

PUBLIC EMPLOYEES RETIREMENT BOARD

CONFERENCE CALL MEETING

This meeting is open to the public; interested parties may listen to this meeting at PERS Headquarters.

Friday December 16, 2011 10:00 AM	<i>PERS Headquarters 11410 SW 68th Parkway Tigard</i>
--	--

<i>Item</i>	<i>Presenter</i>
Eugene Water and Electric Board Petition for Declaratory Ruling	O'LEARY

**James Dalton, Chair • Laurie Warner, Vice-Chair
Eva Kripalani • Mike Pittman • Pat West
Paul Cleary, Executive Director**



Oregon

John A. Kitzhaber, MD, Governor

Public Employees Retirement System

Headquarters:
11410 S.W. 68th Parkway, Tigard, OR
Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.oregon.gov/pers

December 16, 2011

TO: Members of the PERS Board
FROM: Joseph O'Leary, Administrator, PPLAD
SUBJECT: Eugene Water and Electric Board 9/23/11 Petition for Declaratory Ruling

The issue before the Board is whether to issue rulings on the questions raised by the Eugene Water and Electric Board (EWEB) in its petition for declaratory ruling dated September 26, 2011. EWEB's petition presents two questions. The first question is whether a hypothetical worker who is employed and paid by a temp agency and is placed at EWEB for seven months is a member of PERS. The second question is whether the same worker, if subsequently hired by EWEB is entitled to creditable service with PERS for the period when the person was placed at EWEB, but was paid by the temp agency. EWEB asserts that the fact that the worker was paid by a temp agency should be dispositive of the conclusion that the worker was not a member of PERS. PERS staff asserts that applicable statutes and rules also require a determination of whether the worker was an employee of the public agency and that the source of the salary is not necessarily a determining issue for membership. EWEB's petition, the PERS staff memo to the Board on the petition and EWEB's response to the PERS staff memo to the Board are attached.

The statutes and administrative rules concerning petitions for declaratory rulings require the agency to respond to a petition within 60 days of receipt notifying the petitioner whether it will issue a ruling. This matter was presented at the November 18th Board meeting, at which time the Board requested, and EWEB's counsel consented to, an additional 30 days for the Board to decide how to respond to this petition. If the agency decides to issue a ruling, it must notify all persons named in the petition, must allow for intervention by interested parties, must provide opportunity for briefing and oral argument by interested parties, and must issue a written ruling within 60 days of the close of the record. Parties may seek judicial review of the ruling to the Court of Appeals. Alternatively, the agency may decline to issue a declaratory ruling. A declination is not subject to review by the court.

At the November 18th Board meeting, Chair Dalton requested a legal analysis on the underlying issues raised by the petition. That analysis was completed by DOJ Counsel and provided to Board Member Kripalani. PERS staff also broached with EWEB's counsel whether it would be willing to agree to additional factual stipulations that the temp agency paid the workers from funds that EWEB paid to the temp agency and that the workers were considered employees of EWEB for all other purposes. EWEB responded that it would not agree to supplement the petition with those additional facts. Correspondence to and from EWEB on this point is also attached.

BOARD OPTIONS:

1. Decline to issue a declaratory ruling.
2. Issue a declaratory ruling and begin the notice and hearing process required under ORS 183.410.



HARRANG LONG
GARY RUDNICK P.C.
ATTORNEYS AT LAW

VELERIA R. SHARP

Legal Assistant

1001 SW Fifth Avenue, 16th Floor

Portland, OR 97204

veleria.sharp@harrang.com

503.242.0000

503.241.1458 (fax)

September 23, 2011

**VIA CERTIFIED MAIL
AND RETURN RECEIPT REQUESTED**

Mr. Steven Rodeman
Public Employees' Retirement Board
PERS Headquarters
P.O. Box 23700
Tigard, OR 97281-3700

Re: Eugene Water & Electric Board

Dear Mr. Rodeman:

Enclosed please find a Petition for Declaratory Rulings for filing in the above-referenced matter.

If you have any questions, please do not hesitate to contact Susan D. Marmaduke at 503-242-0000. Thank you for your attention to this matter.

Sincerely,

Veleria R. Sharp
Legal Assistant to Susan D. Marmaduke

VRS:

Enclosure

cc: Client
P0249427.DOC;1

STATE OF OREGON

PUBLIC EMPLOYEES' RETIREMENT BOARD

**EUGENE WATER & ELECTRIC
BOARD,**

Petitioner.

No. _____

**PETITION FOR DECLARATORY
RULINGS**

Eugene Water & Electric Board ("EWEB") petitions for declaratory rulings pursuant to ORS 183.410 and OAR 137-002-0010.¹ EWEB asks that the Public Employees' Retirement Board ("PERB") answer two related questions about Public

¹ ORS 183.410 provides:

On petition of any interested person, any agency may in its discretion issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. However, the agency may, where the ruling is adverse to the petitioner, review the ruling and alter it if requested by the petitioner. Binding rulings provided by this section are subject to review in the Court of Appeals in the manner provided in ORS 183.480 for the review of orders in contested cases. The Attorney General shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition. The petitioner shall have the right to submit briefs and present oral argument at any declaratory ruling proceeding held pursuant to this section.

OAR 137-002-0010 provides the requirements for a petition for declaratory ruling.

Employees' Retirement System ("PERS") retirement credit for a temporary worker placed with EWEB by a staffing company that pays the worker's salary.

I. RULES AND STATUTES AT ISSUE

These questions involve the application of ORS 238.015(1) (providing requirements for membership in PERS), ORS 238.005(5) (defining creditable service), ORS 238.005(21)(a) (defining salary), and OAR 459-010-0003(1) (defining service). We have attached copies of the statutes and administrative rule to this petition as an addendum.

II. FIRST REQUEST FOR DECLARATORY RULING

A. Relevant Facts

EWEB, a public employer participating in PERS, contracted with a staffing company or "temp agency" for a worker under a contract like those attached as Exhibits A through E. The temp agency paid the worker's salary and EWEB provided no salary, lodging, or other "advantages" within the statutory definition of "salary" to the worker in return for the worker's services. While the worker was placed at EWEB, EWEB provided direction and controlled the work. The worker's placement with EWEB lasted for seven months.

B. Question Presented

Under the above facts, is the worker, employed and paid by the temp agency and placed by the temp agency with EWEB, a member of PERS?

C. Proposed Ruling or Relief Requested

In order for a worker to become a member of PERS, he or she must be “in the service of” a public employer for six months. Under the facts posited above, although the worker was at EWEB for seven months, the worker was not “in the service of” EWEB because the temp agency employed the worker and paid the worker’s salary. Therefore, the worker did not become a member of PERS.

D. Argument

Under the statutes regulating PERS, to the extent a staffing company or temp agency pays an individual’s salary while placed with a public employer, that individual is not “in the service of” the public employer for purposes of membership in PERS. ORS 238.015(1) describes the requirements for membership in PERS in part as follows:

No person may become a member of the system unless that person is *in the service of a public employer* and has completed six months’ service uninterrupted by more than 30 consecutive working days during the six months’ period.

Thus, a person becomes a member in PERS only after six months “in the service of” a public employer. The Oregon Administrative Rules define “service” for purposes of eligibility and membership in PERS as requiring:

a period in which an employee: (A) is in an employer/employee relationship, as defined in OAR 459-0010-0030 and (B) receives payment of ‘salary’ as defined in ORS 238.005 or similar payment from workers compensation or disability.

OAR 459-010-0003(1)(d) (emphasis added). The referenced statute defines “salary” as:

the remuneration paid an employee in cash out of the funds of a public employer in return for services to the employer, plus the monetary value, as determined by the Public Employees Retirement Board, of whatever living quarters, board, lodging, fuel, laundry and other advantages the employer furnishes the employee in return for services.

ORS 238.005(21)(a) (emphasis added).

In other words, the threshold question is whether a worker is receiving “cash out of the funds of a public employer [or other advantages the employer furnishes the employee] in return for services to the public employer.” *Id.* If not, the worker is not receiving a salary as defined in ORS 238.005 and so is not “in the service of” a public employer. The worker, therefore, cannot qualify for PERS membership on the basis of that work.

If a worker *is* receiving “cash out of the funds of the public employer” (ORS 238.005(21)(a)), the next question is whether such worker nonetheless qualifies as an “independent contractor” under the criteria specified in OAR 459-010-0030 (“determination of employee status”).² If a worker receives “remuneration paid an employee in cash out of the funds of a public employer in return for services” from the public employer, but is an independent contractor, such worker is not eligible for PERS membership. A worker may be eligible for PERS membership only if both criteria are met, *i.e.*, the worker is: (1) receiving a “salary” from the public employer; and, (2) not an

² That rule provides that the 20-factor test described in Internal Revenue Service Ruling 87-41 shall be used in determining whether or not an individual is an employee.

independent contractor, but an “employee” of the public employer, as defined in OAR 459-010-0030. Unless both criteria are met, the person is not eligible for PERS membership.

The worker in the scenario described above would not be eligible for PERS membership because the first requirement, *i.e.*, payment of a salary by the public employer, is not met. Therefore, a worker who is paid a salary by a temp agency is not a PERS member, even if the worker is placed at EWEB for longer than six months.

III. SECOND REQUEST FOR DECLARATORY RULING

A. Relevant Facts

The same facts as stated in EWEB’s first request for declaratory ruling, but EWEB subsequently hired the worker from the temp agency and began paying the worker’s salary and other benefits.

B. Question Presented

When EWEB hires a worker from a temp agency after the worker had been placed at EWEB by the temp agency for seven months, is the worker entitled to “creditable service” for the period when the temp agency was paying the worker’s salary?

C. Proposed Ruling or Relief Requested

The worker in this scenario is not entitled to “creditable service” for the period when he or she was on the temp agency’s payroll and placed at EWEB; the worker’s eligibility for membership and creditable service is “counted” from the date the worker is hired by EWEB.

D. Argument

Under the plain terms of the PERS statute defining “creditable service,” a public employer must pay a worker’s salary in order for creditable service to accrue:

“Creditable service” means any period of time during which an *active member is being paid a salary by a participating public employer* and for which benefits under this chapter are funded by employer contributions and earnings on the fund.

* * * “Creditable service” includes all retirement credit received by a member.

ORS 238.005(5). The administrative rule discussed above, OAR 459-010-0003(1)(d), reinforces that the public employer must pay the worker’s salary in order for the worker to be a member who accrues PERS retirement credit. That rule requires both that the worker “receives payment of ‘salary’ as defined in ORS 238.005” *and* that the worker not be an independent contractor, but instead qualify as an “employee” of the public employer. Again, salary means payment by the employer because it is defined as “remuneration paid an employee *in cash out of the funds of a public employer*” or other “advantages the employer furnishes the employee in return for services.” ORS 238.005(21)(a).

Under the plain text of the PERS statutes and rules, a public employer must pay a worker’s salary in order for the worker to accrue serviceable credit time. The worker in this proposed scenario is not entitled to any creditable service time for the time spent at EWEB while the temp agency paid the worker’s salary.

Moreover, significant practical concerns would arise if public employers were required to contribute to PERS on the basis of compensation paid to a worker – or other

advantages furnished to the worker – by another entity, such as a temp agency: The public employer would have no control over the amounts paid or “advantages” furnished in return for services, and it may have no record of those amounts or advantages, since the worker was not on the public employer’s payroll during that time.

IV. INTERESTED PERSONS

EWEB does not maintain records of all of the persons who have been placed at EWEB by a temp agency. Most of those persons presumably moved on to other placements. Even the identities of those persons whom EWEB subsequently hired after they were placed at EWEB by a temp agency would not necessarily be reflected in EWEB’s records. However, EWEB is aware of some people who were employed by, and paid by, a temp agency which placed them at EWEB, and whom EWEB did ultimately hire and pay salaries and other benefits.

The persons listed below have either contacted EWEB or PERB, or both, about this issue.³

Carla Aguilar

John Alban

³ In several instances, PERB has asked EWEB to assess whether the person met the definition of an “independent contractor” or “employee,” as those terms are defined in OAR 459-010-0030, while they were placed at EWEB by a temp agency. In each such instance, EWEB informed PERB that the person did not meet the definition of “independent contractor” for purposes of that rule. In a few instances, EWEB has received and paid invoices from PERS for additional contributions, apparently based on the members’ evidence of compensation they received from other entities, i.e., temp agencies, notwithstanding the fact that EWEB did not pay those persons’ salaries as defined by ORS 238.005 during that time.

Michael Anderson

Lisa Bean

Daniel M. Bedbury

Scott R. Brenneman

Jay Bryant

John Culver

Randy L. Enders

John Femal

Tafianne Gardner

Matthew Halleman

Taryn Johnson

Rick Mansker

Craig Matsler

Jared McDonald

Rod Olsen

Stephanie Penselin

Jenean Rigney

Derrick Sitowski

Kris Stenshoel

Michael Straney

26

Philip S. Stuart

Kurt Suzuki

Kevin Thomas

Kelly Thompson

David Trinka

Ken Wedin

Tom West

Thomas Williams

John Wigle

Michael Wilson

Other public employers, and their similarly situated workers, also may be interested.

///

///

///

///

///

///

///

///

///

V. CONCLUSION

A worker placed at EWEB by a temp agency or staffing company and paid a salary by that temp agency or staffing company is not “in the service of” EWEB for purposes of PERS membership and is not accruing PERS creditable service during that time.

DATED this 23rd day of September, 2011.

Respectfully submitted,



William F. Gary, OSB #770325

william.f.gary@harrang.com

Susan D. Marmaduke, , OSB #841458

susan.marmaduke@harrang.com

Jona J. Maukonen, , OSB #043540

jona.maukonen@harrang.com

Harrang Long Gary Rudnick P.C.

1001 SW Fifth Avenue, 16th Floor

Portland, Oregon 97204

(503) 242-0000

Attorneys for Eugene Water and Electric
Board

P0249211.DOC;1

Formerly cited as OR ST § 237.003



West's Oregon Revised Statutes Annotated Currentness

Title 22. Public Officers and Employees

Chapter 238. Public Employees Retirement System (Refs & Annos)

In General

→ **238.005. Definitions**

<Text subject to final change by the Oregon Office of the Legislative Counsel.>

<Text of section operative until Jan. 1, 2012. See, also, section as amended by Laws 2011, c. 506, § 32, operative Jan. 1, 2012, and section as amended by Laws 2011, c. 637, § 72, operative Jan. 1, 2012.>

For purposes of this chapter:

- (1) "Annuity" means payments for life derived from contributions made by a member as provided in this chapter.
- (2) "Board" means the Public Employees Retirement Board.
- (3) "Calendar year" means 12 calendar months commencing on January 1 and ending on December 31 following.
- (4) "Continuous service" means service not interrupted for more than five years, except that such continuous service shall be computed without regard to interruptions in the case of:
 - (a) An employee who had returned to the service of the employer as of January 1, 1945, and who remained in that employment until having established membership in the Public Employees Retirement System.
 - (b) An employee who was in the armed services on January 1, 1945, and returned to the service of the employer within one year of the date of being otherwise than dishonorably discharged and remained in that employment until having established membership in the Public Employees Retirement System.
- (5) "Creditable service" means any period of time during which an active member is being paid a salary by a participating public employer and for which benefits under this chapter are funded by employer contributions and earnings on the fund. For purposes of computing years of "creditable service," full months and major fractions of a month shall be considered to be one-twelfth of a year and shall be added to all full years. "Creditable service" includes all retirement credit received by a member.
- (6) "Earliest service retirement age" means the age attained by a member when the member could first make application for retirement under the provisions of ORS 238.280.
- (7) "Employee" includes, in addition to employees, public officers, but does not include:
 - (a) Persons engaged as independent contractors.

ADD - 1

Formerly cited as OR ST § 237.003

(b) Seasonal, emergency or casual workers whose periods of employment with any public employer or public employers do not total 600 hours in any calendar year.

(c) Persons, other than workers in the Oregon Industries for the Blind under ORS 346.190, provided sheltered employment or made-work by a public employer in an employment or industries program maintained for the benefit of such persons.

(d) Persons employed and paid from federal funds received under the Emergency Job and Unemployment Assistance Act of 1974 (Public Law 93-567) or any other federal program intended primarily to alleviate unemployment. However, any such person shall be considered an "employee" if not otherwise excluded by paragraphs (a) to (c) of this subsection and the public employer elects to have the person so considered by an irrevocable written notice to the board.

(e) Persons who are employees of a railroad, as defined in ORS 824.020, and who, as such employees, are included in a retirement plan under federal railroad retirement statutes. This paragraph shall be deemed to have been in effect since the inception of the system.

(8) "Final average salary" means whichever of the following is greater:

(a) The average salary per calendar year paid by one or more participating public employers to an employee who is an active member of the system in three of the calendar years of membership before the effective date of retirement of the employee, in which three years the employee was paid the highest salary. The three calendar years in which the employee was paid the largest total salary may include calendar years in which the employee was employed for less than a full calendar year. If the number of calendar years of active membership before the effective date of retirement of the employee is three or fewer, the final average salary for the employee is the average salary per calendar year paid by one or more participating public employers to the employee in all of those years, without regard to whether the employee was employed for the full calendar year.

(b) One-third of the total salary paid by a participating public employer to an employee who is an active member of the system in the last 36 calendar months of active membership before the effective date of retirement of the employee.

(9) "Firefighter" does not include a volunteer firefighter, but does include:

(a) The State Fire Marshal, the chief deputy fire marshal and deputy state fire marshals; and

(b) An employee of the State Forestry Department who is certified by the State Forester as a professional wildland firefighter and whose primary duties include the abatement of uncontrolled fires as described in ORS 477.064.

(10) "Fiscal year" means 12 calendar months commencing on July 1 and ending on June 30 following.

(11) "Fund" means the Public Employees Retirement Fund.

(12)(a) "Member" means a person who has established membership in the system and whose membership has not been terminated as described in ORS 238.095. "Member" includes active, inactive and retired members.

(b) "Active member" means a member who is presently employed by a participating public employer in a qualifying position and who has completed the six-month period of service required by ORS 238.015.

Formerly cited as OR ST § 237.003

- (c) "Inactive member" means a member who is not employed in a qualifying position, whose membership has not been terminated in the manner described by ORS 238.095, and who is not retired for service or disability.
- (d) "Retired member" means a member who is retired for service or disability.
- (13)(a) "Member account" means the regular account and the variable account.
- (b) "Regular account" means the account established for each active and inactive member under ORS 238.250.
- (c) "Variable account" means the account established for a member who participates in the Variable Annuity Account under ORS 238.260.
- (14) "Normal retirement age" means:
- (a) For a person who establishes membership in the system before January 1, 1996, as described in ORS 238.430, 55 years of age if the employee retires at that age as a police officer or firefighter or 58 years of age if the employee retires at that age as other than a police officer or firefighter.
- (b) For a person who establishes membership in the system on or after January 1, 1996, as described in ORS 238.430, 55 years of age if the employee retires at that age as a police officer or firefighter or 60 years of age if the employee retires at that age as other than a police officer or firefighter.
- (15) "Pension" means annual payments for life derived from contributions by one or more public employers.
- (16) "Police officer" includes:
- (a) Employees of institutions defined in ORS 421.005 as Department of Corrections institutions whose duties, as assigned by the Director of the Department of Corrections, include the custody of persons committed to the custody of or transferred to the Department of Corrections and employees of the Department of Corrections who were classified as police officers on or before July 27, 1989, whether or not such classification was authorized by law.
- (b) Employees of the Department of State Police who are classified as police officers by the Superintendent of State Police.
- (c) Employees of the Oregon Liquor Control Commission who are classified as enforcement officers by the administrator of the commission.
- (d) Sheriffs and those deputy sheriffs or other employees of a sheriff whose duties, as classified by the sheriff, are the regular duties of police officers or corrections officers.
- (e) Police chiefs and police personnel of a city who are classified as police officers by the council or other governing body of the city.
- (f) Parole and probation officers employed by the Department of Corrections, parole and probation officers who are transferred to county employment under ORS 423.549 and adult parole and probation officers, as defined in ORS 181.610, who are classified as police officers for the purposes of this chapter by the county governing body. If a county classifies adult parole and probation officers as police officers for the purposes of this chapter, and the employees so classified are represented by a labor organization, any proposal by the county to change that classi-

Formerly cited as OR ST § 237.003

fication or to cease to classify adult parole and probation officers as police officers for the purposes of this chapter is a mandatory subject of bargaining.

(g) Police officers appointed under ORS 276.021 or 276.023.

(h) Employees of the Port of Portland who are classified as airport police by the Board of Commissioners of the Port of Portland.

(i) Employees of the State Department of Agriculture who are classified as livestock police officers by the Director of Agriculture.

(j) Employees of the Department of Public Safety Standards and Training who are classified by the department as other than secretarial or clerical personnel.

(k) Investigators of the Criminal Justice Division of the Department of Justice.

(L) Corrections officers as defined in ORS 181.610.

(m) Employees of the Oregon State Lottery Commission who are classified by the Director of the Oregon State Lottery as enforcement agents pursuant to ORS 461.110.

(n) The Director of the Department of Corrections.

(o) An employee who for seven consecutive years has been classified as a police officer as defined by this section, and who is employed or transferred by the Department of Corrections to fill a position designated by the Director of the Department of Corrections as being eligible for police officer status.

(p) An employee of the Department of Corrections classified as a police officer on or prior to July 27, 1989, whether or not that classification was authorized by law, as long as the employee remains in the position held on July 27, 1989. The initial classification of an employee under a system implemented pursuant to ORS 240.190 does not affect police officer status.

