ and ‘conduct’ may refer to events of *either* short or long duration or events that are *either* isolated or regular.” (emphases in original)).

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<sup>15</sup>Staff measure summaries, statements of legislators, and testimony of nonlegislator witnesses are relevant evidence of legislative intent. *See, e.g., State Treasurer v. Marsh & McLennan Companies, Inc.*, 353 Or 1, 12-13, 292 P3d 525 (2012) (staff measure summaries); *Lamb v. Coursey*, 238 Or App 647, 655, 243 P3d 139 (2010), *rev den*, 350 Or 230 (2011) (same); *Oregon Cable Telecommunications v. Dept. of Rev.*, 237 Or App 628, 635, 640-41, 240 P3d 1122 (2010) (statements of bill carriers); *State v. Zolotoff*, 354 Or 711, 717-18, 320 P3d 561 (2014) (statements of nonlegislator proponents of bill); *State v. Partain*, 349 Or 10, 20, 239 P3d 232 (2010) (letter submitted by nonlegislator proponents of bill).

Similarly, in this case, the dictionary definition relied on by Oregon Tech, at best, supplies us with a range of possible meanings: it indicates that a “head” can mean “one in charge of a division or department in an office or institution,” “one in charge of a department in a school, college, or university,” or “an officer in charge of a hall or college.” Oregon Tech’s Post-hearing Brief at 21-22 (quoting Merriam-Webster Dictionary). The dictionary, however, does not tell us which type or types of “heads” in Oregon universities that the legislature intended to deem supervisory (*i.e.*, did the legislature mean head of a college, division, department, some of the above, all of the above, or other?). Further, as Oregon Tech concedes, job titles are not dispositive, and for a position to qualify as a “head” position under subparagraph (23)(b)(A), it must actually be vested with some minimum amount of administrative authority.<sup>16</sup> The parties dispute what the requisite amount of authority is and what types of authority are required, and the dictionary definition does not resolve those issues. Thus, even if the positions listed in subparagraph (23)(b)(A) were not terms of art, we would still need to consider context and legislative history to determine the legislature’s intent. Significantly, nothing in the legislative record indicates that the legislature intended “head” to mean any faculty member “in charge of a department.” There is no discussion, for example, of excluding faculty members who are “in charge” of a department (or college or other division) or legislative discussion about what it would mean to be so “in charge.” There is, however, consistent evidence of legislative intent to exclude faculty members from organizing who have an administrative, rather than academic, focus.

Oregon Tech also makes the following argument: the positions enumerated in subparagraph (23)(b)(A) are listed in order of descending hierarchy; “head” is the last term in the list; that means “head” corresponds to positions at the “first-level” or “bottom” of university administrations; department chairs are the bottom of the administrative hierarchy at Oregon Tech; therefore, Oregon Tech department chairs are positions equivalent to “head.” Although Oregon Tech’s interpretation of the text is plausible, it is far from the only plausible interpretation; at best, the text is ambiguous. After considering the text, context, and legislative history, we are not persuaded that Oregon Tech’s interpretation is what the legislature intended. In addition to the reasons discussed above, there are several problems with Oregon Tech’s interpretation. As illustrated by the record in this case, the list is not necessarily hierarchical. (For example, the Oregon Tech Provost also has the title of Vice President, and both College Deans and other Vice Presidents report to the Provost.) And, nothing in the legislative record expressly refers to the list as a hierarchy (or anything to that effect). Further, even assuming that the titles are listed in descending order, that fact does not necessarily mean that the legislature intended for the list to encompass “the bottom level” of university administrators (as Oregon Tech contends).<sup>17</sup> And, even

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<sup>16</sup>At oral argument, Oregon Tech conceded that, for an individual to be “in charge” of a university department, they must have something more than “budgetary authority,” but argued that something less than “complete” authority would suffice.

<sup>17</sup>To the contrary, the legislative record consistently and repeatedly indicates that the list of supervisory positions refers to only “high-level administrators.” *See, e.g.*, HB 3170 Staff Measure Summaries (“House Bill 3170[] excludes from the definition of ‘supervisory employee’ those faculty members of public universities who are not high-level administrators or who have a reasonable expectation of teaching, research or other scholarly accomplishments.”).

assuming that the legislature intended to reach “the bottom level” of university administrators, nothing in the text, context, or legislative history establishes that the legislature intended to reach *all* department-level “head” positions, even if those positions are primarily academic. Rather, for the reasons discussed above, the legislative history demonstrates an intention that, for a position to qualify as a “head” position (department-level or otherwise), its focus must be primarily administrative. And, for the reasons discussed below, we conclude that Oregon Tech department chairs are not primarily administrative, and therefore, they are not equivalent to “head” positions.<sup>18</sup>

