EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. UC-006-17

(UNIT CLARIFICATION)

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| OREGON AFSCME COUNCIL 75, LOCAL NO. 88, Petitioner, | ) | |
| v. | ) | INTERIM ORDER |
| MULTNOMAH COUNTY, Respondent. | ) | |

On March 22, 2018, the Board heard oral argument on Petitioner's objections to an amended recommended order issued by Administrative Law Judge (ALJ) B. Carlton Grew on January 10, 2018, after a hearing held on August 24 and 25, 2017, in Portland, Oregon. The record closed on October 5, 2017, following receipt of the parties' post-hearing briefs.

Giles Gibson, Legal Counsel, Oregon AFSCME Council 75, Local No. 88, Portland, Oregon, represented Petitioner.

Kathryn A. Short, Deputy County Attorney, Multnomah County, Portland, Oregon, represented Respondent.

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On April 28, 2017, Oregon AFSCME Council 75, Local No. 88 (AFSCME) filed a Petition requesting that its general employees bargaining unit be clarified to include certain "temporary" and "on-call" workers that had previously been excluded from the AFSCME-represented bargaining unit. AFSCME filed an Amended Petition on May 17, 2017. Multnomah County (County) filed a timely objection, asserting that the petitioned-for employees should not be included in the AFSCME unit because (1) the on-call workers were casual workers who lacked a community of interest with the AFSCME unit employees, and (2) the temporary workers lacked a reasonable expectation of continued employment and lacked a community of interest with the AFSCME unit employees.

As modified at hearing on August 24, 2017, the issue in this case is whether the existing AFSCME unit should be clarified to include:

> All temporary and on-call employees excluded from the classified service as such by [Multnomah County Code (MCC)] Section 9.100(F) who work more than an average of four hours per week per calendar quarter, but not
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> On-call employees who work an average of four hours or less per week per calendar quarter, and not
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> Temporary and on-call employees in job classifications which are included in other bargaining units, or are historically excluded from this General Employees Unit.

For the reasons discussed below, we conclude that there is insufficient evidence in the record to resolve the issue presented. Accordingly, we vacate the amended recommended order and reopen the record so that the ALJ may conduct further investigation, pursuant to ORS 243.682(1)(b), OAR 115-010-0070(5)(a), and OAR 115-060-0040(3).[1] In doing so, we note that this Board has both the responsibility and the discretion to develop a full factual record in representation cases, which include unit clarification cases. *Id.*; *see also*, *Clackamas County Peace Officers' Association, Local 843 v. City of Sandy*, Case No. C-186-77 at 2, 4 PECBR 2200, 2201 (1979); *Graphic Arts International Union, Local 213B v. State Printer and Department of General Services*, Case No. C-56-77 at 2, 3 PECBR 1885, 1886 (1978). "Representation, clarification and unit redesignation hearings are investigatory," not adversarial, and "[t]heir purpose is to develop a full factual record." OAR 115-010-0070(5)(a). Further, the Board and its agents are expressly authorized to "examine witnesses, require the production of documents and call witnesses not called by the parties." *Id.*

In the following discussion, we provide some guidance to the parties regarding the aspects of the record that we believe should be developed further, based on the evidence submitted thus far. The ALJ may provide additional guidance and make specific inquiries to help the parties develop a full factual record. This order should not be read as requiring the development of a lengthy or complex record, and we encourage the parties to identify the most efficient and least burdensome ways to address the outstanding factual issues. Additionally, the parties may supplement the record through a variety of means, including alternatives to in-person witness testimony such as telephonic testimony, factual stipulations, joint or unopposed submission of exhibits, and affidavits.