(q) Employees of a school district who are appointed and duly sworn members of a law enforcement agency of the district as provided in ORS 332.531 or otherwise employed full-time as police officers commissioned by the district.

(r) Employees at youth correction facilities and juvenile detention facilities under ORS 419A.050, 419A.052 and 420.005 to 420.915 who are required to hold valid Oregon teaching licenses and who have supervisory, control or teaching responsibilities over juveniles committed to the custody of the Department of Corrections or the Oregon Youth Authority.

(s) Employees at youth correction facilities as defined in ORS 420.005 whose primary job description involves the custody, control, treatment, investigation or supervision of juveniles placed in such facilities.

(t) Employees of the Oregon Youth Authority who are classified as juvenile parole and probation officers.

(17) "Public employer" means the state, one of its agencies, any city, county, or municipal or public corporation, any political subdivision of the state or any instrumentality thereof, or an agency created by one or more such governmental organizations to provide governmental services. For purposes of this chapter, such agency created by one or

Formerly cited as OR ST § 237.003

more governmental organizations is a governmental instrumentality and a legal entity with power to enter into contracts, hold property and sue and be sued.

(18) "Prior service credit" means credit provided under ORS 238.442 or under ORS 238.225 (2) to (6)(1999 Edition).

(19) "Qualifying position" means one or more jobs with one or more participating public employers in which an employee performs 600 or more hours of service in a calendar year, excluding any service in a job for which a participating public employer does not provide benefits under this chapter pursuant to an application made under ORS 238.035.

(20) "Retirement credit" means a period of time that is treated as creditable service for the purposes of this chapter.

(21)(a) "Salary" means the remuneration paid an employee in cash out of the funds of a public employer in return for services to the employer, plus the monetary value, as determined by the Public Employees Retirement Board, of whatever living quarters, board, lodging, fuel, laundry and other advantages the employer furnishes the employee in return for services.

(b) "Salary" includes but is not limited to:

(A) Payments of employee and employer money into a deferred compensation plan, which are deemed salary paid in each month of deferral;

(B) The amount of participation in a tax-sheltered or deferred annuity, which is deemed salary paid in each month of participation;

(C) Retroactive payments described in section 7 of this 2009 Act; and

(D) Wages of a deceased member paid to a surviving spouse or dependent children under ORS 652.190.

(c) "Salary" or "other advantages" does not include:

(A) Travel or any other expenses incidental to employer's business which is reimbursed by the employer;

(B) Payments for insurance coverage by an employer on behalf of employee or employee and dependents, for which the employee has no cash option;

(C) Payments made on account of an employee's death;

(D) Any lump sum payment for accumulated unused sick leave;

(E) Any accelerated payment of an employment contract for a future period or an advance against future wages;

(F) Any retirement incentive, retirement severance pay, retirement bonus or retirement gratuitous payment;

(G) Payments for periods of leave of absence after the date the employer and employee have agreed that no future services qualifying pursuant to ORS 238.015 (3) will be performed, except for sick leave and vacation;

Formerly cited as OR ST § 237.003

(H) Payments for instructional services rendered to institutions of the Department of Higher Education or the Oregon Health and Science University when such services are in excess of full-time employment subject to this chapter. A person employed under a contract for less than 12 months is subject to this subparagraph only for the months to which the contract pertains; or

(I) Payments made by an employer for insurance coverage provided to a domestic partner of an employee.

(22) "School year" means the period beginning July 1 and ending June 30 next following.

(23) "System" means the Public Employees Retirement System.

(24) "Vested" means being an active member of the system in each of five calendar years.

(25) "Volunteer firefighter" means a firefighter whose position normally requires less than 600 hours of service per year.

CREDIT(S)

Formerly 237.003; Laws 1997, c. 249, § 64; Laws 1997, c. 853, § 36; Laws 1999, c. 317, § 24; Laws 1999, c. 407, § 3; Laws 1999, c. 971, § 1; Laws 2001, c. 295, § 9; Laws 2001, c. 874, § 1; Laws 2001, c. 945, § 29a; Laws 2001, c. 968, § 1; Laws 2003, c. 14, § 112; Laws 2003, c. 67, § 16, eff. July 1, 2003; Laws 2003, c. 625, § 20, eff. July 30, 2003; Laws 2005, c. 152, § 5; Laws 2005, c. 332, § 1, eff. June 29, 2005; Laws 2009, c. 762, § 47, eff. July 1, 2009; Laws 2010, c. 1 (1st Sp. Sess.), § 8, eff. Feb. 18, 2010.

HISTORICAL AND STATUTORY NOTES

2011 Electronic Update

Laws 1999, c. 971, § 2, eff. Oct. 23, 1999, as amended by Laws 2011, c. 722, § 8, eff. Aug. 5, 2011, operative Sept. 1, 2011, provides:

"Sec. 2. (1) The amendments to ORS 238.005 by section 1, chapter 971, Oregon Laws 1999, apply only to persons specified in ORS 238.005 (9)(b) who are employed by the State Forestry Department on October 23, 1999, or who become employed by the State Forestry Department after October 23, 1999.

"(2) Except as provided in subsection (3) of this section, the amendments to ORS 238.005 by section 1, chapter 971, Oregon Laws 1999, apply only to service rendered to a participating public employer on or after October 23, 1999.

"(3) Any employee who is employed by the State Forestry Department in a position described in ORS 238.005 (9)(b) on October 23, 1999, may acquire creditable service in the Public Employees Retirement System as a firefighter for service performed by the employee in a position described in ORS 238.005 (9)(b) before October 23, 1999, by paying to the Public Employees Retirement Board an amount determined by the board to represent the full cost to the system of providing credit as a firefighter to the member. The member may acquire credit as a firefighter for all or part of the service in a position described in ORS 238.005 (9)(b) performed before October 23, 1999. All amounts required for acquisition of credit as a firefighter under this subsection must be paid at least 90 days before a member's effective date of retirement. The board may by rule allow members to pay amounts required under this subsection in installments in lieu of requiring a single lump sum payment. Amounts required under this subsection may be paid using moneys transferred by way of a trustee-to-trustee transfer as described in ORS 238.222."

Formerly cited as OR ST § 237.003

2009 Main Volume

Laws 2001, c. 968, § 2, provided:

“Section 2. The amendments to ORS 238.005 by section 1 of this 2001 Act apply to all service by an adult parole and probation officer that is performed on and after the date that the adult parole and probation officer is classified as a police officer for the purposes of ORS chapter 238 by the county governing body, whether that classification occurs before, on or after the effective date of this 2001 Act [January 1, 2002].”

Laws 2005, c. 332, § 3, eff. June 29, 2005, provides:

“The amendments to ORS 238.005 and 238A.005 by sections 1 and 2 of this 2005 Act apply only to members of the Public Employees Retirement System who die on or after the effective date of this 2005 Act.”

CROSS REFERENCES

Board and university officials powers and duties, see ORS 353.050.
Community college districts alternative retirement plan, see ORS 341.551.
Higher education employees, optional retirement plans, see ORS 243.800.
Special campus security officers, see ORS 352.385.

NOTES OF DECISIONS

Creditable service 1

1. Creditable service

Payment to state university employee of equivalent of amount paid as critical need incentive (CNI) bonus paid to workers who crossed picket line during period of strike did not constitute “salary,” and thus, period during which employee was on strike did not count towards creditable service, for purposes of calculating employee's retirement benefits; CNI remedy payment to striking employees was not payment for work that was or which would have been done during period of strike, but was paid to equalize pay between nonstriking and striking workers, and payments bore no relationship to amount of hours that striking employee would have worked. Bailey v. Public Employees Retirement Bd. (2009) 208 P.3d 511, 228 Or.App. 300. Colleges and Universities ↪8(3)

O. R. S. § 238.005, OR ST § 238.005

Current with emergency legislation through Ch. 733 of the 2011 Regular Session. Revisions to Acts made by the Oregon Reviser were unavailable at the time of publication.

(C) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT

Formerly cited as OR ST § 237.011

C

West's Oregon Revised Statutes Annotated Currentness

Title 22. Public Officers and Employees

Chapter 238. Public Employees Retirement System (Refs & Annos)

Membership

(Membership in General)

→ **238.015. Qualification**

(1) No person may become a member of the system unless that person is in the service of a public employer and has completed six months' service uninterrupted by more than 30 consecutive working days during the six months' period. Every employee of a participating employer shall become a member of the system at the beginning of the first full pay period of the employee following the six months' period. Contributions for new members shall first be made for those wages that are attributable to services performed by the employee during the first full pay period following the six months' period, without regard to when those wages are considered earned for other purposes under this chapter. All public employers participating in the Public Employees Retirement System established by chapter 401, Oregon Laws 1945, as amended, at the time of repeal of that chapter, and all school districts of the state, shall participate in, and their employees shall be members of, the system, except as otherwise specifically provided by law.

(2) Any active member of the Public Employees Retirement System who, through the annexation of a political subdivision employing the member or by change of employment, becomes the employee of another political subdivision which is participating in the Public Employees Retirement System and has also a separate retirement system for its employees, shall remain an active member of the Public Employees Retirement System unless, within 60 days after the effective date of the annexation or change of employment or April 8, 1953, the member shall by written notice to the Public Employees Retirement Board and to the administrative body of the new public employer elect to relinquish membership in the Public Employees Retirement System and become a member of the separate retirement system of the employer, if eligible for membership in that retirement system, and the member shall be so carried by the new employer. Immediately upon such annexation of any political subdivision or such change of employment, the new public employer shall inform such employee in writing of the right of the employee to exercise an election as in this section provided.

(3) A political subdivision (other than a school district) not participating in the retirement system established by chapter 401, Oregon Laws 1945, as amended, which employs one or more employees, each of whose position requires 600 hours of service per year, or an agency created by two or more political subdivisions to provide themselves governmental services, which employs one or more employees, each of whose position requires 600 hours of service per year, may, through its governing body, notify the board in writing, that it elects to include its employees in the system hereby established. Such public employer may request the board to make a study and estimate of the cost of including it and its eligible employees, other than volunteer firefighters, in the system, which the board thereupon shall cause to be made and the cost of which the employer shall bear. Upon completion of the study and estimate the employer may apply for admission to the system, whereupon it shall begin to participate therein and its eligible employees other than volunteer firefighters shall become members of the system. If the employer is an agency created by two or more political subdivisions to provide themselves governmental services and ceases thereafter to transmit to the board contributions for any of its eligible employees, the benefits based upon employer contributions to which such employees would otherwise be entitled shall be reduced accordingly.

(4) No inmate of a state institution or an alien on a training or educational visa working for any participating em-

Formerly cited as OR ST § 237.011

ployer, even though the inmate or alien received compensation from a participating employer, shall be eligible to become a member of the system. No person employed by a participating employer and defined by such employer as a student employee is eligible to become a member of the system for such student employment.

(5) A person holding an elective office or an appointive office with a fixed term or an office as head of a department to which the person is appointed by the Governor may become a member of the system by giving the board written notice of desire to do so within 30 days after taking the office or, in the event that the officer is not eligible to become a member of the system at the time of taking the office, within 30 days after becoming so eligible. Membership so established shall not be discontinued during the appointive or elective term of the officer except upon separation of the officer from service.

(6) A public employer employing volunteer firefighters may apply to the board at any time for them to become members of the system. Upon receiving the application the board shall fix a wage at which, for purposes of this chapter only, they shall be considered to be employed and which shall be the basis for computing the amounts of the contributions, if any, which they pay into, and of the benefits which they and their beneficiaries receive from, the fund; and if the wage so fixed is satisfactory to the employer, shall include the firefighters in the system.

(7)(a) In the event that an employee enters the service of a public employer which is participating in or later begins to participate in the system and in the event that at the time of entering that service or at the time that the employer begins to participate in the system the employee has commenced to purchase and is continuing to purchase a retirement annuity, if the employer deems the annuity adequate for the purposes of this chapter, it may enter into an agreement with the employee and the board pursuant to which the employee may be exempted from contributing to the Public Employees Retirement Fund, and, if no public funds are being used to purchase the annuity or a corresponding pension, the employer, in lieu of the contributions which it otherwise would make to the fund on account of the employee, may make contributions toward the cost of purchasing the annuity. Such employee otherwise shall be subject to the provisions of this chapter, except that neither the employee nor any person claiming under the employee shall receive any payments from the retirement fund as service or disability allowance.

(b) An employee who enters into an agreement under paragraph (a) of this subsection may elect at any time thereafter to start to participate in the system by giving written notice of desire to participate to the board and to the employer. The employee shall receive no retirement credit for the period during which the employee was exempted from contributing to the fund under the agreement, but the employee shall be considered to have completed the six months' service required for membership in the system. When the employee starts to participate in the system the employer shall start to contribute to the fund on account of the employee in the same manner as the employer contributes on account of other employees who are active members of the system and the employer shall stop making contributions toward the cost of purchasing the retirement annuity.

(8)(a) All new appointees in the Federal Cooperative Extension Service or in any other service in which participation in the Federal Civil Service retirement program is mandatory, who receive a federal appointment on or after July 1, 1955, may participate in the Public Employees Retirement System only by giving written notice of their election to so participate to the Public Employees Retirement Board within six months after the effective date of their appointment.

(b) All persons employed by the Federal Cooperative Extension Service or by any other service in which participation in the Federal Civil Service retirement program is mandatory, who are under federal appointment as of July 1, 1955, and who are members of the state retirement system, shall continue such membership unless, prior to February 1, 1956, they give written notice to the Public Employees Retirement Board of their desire to cancel their membership.

(c) Any person who is an active member of the Public Employees Retirement System, who, on or after July 1,

Formerly cited as OR ST § 237.011

1955, is employed by the Federal Cooperative Extension Service or by any other service in which participation in the Federal Civil Service retirement program is mandatory, and who is given a federal appointment, shall continue such membership in the Public Employees Retirement System unless, within six months after the effective date of the appointment, the person gives written notice to the Public Employees Retirement Board of the desire to cancel membership.

(d) A cancellation of membership under paragraph (b) or (c) of this subsection terminates membership in the Public Employees Retirement System and cancels the right to any benefits from, or claims against, that system. Such cancellation prevents the withdrawing member from claiming thereafter any retirement credit for any period of employment before the cancellation. Upon receipt of a notice of cancellation, the Public Employees Retirement Board shall refund the member account of the withdrawing member, regardless of the age of the withdrawing member.

(9) Employees, including managers, of foreign trade offices of the Oregon Business Development Department who live and perform services in foreign countries under the provisions of ORS 285A.075 (1)(g) shall not be members of the system. However, any person who is an active member of the system immediately before becoming an employee of a foreign trade office shall continue to be a member of the system during the period of time the person serves as an employee of the foreign trade office.

(10) An employee who is participating in an alternative retirement program established pursuant to ORS 353.250 or an optional retirement plan established pursuant to ORS 341.551 may not be an active member of the Public Employees Retirement System.

CREDIT(S)

Formerly 237.011; Laws 1997, c. 249, § 65; Laws 1999, c. 130, § 4; Laws 1999, c. 509, § 23; Laws 2001, c. 192, § 1; Laws 2001, c. 883, § 41; Laws 2001, c. 945, § 30; Laws 2003, c. 67, § 17, eff. July 1, 2003; Laws 2005, c. 152, § 6; Laws 2005, c. 728, § 3; Laws 2007, c. 804, § 76, eff. July 17, 2007.

HISTORICAL AND STATUTORY NOTES

2009 Main Volume

Laws 2001, c. 192, § 2, provided:

“The amendments to ORS 238.015 by section 1 of this 2001 Act apply to all employer and employee contributions made on behalf of members of the Public Employees Retirement System, whether those members first established membership in the system before, on or after the effective date of this 2001 Act [January 1, 2002].”

CROSS REFERENCES

Assumption of duties by regional correctional facility, public employer, see ORS 169.810.

Industries for the Blind Program, employment of sighted persons, see ORS 346.190.

Membership, see ORS 237.620.

Metropolitan service districts, employee rights and benefits, membership for specified classes of district employees, conditions, see ORS 268.240.

Oregon Public Service Retirement Plan established, see ORS 238A.025.

LIBRARY REFERENCES

ADD - 10

Formerly cited as OR ST § 237.011

2009 Main Volume

Officers and Public Employees  101.5(1).

Westlaw Topic No. 283.

C.J.S. Officers and Public Employees §§ 270 to 271, 311 to 320.

O. R. S. § 238.015, OR ST § 238.015

Current with emergency legislation through Ch. 733 of the 2011 Regular Session. Revisions to Acts made by the Oregon Reviser were unavailable at the time of publication.

(C) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT

Or. Admin. r. 459-010-0003

C

Oregon Administrative Rules Compilation Currentness
Chapter 459. Oregon Public Employees Retirement System
Division 10. Membership
→ 459-010-0003 Eligibility and Membership for the PERS Chapter 238 Program

(1) For the purpose of this rule:

(a) "Concurrent positions" means employment with two or more participating employers in the same calendar year.

(b) "Partial year of separation" means a period in the calendar year the employee separates from employment that begins on January 1 of the year and ends before the last working day of the year.

(c) "Qualifying position" means a position designated by the employer as qualifying, except:

(A) A position or concurrent positions in which an employee performs at least 600 hours of service in a calendar year is qualifying regardless of employer designation.

(B) A position in a partial year of separation is qualifying regardless of employer designation if the position is continued from an immediately preceding calendar year in which the employee performed at least 600 hours of service in the position or concurrent positions.

(C) A position with one employer in which the employee is employed for the entire calendar year and fails to perform at least 600 hours of service in that position or concurrent positions in the calendar year is non-qualifying regardless of employer designation.

(d) "Service" means a period in which an employee:

(A) Is in an employer/employee relationship, as defined in OAR 459-010-0030; and

(B) Receives a payment of "salary," as defined in ORS 238.005 or similar payment from workers compensation or disability.

(e) "Working day" means a day that the employer is open for business.

(2) At the time an employee is hired, an employer must designate the employee's position as qualifying or non-qualifying. An employer must designate a position as qualifying if the position is one in which an employee would normally perform at least 600 hours of service in a calendar year.

(3) Employer designation of a position as qualifying or non-qualifying must be determined by PERS from information communicated to PERS by the employer. An employer designation that is contrary to the provisions of subsection (1)(c) of this rule in any calendar year will be reversed for that calendar year.

Or. Admin. r. 459-010-0003

(4) Eligibility. An employee who was employed in a qualifying position before August 29, 2003 by an employer participating in the PERS Chapter 238 Program was eligible to become a member of that program if the employee:

- (a) Began the six-month waiting period described in OAR 459-010-0035 before August 29, 2003;
- (b) Did not elect to participate in an optional or alternative retirement plan as provided in ORS Chapters 243, 341, or 353; and
- (c) Was not otherwise ineligible for membership.

(5) Membership. An employee who meets the requirements of section (4) of this rule becomes a member of the PERS Chapter 238 Program on the first day of the calendar month following the completion of the six-month waiting period described in OAR 459-010-0035 provided that the employee is employed on that date by the same employer that employed the employee throughout the waiting period.

Stat. Auth.: ORS 238.650

Stats. Implemented: ORS 238.005, 238.015, & 238A.025

Hist.: PERS 5-2005, f. & cert. ef. 2-22-05; PERS 23-2005, f. 12-23-05, cert. ef. 1-1-06; PERS 15-2007, f. & cert. ef. 11-23-07

OAR 459-010-0003, OR ADC 459-010-0003

Current through January 14, 2011

END OF DOCUMENT

Or. Admin. r. 459-010-0030

C

Oregon Administrative Rules Compilation Currentness
Chapter 459. Oregon Public Employees Retirement System
Division 10. Membership
→ **459-010-0030 Determination of Employee Status**

- (1) The term "employee" shall have the same meaning as provided in ORS 238.005(7) and OAR 459-005-0001(12).
- (2) Determination of whether an individual is an employee is made under common-law rules. Under common-law rules, every individual who performs labor or services subject to the direction and control of an employer, both as to what must be done and how it must be done, is an employee. It does not matter that the employer allows the employee discretion and freedom of action, so long as the employer has the legal right to control both the method and the result of the labor or services, resulting in an employee/employer relationship.
- (3) If, under the common-law rules, there is an employee/employer relationship, it makes no difference how it is described. It is not controlling whether the employee is called an employee. It is not controlling how the payments are measured, how they are made, or what they are called. It is not controlling whether the individual is employed full time or part time. There is no distinction made between classes of employees. Superintendents, executives, managers, supervisors, and other supervisory personnel are all employees.
- (4) In applying the common-law rules, the 20-factor test as described in Internal Revenue Service Ruling 87-41 shall be used in determining whether or not an individual is an employee. The degree of importance of each factor varies depending on the labor or services to be performed and the context in which the labor or services are performed. The 20 factors are:
 - (a) Instructions;
 - (b) Training;
 - (c) Integration;
 - (d) Services Rendered Personally;
 - (e) Hiring, Supervising, and Paying Assistants;
 - (f) Continuing Relationship;
 - (g) Set Hours of Work;
 - (h) Full Time Required;
 - (i) Doing Work on Employer's Premises;

Or. Admin. r. 459-010-0030

- (j) Order of Sequence Set;
- (k) Oral or Written Reports;
- (l) Payment by Hour, Week, Month;
- (m) Payment of Business and/or Traveling Expenses;
- (n) Furnishing of Tools and Materials;
- (o) Significant Investment;
- (p) Realization of Profit or Loss;
- (q) Working for More than One Employer at a Time;
- (r) Making Service Available to General Public;
- (s) Right to Discharge; and
- (t) Right to Terminate.