We turn to the question of whether the record in this case establishes that the petitioned-for department chairs at Oregon Tech have an administrative, rather than academic, focus. If so, they are excluded as supervisors (ORS 243.650(23)(b)(A)); if not, they are permitted to organize and comprise a standalone collective bargaining unit (ORS 243.650(23)(c); ORS 243.682(1)(a)).<sup>19</sup>

When reviewing the evidence, we apply this Board’s long-standing evidentiary standards for representation matters. Representation matters, like the instant case, are investigatory, and neither party bears the burden of proof. *See* OAR 115-010- 0070(5)(a). “Before we will conclude that an otherwise ‘public employee’ is a ‘supervisory employee,’ however, there must be sufficient evidence establishing that the statutory exclusion of ORS 243.650(23) applies.” *Keizer Police Association v. City of Keizer*, Case No. UC-004-18 at 19, \_\_\_ PECBR \_\_\_, \_\_\_ (2019). “Mere inferences and conclusory statements are insufficient.” *Id.* Accordingly, in the absence of detailed, specific evidence establishing that a petitioned-for employee qualifies as a supervisory employee as defined in ORS 243.650(23), we will conclude that the employee is not a supervisory employee. *Id.*

Here, the record does not establish that the department chairs have an administrative, rather than academic, focus. As evidence that the department chairs have an academic focus, the

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<sup>18</sup>Oregon Tech also argues that, because HB 3170’s proponents repeatedly identified research faculty’s circumstances as “the issue” or problem that HB 3170 would address, HB 3170 extended collective bargaining rights only to research faculty. Although research faculty were prominently discussed, after reviewing the text, context, and legislative history, we conclude that HB 3170’s reach is not so limited. *See, e.g., South Beach Marina, Inc. v. Dept. of Rev.*, 301 Or 524, 531, 724 P2d 788 (1986) (“The legislature may and often does choose broader language that applies to a wider range of circumstances than the precise problem that triggered legislative attention.”). As set forth above, the legislature chose broad language to define which faculty are *not* supervisory, and the legislative history demonstrates an intent to extend collective bargaining rights to all university faculty members who are not employed in the types of administrative positions set forth in ORS 243.650(23)(b). Moreover, if the legislature had intended to reach *only* research faculty, it could have simply amended the definition of “supervisory employee” to expressly exclude “research faculty” or “principal investigators,” as the legislature did when it extended collective bargaining rights to charge nurses. *See* ORS 243.650(23)(c)(A) (“‘Supervisory employee’ does not include: A nurse, charge nurse or nurse holding a similar position \* \* \* [.]”).

<sup>19</sup>Oregon Tech does not argue that ORS 243.650(23)(b)(B) (defining as supervisory a public university faculty member who “[i]s employed in an administrative position without a reasonable expectation of teaching, research or other scholarly accomplishments”) applies to the faculty Department Chairs at issue; the record shows that all Oregon Tech Department Chairs retain some teaching responsibilities, ranging from .25 to .75 of their usual, respective teaching workload requirements as non-chair faculty members.

Association points to the fact that at the time that the petition was filed, June 5, 2018, Oregon Tech’s policy regarding department chair selection and evaluation (OIT-21-030) stated that a department “chair’s first priority is to serve as teaching faculty.” “In addition,” the policy noted, “the chair supports the teaching activities of the department, actively represents departmental needs to the dean, and serves as a communicative link between the administration and the departmental faculty.” Conversely, Oregon Tech cites the current version of the policy, effective June 14, 2018 (nine days after this petition was filed), which states that the department chair position has a “dual role as administrator and teacher.”

We typically view with caution evidence of alleged supervisory responsibility that arises after or contemporaneously with the filing of a petition. *See, e.g., Washington County Professional Fire Fighters, Local 1660 v. Tualatin Valley Fire and Rescue District and City of Beaverton*, Case No. UC-17-94 at 3, 15 PECBR 427, 429 (1994). Although Oregon Tech observes that the process for revising OIT-21-030 started before the petition was filed, that process started only *after* the faculty organizing campaign was announced, and the administration was made aware of it. However, even crediting that OIT-21-030 was changed without regard to the organizing campaign, and assuming that the changes are not illusory, we conclude that the record still does not establish that department chairs have an administrative, rather than academic, focus.