## DISCUSSION

AFSCME has historically represented a bargaining unit comprised of "all employees in the County classified service as set forth in [Multnomah County Code] Chapter 9 except those specifically excluded." In relevant part, the bargaining unit has historically excluded "temporary"

[1]AFSCME filed objections to the amended recommended order. However, by operation of the Board's rule that determines the date of filing, OAR 115-010-0010(10), AFSCME's objections were filed on January 25, 2018, one day after the January 24 filing deadline, as determined by OAR 115-010-0090. On February 7, 2018, AFSCME filed a motion to extend the time for filing objections to January 25, and the County took no position regarding that motion. Because we are vacating the amended recommended order and reopening the record, the issue of whether AFSCME filed timely objections is moot, and it is unnecessary to rule on AFSCME's motion.

and "on-call" employees, as those terms are defined in County Code Chapter 9. AFSCME's petition proposes to add to the existing bargaining unit those temporary and on-call employees who both work in AFSCME-represented classifications and work an average of more than four hours per week per calendar quarter.

Generally, this Board considers it inappropriate to add temporary and on-call employees to a bargaining unit of regular employees if the petitioned-for employees have only a "tenuous employment relationship" with the employer. Employees categorized by an employer as "temporary" or "on-call," however, do not necessarily have a tenuous employment relationship with the employer, as measured by this Board's standards. If we find that such employees have more than a tenuous employment relationship, then we determine whether it is appropriate to include them in a bargaining unit with other regular employees by considering both statutory and administrative unit determination factors, including community of interest; wages, hours and other working conditions of the employees involved; the history of collective bargaining; the desires of the employees; and this Board's larger unit preference. *See Service Employees International Union Local 503, Oregon Public Employees Union v. Marion County*, Case No. UC-11-10 at 34-35, 24 PECBR 521, 554-55, *nunc pro tunc*, 24 PECBR 557 (2012) (*Marion II*). We also determine whether the petitioned-for employees constitute a "logically defined group of employees." *Id.*, UC-11-10 at 35, 24 PECBR at 555.

On-Call Employees

In *Marion II*, the Board adopted the National Labor Relations Board's (NLRB) standard for determining whether employees who work part-time, intermittent, or irregular schedules are "casual" (*i.e.*, having only a tenuous employment relationship) or "regular." UC-11-10 at 32-34, 24 PECBR at 552-54. Casual employees are "those individuals who, on the date of eligibility for the election, have averaged less than four weekly hours of work in the quarter (13 weeks) preceding the election eligibility date." *Id.*, UC-11-10 at 33, 24 PECBR at 553.[2]

Based on the parties' briefs and representations at oral argument, there is no dispute that we should apply the test adopted in *Marion II* to the County's on-call employees, for the purpose of determining which on-call employees have a sufficient employment relationship to be eligible for inclusion in the existing bargaining unit. However, as discussed above, our inquiry does not end there, and we must still apply the statutory and administrative unit determination factors to determine whether it is appropriate to add those on-call employees to the existing bargaining unit. After considering the record at this stage, and the size of the County's workforce and the number of different departments, we find that there is insufficient evidence regarding some of those factors, particular the community of interest and working conditions factors.

[2]We note that AFSCME has indicated that it is willing to modify its proposed unit description to conform to the standard adopted in *Marion II*, that is, to include employees who work "an average of four or more hours per week per calendar quarter," and that it would not object to the Board exercising its authority to modify the proposed unit description accordingly.

For example, the record provides little or no evidence regarding on-call employees in the following departments: District Attorney, County Assets, County Human Services, County Management, Elections (part of Community Services), Sheriff's Office, and Non-Departmental. As a result, we do not know whether, or the extent to which, on-call employees and existing bargaining unit employees in those departments perform the same job duties or share common supervision. Similarly, we do not know whether there is interchange between them, or the nature of any such interchange.[3]

Temporary Employees

Also in *Marion II*, this Board noted that there are two different NLRB standards that may be used for determining whether temporary employees have a sufficient employment relationship to be included in a bargaining unit of regular employees: a reasonable expectation of employment test and a date certain test. UC-11-10 at 32-33, 24 PECBR at 552-53. Based on the record in that case, however, the Board determined that it was not necessary to decide whether to use one test or the other, or both, to determine the nature of a temporary employee's employment relationship under the Public Employee Collective Bargaining Act, and it has not had occasion to do so since then. *Id.*[4]