Stat. Auth.: ORS 238.650

Stats. Implemented: ORS 238.005(7)

Hist.: PER 8, f. 12-15-55; PERS 7-1992, f. & cert. ef. 11-9-92; PERS 12-1998, f. & cert. ef. 12-17-98; PERS 21-2005, f. & cert. ef. 11-1-05

OAR 459-010-0030, OR ADC 459-010-0030

Current through January 14, 2011

END OF DOCUMENT

ADD - 15

MAY 3 1989

AGREEMENT

Revised 5-3-83
GX

Purchase Order # 06791

TRAMP 5
DBIT Don't to H. Dine
This agreement is entered into this 28 day of SEPTEMBER, 1983 by and between Eugene Water & Electric Board, hereafter called EWEB, and ~~PROFESSIONAL TEMPORARY EMPLOYEES~~, hereafter called contractor, for the purpose of furnishing temporary services at hourly rates to be paid contractor by EWEB. Any change in these rates must be in writing with a minimum 30-day notice.

In performing the above services, it is understood and agreed that:

- 1) The services shall be performed by persons in the employ of the contractor and contractor assumes all legal responsibility as the employer of said person, including payment of wages and other compensation due said persons and compliance with all applicable federal, state and other payroll tax requirements.
- 2) Contractor shall procure and maintain the following insurance and upon request of EWEB shall provide certificates of said insurance.
 - a) Workers Compensation and Employee Liability *Liberty NW*
 - b) Comprehensive General Liability insurance of not less than \$500,000 Bodily Injury and \$100,000 Property Damage each occurrence.
 - c) Comprehensive Automobile Liability, \$500,000-\$1,000,000 Bodily Injury and \$100,000 Property Damage.
 - d) Commercial blanket bond of \$1,000,000.
- 3) Contractor agrees to indemnify and save harmless EWEB against any liability for premiums, contributions or taxes payable under any Workmens Compensation, unemployment compensation, disability benefits, old age benefits or tax withholding laws for which EWEB shall be finally adjudged liable as an employer with respect to any employees of contractor in the performance of such work.
- 4) Contractor guarantees that said services shall be performed in an acceptable, workmanlike manner, by employees who are fully qualified to serve in the capacity specified by EWEB. Upon reasonable notice from EWEB, contractor will not charge for unsatisfactory service and will furnish a replacement as soon as possible.
- 5) Employees of contractor are not employees of EWEB and are not entitled to any of the fringe benefits extended to EWEB employees.
- 6) This agreement may not be modified or amended except by agreement in writing between parties.

TEMPORARY HELP "CONTRACT" SHELTON, Edie L.
~~PROFESSIONAL TEMPORARY EMPLOYEES~~
TRAMP 5
Doc #7189-159

Exhibit A
Page 1

7) Either party may terminate this agreement by giving 7 days written notice to the other, in such event contractor will be paid for services to date of termination.

This agreement and any amendments to this agreement will not be effective until approved by Personnel Department and authorized by EWEB purchase order. Payments will be made by the Accounting Department after receipt of invoice and verification by the Personnel Department that the specified services have been satisfactorily provided.

EWEB

CONTRACTOR

Richard P. Carlson
Personnel Department Manager

(Personnel's file)
EDIE L. SHELTON
signature on original
Signature

Date Oct. 12, 1983

Date 10-17-83

Doc. 17189-150

Exhibit A
Page 2

AGREEMENT

PARTIES: Eugene Water and Electric Board, a municipal utility (referred to as "EWEB").

Delta-T, Inc., an Oregon business corporation (referred to as "Contractor").

1. Purpose. EWEB desires Contractor, and Contractor desires, to provide the temporary Contract Employee positions for the EWEB Conservation Department pursuant to the within terms and conditions.

2. Term. The starting date for the commencement of work shall be November 1, 1987. The term of this Agreement shall be one year from that date.

3. Employees. Contractor agrees to provide a minimum number of eight Contract Employees. Additional Contract Employees may be added upon mutual agreement of the parties hereto. Upon the written request of EWEB, contractor will assist in the search for and recruitment of any needed additional Contract Employees at no charge to EWEB. Contract Employees currently under contract to, or employed by, EWEB shall be hired by Contractor. The now current EWEB pay schedule, EWEB's right to hire and fire at will, and current supervisory relationships shall remain in effect until changed in the normal course of business.

4. Costs. Services provided by Contractor under this Agreement shall be paid for by EWEB at the rate of twenty-nine percent (29%) above the wages EWEB assigns for temporary positions within the Conservation Program. It is agreed there shall be no reductions in the hourly wages assigned to Contract Employee positions. It is contemplated that these positions may receive salary increases.

5. Invoicing. Contractor shall invoice EWEB weekly on the basis of supervisor-approved time cards. Invoices shall be submitted each monday for the previous week's work. If monday is a legal holiday, invoices shall be submitted the following day. Payment by EWEB on account of each invoice so submitted shall be made within ten (10) days of receipt by EWEB. Each weekly invoice shall be accompanied by receipts, signed by all Contract Employees, reflecting receipt of all money due to them.

6. Escrow Account. An interest-bearing escrow account shall be opened with a mutually agreeable party. It shall be funded by Contractor in an amount equal to one week's average invoice amount. Should the level of employment increase, Contractor shall correspondingly increase the amount in the escrow account. The purpose of the escrow account is to insure sufficient funds are available to pay the Contract Employees. Should Contractor fail to pay any Contract Employee when the wages are due, EWEB shall provide written notice of such failure to Contractor. If Contractor has not made payment or advised EWEB in writing there is a dispute as to the wages within five days after the date of the notice, EWEB shall have the right to immediately, and

without the consent or signature of Contractor, instruct the escrow holder to release from the escrow such sums as are necessary to pay said wages. Any funds remaining in the escrow account upon termination of this Agreement shall automatically revert to and become the property of Contractor which shall add said funds to the "Bonus Plan" described herein below. Costs of the escrow shall be paid by Contractor.

7. "Bonus Plan." Contractor shall provide a "Bonus Plan" ("Plan") for all Contract Employees. The Plan's funds shall consist of the remaining net proceeds of Contractor at the end of the contract year after deduction of all costs and expenses. Payment from the Plan shall be made at the close of each contract year. Payment to each Contract Employee shall equal the Plan fund amount at the close of each applicable contract year multiplied by a fraction, the numerator of which is the total billings during the contract year by the Contract Employee and the denominator of which is the total billings of all Contract Employees during the contract year. Provided, however, that the payment to any Contract Employee no longer employed at the end of the contract year shall be calculated by multiplying the amount in the escrow account by a fraction, the numerator of which is equal to the total billings of the Contract Employee and the denominator of which is equal to the total billings of all Contract Employees through the date of departure for that Contract Employee. That product shall then be reduced by seventy percent (70%) and payment shall not be made until the end of the contract year. Contract Employees who accept another position at EWEB or are laid-off by EWEB shall have their distribution calculated as though they were no longer employed at the end of the contract year but shall not be subject to the seventy percent (70%) reduction. Upon the ultimate termination of this Agreement, the Plan shall distribute to each Contract Employee employed during the 1987-88 contract year an amount equal to that fraction calculated above based upon total 1987-88 billings multiplied by the amount, if any, remaining in the escrow account referred to in paragraph 6 above.

8. Benefits. Full-time Contract Employees shall receive fifty (50) hours of paid vacation per contract year which shall accrue at the rate of one hour per week. As with current time-off arrangements, all vacation hours shall be approved by appropriate EWEB supervisors. Contract Employees shall be required to use at least thirty hours of vacation time each contract year. At the election of the Contract Employee, additional accrued vacation time may be paid in cash to the Contract Employee at the close of the contract year or "rolled-over" for use during the next contract year, if any. Additionally, all Contract Employees shall be covered by a health plan. Contractor shall pay 100% of the premium for each Contract Employee and a percentage agreed to by a simple majority of all initially employed Contract Employees of the premium for spouses and dependents.

9. Insurance. Contractor shall carry a One Million Dollar (\$1,000,000) per occurrence liability and property damage policy covering all Contract Employees. Contractor shall also provide proof of insurance by each Contract Employee in the amount required by Oregon law for all Contract Employees who utilize their own vehicles in the course of their work. EWEB automobile insurance shall cover Contract Employees who operate EWEB vehicles. Proof of insurance shall be provided prior to the effective date of this Agreement.

Exhibit B

Page 2

10. Bonding. All Contract Employees and other employees of Contractor who handle funds shall be covered by a \$10,000 honesty (fidelity) bond. Proof of such bonding shall be provided prior to the effective date of this Agreement.

11. Hold Harmless. Contractor's employees are not employees of EWEB. Contractor shall defend, indemnify, and hold EWEB harmless from and against all claims and demands for loss or damage, including without limitation property damage, personal injury, and wrongful death, arising out of or pertaining to conduct of Contract Employees or other employees of Contractor which are not part of their assigned job responsibilities. EWEB shall defend, indemnify, and hold Contractor harmless for loss or damage, including without limitation property damage, personal injury, and wrongful death, arising out of or in connection with EWEB's performance of its duties under this Agreement as well as from any claim(s) by the Bonneville Power Administration (or any of its divisions) or EWEB on account of Contract Employee work which was not properly or fully performed.

12. Successors. This Agreement shall be binding upon and inure to the benefit of the respective successors of the parties hereto.

13. Assignment. Neither party to this Agreement may assign their rights or delegate their duties under this Agreement without the express prior written consent of the other party.

14. Amendment. Any amendment to this Agreement must be in writing and approved by each party prior to its effective date.

15. Attorney Fees. In any legal proceeding between the parties hereto arising out of this Agreement, the prevailing party shall be entitled to recover a reasonable attorney's fee for arbitration, trial, and appeal as determined by the arbitrator, trial, or appellate courts. Any proceeding in tort or contract which may be brought because of the existence of this Agreement shall be considered a "legal proceeding arising out of this Agreement." The prevailing party shall be the party in whose favor final judgment is entered.

16. Necessary Documents. The parties agree to execute, acknowledge, and deliver any documents necessary or advisable to comply with the terms and provisions of this Agreement, and to give it full force and effect.

17. Notice. Any notice required or permitted under this Agreement shall be deemed to have been duly given on the date of service if served personally on the party to whom notice is to be given, or on the third day after mailing if mailed to the party to whom notice is to be given, by certified mail, return receipt requested, postage prepaid, and addressed to the addressee at the address by its name hereinbelow, or at the most recent address, specified by written notice, given to the sender by the addressee under this provision.

Exhibit B

Page 3

18. Remedies. No right or remedy herein conferred or reserved to any party is exclusive of any other right or remedy herein or by law or equity provided or permitted; but each shall be cumulative of every other right or remedy given hereunder or now or hereafter existing at law or in equity or by statute or otherwise, and may be enforced concurrently therewith or from time to time.

19. Severability. Each provision of this Agreement shall be considered separable and if for any reason any provision(s) hereof is determined to be invalid, such invalidity shall not impair the operation of or affect those provisions which are mutually agreed to be valid.

20. Compliance with Laws and Regulations. The Contractor agrees to follow the regulations as required by Executive Order 11246, Part II, Section 202, dated September 24, 1965 as amended and contained in Office of Federal Contract Compliance, Rules and Regulations, Chapter 60, Section 60-1.4(a); Regulations 41 CFR 60-20, entitled "Employment of the Handicapped"; and Executive Order 11625, promoting the use of minority business enterprises, are incorporated herein by reference. The Contractor hereby agrees to comply with all applicable laws of the federal government; the statutes of this state, including but not limited to Chapter 279 Oregon Revised Statutes with respect to public contracts and agrees to prefer goods or services that have been manufactured or produced in this state if price, fitness, availability, and quality are otherwise equal; and will comply with all requirements of Lane County, and the Municipal Code of the City of Eugene, including but not limited to Section 4.615 through 4.655.

21. Termination. This Agreement may be terminated by either party hereto without cause by providing 90 days prior written notice of intent to so terminate. If Contractor has not paid Contract Employees in full within 5 days of receipt of the corresponding payment from EWEE, EWEE shall then have the right to immediately terminate this Agreement. This Agreement may be terminated immediately, but only for cause set forth in writing and delivered to the other party.

22. Entire Agreement. This Agreement contains the entire agreement of the parties relating to the rights granted and obligations assumed in this Agreement and supersedes any prior understandings or agreements. Any oral representations or modifications concerning this Agreement shall be of no force or effect unless contained in a subsequent written modification signed by the party to be charged.

IN WITNESS WHEREOF, the parties have set forth their signatures below to signify their agreement on or as of this 23 day of October, 1987.

EWEE:

By: [Signature]

Its: Director, Power Management

Contractor:

By: [Signature]

Its: President

Doc. #7522

EUGENE WATER & ELECTRIC BOARD

Business Services Agreement
(To be executed by Purchasing Department)

JOB #446

PURCHASE ORDER # 58525
DOCUMENT # 7129624

THIS AGREEMENT is entered into this 23 day of FEBRUARY, 1994, by and between EUGENE WATER & ELECTRIC BOARD, hereinafter called EWEB, and TEMP SOURCE, INC., hereinafter called the Contractor.

WHEREAS, EWEB has need for the professional services of an independent contractor with the particular training, knowledge, and experience offered by the Contractor,

NOW THEREFORE, in consideration of a sum at the rate of \$32 per hour the total of which shall not exceed \$5,000, to be paid to the Contractor by EWEB, the Contractor agrees to perform during the period January 1, 1994, through December 31, 1994, inclusive, the following personal and/or professional services:

SCOPE OF WORK:

Contractor shall supply educators subject to EWEB's approval. These educators will work on a variety of tasks needing diverse skills related to energy and water literacy education. Duties will include, but are not limited to: Research, writing, workshop design, model building, creating curriculum materials, test construction, teacher education, conducting energy and water workshops, and advising EWEB's education department.

IT IS FURTHER UNDERSTOOD AND AGREED THAT:

1. The recitals hereinbefore stated are by reference made a part of this agreement.
2. Contractor is engaged as an independent contractor in the performance of the work. Contractor is solely and personally liable for all labor and expenses, and any federal or state taxes or withholdings, other governmental payments, or fringe benefits and shall indemnify EWEB from all such labor, expenses, taxes, withholdings, benefits or other payments. No such tax, withholding, or other payment or benefit is provided by EWEB to, or on behalf of, Contractor or Contractor's workers. EWEB is interested only in the results achieved by Contractor. Contractor shall be in control of the means by which the results are achieved and substantially all necessary tools, equipment, and supplies will be furnished by the Contractor unless otherwise specified.
3. Contractor and Contractor's workers will adhere to applicable professional and ethical standards and will perform all work in a manner consistent with

Page 1 of 4

Exhibit C
Page 1

generally accepted skill and care in the types of work undertaken. Contractor will utilize only regularly employed workers of Contractor who are qualified and experienced in the work they are engaged to perform. Contractor shall adequately supervise the work. Work shall be performed and completed at Contractor's risk, and Contractor shall be liable for loss or damage occasioned by the acts of Contractor or those under Contractor's supervision. Contractor shall take all precautions and safety measures necessary to avoid damage or injury to persons or property.

4. If this payment is to be charged against federal funds, the Contractor certifies that the amount charged does not exceed the normal charge for the type of service provided.
5. The Contractor will forward invoices to EWEB to the attention of Judy Marsh, Contract Administrator, at: P. O. Box 10148, Eugene, Oregon 97440, identifying the Purchase Order No. Payment will be made within thirty (30) days of receipt of invoices.
6. The Contractor agrees to follow the regulations as required by Executive Order 11246, Part II, Section 202, dated September 24, 1965 as amended and contained in Office of Federal Contract Compliance, Rules and Regulations, Chapter 60, Section 60-1.4(a); Regulation 41 CFR 60-20, entitled "Sex Discrimination;" Regulation 20, CFR 741-3, entitled "Employment of the Handicapped;" and Executive Order 11625, promoting the use of minority business enterprises, and these provisions are incorporated herein by reference.
7. The Contractor hereby agrees to comply with all applicable statutes and regulations of the federal government and of this state, including but not limited to Chapter 279 Oregon Revised Statutes with respect to public contracts, and will comply with all requirements of Lane County and the Municipal Code of the City of Eugene, including but not limited to Section 4.615 through 4.650.
8. Contractor shall comply with all applicable Workers' Compensation Acts in the state of Oregon and shall furnish proof thereof satisfactory to EWEB prior to commencing work.
9. Contractor specifically and expressly agrees to indemnify, defend, and hold harmless EWEB, its Board of Commissioners, directors, employees, and agents (hereinafter collectively "Indemnitees") against and from any and all claims, demands, suits, losses, costs, and damages of every kind and description, including attorneys' fees, brought or made against or incurred by any of the Indemnitees resulting from, arising out of, or in any way connected with any negligent act, omission or fault of Contractor, its employees, agents or representatives, or subcontractors of any tier, their employees, agents or representatives in the performance or nonperformance

of Contractor's obligations under this Agreement or in any way related to this Agreement. The indemnity obligations under this Section shall include without limitation:

- a. Loss of or damage to any property of EWEB, Contractor, or any third party;
- b. Bodily or personal injury to, or death of, any third person(s), including without limitation employees of EWEB, or of Contractor or its subcontractors of any tier; and
- c. Claims arising out of Workers' Compensation, Employer's Liability, Unemployment Compensation, or similar such laws or obligations applicable to employees of Contractor or its subcontractors of any tier.

Contractor's indemnity obligation under this Section shall not extend to any liability caused by the sole negligence of any of the Indemnitees.

10. Without limiting any liabilities or any other obligations of Contractor, at the time of execution of this Agreement, Contractor will be required to furnish evidence of liability insurance coverage. Such insurance shall include coverages and be in a form and with an insurance company satisfactory to EWEB in the following amounts: The specified limit of liability shall be a combined single limit of \$1,000,000 per occurrence.

Certificates of insurance coverage shall be submitted to EWEB prior to commencement of said business services, and shall provide for not less than thirty (30) days notice to EWEB of the cancellation of such insurance.

11. The Contractor shall maintain books, records and accounts of all costs for this project up to one year after completion of the Agreement in accordance with generally accepted accounting principles and practices.

EWEB, the Contract Administrator or their authorized representative shall have the right to audit the books, records and accounts of the contract.

12. This Agreement shall not be assigned, sublet or subcontracted prior to EWEB's written consent.
13. This Agreement may not be modified or amended except by agreement in writing between the parties.
14. Either party may terminate this Agreement by giving 30 days written notice to the other. In such event Contractor will be paid for services to date of termination.

THIS AGREEMENT and any amendments to this Agreement will not be effective until authorized by EWEB Purchase Order. Payments will be made by the Accounting Department after receipt of invoices and verification by the manager of the originating department that the specified services have been satisfactorily provided.

EUGENE WATER & ELECTRIC BOARD

CONTRACTOR

ORIGINATING DEPARTMENT:

Judy Marsh
Contract Administrator

142
Dept. #

Jerry Stiltner
Signed

Sammy Brady
Division Director

JERRY STILTNER
Name (Print or Type)

TEMP SOURCE, INC.
Company

Approved [Signature]
Purchasing Manager

1600 OAK STREET
Address

Date 2-23-94

EUGENE, OR 97401

Telephone No. (503) 342-5310

Tax ID No. 93-1019245

Doc. #7189-624

EUGENE WATER & ELECTRIC BOARD

Business Services Agreement
(To be executed by Purchasing Department)

JOB #210 & 6158

PURCHASE ORDER # 000699
DOCUMENT # 1461

THIS AGREEMENT is entered into this 19th day of April, 2000, by and between **EUGENE WATER & ELECTRIC BOARD**, hereinafter called EWEB, and the **Eugene Branch of OFFICE TEAM, A DIVISION OF ROBERT HALF INT.**, hereinafter called the Contractor.

WHEREAS, EWEB has need for the professional services of an independent contractor with the particular training, knowledge, and experience offered by the Contractor; and

WHEREAS, EWEB has negotiated the following agreement in Eugene, Oregon, and Contractor has agreed to deliver its services in Eugene, Oregon;

NOW THEREFORE, in consideration of a sum at the rate of \$12 per hour agreed to by the parties, to be paid to the Contractor by EWEB, the Contractor agrees to perform during the period **March 1, 2000**, through **September 30, 2000**, inclusive, the following personal and/or professional services:

SCOPE OF WORK:

Contractor shall provide temporary clerical assistance for EWEB's Customer Service and Field Services departments. Contractor's Terms and Conditions of Assignment are attached hereto as Exhibit #1, and by reference made a part of this Agreement.

In the event of a conflict between the terms and conditions of this Agreement and those of the Exhibit attached hereto, the terms and conditions of this Business Services Agreement shall control.

IT IS FURTHER UNDERSTOOD AND AGREED THAT:

1. The recitals hereinbefore stated are by reference made a part of this Agreement.
2. Contractor is engaged as an independent contractor in the performance of the work. Contractor is solely and personally liable for all labor and expenses, and any federal or state taxes or withholdings, other governmental payments, or fringe benefits.
3. Contractor and Contractor's workers will adhere to applicable professional and ethical standards and will perform all work in a manner consistent with generally accepted skill and care in the types of work undertaken.
4. Contractor shall comply with all applicable statutes and regulations of the federal government and of this state, including but not limited to Oregon Revised Statutes Chapter 279 with respect to public contracts.
5. Contractor shall comply with all applicable Workers' Compensation Acts, and shall furnish proof of coverage for its employees prior to commencing work
6. Without limiting any liabilities or any other obligations of Contractor, at the time of execution of this Agreement, Contractor will be required to furnish evidence of Comprehensive or Commercial General Liability insurance shall cover personal injury and property damage. Coverage limits shall not be less than \$1,000,000

combined single limit for each occurrence. If the coverage has a general aggregate limit, it shall not be less than \$1,000,000.