Specifically, even with that policy change, Oregon Tech did not describe the department chair position as primarily administrative, or as having an administrative, as opposed to academic, focus. Rather, the “dual role” description is vague as to the primary focus of department chairs (academic versus administrative). Other evidence, however, indicates that the department chairs at Oregon Tech still occupy a position with an academic, rather than administrative, focus. Specifically, Oregon Tech continues to consider the department chairs to be “unclassified *academic* employees with faculty rank,” as described by OAR 580-021-0050, rather than “*administrative* staff.” *See* Oregon Tech Faculty Grievance Procedure; Oregon Tech Administrative Staff Grievance Procedure (emphases added). Oregon Tech defines “administrative staff” as those employees with primary job functions in the areas of administration, service, or research, rather than classroom instruction. *See* Oregon Tech Administrative Council Charter, Bylaws, & Council Members.<sup>20</sup> Thus, according to Oregon Tech’s own policy, department chairs are employees with primary job functions in the area of classroom instruction, not administration. Additionally, the department chairs remain subject to the policies that apply to faculty, and not the corresponding policies that apply to administrative staff, including those governing compensation, evaluations, academic rank, promotion, post-tenure review, and grievance procedures. Faculty members who serve as chair also remain subject to the same faculty policies regarding teaching workload requirements and the same salary scale: they are eligible only for partial releases from their regular teaching workload and a supplemental stipend. In contrast, unclassified administrators are paid on separate salary scales and are not subject to teaching workload requirements. All department chairs maintain some teaching duties; typically, they retain half of their instructional workload requirements.

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<sup>20</sup>To the extent that Oregon Tech’s definition of “administrative” functions includes academic “research or other scholarly accomplishments,” it is inconsistent with and broader than the statutory definition. The text and legislative history of HB 3170 establish that the legislature intended “research and other scholarly accomplishments” to be academic, not administrative, functions. ORS 243.650(23)(b)(B).

In addition to teaching, department chairs continue to be responsible for student advising and are expected to continue their professional development, *i.e.*, to pursue scholarly accomplishments. Oregon Tech cites serving as a department chair as an example of how a faculty member in an academic position can fulfill the service requirements for academic tenure or promotion in academic rank. When a faculty member serves as department chair, they retain their academic faculty position, and when their term ends, they simply give up their department chair stipend and release time and resume teaching a full workload. Taken together, this evidence establishes that the petitioned-for department chairs continue to have an academic, rather than administrative, focus.<sup>21</sup>

In sum, for the foregoing reasons, we conclude that the legislature intended that the list of supervisory positions (and equivalent positions) at Oregon’s public universities share a common feature that makes them supervisory under PECBA—namely, an administrative, rather than academic, focus. We also conclude that the petitioned-for department chairs at Oregon Tech have an academic focus. Consequently, the department chairs are not “supervisory employees” under ORS 243.650(23)(b)(A), and therefore, they are public employees with the right to collectively bargain. There being no other objection to the petition, we conclude that the petitioned-for unit is appropriate.<sup>22</sup> Because a majority of those unrepresented employees signed cards authorizing the Association to be their exclusive representative, and no petition for election was filed, we certify the Association as the exclusive representative for the department chairs at Oregon Tech.

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<sup>21</sup>Oregon Tech also argues that it is significant that the department chairs have traditional supervisory authority, including the power to hire and fire. The Association contests those factual issues. And, in any event, the text, context, and legislative history of the amendments to the definition of “supervisory employee” show that the legislature intended to extend collective bargaining rights to certain university faculty members who have traditional supervisory authority, regardless of the *type* of supervisory authority they possess. *Compare* ORS 243.650(23)(c)(B) (under amended definition, firefighter who “assigns, transfers or directs the work of other employees” is non-supervisory, but firefighter who has “the authority to hire, discharge or impose economic discipline” remains supervisory) *with* ORS 243.650(23)(c)(C) (under amended definition, university faculty members are non-supervisory so long as they are not employed in an administrative position covered by paragraph (23)(b)). *See also, e.g.*, Transcript of Audio, Senate Committee on Education, HB 3170A, May 18, 2017, at p. 10:6-12:22 (testimony of Donna Chastain, Oregon State University) (discussing extent of faculty members’ supervisory authority); Transcript of Audio, House Committee on Business and Labor, HB 3170, April 12, 2017, at p. 11:3-12:21 (exchange between Rep. Julie Fahey and Sarah Drescher (bill proponent)) (same).

<sup>22</sup>Consistent with the requirements for appropriate faculty bargaining units set forth in ORS 243.682(1)(a), the department chair unit is separate from the bargaining unit of Oregon Tech faculty members certified in RC-008-18.

ORDER

The petition is granted.