In this case, there is insufficient evidence in the record to determine whether the County's temporary employees *categorically* have "only a tenuous" employment relationship with the County, under either or both of the NLRB tests.[5] Additionally, even assuming that some or all of the temporary employees have a more than tenuous employment relationship with the County,

[3]This interim order should not be construed as establishing a standard that requires department-specific evidence in all representation cases, regardless of circumstance. In this case, there are several departments for which there is little or no evidence, including the Elections department, which employs a significant number of on-call employees. Nor is there sufficient evidence to establish that department-specific evidence is not necessary, such as testimony or stipulations establishing that the existing evidence regarding on-call employees in certain departments is generalizable or that there are not significant departmental variations in how the County employs on-call employees.

[4]We are not, at this time, deciding which test we should use to determine the employment status of temporary employees, in part because neither party has asked us to do so; the parties may submit additional briefing on that issue if they so choose.

[5]In some cases, the nature of the employment relationship for a group of temporary employees may be determined categorically, *i.e.*, this Board will determine whether the evidence establishes that temporary employees, *as a group*, do or do not have a tenuous employment relationship, for the purpose of determining whether a proposed unit is appropriate. *See, e.g.*, *Laborers' International Union of North America, Local 483 v. City of Portland*, Case No. UC-011-13 at 15-16, 25 PECBR 953, 967-68 (2014); *Marion II*, UC-11-10 at 33, 24 PECBR at 553. In other cases, it may be both necessary and feasible to make individualized determinations, such as when the status of certain individuals is outcome determinative in a representation case. Under some circumstances, a categorical determination about the employment status of temporary employees (in the context of an appropriate unit determination) will not necessarily preclude the parties from disputing the status of certain individuals at a later stage of the case (such as through the process for challenging the list of eligible employees provided for in OAR 115-025-0065(5)).

there is insufficient evidence to assess whether the community of interest and working conditions factors weigh in favor of adding those employees to the existing bargaining unit.

For example, there is only unspecific hearsay testimony regarding the County's temporary appointment letters and the statements made therein to temporary employees regarding their employment tenure. Further, it is unclear whether there are any significant departmental variations in those statements. Similarly, the County submitted some County-wide information regarding the percentage of temporary employees who are hired into regular positions, but it is unclear whether there is any significant departmental variation in the frequency or nature of such interchange. There is also no County-wide or department-specific information regarding how frequently temporary employees are employed beyond the expected termination dates listed in their original appointment letters, or how frequently they are appointed to different temporary positions, on-call positions, or limited duration positions (in addition to regular positions).[6] Similarly, it is unclear whether any of the employees classified by the County as "temporary" in this record are actually bargaining unit or on-call employees who have been given a temporary appointment. We also note that there is little or no information regarding temporary workers in several departments (District Attorney, County Assets, County Management, Community Services, Library, Sheriff's Office, and Non-Departmental), and it is unclear whether the evidence in the record is generalizable to those departments.

Therefore, because the record is not sufficiently developed so as to allow this Board to appropriately act on the petition, we vacate the January 10, 2018, amended recommended order, and remand the matter to the ALJ for the reopening of the record consistent with this interim order and the issuing of a new recommended order.

## INTERIM ORDER

The amended recommended order issued January 10, 2018, is vacated and the matter is remanded to the ALJ to reopen the record in accordance with this order. Once a sufficiently full record is developed, the ALJ will issue a recommended order, which the parties may object to under OAR 115-010-0090.

DATED: April 13, 2018.

Adam L. Rhynard, Chair

Lisa M. Umscheid, Member

Jennifer Sung, Member

[6]There is some evidence of interchange between temporary, on-call, and bargaining unit employees, but we are unable to determine or even estimate how frequently such interchange occurs, or whether there is any significant departmental variation.