Automobile Liability insurance may be written in combination with the Comprehensive or Commercial General Liability insurance. Coverage limits shall not be less than \$1,000,000 combined single limit for each occurrence.

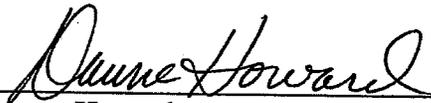
Certificates of insurance coverage shall be submitted to EWEB prior to commencement of said business services, and shall provide for not less than thirty (30) days notice to EWEB of the cancellation of such insurance.

7. The Contractor will forward invoices to EWEB to the attention of **Dawne Howard**, Contract Administrator, at: P.O. Box 10148, Eugene, Oregon 97440, identifying the Purchase Order No. Payment will be made within thirty (30) days of date of invoices.
8. The parties agree that a material part of this agreement is that Oregon substantive law will govern all rights, obligations and disputes arising out of this Agreement.
9. This Agreement shall not be assigned, sublet or subcontracted prior to EWEB's written consent.
10. This Agreement may not be modified or amended except by agreement in writing between the parties.
11. Either party may terminate this Agreement by giving thirty (30) days written notice to the other. In such event, Contractor will be paid for services to date of termination.

THIS AGREEMENT and any amendments to this Agreement will not be effective until authorized by EWEB.

EUGENE WATER & ELECTRIC BOARD

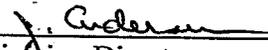
OFFICE TEAM, A DIVISION OF
ROBERT HALF, INT.



Dawne Howard
Contract Administrator



Signed



Division Director

KELLI JACKSON
Name (Print or Type)

Approved 

Purchasing Coordinator

800 WILLAMETTE STREET
Address

Date 4/19/00

EUGENE, OR 97401

Telephone No. 541/345-9931

Tax ID No. 94-1648752

Doc. #7189-1461



Services Contract

Temporary Staffing Services

SC No. 1879

By and between
Eugene Water & Electric Board
and
Kelly Services

This Contract is entered into by and between the **Eugene Water & Electric Board**, hereinafter called EWEB, and **Kelly Services**, hereafter called Contractor.

WHEREAS, EWEB has need for the services of an independent contractor with the particular training, knowledge, and experience offered by the Contractor; and

WHEREAS, EWEB has negotiated the following agreement in Eugene, Oregon, and Contractor has agreed to deliver its services in Eugene, Oregon;

NOW THEREFORE, in consideration of a sum agreed to by the Parties, the Contractor agrees to perform the services as described in this Contract, in accordance with all requirements, terms and conditions of this contract, as set forth below:

1. Effective Date and Duration.

- a. This Contract shall become effective on the date this Contract has been signed by every party hereto and, when executed by EWEB's Purchasing/Risk Manager. Unless terminated or extended, this Contract shall expire when EWEB accepts Contractor's performance, or on June 30, 2008 whichever date occurs first. Expiration shall not extinguish or prejudice EWEB's right to enforce this Contract with respect to any breach of a Contractor warranty or any default or defect in Contractor performance that has not been cured.
- b. This Agreement may be renewed for additional period(s), in accordance with EWEB Rule 3-0850, subject to agreement by the Parties, at least thirty (30) days prior to the expiration of the initial term, on the term and price of the services hereunder. The maximum term for this Agreement shall not exceed five (5) years.

2. Statement of Work.

The statement of work (the "Work") is contained in Attachment E attached and incorporated by reference into this Contract. Contractor agrees to perform the Work in accordance with the terms and conditions of this Contract.

3. Consideration & Payments.

- a. The maximum, not-to-exceed compensation payable to Contractor under this Contract, which includes any allowable expenses, is **\$100,000**. Contractor's Fee Schedule and Rates will be attached to and included in this Contract by reference as Attachment F.
- b. Interim payments to Contractor shall be made according to the following:
Invoices shall be submitted and addressed to the appropriate and/or designated EWEB staff for the specific assignment or work performed under this Contract. All invoices must list the appropriate purchase order number.

The cost of the Work or Contractor services shall be determined by multiplying the number of Contractor hours for each Contractor employee multiplied by the applicable hourly billing rate identified in the Contract for that employee.

Contractor shall not submit invoices for, and EWEB shall not pay any amount in excess of the maximum not-to-exceed compensation stated in the Contract. If this maximum amount is increased by amendment of this Contract, the amendment must be fully effective before Contractor performs Work subject to the amendment. No payment will be made for any work performed or Deliverables, Developments or Work Products delivered before the beginning date or after the expiration date of this Contract, as it may be amended from time to time in accordance with its terms.

All invoices shall itemize and explain all expenses for which reimbursement is claimed. EWEB will have the right to review each such invoice for compliance with the requirements and any other pertinent provisions of this Contract. If Contractor uses a billing agent, responsibility for billing errors remains with Contractor.

EWEB will make payment in accordance with its regular payment schedule; Net 30 days upon receipt of a valid, undisputed invoice.

4. Price Adjustments.

Price increases may be considered by EWEB once annually. A positive means of substantiating the price increase shall accompany the request. The Purchasing Department shall determine what constitutes acceptable documentation.

Upon receipt of request, EWEB reserves the right to (1) accept the requested price increase or (2) reject the price increase and terminate the Contract.

EWEB shall be given the immediate benefit of any price decrease. Contractor shall promptly notify EWEB's Purchasing Department of the amount and effective date of each decrease. Decreases shall apply to services performed on or after the effective date of the decrease.

**5. Inspection & Modification - Reimbursement for Unacceptable Work.
RESERVED**

**6. Deficiencies.
RESERVED**

**7. Deliverable Review & Approval.
RESERVED**

8. Confidentiality / Non-Disclosure.

a. Confidential Information. Contractor acknowledges that it and its employees or agents may, in the course of performing its responsibilities under this Contract, be exposed to or acquire information that is confidential to EWEB or EWEB's clients. Any and all information of any form obtained by Contractor or its employees or agents in the performance of this Contract shall be deemed to be confidential information of EWEB ("Confidential Information"). Any reports or other documents or items (including software) which result from the use of the Confidential Information by Contractor shall be treated with respect to confidentiality in the same manner as the Confidential Information. Confidential Information shall be deemed not to include information that (a) is or becomes (other than by disclosure by Contractor) publicly known or is contained in a publicly available document; (b) is furnished by EWEB to others without restrictions similar to those imposed by this Contract; (c) is rightfully in Contractor's possession without the obligation of nondisclosure prior to the time of its disclosure under this Contract; or (d) is independently developed by employees or agents of Contractor who can be shown to have had no access to the Confidential Information.

b. Non-Disclosure. Contractor agrees to hold Confidential Information in strict confidence, using at least the same degree of care that Contractor uses in maintaining the confidentiality of its own confidential information, and not to copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give, or disclose Confidential Information to third parties or use Confidential Information for any purposes whatsoever other than the provision of services to EWEB hereunder, and to advise each of its employees and agents of their obligations to keep Confidential Information confidential.

- c. Unauthorized Use. Contractor shall use its best efforts to assist EWEB in identifying and preventing any unauthorized use or disclosure of any Confidential Information. Without limitation of the foregoing, Contractor shall advise EWEB immediately in the event Contractor learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms of this Contract and Contractor will at its expense cooperate with EWEB in seeking injunctive or other equitable relief in the name of EWEB or Contractor against any such person.
- d. Return of Confidential Information. Contractor agrees that, except as directed by EWEB, Contractor will not at any time during or after the term of this Contract disclose, directly or indirectly, any Confidential Information to any person, and that upon termination of this Contract or at EWEB's request, Contractor will turn over to EWEB all documents, papers, and other matter in Contractor's possession which embody Confidential Information.
- e. Injunctive Relief. Contractor acknowledges that breach of this Section 9, including disclosure of any Confidential Information, or disclosure of other information that, at law or in good conscience or equity, ought to remain confidential, will give rise to irreparable injury to EWEB inadequately compensable in damages. Accordingly, EWEB may seek and obtain injunctive relief against the breach or threatened breach of the foregoing undertakings, in addition to any other legal remedies that may be available. Contractor acknowledges and agrees that the covenants contained herein are necessary for the protection of the legitimate business interests of EWEB and are reasonable in scope and content.
- f. Ensuring Confidentiality. Contractor agrees to comply with all reasonable requests by EWEB to ensure the confidentiality and nondisclosure of the Confidential Information, including without limitation (a) obtaining nondisclosure agreements, in a form approved by EWEB, from each of Contractor's employees and agents who are performing Work, and providing copies of such agreements to EWEB, and (b) performing criminal background checks on each of Contractor's employees and agents who are performing Work, and providing a copy of the results to EWEB.

Expenses (e.g., mileage) and all costs or administrative fees associated with any required screenings, etc. will be charged to the EWEB (without application of the agreed-upon markup, if any).

9. Insurance.

Contractor shall provide certificates of insurance as described below:

- a. **Certificates of Insurance.** As evidence of the insurance coverage required by this contract, the Contractor shall furnish Certificate(s) of insurance to the EWEB Purchasing Department, before final award can be authorized. The insurance coverage required under this contract shall be obtained from acceptable insurance companies or entities. The contractor shall be financially responsible for all deductibles, self-insured retention and/or self-insurance included hereunder.
- b. **Comprehensive Commercial / General Liability.** Contractor shall obtain, at Contractor's expense, and keep in effect during the term of this contract, Comprehensive or Commercial General Liability Insurance covering bodily injury and property damage. Combined single limit per occurrence shall not be less than \$1,000,000, when applicable. Each annual aggregate limit shall not be less than \$1,000,000, when applicable.
- c. **Automobile Liability.** Contractor shall obtain, at contractor's expense, and keep in effect during the term of this contract, Automobile Liability Insurance for Contractor's full-time, non-assigned employees.. This coverage may be written in combination with the Commercial

General Liability Insurance. Combined single limit per occurrence shall not be less than \$1,000,000, or the equivalent.

- d. **Workers' Compensation.** All subject employers working under this contract are either employers that will comply with ORS 656.017 which requires them to provide Oregon workers' compensation coverage that satisfies Oregon law for all their subject workers, or employers that are exempt under ORS 656.126. [2003 c.794 §76c]
- e. **Indemnification.** Contractor shall defend, save, hold harmless, and indemnify EWEB, its officers, employees and agents from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever resulting from, arising out of, or relating to the activities of Contractor or its officers, employees, subcontractors, or agents under this Contract based on their failure to properly perform Contractor's obligations as a provider of staffing services.
- f. **Additional Insured.** The General liability insurance coverage required for performance of the contract shall include EWEB, its' divisions, officers, and employees as Additional Insured but only with respect to the Contractor's activities to be performed under this contract.
- g. **Notice of Cancellation or Change.** There shall be no cancellation or material change, without 30 days' written notice from the Contractor or its insurer(s) to EWEB, Purchasing department. Any failure to comply with the reporting provisions of this insurance, except for the potential exhaustion of aggregate limits, shall not affect the coverage(s) provided to the EWEB, its' department, officers, and employees.

10. Contact Person.

Contractor shall designate one or more person(s) responsible for Contractor's work under this Contract. Contractor shall provide EWEB the names, addresses and telephone numbers of such person(s) and shall keep this information current at all times. The representative shall be thoroughly familiar with the terms of the Contract and shall have the technical knowledge to perform the work.

11. EWEB Contacts.

Following are EWEB's contacts for this contract:

Contract Administrator: Alison Lewis, (541) 341-1875

Purchasing Analyst: Quentin Furrow, (541) 334-4617

12. Contract Documents.

This Contract consists of the following documents, hereby incorporated by reference, which are listed in descending order of precedence: this Contract less all attachments and exhibits, attached Attachment A, Attachment B, Attachment D, Attachment E, and Attachment F.

This Contract and the attached Attachments and Exhibits constitute the entire agreement between the parties. All understandings and agreements between the parties and representations by either party concerning this Contract are contained in this Contract. No waiver, consent, modification or change in the terms of this Contract shall bind either party unless in writing signed by both parties. Any written waiver, consent, modification or change shall be effective only in the specific instance and for the specific purpose given.

13. Survival.

RESERVED

14. Assurances:

SC No. 1879

Rev. 3-28-06

Temporary Staffing Services

Exhibit E

Page 5

The undersigned attests that:

S/he represents and warrants to EWEB that S/he has the power and authority to enter into and perform this Contract and that this Contract, when executed by EWEB, shall be a valid and binding obligation of Consultant enforceable in accordance with its terms.

CONTRACTOR, BY EXECUTION OF THIS CONTRACT, HEREBY ACKNOWLEDGES THAT CONTRACTOR HAS READ THIS CONTRACT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

CONTRACTOR:

Kelly Services, Inc.
Company Name

999 W. Big Beaver Rd. Troy, Michigan 48084
Company Address

248-244-4223 248-244-4571 38-1510762
Telephone Number Fax Number FEDERAL ID NUMBER

Wm. Edward Meisenheimer Title Sr Vice President & General Mgr
Person Signing Contract (Please print or type Name)

Signature: 

EXECUTION

EWEB:

 5/14/08
Contract Administrator Date

Debra Smith 5/27/08
Division Director Date

 5/27/08
Purchasing / Risk Manager Date

ATTACHMENT A

STANDARD TERMS & CONDITIONS FOR THE PURCHASE OF SERVICES

A.1 DEFINITIONS:

"Architect" means a person who is registered and holds a valid certificate in the practice of architecture in the State of Oregon, as provided under ORS 671.010 to 671.220, and includes without limitation the terms "architect," "licensed architect," and "registered architect." (See ORS 279C.100(1))

"Architectural, engineering and land surveying services" or "Architectural, engineering or land surveying services" means professional services that are required to be performed by an architect, engineer or land surveyor. (See ORS 279C.100(2))

"Consultant," for purposes of EWEB Rules, Division 4, means an architect, engineer, land surveyor, or provider of related services. A Consultant includes a business entity that employs Architects, Engineers, Land Surveyors, or providers of related services, or any combination of the foregoing. (See ORS 279C.115(1))

"Contract" or **"Contracts"** means the Written agreement(s), resulting from the Solicitation Document that sets forth the rights and obligations of the parties.

"Contractor" means the Person with whom EWEB enters into a Contract.

"Engineer" means a person who is registered and holds a valid certificate in the practice of engineering in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002(2). (See ORS 279C.100(3))

"Goods and services" or "Goods or services" means supplies, equipment, materials and services other than personal services designated under ORS 279A.055 and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, that EWEB or another contracting agency is authorized by law to procure. "Goods and services" or "Goods or services" includes combinations of any of the items identified in this Rule. (See ORS 279B.005(1)(b))

"Person" means a natural person capable of being legally bound, a sole proprietorship, a corporation, a partnership, a limited liability company or partnership, a limited partnership, a for-profit or nonprofit unincorporated association, a business trust, two or more persons having a joint or common economic interest, any other person with legal capacity to contract or a public body.

"Personal services" mean the services of a person or persons that are designated by the Board as personal services, and includes architectural, engineering and land surveying services, and related services, for purposes of EWEB Rules, Division 4. (See ORS 279C.100(5))

"Personal Services Contract" or "Contract for Personal Services," for purposes of EWEB Rules, Division 3, means a contract, or member of a class of contracts, other than a contract for the services of an Architect, Engineer, Land Surveyor or Provider of Related Services, and other than a contract for services not designated by the Board as personal services (see EWEB Rules, Division 6), whose primary purpose is to acquire specialized skills, knowledge and resources in the application of technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment, including, without limitation, a contract for the services of an accountant, physician or dentist, educator, information technology consultant, broadcaster, artist (including a photographer, filmmaker, painter, weaver or sculptor), or consultant (excluding an Architect, Engineer, Land Surveyor, or Provider of Related Services).

"Rule" means a Rule within the EWEB Public Contracting Rules.

"Work" means the furnishing of all materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire Contract and successful completion of all duties and obligations imposed by the Contract.

"Working hours" means EWEB's regular business hours, which currently are Monday through Friday, 9 a.m. to 5 p.m., excluding EWEB recognized holidays.

All other terms not expressly identified above shall have the meanings as set forth in EWEB Public Contracting Rules, Division 1 - Definitions.

A.2 HEADINGS:

The section headings in this Contract are included for convenience only; they do not give full notice of any portion of the terms of this Contract.

If these Terms and Conditions are attached to a Request for Proposals (RFP) solicitation, then "ITB", whenever stated herein, shall mean "RFP".

A.3 STANDARD AND SPECIAL TERMS AND CONDITIONS; ORDER OF PRECEDENCE:

These printed Terms and Conditions are the Standard Terms and Conditions for EWEB contracts for the purchase of Services. EWEB may also provide "Special Terms and Conditions" elsewhere in the Contract which apply only to this Contract. Whenever possible, all terms and conditions are to be harmonized. In the event of a conflict between the standard and "special terms and conditions", the "special terms and conditions" take precedence, unless the standard term(s) in question is/are required by law. In the event of any other conflict, 1) the special terms and conditions, 2) these Standard Terms and Conditions, 3) the Invitation to Bid or Request for Proposal, and 4) the bid or response thereto shall be interpreted in the foregoing order of precedence. By

signing this Contract, Contractor agrees that, in the event of a conflict, all the terms and conditions of this Contract supersedes all preprinted terms and conditions on any forms used by the Contractor.

A.4 INDEPENDENT CONTRACTOR:

Any service or services to be rendered by Contractor under this Contract are those of an independent contractor. Contractor, its Subcontractors, Agents, Officers or Representatives are not officers, employee, or agents of EWEB as those terms are used in ORS 30.265. Contractor is responsible for all federal and state taxes or other payments or withholdings applicable to compensation or payments paid to Contractor under this Contract.

A.5 CONTRACTOR REPRESENTATIONS:

Contractor represents to EWEB that (1) Contractor has the power and authority to enter into and perform this Contract, (2) this Contract, when executed and delivered shall be a valid and binding obligation of Contractor, enforceable in accordance with its terms, (3) the Work under this Contract will be performed in accordance with the professional standards of skill and care ordinarily exercised by members of that profession under similar conditions and circumstances, (4) Contractor shall, at all times during the term of this Contract be duly licensed to perform the Work, and if there is no licensing requirement for the profession or work, be duly qualified and professionally competent.

A.6 SECURITY OF DOCUMENTS AND PROPERTY:

All EWEB property, materials and documents and all personal property of EWEB employees are to be left undisturbed and are not to be handled, read or otherwise used by Contractor or Contractor's employees, except to the extent required by the Contract. Contractor shall consider all documents confidential. Any disclosure of confidential information or removal of EWEB property by Contractor or Contractor's employees shall be cause for immediate contract termination. Any liability, including but not limited to, attorney fees, arising from any action or suit brought against EWEB because of Contractor's willful or negligent release of information, documents or property shall be borne by Contractor.

A.7 COMMENCEMENT OF WORK:

Contractor shall commence no work under this contract until all insurance requirements have been met and a Purchase Order or Notice to Proceed has been issued by EWEB.

A.8 NON INTERFERENCE WITH WORK SITE:

Contractor shall perform its work activities in such a manner that they will not interfere with the normal work activities of EWEB. Contractor shall not block access to any work areas, and shall maintain a safe passage for normal EWEB business activities.

A.9 NOTICE:

Except as otherwise expressly provided in this Contract, any communications between the parties hereto or notices to be given hereunder shall be given in writing by personal delivery, facsimile, or mailing the same, postage prepaid, to Contractor or EWEB at the address or number set forth on the signature page of this Contract, or to such other

addresses or numbers as either party may hereafter indicate pursuant to this Section. Any communication or notice so addressed and mailed shall be deemed to be given five (5) days after mailing. Any communication or notice delivered by facsimile shall be deemed to be given when receipt of the transmission is generated by the transmitting machine. To be effective against EWEB, such facsimile transmission shall be confirmed by telephone notice to the EWEB's Contract Administrator. Any communication or notice by personal delivery shall be deemed to be given when actually delivered.

A.10 INVOICING AND PAYMENT.

Contractor shall invoice weekly for services performed during that month. Invoices shall include itemization of all work performed during the billing period. EWEB reserves the right to withhold payment for services not performed. EWEB will make payment to Contractor for undisputed amounts in accordance with its regular payment terms: Net 30 days after acceptance of services and upon receipt of a valid invoice.

A.11 SAFETY AND HEALTH REQUIREMENTS:

Contractor warrants goods and services provided under this Contract comply with all applicable federal Occupational Safety and Health Administration (OSHA) requirements and with all applicable Oregon safety and health requirements, including those of the State Workers' Compensation Division. EWEB shall take every precaution to instruct temporary employees about and otherwise safeguard them against any possible injuries associated with chemicals or equipment as well as other potential hazards within the facility.

A.12 HAZARD COMMUNICATION:

Products which contain hazardous chemicals, as defined by Oregon Administrative Rules Chapter 437, must be labeled, tagged or marked with the following information:

- 1) Identity of the hazardous chemical(s);
- 2) Appropriate hazard warning; and
- 3) Name and address of the chemical manufacturer, importer or other responsible party.

EWEB shall keep Material Safety Data Sheets (MSDS) on file at the location where such chemicals are stored, as required by OAR 437-155-025, for the products listed above.