OREGON TECH AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

is the exclusive representative of the following bargaining unit for purposes of collective bargaining:

“All faculty Department Chairs at the Oregon Institute of Technology, excluding employees in the following groups: (1) faculty employed as a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position; (2) faculty employed in an administrative position without a reasonable expectation of teaching, research or other scholarly accomplishments; (3) classified staff; (4) confidential employees; and (5) all faculty, instructors or librarians in any other bargaining unit.”

DATED: November 14, 2019.



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Adam L. Rhynard, Chair

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\*Lisa M. Umscheid, Member



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Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.

\*Member Umscheid Dissenting

I respectfully dissent. I would conclude that the department chairs at Oregon Institute of Technology (Oregon Tech) are supervisory employees within the meaning of ORS 243.650(23)(b)(A). In my view, the Oregon Tech department chairs are employed in “head or equivalent” positions, and are therefore ineligible to organize and collectively bargain.

This case turns on the meaning of ORS 243.650(23), as amended by HB 3170. Enacted in 2017, HB 3170 added new provisions to PECBA’s definition of “supervisory employee” for

Oregon public university faculty. ORS 243.650(23)(b)(A), the provision at issue in this case, states:

“(b) ‘Supervisory employee’ includes a faculty member of a public university listed in ORS 352.002 or the Oregon Health and Science University who:

“(A) Is employed as a president, vice president, provost, vice provost, dean, associate dean, assistant dean, head or equivalent position[.]”

ORS 243.650(23)(b)(A). Based on text, context, and the legislative history, I would conclude that the legislature intended to designate as “supervisory employees” those faculty members who hold administrative authority over a university or a significant component of a university—that is, those who hold traditional administrator roles. I would conclude that the record here indicates that department chairs at Oregon Tech hold such traditional administrator roles, and therefore are supervisory employees, even though they also teach and perform other academic duties for part of their work time.

In discerning the legislature’s intent, the text itself is paramount. *State v. Haltom*, 298 Or App 533, 540, 447 P3d 66 (2019) (Aoyagi, J., concurring) (courts “are necessarily sensitive to wording, phrasing, grammar, and syntax when construing statutes, because text is paramount in statutory construction, and because those nuances are sometimes our only window into the legislative intent”). The text “is the best evidence of the legislature’s intent.” *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 610, 859 P2d 1143, 1146 (1993). Here, that text offers a strong clue about the legislature’s intent. Specifically, in ORS 243.650(23)(b)(A), the legislature chose both to (1) use a hierarchical list of university administrator positions in an approximately descending order, beginning with president, and (2) conclude that list with the position of “head or equivalent.” Both choices have meaning. *See* ORS 174.010 (“where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all”).

In particular, it is evident that the list is at least approximately hierarchical, and that it descends down a typical organizational structure. The list begins with president. It then lists the “vice” and other subordinate positions after the associated higher-level positions (vice president follows president; vice provost follows provost; and associate dean and assistant dean follow dean). On its face, this list corresponds to an organizational hierarchy with positions listed in approximately descending order. Further, having chosen an approximately descending hierarchical structure for the list, the bill’s drafters needed to select an end point for that list. The legislature chose to end the list with “head or equivalent.” Significantly, the list does not end with “assistant dean or equivalent,” nor does it conclude with “assistant dean or other similar position.” Instead, there is a final position—head or equivalent—listed after assistant dean. That textual choice at least plausibly indicates that the last listed position—head or equivalent—is *lower* than the positions that precede it. These drafting choices support a conclusion that the legislature intended that some positions lower than assistant dean are, like the positions listed from president through assistant dean, supervisory positions within the meaning of ORS 243.650(23)(b)(A).

This textual analysis, however, is not the end of the inquiry. Construing “head or equivalent” to include positions below assistant dean, although plausible, is not the only possible meaning. Turning to legislative history for assistance in discerning the intent of the legislature is therefore necessary. Here, there is nothing express in the legislative record that indicates what “head or equivalent” means. There is also no indication that the legislature sought to exclude department chairs from the list of supervisory employees in ORS 243.650(23)(b)(A).<sup>23</sup>

Instead, we are left with the task of discerning legislative intent from other statements in the legislative record, including statements about the specific issue that the legislature was attempting to address and the scope of the solution it chose. Here, the proponents of HB 3170 described the bill’s purpose as ensuring that Oregon public university faculty members who work as principal investigators—faculty members who intermittently supervise others on grant-funded projects and other academic research—have the right to organize and collectively bargain. For example, Senator Michael Dembrow’s comments to the Senate Committee on Education focused on principal investigators. After explaining that a university president and provost are members of the faculty, but nonetheless ineligible to collectively bargain, Senator Dembrow stated:

“But we have some faculty who are in a kind of ambiguous position. *They’re researchers who are coordinating research projects* that involves other employee—employees. And currently, under the interpretation of the—of Public Collective Bargaining Act, they are unable to be part of a bargaining unit.

“So what House Bill 3170 does is it clarifies that those individuals such as, you know, the president, the provost, et cetera, despite being faculty are not—you know, cannot be part of a bargaining unit. But those faculty who are not, you know, of those listed groups could (indiscernible) be. And that’s really simply what it—what it does.

“And we have faculty at our universities, you know, some are able to be part of the—the faculty union. Others are not. This would clarify that those, *even though they are research faculty who are leading teams of researchers*, can still be part of the bargaining unit.”

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<sup>23</sup>In statutory construction, we consider both text and context at the first step. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042, 1050 (2009). To the extent that this Board’s precedent is helpful context, this Board has held that department chairs at Oregon Tech (and department heads at Portland State University) are supervisory employees under *former* ORS 243.650(23), ineligible to organize and collectively bargain. See *Associated Professors of Oregon Institute of Technology v. Oregon State System of Higher Education*, Case No. C-230, 1 PECBR 425 (1975) (department chairs at Oregon Tech are supervisory employees); *Portland State University Chapter of the American Association of University Professors, et al. v. State System of Higher Education and Portland State University*, Case No. C-381, 3 PECBR 1678 (1978) (department heads at Portland State University are supervisory employees). Given those holdings, if the legislature had intended to exclude department chairs from supervisory status, there likely would be something in the legislative record indicating some support for that intent.

Transcript of Audio, Senate Committee on Education, HB 3170A, May 18, 2017, at p. 3:6-24 (Statement of Senator Michael Dembrow) (emphasis added).<sup>24</sup>

The witnesses who testified in support of the bill also described the purpose of the bill as ensuring that research faculty have the right to organize and collectively bargain. For example, Marcus Swift, Director of Political and Legislative Affairs for the American Federation of Teachers-Oregon, described the issue as follows: “[I]n our work representing educators in public higher education, we have encountered a population of public university faculty who—unlike their colleagues who perform similar work—lack the ability to have a voice in their workplace. This is due to the fact that at a given time, *they may have limited supervisory authority in order to direct cutting edge research work*. However, these faculty are primarily focused on academic pursuits, just like their colleagues.” House Committee on Business and Labor, HB 3170 (April 12, 2017) (letter submitted by Marcus Swift) (emphasis added). His written testimony goes on to describe the bill as having a limited focus:

“HB 3170 seeks to amend the definition of supervisor in Oregon’s Public Employee Collective Bargaining Act (PECBA), only as it pertains to public universities (this does not include community colleges) *and only as it pertains to faculty who have an academic focus*. PECBA already grants collective bargaining rights to some workers with supervisory authority, including nurses and fire fighters. Charge nurses have had the right to join a union since 1995, a process which has worked well. This would simply add a third category for public university faculty.”

*Id.* (emphasis added). *See also* House Committee on Business and Labor, HB 3170 (April 12, 2017) (letter submitted by Alan Bakalinsky) (“Research faculty at public universities conduct research, raise significant amounts of revenue through external research grants, teach, and provide immense benefit to their institutions, and to the public at large. Yet, currently, many of those faculty members lack the right to bargain collectively over the terms of their employment with the university because they possess a limited amount of supervisory authority”).

In addition, the staff measure summaries for the April 17, 2017, meeting of the House Committee on Business and Labor and for the May 18, 2017 and June 1, 2017, meetings of the Senate Committee on Education listed as an “issue discussed” how to “classify research faculty

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<sup>24</sup>Similarly, Representative Dan Rayfield’s floor letter described the issue addressed by the legislation as follows:

“Although *research faculty with limited supervisory authority* have the same teaching, research and service responsibilities as their colleagues, they have no right to collectively bargain over wages, benefits, or working conditions. Supervisory duties are incidental and often exercised for a limited period of time.”

Rep. Dan Rayfield floor letter, April 27, 2017 (emphasis added); *see also* Rep. Barbara Smith Warner floor letter, April 25, 2017 (same).

who ‘supervise’ lab employees and students[.]’<sup>25</sup> Staff Measure Summary, House Committee on Business and Labor, HB 3170A, April 17, 2017; Staff Measure Summary, Senate Committee on Education, HB 3170, May 18, 2017; Staff Measure Summary, Senate Committee on Education, HB 3170B, June 1, 2017.