A.13 EWEB PAYMENT OF CONTRACTOR CLAIMS:

a. Contractor shall make payment promptly, as due, to all persons supplying Contractor labor, equipment or material for work under this Contract; pay all contributions or amounts due the Industrial Accident Fund from Contractor or any subcontractor incurred in the performance of the Contract; not permit any lien or claim to be filed or prosecuted against EWEB on account of any labor or material furnished; and pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.0167.

b. If Contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to Contractor or a subcontractor by any person in connection with this Contract as such claim becomes due, EWEB may, but is not obligated to pay such claim to the person

furnishing the labor or services and charge the amount of the payment against funds due or to become due Contractor by reason of this Contract. The payment of a claim under this section shall not relieve Contractor or Contractor's surety from any obligation with respect to any unpaid claims. ORS 279B.220.

A.14 PAYMENT FOR MEDICAL CARE:

As applicable, Contractor agrees to make payment promptly, as due, to any person, copartnership, association or corporation furnishing medical, surgical, hospital or other needed medical care to Contractor's employees. Such payment shall be made from all sums which Contractor has agreed to pay for such services and from all sums which Contractor has collected or deducted from the wage of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such services.

All subject employers working under this contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126. [2003 c.794 §76c]

A.15 PERFORMANCE:

Contractor shall perform all services required by this contract within the time specified in this contract, including extensions. All services shall be performed in highest professional manner, and in accordance with the utmost industry standards. Unless the means or methods of performing a task is specified elsewhere in this contract, Contractor shall employ methods that are generally accepted and used by the industry. Failure to meet the performance requirements of this contract shall constitute breach of contract. EWEB, by written notice to Contractor, may cancel the whole or any part of this contract:

- a. If Contractor fails to provide the services required by this contract within the time specified, or fails to perform any other provision of this contract; and
- b. If Contractor, after receipt of written notice from EWEB, fails to correct such failures within the number of days specified in the written notice.

The rights and remedies of EWEB provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

A.16 EARLY TERMINATION:

This Contract may be terminated as follows:

- a. EWEB and Contractor, by mutual written agreement, may terminate this Contract at any time.
- b. Either party may terminate this Contract for any reason on 30 days written notice to Contractor.
- c. EWEB's Right to Terminate For Cause. EWEB may terminate this Contract, in whole or in part, immediately upon notice to Contractor, or at such later date as EWEB may establish in such notice, upon the occurrence of any of the following events:
 - (i) EWEB fails to receive funding, or appropriations, limitations or other expenditure authority at levels sufficient to pay for Contractor's Work;

- (ii) Federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the Work under this Contract is prohibited or EWEB is prohibited from paying for such Work from the planned funding source;

- (iii) Contractor no longer holds any license or certificate that is required to perform the Work

- (iv) Contractor commits any material breach or default of any covenant, warranty, obligation or agreement under this Contract, fails to perform the Work under this Contract within the time specified herein or any extension thereof, or so fails to pursue the Work as to endanger Contractor's performance under this Contract in accordance with its terms, and such breach, default or failure is not cured within 15 business days after delivery of EWEB's notice, or such longer period as EWEB may specify in such notice.

d. Contractor's Right to Terminate for Cause.

- (i) If EWEB fails to pay Contractor pursuant to the terms of this Contract, Contractor may terminate this Contract by giving notice to EWEB, and EWEB fails to cure within 15 business days after receipt of Contractor's notice, or such longer period of cure as Contractor may specify in such notice. EWEB shall pay Contractor for all work performed in accordance with the terms of the Contract prior to termination date, if Contractor is not otherwise in default.

- (ii) Contractor may terminate this Contract, for reasons other than nonpayment, if EWEB commits any material breach or default of any covenant, warranty, obligation or agreement under this Contract, fails to perform under the Contract within the times specified, or so fails to perform as to endanger Contractor's performance under this Contract, and such breach, default or failure is not cured within 15 business days after delivery of Contractor's notice, or such longer period as Contractor may specify in such notice.

A.17 PAYMENT ON EARLY TERMINATION:

Upon termination pursuant to paragraph A.16, payment shall be made as follows:

- a. If terminated under A.16a or A.16b for the convenience of EWEB, EWEB shall pay Contractor for work performed prior to the termination date if such work was performed in accordance with the Contract. EWEB shall not be liable for direct, indirect or consequential damages. Termination shall not result in a waiver of any other claim EWEB may have against Contractor.
- b. If terminated under A.16c by the Contractor due to a breach by EWEB, then EWEB shall pay the Contractor for work performed prior to the termination date if such work was performed in accordance with the Contract.
- c. If terminated under A.16c or A.16d by EWEB due to a breach by the Contractor, then EWEB shall pay the

Contractor for work performed prior to the termination date provided such work was performed in accordance with the Contract less any setoff to which EWEB is entitled.

A.18 REMEDIES:

In the event of breach of this Contract the parties shall have the following remedies:

- a. In addition to the remedies in paragraphs A.16 and A.17 for a breach by the Contractor, EWEB also shall be entitled to any other equitable and legal remedies that are available.
- b. If EWEB breaches this Contract, Contractor's remedy shall be limited to termination of the Contract and receipt of Contract payments to which Contractor is entitled.

A.19 HOURS OF LABOR:

Contractor shall pay employees, and Contractor will bill EWEB, for overtime work performed under the public contract in accordance with ORS 653.010 to 653.261 and the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).

A.20 RECYCLABLE PRODUCTS:

Contractor shall use recycled and recyclable products to the maximum extent economically feasible in the performance of the Contract work set forth in this document. Contractor shall specify the minimum percentage of recycled product in the goods provided under this Contract. Contractor agrees to abide by all covenants contained in ORS 279B.270, which is incorporated by reference.

A.21 TIME IS OF THE ESSENCE:

Time is of the essence in the performance of this Contract.

A.22 FORCE MAJEURE:

Unless this contract is executed to remedy an act(s), occurrence(s), or event(s) stated herein, neither Party shall be liable for delays in the execution of its obligations due to causes beyond its reasonable control including but not limited to acts of God, fires, strikes, labor disturbances, floods, epidemics, quarantine restrictions, war, insurrection or riot, acts of a civil or military authority, compliance with priority orders or preference ratings issued by the federal Government, acts of Government authorities with respect to revocation of export or re-export permits/licenses, wrecks, or unusually severe weather. The Party shall, however, make all reasonable efforts to remove or eliminate such cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligations under this Contract.

In the event of any such delay, the required date of services will be extended for a period of time equal to the period of the delay, or as short a period as is reasonably possible.

EWEB may terminate this Contract upon written notice after reasonably determining that such delay or default will likely prevent successful performance of this Contract.

A.23 LIMITATION OF LIABILITIES:

NEITHER PARTY SHALL BE LIABLE FOR (i) ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL OR SPECIAL DAMAGES UNDER THE CONTRACT OR (ii) ANY DAMAGES OF ANY SORT ARISING SOLELY FROM THE TERMINATION OF THIS CONTRACT IN ACCORDANCE WITH ITS TERMS

A.24 SUBCONTRACTS AND ASSIGNMENT:

Contractor shall not subcontract any of the work required by this Contract or assign or transfer any of its interest in this Contract, without the prior written consent of EWEB. No such written approval shall relieve Contractor of any obligations under this Contract, and any transferee or subcontractor shall be considered the agent of Contractor. Contractor shall remain liable to EWEB under the Contract as if no such transfer or subcontract had occurred.

A.25 SUCCESSORS IN INTEREST:

The provisions of this Contract shall be binding upon and inure to the benefit of the parties and their successors and approved assigns, if any.

A.26 NO THIRD PARTY BENEFICIARIES:

EWEB and Contractor are the only parties to this Contract and are the only parties entitled to enforce its terms. Nothing in this Contract gives or provides any benefit or right, whether directly, indirectly, or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Contract.

A.27 FOREIGN CONTRACTOR:

If the Contract includes services and the amount of those services exceeds \$10,000 and if Contractor is not domiciled in or registered to do business in the state of Oregon, Contractor shall promptly provide the Oregon Department of Revenue all information required by that Department relative to this Contract. EWEB may withhold final payment under this Contract until Contractor has met this requirement.

A.28 ACCESS TO RECORDS:

Contractor shall maintain fiscal records and all other records pertinent to this Contract. Records shall be maintained pursuant to generally accepted accounting standards, and other records shall be maintained to the extent necessary to clearly reflect actions taken in the provision of the products required herein. All such records shall be retained and kept accessible for at least three years following final payment. EWEB's authorized representatives shall have the right to direct access to documents, papers and records related to this Contract for the purpose of conducting audits and examinations and making copies, excerpts and transcripts, subject to confidentiality laws. EWEB shall reimburse Contractor for Contractor's cost of preparing copies.

A.29 COMPLIANCE WITH APPLICABLE LAW:

Contractor shall comply with all federal, state, and local laws applicable to the work under this Contract, and all regulations and administrative rules established pursuant to those laws.

Contractor shall maintain in effect all licenses, permits and certifications required for the performance of the work. Contractor shall notify EWEB immediately if any license,

permit, or certification required for performance of this Contract ceases to be in effect for any reason.

A.30 EWEB RESPONSIBILITIES:

EWEB is responsible for 1) providing adequate internal controls, supervision, and instructions for temporary employees, and be responsible for their conduct when they are required to handle cash, confidential or credit card information, trade secrets, valuables, or similar property and the use of any vehicle or powered mobile equipment by temporary employees in connection with an order, except for workers' compensation claims of Contractor's Temporary Employees.

A.31 WAIVER:

Waiver of any default under this Contract by EWEB shall not be deemed to be a waiver of any subsequent default or a modification of the provisions of this Contract.

A.32 GOVERNING LAW:

The provisions of this Contract shall be construed in accordance with the laws of the State of Oregon and ordinances of Lane County, Oregon. Any legal action involving any question arising under this Contract must be brought in Lane County, Oregon. If the claim must be brought in a federal forum, then it shall be brought and conducted in the United States District Court for the District of Oregon.

A.33 SEVERABILITY:

If any term or provision of this Contract is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Contract did not contain the particular term or provision held invalid.

A.34 ANTI-DISCRIMINATION:

Contractor shall not discriminate based on race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, source of income, or political affiliation in programs, activities, services, benefits or employment. Contractor shall not discriminate against minority-owned, women-owned or emerging small businesses.

A.35 EQUAL OPPORTUNITY EMPLOYER:

EWEB is an Equal Employment Opportunity and Affirmative Action employer and requires contractors and their subcontractors to follow EEO/AA practices in their performance of this Contract.

A.36 NON-APPROPRIATION CLAUSE:

If payment for work under this Contract extends into EWEB's next fiscal year, EWEB's obligation to pay for such work is subject to approval of future appropriations to fund this Contract by the EWEB Board of Commissioners. If such future appropriations are not approved, EWEB shall terminate the contract and pay Contractor for work performed in accordance with paragraph's A.17 and A18.

A.37 TAXES:

EWEB is a tax-exempt municipal corporation.
TIN #93-6001482; Tax exempt #93-880393K.

A.38 COOPERATIVE PURCHASING:

Other public agencies may utilize the results of this solicitation in accordance with ORS 279A.215 and Rule 2-0210. If utilized, EWEB assumes no liability or responsibilities for the actions of the utilizing parties, or as may pertain to the resulting contract established by and between the utilizing agency and the Contractor. The utilizing agency and the Contractor assume full responsibility for any and all agreements established between the parties.

**ATTACHMENT B
BIDDER RESIDENCY INFORMATION**

ORS 279A.120 states, "For the purposes of awarding a public contract, a contracting agency shall":

(a) Give preference to goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal; and

(b) Add a percent increase to the bid of a nonresident bidder equal to the percent, if any, of the preference given to the bidder in the state in which the bidder resides.

"Resident bidder" means a bidder that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the bid, has a business address in this state and has stated in the bid whether the bidder is a "resident bidder" under this paragraph.

"Non-resident Bidder" means a Bidder who is not a "resident Bidder" as defined above

a. CHECK ONE: Bidder is a (X) RESIDENT Bidder () NON-RESIDENT Bidder.

b. If resident Bidder, enter your Oregon business address: (physical and mailing address)

1600 Valley River Drive, Suite 220
Eugene, Oregon 97401

c. If a non-resident Bidder, enter state of residency:

d. If a non-resident Bidder, do you or your Company receive, or are you or your Company eligible for any preference in award of contracts with your state's government or with other governmental bodies in your state?

CHECK ONE: () YES () NO

If YES, state the preference percentage: _____%

If YES, but not a percentage of bid price, describe the preference:

If YES, state the law or regulation that allows the preference described (legal citation):

SCOPE OF WORK

EWEB Temporary Staffing Services Criteria and Process Survey

Please refer to the following procedures and requirements when a temporary job order is needed to fulfill an EWEB business need.

Process for Filling a Temporary Job Order

1. A temporary tracking form with the Manager/Supervisor signature and Human Resource signature will be sent to the Agency in advance of placement. *(Attached)*.
 - o Please note: If an HR signature is not on the form, Agency will contact an HR Representative or the requesting M/S to verify approval has been granted.
 - o Phone or email orders can be placed if HR approval is confirmed.
 - o It's not necessary to fax a form or verify approval when reopening an existing order with an active PO (in which the assigned worker may vary depending on availability and need).
2. Managers and Supervisors may conduct interviews with several suitable candidates in order to identify a candidate that will best meet the needs of the project.
3. Once a suitable candidate has been identified that meets the requirements and screening criteria outlined below they may begin an EWEB assignment.

Candidate Qualification Requirements

Candidate qualifications will vary depending on the specific needs of the assignment. Although a formal job description typically doesn't exist for temporary assignments, minimum qualifications should be identified and provided prior to placement to ensure a successful match.

Screening Process

EWEB is a public, customer-owned utility; so pre-employment screening is an essential component in identifying candidates that meet the eligibility requirements for placement in an EWEB assignment.

In order to assess suitability for job assignments temporary agencies are **required** to conduct the following screening measures for ALL temporary placements at EWEB:

1. Interview candidates to assess knowledge, skills, abilities, experience, and clarify application information to get a sense of suitability for EWEB opportunities.
2. Conduct reference checks – obtain a minimum of two professional references, preferably supervisors, to verify employment information and job performance.
3. Conduct a drug screening. EWEB is a drug-free workplace and requires all employees to successfully pass a drug screening upon placement in each temporary assignment.
4. PERS retiree status - PERS retirees may not be hired as temporaries (exceptions may be considered with Executive Management Team and Board of Directors approval.)
 - o Agency will contact EWEB if they are interviewing a candidate with several years of previous EWEB experience to verify they aren't a PERS retiree.

Depending on the nature of the assignment there may be cases in which additional screening will be required. Such instances include:

- o Driving – Conduct driving record history checks to ensure candidates meet the criteria outlined in EWEB's driving policy (attached).
 - o Customer or public contact, or access to sensitive information - Conduct criminal background check to ensure candidates meet the criteria, and follow the procedures outlined in EWEB's post-job offer criminal background check policy (attached).
 - o Physically demanding assignments – May warrant conducting a physical aptitude test through: Cascade Health Solutions (Agency to Indicate)
- An Agency employee cannot begin an EWEB assignment until the applicable screening criterion has been conducted.

- Once the candidate has verifiably passed the screening process the manager/supervisor or HR Representative should be notified and the selected candidate can begin their EWEB assignment.

Additional EWEB Requirements, Policies and Procedures

- If a temporary worker leaves an assignment prior to "exiting" the organization, EWEB will contact Agency to collect EWEB property (badge, parking sticker, etc.).
- Temporary assignments will not exceed 1000 hours in a calendar year. EWEB should receive monthly reports from Agency to track the total number of hours worked.
 - EWEB will monitor for 1000-hour maximum for each worker per assignment per year (unless exception is necessary and approved).
 - Temporary workers with 1000 hours or more will not be eligible for continued placement.
- A Manager/Supervisor can end the temporary job order at any time for any reason, and will notify Agency when the services of an Agency employee are no longer needed.

Types of Placement Requests

EWEB has varied workforce needs, so depending on the nature of the business need may place job orders for the following services:

1. Payrolling: Occurs when EWEB has identified suitable temporary candidates and refers them to the Agency in order to be considered for employment. *(Billing rates are negotiated and typically reduced for payrolling placements.)*
2. Direct Placement: Occurs when EWEB has a business need and contacts the Agency to provide prospective candidates to consider. *(Billing rates are negotiated.)*
3. Temp-to-Hire: Occurs when EWEB selects an Agency employee for a temporary assignment and an opportunity presents itself to hire them as an EWEB employee. *(If an Agency temporary is selected for an EWEB position within a designated period of time some additional finder fees may apply.)*

Agency Points of Contact

- Indicate key staff that would be in contact with EWEB and describe their duties/roles

Name	Title/Role	Contact Info (Phone/Fax/email)
Jim Ordway	District Manager	(p) 541.687.9558 (f) 541.345.6246 (e) ordwaja@kellyservices.com
Sarah Hutchinson	Recruiting Supervisor	(p) 541.687.9558 (f) 541.345.6246 (e) hutchsl@kellyservices.com
e-mail general delivery		ks5012@kellyservices.com

EWEB and Agency will communicate about requests for process and procedure adjustments as needed.

EWEB Points of Contact:

- Alison Lewis: Primary point of contact for all temporary inquiries
 - Alison.lewis@eweb.eugene.or.us
- ~~Julia Hoskins~~ Back up contact for inquiries
 - ~~Julia.Hoskins@eweb.eugene.or.us~~
- Christina Bennett: Back up contact for inquiries
 - Christina.Bennett@eweb.eugene.or.us
- Laurie Muggy: Back up contact for inquiries
 - Laurie.muggy@eweb.eugene.or.us

Pricing

EWEB Temporary Staffing Services
Criteria and Process Survey

Please refer to the following procedures and requirements when a temporary job order is needed to fulfill an EWEB business need.

Contractual Pricing**PAYRATE/BILLRATE:**Payrates

Payrates are to be determined per assignment, based on requirements and skills needed for assignment.

Markup Rate

REGULAR SERVICE				PAYROLL SERVICE W/BENEFITS
Office	Light Industrial	IT/Engineering	Accounting/Finance	Office, Accounting/Finance, IT, Engineering
1.357	1.402	1.450	1.450	1.281

Bill Rate

Bill Rate = Payrate x Markup Rate

FEES/EXPENSES (Paid to Kelly):Assigning and Screening Fees:

All fees associated with drug screening, criminal background screening, physical aptitude tests and driver history checks are to be passed through to EWEB (including a \$10.00 administration cost).

Pass-through Fees

Kelly will pay our employee and bill EWEB a minimum of four (4) hours if our employee shows up for scheduled work and is sent home at EWEB's request prior to completing four (4) hours of work (not performance related).

CONVERSION:

Office Services	
1 – 520 Hours	\$1200.00
Greater than 520 Hours	No Charge
Light Industrial	
1 – 520 Hours	\$800.00
Greater than 520 Hours	No Charge
Accounting/Finance, IT and Engineering (% of annual salary)	
1 – 350 hours	15%
351 – 700 Hours	10%
701 – 1,040 Hours	5%
Greater than 1,040 Hours	No Charge



Oregon

John A. Kitzhaber, MD, Governor

Public Employees Retirement System

Headquarters:
11410 S.W. 68th Parkway, Tigard, OR
Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.oregon.gov/pers

November 18, 2011

TO: Members of the PERS Board
FROM: Joseph O'Leary, Administrator, PPLAD
SUBJECT: Eugene Water and Electric Board 9/23/11 Petition for Declaratory Ruling

THE PETITION AND PROCESS

The Eugene Water and Electric Board (EWEB) filed a petition for declaratory ruling with PERS pursuant to ORS 183.410¹ on September 26, 2011. EWEB's petition requests a ruling by PERS on the membership and creditable service for workers who were under the control and supervision of EWEB, a public employer, but whose salaries were entirely paid by a non-public agency staffing company. The only facts included in the petition pertain to an unnamed hypothetical worker who was hired and paid by a staffing company and placed at EWEB for seven months under the control and direction of EWEB. The petition also states the worker was subsequently hired by EWEB, which began paying the worker's salary and benefits.

EWEB asks PERS to conclude that the hypothetical worker described in the petition is not entitled to PERS membership or creditable service for the time served while working for the staffing company. EWEB also asks PERS to decide that the worker's membership and creditable service be counted from the date that EWEB began to pay the salary of the worker.

The statutes and administrative rules concerning petitions for declaratory rulings require the agency to respond to a petition within 60 days of receipt notifying the petitioner whether it will issue a ruling. November 24th is the 60th day for response on this petition. If the agency decides to issue a ruling, it must notify all persons named in the petition, must allow for intervention by interested parties, must provide opportunity for briefing and oral argument by interested parties, and must issue a written ruling within 60 days of the close of the record. Parties may seek judicial review of the ruling to the Court of Appeals. Alternatively, the agency may decline to issue a declaratory ruling. A declination is not subject to review by the court.

EWEB has provided a list of interested persons in its petition, consisting of 32 workers placed at EWEB by staffing companies and later hired by EWEB. The petition acknowledged that this is

¹ **183.410 Agency determination of applicability of rule or statute to petitioner; effect; judicial review.** On petition of any interested person, any agency may in its discretion issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. However, the agency may, where the ruling is adverse to the petitioner, review the ruling and alter it if requested by the petitioner. Binding rulings provided by this section are subject to review in the Court of Appeals in the manner provided in ORS 183.480 for the review of orders in contested cases. The Attorney General shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition. The petitioner shall have the right to submit briefs and present oral argument at any declaratory ruling proceeding held pursuant to this section.

not a complete list. All of the interested parties listed in the petition have established membership in the OPSRP Pension Program or the PERS Chapter 238 Program; some are active and others are retired. Attached to EWEB's petition are five different temporary services agency contracts, each with varying provisions.