Consistent with these explanations of HB 3170 as focused on research faculty supervising others on academic projects, several witnesses who testified in favor of the bill described the impact of the bill on university administrators as limited. Attorney Jason Weyand testified that HB 3170 “seeks a limited amendment to the statute” and “make[s] it clear that the other administrative types that are listed in the statute as well are *still* excluded from the ability to bargain.” Transcript of Audio, Senate Committee on Education, HB 3170A, May 18, 2017, at p. 7:15-25 (emphasis added). Similarly, attorney Sarah Drescher explained that presidents and other administrative positions through “heads” and equivalents “will *still* be excluded as supervisors.” House Committee on Business and Labor, HB 3170 (April 12, 2017) (letter submitted by Sarah Drescher) (emphasis added). Drescher described faculty researchers as engaging in “collaborative” supervision, different in kind from traditional supervision. *Id.* (contrasting the supervision by faculty researchers with the supervision by others, and explaining that “[u]nlike the traditional supervisor-subordinate relationship, the relationship between faculty and research assistants is collaborative, working together in both lab and field conditions to produce ground-breaking research”).<sup>26</sup>

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<sup>25</sup>The other listed “issues discussed” were “[w]hether employee is a supervisor determined on a case-by-case basis” and “prior legislation” allowing firefighters and nurses “who have some supervisory duties” to be included in a collective bargaining unit. *See* Staff Measure Summary, House Committee on Business and Labor, HB 3170A, April 17, 2017; Staff Measure Summary, Senate Committee on Education, HB 3170, May 18, 2017; Staff Measure Summary, Senate Committee on Education, HB 3170B, June 1, 2017.

<sup>26</sup>“Traditional supervisors,” as distinct from faculty researcher “supervisors,” were also referred to during the hearing. Specifically, during the April 12, 2017, hearing before the House Committee on Business and Labor, in response to a question from Vice Chair Greg Barreto in which he inquired whether a university president could be in a bargaining unit, Sarah Drescher explained, “What we’re looking at are these people who, frankly, their positions, you know, research faculty, faculty members at U of O, for example, those positions are already in the bargaining unit. Right? The problem is that individuals are plucked out, okay, and said you’re a supervisor, you don’t have the right to join the rest of your colleagues. These positions are already in the bargaining unit. Individual employees, particularly research faculty, have been removed because they’re told you’re supervisors because you supervise these folks in the lab. *That’s the problem we’re looking at. This is not traditional supervisors.* This is a special category like charge nurses, like battalion chiefs for firefighters.” Transcript of Audio, House Committee on Business and Labor, HB 3170, April 12, 2017, at p. 14:9-24 (emphasis added). *See also* House Committee on Business and Labor, HB 3170 (April 12, 2017) (letter submitted by Marcus Swift) (the “bill is also clear about who cannot join a union: public university administrators. This clear cut definition will ensure that a separation remains between true supervisors with administrative authority, and faculty who are focused on teaching and research”).

I construe this legislative history as indicating that the legislature intended to expand collective bargaining rights for faculty members with intermittent supervisory authority related to academic or research projects. To accomplish that end, the legislature drew a bright line between faculty who can organize and collectively bargain (including those who may intermittently supervise others on academic or research projects) and those who serve in traditional administrator roles with administrative responsibility for a university or a significant component of a university—that is, those positions listed in ORS 243.650(23)(b)(A). Those traditional administrators are “still” ineligible to organize and collectively bargain.

The staff measure summaries, which use the phrase “high-level administrators,” do not undermine this conclusion. As the majority correctly notes, the summaries all describe HB 3170 as excluding from the definition of supervisory employee “those faculty members of public universities who are not high-level administrators.” Specifically, the staff measure summaries all include a statement substantively identical to the following:

“House Bill 3170-A excludes from the definition of ‘supervisory employee’ those faculty members of public universities who are not high-level administrators or who have a reasonable expectation of teaching, research or other scholarly accomplishments. By excluding them from the definition of ‘supervisory employee,’ faculty members with an academic focus would be permitted to organize under PECBA.”

Staff Measure Summary, Senate Committee on Education, HB 3170, May 18, 2017.

I do not read these summaries as strong evidence that the legislature, when it drew the bright line between supervisory and non-supervisory faculty members, intended to exclude from the group of “supervisory” administrators those faculty who serve as department heads or chairs merely because they also perform academic duties part-time. Certainly, staff measure summaries can be helpful evidence of legislative intent when they clearly state an intent. *See, e.g., Simpson v. Department of Fish and Wildlife*, 242 Or App 287, 291, 255 P3d 565 (2011) (to construe a 2007 amendment to the statute granting the Oregon Fish and Wildlife Commission the authority to define wild birds and mammals, the court relied on a staff measure summary stating that the legislation was intended to reinstate the ability of the Commission “to regulate wildlife as it had done historically prior to the Supreme Court decision” in *State v. Couch*, 341 Or 610, 147 P3d 322 (2006)).

Here, the staff measure summaries do not clearly state an intent about whether a faculty member who holds a traditional administrator role with regard to a significant component of a university and who also has academic responsibilities (such as a part-time department chair) is a supervisory employee. The summaries do not address that precise issue. Rather, the staff measure summaries equate “faculty members with an academic focus” with faculty members “who are *not* high-level administrators,” thereby drawing an either/or distinction between two groups assumed to be distinct: faculty members with an academic focus, on the one hand, and high-level administrators, on the other. The summaries are not especially helpful in discerning how the legislature intended to treat faculty members who have *both* teaching responsibilities (an academic

focus) and administrative responsibilities with respect to a significant component of a university (an administrative focus).

In sum, taking text, context, and legislative history together, I would conclude that the legislature intended to expand collective bargaining rights for faculty members who intermittently supervise others, typically on academic or research projects. The legislature also designated as “supervisory employees” those faculty members with traditional administrator roles with regard to the operation of a university or a significant component of a university. Because the legislature described that group in ORS 243.650(23)(b)(A) as including a faculty member employed as a “head or equivalent,” a position lower than assistant dean, in light of the legislative history indicating that HB 3170 was intended to have only limited impact on administrators, I would conclude that faculty members who serve as traditional administrators of university departments are supervisory employees.

Applying that standard to the Oregon Tech department chairs, I would conclude that they are supervisory employees within the meaning of ORS 243.650(23)(b)(A), even though they also continue to teach and perform research part-time. To begin, I read the record as indicating that the department chairs act as traditional administrators with regard to the faculty in their departments. The record includes evidence that department chairs hire adjunct faculty, fixed-term faculty and retired faculty. Although the dean approves the hires, the department chair makes the hiring decision, and witness testimony confirms that department chair recommendations are routinely granted. For tenure-track faculty hiring, after receiving the recommendation of the department hiring committee, the department chair makes his or her own recommendation to the dean. Such recommendations are effective and routinely implemented.

Department chairs also evaluate ranked faculty by first reviewing and approving each faculty member’s objective plan for the year, and then preparing for each faculty member an Annual Performance Evaluation. Those annual evaluations are used in the consideration of a number of decisions with impact on faculty members’ careers, including decisions about compensation and promotion. The record indicates that department chairs also make effective recommendations regarding decisions related to tenure, post-tenure review, and promotion.

The department chairs also make other decisions that significantly affect the working lives of the faculty in their departments. They select the program directors (the faculty in their departments who oversee programs of study) and the stipends they will receive. The department chairs determine the curriculum offered to students in their departments—decisions with impact on the strategic direction of their departments. Department chairs choose which courses are taught, the number of sections that will be offered each term, and when the courses will be provided. Chairs assign the teaching duties among ranked and adjunct faculty. Department chairs are also responsible for deciding how to manage unanticipated surges in student enrollment.

The record also demonstrates that the department chairs have significant budget authority, a function closely connected to having traditional administrative authority within an organization. Near the end of the 2017-2018 academic year, Budget and Resource Planning Director Stephanie Pope gave the department chairs an overview of Oregon Tech’s new budget model, which resulted from the work of the Fiscal Operations Advisory Council, begun in fall 2017. Under this new

budget model, chairs have final authority to approve faculty travel funds, manage professional development funds, and manage expenditure of overload funds (used when there is unanticipated student over-enrollment, and more courses are offered than originally planned). Under this new budget model, the department chair is expected to manage the department budget in a fiscally responsible manner, and surplus funds remaining at the end of the fiscal year are rolled over to the department's budget for the next year. Under this budget model, departmental savings accounts (sinking funds) create an equipment budget reserve, and department chairs are expected to manage the department budget to "save" budgeted funds over multiple budget years to fund large equipment purchases. Portions of the new budget model were implemented during the 2018-2019 academic year, as the model was being finalized. Oregon Tech anticipates that it will take several budget cycles to fully implement the new budget model.

Department chairs spend a substantial portion of their professional time and attention on department chair duties. Chairs assign themselves release time for their administrative duties, and most have assigned themselves 0.5 release time from their teaching workload, and some more. For example, the Natural Sciences Department has both a department chair and an associate department chair, with the associate chair responsible for managing the department budget and deciding which faculty will teach which classes and the number of those classes, and the chair responsible for serving in a leadership role as the liaison to higher-level administrators. Both the chair and the associate chair of that department received 0.5 release time for the 2018-2019 academic year. The chair of the Electrical Engineering and Renewable Energy Department took 0.6 to .75 release time, depending on the term, over the 2017-2018 and 2018-2019 academic years, and the chair of the Manufacturing and Mechanical Engineering Technology Department took .75 release time for both years. Other department chairs took more than 0.5 release time, assigning themselves both department chair duties as well as various program director or coordinator roles. The record also includes an email from one department chair expressing concern that he was evaluated as teaching faculty, "when most of my efforts are in the chair realm."