The significance of issuing a declaratory ruling is that it becomes binding between the agency and the petitioner with respect to the facts alleged in the petition, unless it is set aside or altered by the court.

EMPLOYEE VS. INDEPENDENT CONTRACTOR STATUS

ORS 238.015 (1) provides that "no person may become a member of the system unless that person is in the service of a public employer and has completed six months' service uninterrupted by more than 30 consecutive working days during the six months' period." The statute goes on to state that "every employee of a participating employer shall become a member of the system...following the six months' period." However, not every worker in the service of a participating public employer for more than six months becomes a member of the system. ORS 238.005(7)(a) specifically excludes "persons engaged as independent contractors" from the definition of "employee" for purposes of Chapter 238. Similarly, "persons engaged as independent contractors" are specifically excluded from the definition of "eligible employees" for purposes of Chapter 238A. ORS 238A.005(4)(a).

The determination of whether a worker is a member of PERS under ORS Chapter 238 or 238A is, in part, driven by a threshold determination whether the worker is an employee or independent contractor. Employees are eligible to become members of PERS, but independent contractors are not. The determination of whether a worker is actually an independent contractor or an employee is not always clear.

If a worker alleges that he or she was an employee rather than an independent contractor, PERS asks the public employer for information relevant to this determination and relies on OAR 459-010-0030 which contains the common law rules for determining whether an individual is an employee, and the IRS 20-factor test published in IRS Ruling 87-41 that further expands upon the common law "right to control" test. Under OAR 459-010-0032, unless it is clearly established that a worker is an independent contractor, "that person shall be deemed to be an employee." The determination whether a worker is an employee is made by applying the common law and IRS tests to individualized facts in each case. Specific details of the behavior and relationship between the parties are relevant for determining whether a worker is an employee or independent contractor.

BACKGROUND

In early 2009, PERS began receiving inquiries from members about their creditable service with EWEB with respect to this issue. Since then, PERS completed eligibility determinations for five EWEB employees who claimed creditable service for the time they worked as temps for EWEB. In many of those cases, EWEB was asked by PERS to make a determination as to whether the members were employees or independent contractors, and in response EWEB communicated to PERS that the affected workers met the legal definition of employees even during the times their salaries were paid by a staffing company. As a result, PERS followed the employer's

characterization that the workers were employees of EWEB and invoiced EWEB a total of \$279,355.21. EWEB did not appeal these five invoices, which resulted from EWEB's report that the members were employees and not independent contractors.

CONCERNS REGARDING EWEB'S PETITION

1. The petition contains insufficient facts.

PERS does not have adequate information to determine the true nature of the relationship between EWEB and the worker described in its petition. In determining whether a worker is an employee or independent contractor, the common law tests or the IRS 20-factor test must be applied in each circumstance by the employer in determining whether to report the person to PERS as an eligible employee. Persons working for a staffing agency but assigned to a public employer would seem to fall outside of the standard, but EWEB's reporting has concluded otherwise and they are in the best position to judge how an individual person's interaction with them fits into the applicable laws and rules. Note that, if such persons were EWEB employees for PERS purposes, they would likely also be considered employees for other labor law purposes, raising a myriad of issues outside of the PERS context.

PERS also does not have sufficient information to determine membership and service credit for the hypothetical worker in the petition; the determination would depend on whether that person had any prior membership status with PERS, the total number of hours that the worker performed in any calendar year (for EWEB and any other participating employer), and whether any exclusions would apply to disqualify them from membership.

2. Issuing a declaratory ruling is not likely to dispose of the issue.

If the agency makes a declaratory ruling, it is unlikely that it would diminish the incidence or need for individual member determinations. If EWEB employees dispute this issue in the future, it is more likely that the facts presented by the employees will be more specific and more comprehensive than the hypothetical presented by EWEB's petition. Thus, future cases with distinguishing facts would accordingly be beyond the binding effect of the declaratory ruling.

3. Making a declaratory ruling on a hypothetical situation is inconsistent with PERS' longstanding practice to avoid speculative decisions.

A broad declaratory ruling based on minimal, insufficient facts involving one hypothetical worker would not be useful in resolving individual employment situations. Such a ruling should not be applied to other workers with different employment relationships and covered under different and specific temporary services contracts. Applying a declaratory ruling broadly is not a fair or accurate determination for each individual member. Making a broad declaratory ruling will not prevent individuals from filing disputes, appeals, and contested case hearing requests and receiving individualized eligibility determinations.

BOARD OPTIONS

1. Decline to issue a declaratory ruling.
2. Request an amended petition from EWEB with additional, specific facts sufficient to make a determination of employee or independent contractor status.
3. Issue a declaratory ruling and begin the notice and hearing process required under ORS 183.410.

In light of the concerns outlined above, staff recommends the PERS Board choose Option 1 and decline to issue a declaratory ruling.



HARRANG LONG
GARY RUDNICK P.C.
ATTORNEYS AT LAW

1001 SW Fifth Avenue, 16th Floor
Portland, OR 97204
503.242.0000
503.241.1458 (fax)

TO: Members of the PERS Board

FROM: Bill Gary and Susan Marmaduke
Counsel for Eugene Water and Electric Board

DATE: November 17, 2011

RE: Eugene Water and Electric Board 9/23/11 Petition for Declaratory Ruling;
Response to Joseph O'Leary's memo of November 18, 2011, regarding
same

The PERS Board is presented with an opportunity to correct a legal error by PERS staff which threatens the viability of the system, and to do so in a quick and relatively inexpensive way. EWEB identifies the legal error below, and proposes that it be addressed through an administrative declaratory ruling, issued by the PERS Board, which would establish the correct legal framework under which individual cases should be evaluated. A copy of EWEB's Petition for Declaratory Ruling ("Petition") is attached as Exhibit 1.

Joseph O'Leary has submitted a memo in which he recommends that the Board decline to issue a declaratory ruling on the legal question at issue ("Staff Memo"). A copy of that Staff Memo is attached as Exhibit 2. The Staff Memo misses the point of the Petition. It omits any mention of the pertinent statutes and rules that are the subject of EWEB's Petition, and instead focuses entirely on a secondary issue. The Staff Memo is, in fact, a good example of the analytical error EWEB seeks to correct.

1. The law

To be eligible for PERS membership, and to earn creditable service, a person must – at a minimum – be on the payroll of a participating public employer. PERS staff is under the misimpression that a person may be entitled to creditable service for a period when the person received no salary or other remuneration from a public employer, but instead was paid by a staffing agency. The law is to the contrary.

To become a member of the system, the person must be "in the service of a public employer * * *." ORS 238.015. "Service" is a defined term:

“Service’ means a period in which an employee:

(A) Is in an employer/employee relationship, as defined in OAR 459-010-0030; **and**

(B) Receives a payment of ‘salary,’ as defined in ORS 238.005 or similar payment from workers compensation or disability.”

OAR 459-010-0003(1)(d) (emphasis added). ORS 238.005 defines “salary,” in pertinent part, as follows:

“Salary’ means the remuneration paid an employee in cash out of the funds of a public employer in return for services to the employer, plus the monetary value, as determined by the Public Employees Retirement Board, of whatever living quarters, board, lodging, fuel, laundry and other advantages the employer furnishes the employee in return for services.”

ORS 238.005(21)(a) (emphasis added). The law also requires payment of a salary by a participating public employer for work time to be treated as “creditable service”:

“Creditable service’ means any period of time during which an active member **is being paid a salary by a participating public employer** and for which benefits under this chapter are funded by employer contributions and earnings on the fund. * * *.”

ORS 238.005(5).

The foregoing provisions leave no doubt that the receipt of “cash out of the funds of a public employer” and “being paid a salary by a participating public employer” is a prerequisite to PERS eligibility and a *sine qua non* of “creditable service.” Thus, whatever other facts may exist in any particular case, the absence of payment of salary is dispositive: No payment of salary by a public body means no creditable service.

Although those provisions are the centerpiece of EWEB’s Petition, the Staff Memo omits any mention of them. Instead of reflecting accurately the pertinent law (and the Petition), the Staff Memo reflects PERS staff’s assumption that persons working for – and

paid by – staffing agencies may be entitled to creditable service for periods when they are placed by such staffing agency at a public employer's workplace. The Staff Memo skips over the requirement that the public employer must pay the worker's salary, and focuses exclusively on the question of whether the public body exercises direction and control (as described in OAR 459-0010-0030) over the worker's activities while in the workplace. That is error.

A public body's payment of a salary to the worker is a prerequisite to PERS eligibility and creditable service. And while the public employer's payment of the worker's salary is a necessary element, it is not sufficient. Even if a worker receives "cash out of the funds of a public employer" and is "being paid a salary by a participating public employer," the worker still is not entitled to PERS membership or creditable service if he or she is merely an "independent contractor." That, in turn, is a question of whether the individual "performs labor or services subject to the direction and control of an employer." OAR 459-010-0030 (See Petition for Declaratory Ruling, Addendum 14-15). To evaluate that question, PERS has adopted the 20 factors described in IRS Ruling 87-41. *Id.*

The Staff Memo reflects PERS staff's misconception that the only determinant of "creditable service" is whether the worker meets the requirements of OAR 459-010-0030. It fails to recognize that the law requires the worker to satisfy two criteria – the existence of an employer/employee relationship, as defined in OAR 459-010-0030, and receipt of a salary, as defined in ORS 238.005, from the public employer.

2. The declaratory ruling is needed to correct the legal framework by which PERS staff evaluates individual cases.

The legal error contained in the Staff Memo also affects PERS staff members' communications with employers and their analysis of individual cases. It causes PERS staff to ask public employers the wrong question, which – not surprisingly – elicits from the public employer a wrong answer. What has occurred with EWEB's employees is illustrative. For example:

_____ worked for a staffing agency known as "Delta-T." Delta-T placed _____ at EWEB from November 4, 1985, until October 1, 1990. EWEB hired him on October 1, 1990, where he continues to be employed.

Mr. _____ apparently approached PERS staff, contending that he was entitled to creditable service for the period when he was working for Delta-T and placed at EWEB. Again, ORS 238.005(5) provides: "'Creditable service' means any period of time during which an active member **is being paid a salary by a participating public employer**

and for which benefits under this chapter are funded by employer contributions and earnings on the fund. * * *." Because Mr. _____ was not paid a salary by a participating employer during the period in question, he was not entitled to creditable service for that time.

However, PERS staff did not ask EWEB whether the time Mr. _____ spent from November 4, 1985, until October 1, 1990, satisfied the statutory definition of "creditable service." Nor did PERS staff ask EWEB whether it paid Mr. _____ a salary during that time. Instead, PERS staff wrote to EWEB:

"Our legal department (PPLAD) has asked that the Eugene Water and Electric Board review OAR 459-010-0030, Determination of Employee Status, and OAR 459-010-0032, Determination of Independent Contractor Status, to evaluate if EWEB would like to adjust the reporting of Mr. _____ for the years 1985-1990. Based on this decision, if there are adjustments to how Mr. _____ was reported, an invoice may be generated."

Exhibit 3.

Because Mr. _____ was not on EWEB's payroll during that period, EWEB had no contract with him and no documentation of his earnings or attendance. Based on an interview with a person who had worked alongside Mr. _____ during that period, EWEB concluded that Mr. _____ met more criteria of an "employee" under OAR 459-010-0032 than of an "independent contractor," and reported to PERS accordingly. Of course, Mr. _____ did not meet the statutory criteria for "creditable service" under ORS 238.005(5) because he was not, in the words of that statute, "being paid a salary by a participating public employer" during that period. Yet, based on EWEB's answer to the question PERS staff had posed, PERS staff adjusted Mr. _____ service date to November 4, 1985, instead of October 1, 1990, and EWEB paid an additional invoice of \$90,820.26.

PERS staff asked EWEB the wrong question. EWEB gave a truthful answer to that question. Neither PERS staff nor EWEB recognized that, regardless of whether Mr. _____ met the criteria of an "employee" for purposes of OAR 459-010-0032, he did not meet the statutory criteria for "creditable service," because he was not paid a salary by EWEB during that period.

Similar errors were made with respect to the other four individuals noted in the Staff Memo. That is a problem for EWEB and its counsel to address at another time. In the meantime, however, EWEB seeks to have the agency confirm that the correct analytical framework is that which is set forth in the statutes and Oregon Administrative Rules addressed in its Petition. This is not a fact bound inquiry. EWEB seeks only a declaratory ruling that will confirm that, in order to be in the service of a public employer and in order to be eligible for creditable service, one must receive a salary from a participating public employer.

The Staff Memo also fails to mention that the Petition presents not one, but two, questions. In addition to asking whether a person who is subsequently hired by a public employer is entitled to creditable service for time before he or she was hired, the Petition also asks whether a person who is *never* hired by the public employer can qualify for PERS membership if he or she is placed at a public employer for more than six months while paid by a staffing agency. That situation highlights the problem with disregarding the statutory requirement of payment of salary by a public employer. If the only pertinent question were whether an individual worked under the direction and control of the public employer while placed there by a staffing agency, then presumably thousands of temporary employees would be entitled to PERS membership, even though they were never on the payroll of any public employer. Of course, that is not the law. To become a member of PERS, a person must be "in the service of a public employer * * *." ORS 238.015. Under OAR 459-010-0003(1)(d):

"'Service' means a period in which an employee:

(A) Is in an employer/employee relationship, as defined in OAR 459-010-0030; **and**

(B) Receives a payment of 'salary,' as defined in ORS 238.005 or similar payment from workers compensation or disability."

Id. (emphasis added). Contrary to the view of PERS staff, *both* criteria must be met. Satisfaction of the criterion set forth in Subpart (A) alone is not sufficient.

A declaratory ruling is an appropriate and cost effective vehicle by which the PERS Board can determine the legal framework under which individual cases are evaluated. The Staff Memo raises the concern that a declaratory ruling would be "speculative" and would not dispose of the issue. In fact, however, there is nothing speculative about

establishing the correct legal framework and that framework would dispose of all cases in which the worker received no salary or other remuneration from a public body.

The legal question presented by EWEB's request for a declaratory ruling is critically important, not only to EWEB, but to every participating public employer that uses, or has used, staffing agencies to meet staffing needs on a temporary basis. If the PERS Board declines to issue a declaratory ruling, the problem will not go away. It will simply mean that participating public employers will be forced to resort to less efficient and more costly means, such as litigation, to resolve the legal question.

Although the law clearly requires payment of a salary by a public employer for both eligibility and creditable service, it is evident that PERS staff is misinformed and that it perpetuates that misconception through its communications with public employers and employees. Because public employers do not necessarily keep records of workers who work for staffing agencies and are not on the public employers' payroll, it is impossible to determine the magnitude of this issue, but one can safely predict it is very large.

Issuance of a declaratory ruling would confirm that the PERS statutes and administrative rules mean what they appear to mean. It would, in effect, set the record straight and allow individual determinations of membership eligibility and creditable service to be made on the basis of the criteria established under the law.

STATE OF OREGON

PUBLIC EMPLOYEES' RETIREMENT BOARD

**EUGENE WATER & ELECTRIC
BOARD,**

Petitioner.

No. _____

**PETITION FOR DECLARATORY
RULINGS**

Eugene Water & Electric Board (“EWEB”) petitions for declaratory rulings pursuant to ORS 183.410 and OAR 137-002-0010.¹ EWEB asks that the Public Employees’ Retirement Board (“PERB”) answer two related questions about Public

¹ ORS 183.410 provides:

On petition of any interested person, any agency may in its discretion issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. However, the agency may, where the ruling is adverse to the petitioner, review the ruling and alter it if requested by the petitioner. Binding rulings provided by this section are subject to review in the Court of Appeals in the manner provided in ORS 183.480 for the review of orders in contested cases. The Attorney General shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition. The petitioner shall have the right to submit briefs and present oral argument at any declaratory ruling proceeding held pursuant to this section.

OAR 137-002-0010 provides the requirements for a petition for declaratory ruling.

Employees' Retirement System ("PERS") retirement credit for a temporary worker placed with EWEB by a staffing company that pays the worker's salary.

I. RULES AND STATUTES AT ISSUE

These questions involve the application of ORS 238.015(1) (providing requirements for membership in PERS), ORS 238.005(5) (defining creditable service), ORS 238.005(21)(a) (defining salary), and OAR 459-010-0003(1) (defining service). We have attached copies of the statutes and administrative rule to this petition as an addendum.

II. FIRST REQUEST FOR DECLARATORY RULING

A. Relevant Facts

EWEB, a public employer participating in PERS, contracted with a staffing company or "temp agency" for a worker under a contract like those attached as Exhibits A through E. The temp agency paid the worker's salary and EWEB provided no salary, lodging, or other "advantages" within the statutory definition of "salary" to the worker in return for the worker's services. While the worker was placed at EWEB, EWEB provided direction and controlled the work. The worker's placement with EWEB lasted for seven months.

B. Question Presented

Under the above facts, is the worker, employed and paid by the temp agency and placed by the temp agency with EWEB, a member of PERS?

C. Proposed Ruling or Relief Requested

In order for a worker to become a member of PERS, he or she must be “in the service of” a public employer for six months. Under the facts posited above, although the worker was at EWEB for seven months, the worker was not “in the service of” EWEB because the temp agency employed the worker and paid the worker’s salary. Therefore, the worker did not become a member of PERS.

D. Argument

Under the statutes regulating PERS, to the extent a staffing company or temp agency pays an individual’s salary while placed with a public employer, that individual is not “in the service of” the public employer for purposes of membership in PERS. ORS 238.015(1) describes the requirements for membership in PERS in part as follows:

No person may become a member of the system unless that person is *in the service of a public employer* and has completed six months’ service uninterrupted by more than 30 consecutive working days during the six months’ period.

Thus, a person becomes a member in PERS only after six months “in the service of” a public employer. The Oregon Administrative Rules define “service” for purposes of eligibility and membership in PERS as requiring:

a period in which an employee: (A) is in an employer/employee relationship, as defined in OAR 459-0010-0030 and (B) receives payment of ‘salary’ as defined in ORS 238.005 or similar payment from workers compensation or disability.

OAR 459-010-0003(1)(d) (emphasis added). The referenced statute defines “salary” as:

the remuneration paid an employee in cash out of the funds of a public employer in return for services to the employer, plus the monetary value, as determined by the Public Employees Retirement Board, of whatever living quarters, board, lodging, fuel, laundry and other advantages the employer furnishes the employee in return for services.

ORS 238.005(21)(a) (emphasis added).

In other words, the threshold question is whether a worker is receiving “cash out of the funds of a public employer [or other advantages the employer furnishes the employee] in return for services to the public employer.” *Id.* If not, the worker is not receiving a salary as defined in ORS 238.005 and so is not “in the service of” a public employer. The worker, therefore, cannot qualify for PERS membership on the basis of that work.

If a worker *is* receiving “cash out of the funds of the public employer” (ORS 238.005(21)(a)), the next question is whether such worker nonetheless qualifies as an “independent contractor” under the criteria specified in OAR 459-010-0030 (“determination of employee status”).² If a worker receives “remuneration paid an employee in cash out of the funds of a public employer in return for services” from the public employer, but is an independent contractor, such worker is not eligible for PERS membership. A worker may be eligible for PERS membership only if both criteria are met, *i.e.*, the worker is: (1) receiving a “salary” from the public employer; and, (2) not an

² That rule provides that the 20-factor test described in Internal Revenue Service Ruling 87-41 shall be used in determining whether or not an individual is an employee.

independent contractor, but an “employee” of the public employer, as defined in OAR 459-010-0030. Unless both criteria are met, the person is not eligible for PERS membership.

The worker in the scenario described above would not be eligible for PERS membership because the first requirement, *i.e.*, payment of a salary by the public employer, is not met. Therefore, a worker who is paid a salary by a temp agency is not a PERS member, even if the worker is placed at EWEB for longer than six months.

III. SECOND REQUEST FOR DECLARATORY RULING

A. Relevant Facts

The same facts as stated in EWEB’s first request for declaratory ruling, but EWEB subsequently hired the worker from the temp agency and began paying the worker’s salary and other benefits.

B. Question Presented

When EWEB hires a worker from a temp agency after the worker had been placed at EWEB by the temp agency for seven months, is the worker entitled to “creditable service” for the period when the temp agency was paying the worker’s salary?

C. Proposed Ruling or Relief Requested

The worker in this scenario is not entitled to “creditable service” for the period when he or she was on the temp agency’s payroll and placed at EWEB; the worker’s eligibility for membership and creditable service is “counted” from the date the worker is hired by EWEB.

D. Argument

Under the plain terms of the PERS statute defining “creditable service,” a public employer must pay a worker’s salary in order for creditable service to accrue:

“Creditable service” means any period of time during which an *active member is being paid a salary by a participating public employer* and for which benefits under this chapter are funded by employer contributions and earnings on the fund.

* * * “Creditable service” includes all retirement credit received by a member.

ORS 238.005(5). The administrative rule discussed above, OAR 459-010-0003(1)(d), reinforces that the public employer must pay the worker’s salary in order for the worker to be a member who accrues PERS retirement credit. That rule requires both that the worker “receives payment of ‘salary’ as defined in ORS 238.005” *and* that the worker not be an independent contractor, but instead qualify as an “employee” of the public employer. Again, salary means payment by the employer because it is defined as “remuneration paid an employee *in cash out of the funds of a public employer*” or other “advantages the employer furnishes the employee in return for services.” ORS 238.005(21)(a).