Based on this record, I would conclude that the department chairs, as a group, spend substantial amounts of their professional time—more than half of their time in multiple departments—on administrative duties. The amount of time an employee spends on administrative work (as opposed to academic or research work) is not determinative of an employee's level or type of administrative authority, but it is pertinent to assessing the significance of that authority. *See, e.g., Portland State University Chapter of the American Association of University Professors, et al. v. State System of Higher Education and Portland State University*, Case No. C-381 at 20, 3 PECBR 1678, 1697 (1978) (holding that Portland State University department heads are supervisory employees, and noting that "the average Department Head devotes at least 50 percent of his/her time to Department Head duties"). Here, these department chairs do not spend brief amounts of time on merely intermittent administrative duties. Their role as department chair is complex and time-consuming. As one department chair said at the March 2, 2018, Academic Council meeting, the department chair role requires "a huge amount of time, energy, effort and inspiration."

To provide context to the analysis, it bears emphasizing that the size and complexity of an organization affects the authority and responsibility that administrators at various levels hold. Oregon Tech is a multi-campus institution. It is comprised of two colleges, and each college has

three campus sites: the College of Health, Arts, and Sciences has campus sites in Klamath Falls, Wilsonville, and Salem; and the College of Engineering, Technology, and Management has campus sites in Klamath Falls, Wilsonville, and Seattle. Each of the 15 departments is headed by a department chair, who reports to the dean of their college, and department chairs with departments with faculty or programs at the Wilsonville campus also report to that campus administrator (the associate provost) on Wilsonville-related matters and strategic priorities. Department-level administrators (even part-time) are essential to the operation of such a multi-location organization. Further, the department chairs are not the Oregon Tech employees with the “lowest”-level administrative duties. Under the department chairs are typically a number of faculty who take on department-level administrative roles, such as program director, scheduling coordinator, or assessment coordinator.<sup>27</sup> This structure tends to show that these department chairs are not merely collaborating as peers with faculty members in their departments, but are holding a traditional administrator role.

Finally, as the majority notes, the record indicates that Oregon Tech has recently strengthened the role of its department chairs as administrators. That transition, however, was well underway before the faculty members began organizing. The record indicates that Oregon Tech’s current provost, who began in 2017, has sought to make the department chair role more significant since 2017. Planning for the new budget model began in 2017. Provost Kuleck began working on possible changes to the department chair guidelines and policy in 2017. At a January 19, 2018, meeting of the Academic Council, which includes the department chairs, Dr. Kuleck informed the Council that, as department chairs “take on high level administrative visioning and strategic thinking for their departments, ample training is critical.” Also in early 2018, at an Academic Council meeting on March 2, 2018, Dr. LeAnn Maupin, Dean of the College of Health, Arts, and Sciences, addressed the issue of department chair leadership and duties, and stated that the university’s goal was to empower departments in their efforts to work with their deans and across colleges in multidisciplinary efforts.

The department chair training suggested by Provost Kuleck ultimately took place on March 23, 2018. It covered topics including leading the academic department, exploring and pursuing interdisciplinary opportunities, promoting effective teaching, managing departmental resources, developing funds, optimizing faculty time, and managing faculty and staff. These recent organizational developments confirm that Oregon Tech’s current expectations of its department chairs date back to at least 2017, and are now an existing aspect of organizational life at Oregon Tech.

In sum, I would conclude that the legislature intended to list in ORS 243.650(23)(b)(A), which designates “supervisory employees” for public university faculty members, those faculty members who hold traditional administrator roles with regard to the operation of a university or a

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<sup>27</sup>Program directors, for example, are typically responsible for five or more of the following ten activities: program design and curriculum coordination; program assessment (for example, program specific accreditation); program marketing and recruiting (for example, web site, program marketing materials, open houses); program outreach; program course scheduling; student advising coordination; program graduation petitions; recruitment and management of adjunct faculty for the program; admission selection to the professional program; and development and management of internships, externships, and/or partnerships.

significant component of a university. Based on the record before us, I would conclude that the department chairs at Oregon Tech hold such traditional administrator roles, even though they also teach and perform academic duties part-time. Their administrative duties are not merely incidental or intermittent—they are essential and go to the core of the department chairs’ work overseeing and managing their departments. I would dismiss the petition.



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\*Lisa M. Umscheid, Member