Under the plain text of the PERS statutes and rules, a public employer must pay a worker’s salary in order for the worker to accrue serviceable credit time. The worker in this proposed scenario is not entitled to any creditable service time for the time spent at EWEB while the temp agency paid the worker’s salary.

Moreover, significant practical concerns would arise if public employers were required to contribute to PERS on the basis of compensation paid to a worker – or other

advantages furnished to the worker – by another entity, such as a temp agency: The public employer would have no control over the amounts paid or “advantages” furnished in return for services, and it may have no record of those amounts or advantages, since the worker was not on the public employer’s payroll during that time.

IV. INTERESTED PERSONS

EWEB does not maintain records of all of the persons who have been placed at EWEB by a temp agency. Most of those persons presumably moved on to other placements. Even the identities of those persons whom EWEB subsequently hired after they were placed at EWEB by a temp agency would not necessarily be reflected in EWEB’s records. However, EWEB is aware of some people who were employed by, and paid by, a temp agency which placed them at EWEB, and whom EWEB did ultimately hire and pay salaries and other benefits.

The persons listed below have either contacted EWEB or PERB, or both, about this issue.³

Carla Aguilar

John Alban

³ In several instances, PERB has asked EWEB to assess whether the person met the definition of an “independent contractor” or “employee,” as those terms are defined in OAR 459-010-0030, while they were placed at EWEB by a temp agency. In each such instance, EWEB informed PERB that the person did not meet the definition of “independent contractor” for purposes of that rule. In a few instances, EWEB has received and paid invoices from PERS for additional contributions, apparently based on the members’ evidence of compensation they received from other entities, i.e., temp agencies, notwithstanding the fact that EWEB did not pay those persons’ salaries as defined by ORS 238.005 during that time.

Michael Anderson

Lisa Bean

Daniel M. Bedbury

Scott R. Brenneman

Jay Bryant

John Culver

Randy L. Enders

John Femal

Tafianne Gardner

Matthew Halleman

Taryn Johnson

Rick Mansker

Craig Matsler

Jared McDonald

Rod Olsen

Stephanie Penselin

Jenean Rigney

Derrick Sitowski

Kris Stenshoel

Michael Straney

26

Philip S. Stuart

Kurt Suzuki

Kevin Thomas

Kelly Thompson

David Trinka

Ken Wedin

Tom West

Thomas Williams

John Wible

Michael Wilson

Other public employers, and their similarly situated workers, also may be interested.

///

///

///

///

///

///

///

///

///

V. CONCLUSION

A worker placed at EWEB by a temp agency or staffing company and paid a salary by that temp agency or staffing company is not “in the service of” EWEB for purposes of PERS membership and is not accruing PERS creditable service during that time.

DATED this 23rd day of September, 2011.

Respectfully submitted,



William F. Gary, OSB #770325

william.f.gary@harrang.com

Susan D. Marmaduke, , OSB #841458

susan.marmaduke@harrang.com

Jona J. Maukonen, , OSB #043540

jona.maukonen@harrang.com

Harrang Long Gary Rudnick P.C.

1001 SW Fifth Avenue, 16th Floor

Portland, Oregon 97204

(503) 242-0000

Attorneys for Eugene Water and Electric
Board

P0249211.DOC;1

Formerly cited as OR ST § 237.003



West's Oregon Revised Statutes Annotated Currentness

Title 22. Public Officers and Employees

Chapter 238. Public Employees Retirement System (Refs & Annos)

In General

→ **238.005. Definitions**

<Text subject to final change by the Oregon Office of the Legislative Counsel.>

<Text of section operative until Jan. 1, 2012. See, also, section as amended by Laws 2011, c. 506, § 32, operative Jan. 1, 2012, and section as amended by Laws 2011, c. 637, § 72, operative Jan. 1, 2012.>

For purposes of this chapter:

- (1) "Annuity" means payments for life derived from contributions made by a member as provided in this chapter.
- (2) "Board" means the Public Employees Retirement Board.
- (3) "Calendar year" means 12 calendar months commencing on January 1 and ending on December 31 following.
- (4) "Continuous service" means service not interrupted for more than five years, except that such continuous service shall be computed without regard to interruptions in the case of:
 - (a) An employee who had returned to the service of the employer as of January 1, 1945, and who remained in that employment until having established membership in the Public Employees Retirement System.
 - (b) An employee who was in the armed services on January 1, 1945, and returned to the service of the employer within one year of the date of being otherwise than dishonorably discharged and remained in that employment until having established membership in the Public Employees Retirement System.
- (5) "Creditable service" means any period of time during which an active member is being paid a salary by a participating public employer and for which benefits under this chapter are funded by employer contributions and earnings on the fund. For purposes of computing years of "creditable service," full months and major fractions of a month shall be considered to be one-twelfth of a year and shall be added to all full years. "Creditable service" includes all retirement credit received by a member.
- (6) "Earliest service retirement age" means the age attained by a member when the member could first make application for retirement under the provisions of ORS 238.280.
- (7) "Employee" includes, in addition to employees, public officers, but does not include:
 - (a) Persons engaged as independent contractors.

ADD - 1

Formerly cited as OR ST § 237.003

(b) Seasonal, emergency or casual workers whose periods of employment with any public employer or public employers do not total 600 hours in any calendar year.

(c) Persons, other than workers in the Oregon Industries for the Blind under ORS 346.190, provided sheltered employment or made-work by a public employer in an employment or industries program maintained for the benefit of such persons.

(d) Persons employed and paid from federal funds received under the Emergency Job and Unemployment Assistance Act of 1974 (Public Law 93-567) or any other federal program intended primarily to alleviate unemployment. However, any such person shall be considered an "employee" if not otherwise excluded by paragraphs (a) to (c) of this subsection and the public employer elects to have the person so considered by an irrevocable written notice to the board.

(e) Persons who are employees of a railroad, as defined in ORS 824.020, and who, as such employees, are included in a retirement plan under federal railroad retirement statutes. This paragraph shall be deemed to have been in effect since the inception of the system.

(8) "Final average salary" means whichever of the following is greater:

(a) The average salary per calendar year paid by one or more participating public employers to an employee who is an active member of the system in three of the calendar years of membership before the effective date of retirement of the employee, in which three years the employee was paid the highest salary. The three calendar years in which the employee was paid the largest total salary may include calendar years in which the employee was employed for less than a full calendar year. If the number of calendar years of active membership before the effective date of retirement of the employee is three or fewer, the final average salary for the employee is the average salary per calendar year paid by one or more participating public employers to the employee in all of those years, without regard to whether the employee was employed for the full calendar year.

(b) One-third of the total salary paid by a participating public employer to an employee who is an active member of the system in the last 36 calendar months of active membership before the effective date of retirement of the employee.

(9) "Firefighter" does not include a volunteer firefighter, but does include:

(a) The State Fire Marshal, the chief deputy fire marshal and deputy state fire marshals; and

(b) An employee of the State Forestry Department who is certified by the State Forester as a professional wildland firefighter and whose primary duties include the abatement of uncontrolled fires as described in ORS 477.064.

(10) "Fiscal year" means 12 calendar months commencing on July 1 and ending on June 30 following.

(11) "Fund" means the Public Employees Retirement Fund.

(12)(a) "Member" means a person who has established membership in the system and whose membership has not been terminated as described in ORS 238.095. "Member" includes active, inactive and retired members.

(b) "Active member" means a member who is presently employed by a participating public employer in a qualifying position and who has completed the six-month period of service required by ORS 238.015.

ADD - 2

Formerly cited as OR ST § 237.003

- (c) “Inactive member” means a member who is not employed in a qualifying position, whose membership has not been terminated in the manner described by ORS 238.095, and who is not retired for service or disability.
- (d) “Retired member” means a member who is retired for service or disability.
- (13)(a) “Member account” means the regular account and the variable account.
- (b) “Regular account” means the account established for each active and inactive member under ORS 238.250.
- (c) “Variable account” means the account established for a member who participates in the Variable Annuity Account under ORS 238.260.
- (14) “Normal retirement age” means:
- (a) For a person who establishes membership in the system before January 1, 1996, as described in ORS 238.430, 55 years of age if the employee retires at that age as a police officer or firefighter or 58 years of age if the employee retires at that age as other than a police officer or firefighter.
- (b) For a person who establishes membership in the system on or after January 1, 1996, as described in ORS 238.430, 55 years of age if the employee retires at that age as a police officer or firefighter or 60 years of age if the employee retires at that age as other than a police officer or firefighter.
- (15) “Pension” means annual payments for life derived from contributions by one or more public employers.
- (16) “Police officer” includes:
- (a) Employees of institutions defined in ORS 421.005 as Department of Corrections institutions whose duties, as assigned by the Director of the Department of Corrections, include the custody of persons committed to the custody of or transferred to the Department of Corrections and employees of the Department of Corrections who were classified as police officers on or before July 27, 1989, whether or not such classification was authorized by law.
- (b) Employees of the Department of State Police who are classified as police officers by the Superintendent of State Police.
- (c) Employees of the Oregon Liquor Control Commission who are classified as enforcement officers by the administrator of the commission.
- (d) Sheriffs and those deputy sheriffs or other employees of a sheriff whose duties, as classified by the sheriff, are the regular duties of police officers or corrections officers.
- (e) Police chiefs and police personnel of a city who are classified as police officers by the council or other governing body of the city.
- (f) Parole and probation officers employed by the Department of Corrections, parole and probation officers who are transferred to county employment under ORS 423.549 and adult parole and probation officers, as defined in ORS 181.610, who are classified as police officers for the purposes of this chapter by the county governing body. If a county classifies adult parole and probation officers as police officers for the purposes of this chapter, and the employees so classified are represented by a labor organization, any proposal by the county to change that classi-

ADD - 3

Formerly cited as OR ST § 237.003

fication or to cease to classify adult parole and probation officers as police officers for the purposes of this chapter is a mandatory subject of bargaining.

(g) Police officers appointed under ORS 276.021 or 276.023.

(h) Employees of the Port of Portland who are classified as airport police by the Board of Commissioners of the Port of Portland.

(i) Employees of the State Department of Agriculture who are classified as livestock police officers by the Director of Agriculture.

(j) Employees of the Department of Public Safety Standards and Training who are classified by the department as other than secretarial or clerical personnel.

(k) Investigators of the Criminal Justice Division of the Department of Justice.

(L) Corrections officers as defined in ORS 181.610.

(m) Employees of the Oregon State Lottery Commission who are classified by the Director of the Oregon State Lottery as enforcement agents pursuant to ORS 461.110.

(n) The Director of the Department of Corrections.

(o) An employee who for seven consecutive years has been classified as a police officer as defined by this section, and who is employed or transferred by the Department of Corrections to fill a position designated by the Director of the Department of Corrections as being eligible for police officer status.

(p) An employee of the Department of Corrections classified as a police officer on or prior to July 27, 1989, whether or not that classification was authorized by law, as long as the employee remains in the position held on July 27, 1989. The initial classification of an employee under a system implemented pursuant to ORS 240.190 does not affect police officer status.

(q) Employees of a school district who are appointed and duly sworn members of a law enforcement agency of the district as provided in ORS 332.531 or otherwise employed full-time as police officers commissioned by the district.

(r) Employees at youth correction facilities and juvenile detention facilities under ORS 419A.050, 419A.052 and 420.005 to 420.915 who are required to hold valid Oregon teaching licenses and who have supervisory, control or teaching responsibilities over juveniles committed to the custody of the Department of Corrections or the Oregon Youth Authority.

(s) Employees at youth correction facilities as defined in ORS 420.005 whose primary job description involves the custody, control, treatment, investigation or supervision of juveniles placed in such facilities.

(t) Employees of the Oregon Youth Authority who are classified as juvenile parole and probation officers.

(17) "Public employer" means the state, one of its agencies, any city, county, or municipal or public corporation, any political subdivision of the state or any instrumentality thereof, or an agency created by one or more such governmental organizations to provide governmental services. For purposes of this chapter, such agency created by one or

Formerly cited as OR ST § 237.003

more governmental organizations is a governmental instrumentality and a legal entity with power to enter into contracts, hold property and sue and be sued.

(18) "Prior service credit" means credit provided under ORS 238.442 or under ORS 238.225 (2) to (6)(1999 Edition).

(19) "Qualifying position" means one or more jobs with one or more participating public employers in which an employee performs 600 or more hours of service in a calendar year, excluding any service in a job for which a participating public employer does not provide benefits under this chapter pursuant to an application made under ORS 238.035.

(20) "Retirement credit" means a period of time that is treated as creditable service for the purposes of this chapter.

(21)(a) "Salary" means the remuneration paid an employee in cash out of the funds of a public employer in return for services to the employer, plus the monetary value, as determined by the Public Employees Retirement Board, of whatever living quarters, board, lodging, fuel, laundry and other advantages the employer furnishes the employee in return for services.

(b) "Salary" includes but is not limited to:

(A) Payments of employee and employer money into a deferred compensation plan, which are deemed salary paid in each month of deferral;

(B) The amount of participation in a tax-sheltered or deferred annuity, which is deemed salary paid in each month of participation;

(C) Retroactive payments described in section 7 of this 2009 Act; and

(D) Wages of a deceased member paid to a surviving spouse or dependent children under ORS 652.190.

(c) "Salary" or "other advantages" does not include:

(A) Travel or any other expenses incidental to employer's business which is reimbursed by the employer;

(B) Payments for insurance coverage by an employer on behalf of employee or employee and dependents, for which the employee has no cash option;

(C) Payments made on account of an employee's death;

(D) Any lump sum payment for accumulated unused sick leave;

(E) Any accelerated payment of an employment contract for a future period or an advance against future wages;

(F) Any retirement incentive, retirement severance pay, retirement bonus or retirement gratuitous payment;

(G) Payments for periods of leave of absence after the date the employer and employee have agreed that no future services qualifying pursuant to ORS 238.015 (3) will be performed, except for sick leave and vacation;

ADD - 5

Formerly cited as OR ST § 237.003

(H) Payments for instructional services rendered to institutions of the Department of Higher Education or the Oregon Health and Science University when such services are in excess of full-time employment subject to this chapter. A person employed under a contract for less than 12 months is subject to this subparagraph only for the months to which the contract pertains; or

(I) Payments made by an employer for insurance coverage provided to a domestic partner of an employee.

(22) "School year" means the period beginning July 1 and ending June 30 next following.

(23) "System" means the Public Employees Retirement System.

(24) "Vested" means being an active member of the system in each of five calendar years.

(25) "Volunteer firefighter" means a firefighter whose position normally requires less than 600 hours of service per year.

CREDIT(S)

Formerly 237.003; Laws 1997, c. 249, § 64; Laws 1997, c. 853, § 36; Laws 1999, c. 317, § 24; Laws 1999, c. 407, § 3; Laws 1999, c. 971, § 1; Laws 2001, c. 295, § 9; Laws 2001, c. 874, § 1; Laws 2001, c. 945, § 29a; Laws 2001, c. 968, § 1; Laws 2003, c. 14, § 112; Laws 2003, c. 67, § 16, eff. July 1, 2003; Laws 2003, c. 625, § 20, eff. July 30, 2003; Laws 2005, c. 152, § 5; Laws 2005, c. 332, § 1, eff. June 29, 2005; Laws 2009, c. 762, § 47, eff. July 1, 2009; Laws 2010, c. 1 (1st Sp. Sess.), § 8, eff. Feb. 18, 2010.

HISTORICAL AND STATUTORY NOTES

2011 Electronic Update

Laws 1999, c. 971, § 2, eff. Oct. 23, 1999, as amended by Laws 2011, c. 722, § 8, eff. Aug. 5, 2011, operative Sept. 1, 2011, provides:

"Sec. 2. (1) The amendments to ORS 238.005 by section 1, chapter 971, Oregon Laws 1999, apply only to persons specified in ORS 238.005 (9)(b) who are employed by the State Forestry Department on October 23, 1999, or who become employed by the State Forestry Department after October 23, 1999.

"(2) Except as provided in subsection (3) of this section, the amendments to ORS 238.005 by section 1, chapter 971, Oregon Laws 1999, apply only to service rendered to a participating public employer on or after October 23, 1999.

"(3) Any employee who is employed by the State Forestry Department in a position described in ORS 238.005 (9)(b) on October 23, 1999, may acquire creditable service in the Public Employees Retirement System as a firefighter for service performed by the employee in a position described in ORS 238.005 (9)(b) before October 23, 1999, by paying to the Public Employees Retirement Board an amount determined by the board to represent the full cost to the system of providing credit as a firefighter to the member. The member may acquire credit as a firefighter for all or part of the service in a position described in ORS 238.005 (9)(b) performed before October 23, 1999. All amounts required for acquisition of credit as a firefighter under this subsection must be paid at least 90 days before a member's effective date of retirement. The board may by rule allow members to pay amounts required under this subsection in installments in lieu of requiring a single lump sum payment. Amounts required under this subsection may be paid using moneys transferred by way of a trustee-to-trustee transfer as described in ORS 238.222."

ADD - 6

Formerly cited as OR ST § 237.003

2009 Main Volume

Laws 2001, c. 968, § 2, provided:

“Section 2. The amendments to ORS 238.005 by section 1 of this 2001 Act apply to all service by an adult parole and probation officer that is performed on and after the date that the adult parole and probation officer is classified as a police officer for the purposes of ORS chapter 238 by the county governing body, whether that classification occurs before, on or after the effective date of this 2001 Act [January 1, 2002].”

Laws 2005, c. 332, § 3, eff. June 29, 2005, provides:

“The amendments to ORS 238.005 and 238A.005 by sections 1 and 2 of this 2005 Act apply only to members of the Public Employees Retirement System who die on or after the effective date of this 2005 Act.”

CROSS REFERENCES

- Board and university officials powers and duties, see ORS 353.050.
- Community college districts alternative retirement plan, see ORS 341.551.
- Higher education employees, optional retirement plans, see ORS 243.800.
- Special campus security officers, see ORS 352.385.

NOTES OF DECISIONS

Creditable service 1

1. Creditable service

Payment to state university employee of equivalent of amount paid as critical need incentive (CNI) bonus paid to workers who crossed picket line during period of strike did not constitute “salary,” and thus, period during which employee was on strike did not count towards creditable service, for purposes of calculating employee's retirement benefits; CNI remedy payment to striking employees was not payment for work that was or which would have been done during period of strike, but was paid to equalize pay between nonstriking and striking workers, and payments bore no relationship to amount of hours that striking employee would have worked. Bailey v. Public Employees Retirement Bd. (2009) 208 P.3d 511, 228 Or.App. 300. Colleges and Universities ↪8(3)

O. R. S. § 238.005, OR ST § 238.005

Current with emergency legislation through Ch. 733 of the 2011 Regular Session. Revisions to Acts made by the Oregon Reviser were unavailable at the time of publication.

(C) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT

Formerly cited as OR ST § 237.011

C

West's Oregon Revised Statutes Annotated Currentness

Title 22. Public Officers and Employees

Chapter 238. Public Employees Retirement System (Refs & Annos)

Membership

(Membership in General)

→ **238.015. Qualification**

(1) No person may become a member of the system unless that person is in the service of a public employer and has completed six months' service uninterrupted by more than 30 consecutive working days during the six months' period. Every employee of a participating employer shall become a member of the system at the beginning of the first full pay period of the employee following the six months' period. Contributions for new members shall first be made for those wages that are attributable to services performed by the employee during the first full pay period following the six months' period, without regard to when those wages are considered earned for other purposes under this chapter. All public employers participating in the Public Employees Retirement System established by chapter 401, Oregon Laws 1945, as amended, at the time of repeal of that chapter, and all school districts of the state, shall participate in, and their employees shall be members of, the system, except as otherwise specifically provided by law.

(2) Any active member of the Public Employees Retirement System who, through the annexation of a political subdivision employing the member or by change of employment, becomes the employee of another political subdivision which is participating in the Public Employees Retirement System and has also a separate retirement system for its employees, shall remain an active member of the Public Employees Retirement System unless, within 60 days after the effective date of the annexation or change of employment or April 8, 1953, the member shall by written notice to the Public Employees Retirement Board and to the administrative body of the new public employer elect to relinquish membership in the Public Employees Retirement System and become a member of the separate retirement system of the employer, if eligible for membership in that retirement system, and the member shall be so carried by the new employer. Immediately upon such annexation of any political subdivision or such change of employment, the new public employer shall inform such employee in writing of the right of the employee to exercise an election as in this section provided.

(3) A political subdivision (other than a school district) not participating in the retirement system established by chapter 401, Oregon Laws 1945, as amended, which employs one or more employees, each of whose position requires 600 hours of service per year, or an agency created by two or more political subdivisions to provide themselves governmental services, which employs one or more employees, each of whose position requires 600 hours of service per year, may, through its governing body, notify the board in writing, that it elects to include its employees in the system hereby established. Such public employer may request the board to make a study and estimate of the cost of including it and its eligible employees, other than volunteer firefighters, in the system, which the board thereupon shall cause to be made and the cost of which the employer shall bear. Upon completion of the study and estimate the employer may apply for admission to the system, whereupon it shall begin to participate therein and its eligible employees other than volunteer firefighters shall become members of the system. If the employer is an agency created by two or more political subdivisions to provide themselves governmental services and ceases thereafter to transmit to the board contributions for any of its eligible employees, the benefits based upon employer contributions to which such employees would otherwise be entitled shall be reduced accordingly.

(4) No inmate of a state institution or an alien on a training or educational visa working for any participating em-

ADD - 8

Formerly cited as OR ST § 237.011

ployer, even though the inmate or alien received compensation from a participating employer, shall be eligible to become a member of the system. No person employed by a participating employer and defined by such employer as a student employee is eligible to become a member of the system for such student employment.

(5) A person holding an elective office or an appointive office with a fixed term or an office as head of a department to which the person is appointed by the Governor may become a member of the system by giving the board written notice of desire to do so within 30 days after taking the office or, in the event that the officer is not eligible to become a member of the system at the time of taking the office, within 30 days after becoming so eligible. Membership so established shall not be discontinued during the appointive or elective term of the officer except upon separation of the officer from service.

(6) A public employer employing volunteer firefighters may apply to the board at any time for them to become members of the system. Upon receiving the application the board shall fix a wage at which, for purposes of this chapter only, they shall be considered to be employed and which shall be the basis for computing the amounts of the contributions, if any, which they pay into, and of the benefits which they and their beneficiaries receive from, the fund; and if the wage so fixed is satisfactory to the employer, shall include the firefighters in the system.

(7)(a) In the event that an employee enters the service of a public employer which is participating in or later begins to participate in the system and in the event that at the time of entering that service or at the time that the employer begins to participate in the system the employee has commenced to purchase and is continuing to purchase a retirement annuity, if the employer deems the annuity adequate for the purposes of this chapter, it may enter into an agreement with the employee and the board pursuant to which the employee may be exempted from contributing to the Public Employees Retirement Fund, and, if no public funds are being used to purchase the annuity or a corresponding pension, the employer, in lieu of the contributions which it otherwise would make to the fund on account of the employee, may make contributions toward the cost of purchasing the annuity. Such employee otherwise shall be subject to the provisions of this chapter, except that neither the employee nor any person claiming under the employee shall receive any payments from the retirement fund as service or disability allowance.

(b) An employee who enters into an agreement under paragraph (a) of this subsection may elect at any time thereafter to start to participate in the system by giving written notice of desire to participate to the board and to the employer. The employee shall receive no retirement credit for the period during which the employee was exempted from contributing to the fund under the agreement, but the employee shall be considered to have completed the six months' service required for membership in the system. When the employee starts to participate in the system the employer shall start to contribute to the fund on account of the employee in the same manner as the employer contributes on account of other employees who are active members of the system and the employer shall stop making contributions toward the cost of purchasing the retirement annuity.

(8)(a) All new appointees in the Federal Cooperative Extension Service or in any other service in which participation in the Federal Civil Service retirement program is mandatory, who receive a federal appointment on or after July 1, 1955, may participate in the Public Employees Retirement System only by giving written notice of their election to so participate to the Public Employees Retirement Board within six months after the effective date of their appointment.

(b) All persons employed by the Federal Cooperative Extension Service or by any other service in which participation in the Federal Civil Service retirement program is mandatory, who are under federal appointment as of July 1, 1955, and who are members of the state retirement system, shall continue such membership unless, prior to February 1, 1956, they give written notice to the Public Employees Retirement Board of their desire to cancel their membership.

(c) Any person who is an active member of the Public Employees Retirement System, who, on or after July 1,

ADD - 9

Formerly cited as OR ST § 237.011

1955, is employed by the Federal Cooperative Extension Service or by any other service in which participation in the Federal Civil Service retirement program is mandatory, and who is given a federal appointment, shall continue such membership in the Public Employees Retirement System unless, within six months after the effective date of the appointment, the person gives written notice to the Public Employees Retirement Board of the desire to cancel membership.

(d) A cancellation of membership under paragraph (b) or (c) of this subsection terminates membership in the Public Employees Retirement System and cancels the right to any benefits from, or claims against, that system. Such cancellation prevents the withdrawing member from claiming thereafter any retirement credit for any period of employment before the cancellation. Upon receipt of a notice of cancellation, the Public Employees Retirement Board shall refund the member account of the withdrawing member, regardless of the age of the withdrawing member.

(9) Employees, including managers, of foreign trade offices of the Oregon Business Development Department who live and perform services in foreign countries under the provisions of ORS 285A.075 (1)(g) shall not be members of the system. However, any person who is an active member of the system immediately before becoming an employee of a foreign trade office shall continue to be a member of the system during the period of time the person serves as an employee of the foreign trade office.

(10) An employee who is participating in an alternative retirement program established pursuant to ORS 353.250 or an optional retirement plan established pursuant to ORS 341.551 may not be an active member of the Public Employees Retirement System.

CREDIT(S)

Formerly 237.011; Laws 1997, c. 249, § 65; Laws 1999, c. 130, § 4; Laws 1999, c. 509, § 23; Laws 2001, c. 192, § 1; Laws 2001, c. 883, § 41; Laws 2001, c. 945, § 30; Laws 2003, c. 67, § 17, eff. July 1, 2003; Laws 2005, c. 152, § 6; Laws 2005, c. 728, § 3; Laws 2007, c. 804, § 76, eff. July 17, 2007.

HISTORICAL AND STATUTORY NOTES

2009 Main Volume

Laws 2001, c. 192, § 2, provided:

“The amendments to ORS 238.015 by section 1 of this 2001 Act apply to all employer and employee contributions made on behalf of members of the Public Employees Retirement System, whether those members first established membership in the system before, on or after the effective date of this 2001 Act [January 1, 2002].”

CROSS REFERENCES

Assumption of duties by regional correctional facility, public employer, see ORS 169.810.

Industries for the Blind Program, employment of sighted persons, see ORS 346.190.

Membership, see ORS 237.620.

Metropolitan service districts, employee rights and benefits, membership for specified classes of district employees, conditions, see ORS 268.240.

Oregon Public Service Retirement Plan established, see ORS 238A.025.

LIBRARY REFERENCES

ADD - 10

Formerly cited as OR ST § 237.011

2009 Main Volume

Officers and Public Employees ↪ 101.5(1).

Westlaw Topic No. 283.

C.J.S. Officers and Public Employees §§ 270 to 271, 311 to 320.

O. R. S. § 238.015, OR ST § 238.015

Current with emergency legislation through Ch. 733 of the 2011 Regular Session. Revisions to Acts made by the Oregon Reviser were unavailable at the time of publication.

(C) 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT

ADD - 11

Or. Admin. r. 459-010-0003

COregon Administrative Rules Compilation Currentness

Chapter 459. Oregon Public Employees Retirement System

Division 10. Membership

→ 459-010-0003 Eligibility and Membership for the PERS Chapter 238 Program

(1) For the purpose of this rule:

(a) “Concurrent positions” means employment with two or more participating employers in the same calendar year.

(b) “Partial year of separation” means a period in the calendar year the employee separates from employment that begins on January 1 of the year and ends before the last working day of the year.

(c) “Qualifying position” means a position designated by the employer as qualifying, except:

(A) A position or concurrent positions in which an employee performs at least 600 hours of service in a calendar year is qualifying regardless of employer designation.

(B) A position in a partial year of separation is qualifying regardless of employer designation if the position is continued from an immediately preceding calendar year in which the employee performed at least 600 hours of service in the position or concurrent positions.

(C) A position with one employer in which the employee is employed for the entire calendar year and fails to perform at least 600 hours of service in that position or concurrent positions in the calendar year is non-qualifying regardless of employer designation.

(d) “Service” means a period in which an employee:

(A) Is in an employer/employee relationship, as defined in OAR 459-010-0030; and

(B) Receives a payment of “salary,” as defined in ORS 238.005 or similar payment from workers compensation or disability.

(e) “Working day” means a day that the employer is open for business.

(2) At the time an employee is hired, an employer must designate the employee's position as qualifying or non-qualifying. An employer must designate a position as qualifying if the position is one in which an employee would normally perform at least 600 hours of service in a calendar year.

(3) Employer designation of a position as qualifying or non-qualifying must be determined by PERS from information communicated to PERS by the employer. An employer designation that is contrary to the provisions of subsection (1)(c) of this rule in any calendar year will be reversed for that calendar year.

ADD - 12

Or. Admin. r. 459-010-0003

(4) Eligibility. An employee who was employed in a qualifying position before August 29, 2003 by an employer participating in the PERS Chapter 238 Program was eligible to become a member of that program if the employee:

- (a) Began the six-month waiting period described in OAR 459-010-0035 before August 29, 2003;
- (b) Did not elect to participate in an optional or alternative retirement plan as provided in ORS Chapters 243, 341, or 353; and
- (c) Was not otherwise ineligible for membership.

(5) Membership. An employee who meets the requirements of section (4) of this rule becomes a member of the PERS Chapter 238 Program on the first day of the calendar month following the completion of the six-month waiting period described in OAR 459-010-0035 provided that the employee is employed on that date by the same employer that employed the employee throughout the waiting period.

Stat. Auth.: ORS 238.650

Stats. Implemented: ORS 238.005, 238.015, & 238A.025

Hist.: PERS 5-2005, f. & cert. ef. 2-22-05; PERS 23-2005, f. 12-23-05, cert. ef. 1-1-06; PERS 15-2007, f. & cert. ef. 11-23-07

OAR 459-010-0003, OR ADC 459-010-0003

Current through January 14, 2011

END OF DOCUMENT

ADD - 13

C

Oregon Administrative Rules Compilation Currentness
Chapter 459. Oregon Public Employees Retirement System
Division 10. Membership
→ **459-010-0030 Determination of Employee Status**

(1) The term “employee” shall have the same meaning as provided in ORS 238.005(7) and OAR 459-005-0001(12).

(2) Determination of whether an individual is an employee is made under common-law rules. Under common-law rules, every individual who performs labor or services subject to the direction and control of an employer, both as to what must be done and how it must be done, is an employee. It does not matter that the employer allows the employee discretion and freedom of action, so long as the employer has the legal right to control both the method and the result of the labor or services, resulting in an employee/employer relationship.

(3) If, under the common-law rules, there is an employee/employer relationship, it makes no difference how it is described. It is not controlling whether the employee is called an employee. It is not controlling how the payments are measured, how they are made, or what they are called. It is not controlling whether the individual is employed full time or part time. There is no distinction made between classes of employees. Superintendents, executives, managers, supervisors, and other supervisory personnel are all employees.

(4) In applying the common-law rules, the 20-factor test as described in Internal Revenue Service Ruling 87-41 shall be used in determining whether or not an individual is an employee. The degree of importance of each factor varies depending on the labor or services to be performed and the context in which the labor or services are performed. The 20 factors are:

- (a) Instructions;
- (b) Training;
- (c) Integration;
- (d) Services Rendered Personally;
- (e) Hiring, Supervising, and Paying Assistants;
- (f) Continuing Relationship;
- (g) Set Hours of Work;
- (h) Full Time Required;
- (i) Doing Work on Employer's Premises;

Or. Admin. r. 459-010-0030

- (j) Order of Sequence Set;
- (k) Oral or Written Reports;
- (l) Payment by Hour, Week, Month;
- (m) Payment of Business and/or Traveling Expenses;
- (n) Furnishing of Tools and Materials;
- (o) Significant Investment;
- (p) Realization of Profit or Loss;
- (q) Working for More than One Employer at a Time;
- (r) Making Service Available to General Public;
- (s) Right to Discharge; and
- (t) Right to Terminate.

Stat. Auth.: ORS 238.650

Stats. Implemented: ORS 238.005(7)

Hist.: PER 8, f. 12-15-55; PERS 7-1992, f. & cert. ef. 11-9-92; PERS 12-1998, f. & cert. ef. 12-17-98; PERS 21-2005, f. & cert. ef. 11-1-05

OAR 459-010-0030, OR ADC 459-010-0030

Current through January 14, 2011

END OF DOCUMENT

ADD - 15

MAY 3 1989

AGREEMENT

Revised 5-3-89
GX

Purchase Order # 06791

TRAMP 5
DB:7 Donald H. Dine
 This agreement is entered into this 28 day of SEPTEMBER, 1983, by and between Eugene Water & Electric Board, hereafter called EWEB, and PROFESSIONAL TEMPORARY EMPLOYEES, hereafter called contractor, for the purpose of furnishing temporary services at hourly rates to be paid contractor by EWEB. Any change in these rates must be in writing with a minimum 30-day notice.

In performing the above services, it is understood and agreed that:

- 1) The services shall be performed by persons in the employ of the contractor and contractor assumes all legal responsibility as the employer of said person, including payment of wages and other compensation due said persons and compliance with all applicable federal, state and other payroll tax requirements.
- 2) Contractor shall procure and maintain the following insurance and upon request of EWEB shall provide certificates of said insurance.
 - a) Workers Compensation and Employee Liability *Liberty NW -*
 - b) Comprehensive General Liability insurance of not less than \$500,000 Bodily Injury and \$100,000 Property Damage each occurrence.
 - c) Comprehensive Automobile Liability, \$500,000-\$1,000,000 Bodily Injury and \$100,000 Property Damage.
 - d) Commercial blanket bond of \$1,000,000.
- 3) Contractor agrees to indemnify and save harmless EWEB against any liability for premiums, contributions or taxes payable under any Workmens Compensation, unemployment compensation, disability benefits, old age benefits or tax withholding laws for which EWEB shall be finally adjudged liable as an employer with respect to any employees of contractor in the performance of such work.
- 4) Contractor guarantees that said services shall be performed in an acceptable, workmanlike manner, by employees who are fully qualified to serve in the capacity specified by EWEB. Upon reasonable notice from EWEB, contractor will not charge for unsatisfactory service and will furnish a replacement as soon as possible.
- 5) Employees of contractor are not employees of EWEB and are not entitled to any of the fringe benefits extended to EWEB employees.
- 6) This agreement may not be modified or amended except by agreement in writing between parties.

TEMPORARY HELP "CONTRACT" SHELTON, Edie L.
 Assistant Personnel Director
 T. EMP. S.
 Doc #7189-159
 5/24/89

Exhibit A
Page 1

7) Either party may terminate this agreement by giving 7 days written notice to the other, in such event contractor will be paid for services to date of termination.

This agreement and any amendments to this agreement will not be effective until approved by Personnel Department and authorized by EWEB purchase order. Payments will be made by the Accounting Department after receipt of invoice and verification by the Personnel Department that the specified services have been satisfactorily provided.

EWEB

Richard D. Anderson
Personnel Department Manager

Date OCT. 12, 1983

CONTRACTOR

(Personnel's file)
EDIE L. SHELTON
signature on original
Signature

Date 10-17-83

Doc. #7189-159

Exhibit A
Page 2

AGREEMENT

PARTIES: Eugene Water and Electric Board, a municipal utility (referred to as "EWEB").

Delta-T, Inc., an Oregon business corporation (referred to as "Contractor").

1. Purpose. EWEB desires Contractor, and Contractor desires, to provide the temporary Contract Employee positions for the EWEB Conservation Department pursuant to the within terms and conditions.

2. Term. The starting date for the commencement of work shall be November 1, 1987. The term of this Agreement shall be one year from that date.

3. Employees. Contractor agrees to provide a minimum number of eight Contract Employees. Additional Contract Employees may be added upon mutual agreement of the parties hereto. Upon the written request of EWEB, contractor will assist in the search for and recruitment of any needed additional Contract Employees at no charge to EWEB. Contract Employees currently under contract to, or employed by, EWEB shall be hired by Contractor. The now current EWEB pay schedule, EWEB's right to hire and fire at will, and current supervisory relationships shall remain in effect until changed in the normal course of business.

4. Costs. Services provided by Contractor under this Agreement shall be paid for by EWEB at the rate of twenty-nine percent (29%) above the wages EWEB assigns for temporary positions within the Conservation Program. It is agreed there shall be no reductions in the hourly wages assigned to Contract Employee positions. It is contemplated that these positions may receive salary increases.

5. Invoicing. Contractor shall invoice EWEB weekly on the basis of supervisor-approved time cards. Invoices shall be submitted each monday for the previous week's work. If monday is a legal holiday, invoices shall be submitted the following day. Payment by EWEB on account of each invoice so submitted shall be made within ten (10) days of receipt by EWEB. Each weekly invoice shall be accompanied by receipts, signed by all Contract Employees, reflecting receipt of all money due to them.

6. Escrow Account. An interest-bearing escrow account shall be opened with a mutually agreeable party. It shall be funded by Contractor in an amount equal to one week's average invoice amount. Should the level of employment increase, Contractor shall correspondingly increase the amount in the escrow account. The purpose of the escrow account is to insure sufficient funds are available to pay the Contract Employees. Should Contractor fail to pay any Contract Employee when the wages are due, EWEB shall provide written notice of such failure to Contractor. If Contractor has not made payment or advised EWEB in writing there is a dispute as to the wages within five days after the date of the notice, EWEB shall have the right to immediately, and

without the consent or signature of Contractor, instruct the escrow holder to release from the escrow such sums as are necessary to pay said wages. Any funds remaining in the escrow account upon termination of this Agreement shall automatically revert to and become the property of Contractor which shall add said funds to the "Bonus Plan" described herein below. Costs of the escrow shall be paid by Contractor.

7. "Bonus Plan." Contractor shall provide a "Bonus Plan" ("Plan") for all Contract Employees. The Plan's funds shall consist of the remaining net proceeds of Contractor at the end of the contract year after deduction of all costs and expenses. Payment from the Plan shall be made at the close of each contract year. Payment to each Contract Employee shall equal the Plan fund amount at the close of each applicable contract year multiplied by a fraction, the numerator of which is the total billings during the contract year by the Contract Employee and the denominator of which is the total billings of all Contract Employees during the contract year. Provided, however, that the payment to any Contract Employee no longer employed at the end of the contract year shall be calculated by multiplying the amount in the escrow account by a fraction, the numerator of which is equal to the total billings of the Contract Employee and the denominator of which is equal to the total billings of all Contract Employees through the date of departure for that Contract Employee. That product shall then be reduced by seventy percent (70%) and payment shall not be made until the end of the contract year. Contract Employees who accept another position at EWEB or are laid-off by EWEB shall have their distribution calculated as though they were no longer employed at the end of the contract year but shall not be subject to the seventy percent (70%) reduction. Upon the ultimate termination of this Agreement, the Plan shall distribute to each Contract Employee employed during the 1987-88 contract year an amount equal to that fraction calculated above based upon total 1987-88 billings multiplied by the amount, if any, remaining in the escrow account referred to in paragraph 6 above.

8. Benefits. Full-time Contract Employees shall receive fifty (50) hours of paid vacation per contract year which shall accrue at the rate of one hour per week. As with current time-off arrangements, all vacation hours shall be approved by appropriate EWEB supervisors. Contract Employees shall be required to use at least thirty hours of vacation time each contract year. At the election of the Contract Employee, additional accrued vacation time may be paid in cash to the Contract Employee at the close of the contract year or "rolled-over" for use during the next contract year, if any. Additionally, all Contract Employees shall be covered by a health plan. Contractor shall pay 100% of the premium for each Contract Employee and a percentage agreed to by a simple majority of all initially employed Contract Employees of the premium for spouses and dependents.

9. Insurance. Contractor shall carry a One Million Dollar (\$1,000,000) per occurrence liability and property damage policy covering all Contract Employees. Contractor shall also provide proof of insurance by each Contract Employee in the amount required by Oregon law for all Contract Employees who utilize their own vehicles in the course of their work. EWEB automobile insurance shall cover Contract Employees who operate EWEB vehicles. Proof of insurance shall be provided prior to the effective date of this Agreement.

Exhibit B
Page 2

10. Bonding. All Contract Employees and other employees of Contractor who handle funds shall be covered by a \$10,000 honesty (fidelity) bond. Proof of such bonding shall be provided prior to the effective date of this Agreement.

11. Hold Harmless. Contractor's employees are not employees of EWEB. Contractor shall defend, indemnify, and hold EWEB harmless from and against all claims and demands for loss or damage, including without limitation property damage, personal injury, and wrongful death, arising out of or pertaining to conduct of Contract Employees or other employees of Contractor which are not part of their assigned job responsibilities. EWEB shall defend, indemnify, and hold Contractor harmless for loss or damage, including without limitation property damage, personal injury, and wrongful death, arising out of or in connection with EWEB's performance of its duties under this Agreement as well as from any claim(s) by the Bonneville Power Administration (or any of its divisions) or EWEB on account of Contract Employee work which was not properly or fully performed.

12. Successors. This Agreement shall be binding upon and inure to the benefit of the respective successors of the parties hereto.

13. Assignment. Neither party to this Agreement may assign their rights or delegate their duties under this Agreement without the express prior written consent of the other party.

14. Amendment. Any amendment to this Agreement must be in writing and approved by each party prior to its effective date.

15. Attorney Fees. In any legal proceeding between the parties hereto arising out of this Agreement, the prevailing party shall be entitled to recover a reasonable attorney's fee for arbitration, trial, and appeal as determined by the arbitrator, trial, or appellate courts. Any proceeding in tort or contract which may be brought because of the existence of this Agreement shall be considered a "legal proceeding arising out of this Agreement." The prevailing party shall be the party in whose favor final judgment is entered.

16. Necessary Documents. The parties agree to execute, acknowledge, and deliver any documents necessary or advisable to comply with the terms and provisions of this Agreement, and to give it full force and effect.

17. Notice. Any notice required or permitted under this Agreement shall be deemed to have been duly given on the date of service if served personally on the party to whom notice is to be given, or on the third day after mailing if mailed to the party to whom notice is to be given, by certified mail, return receipt requested, postage prepaid, and addressed to the addressee at the address by its name hereinbelow, or at the most recent address, specified by written notice, given to the sender by the addressee under this provision.

Exhibit B
Page 3

16. Remedies. No right or remedy herein conferred or reserved to any party is exclusive of any other right or remedy herein or by law or equity provided or permitted; but each shall be cumulative of every other right or remedy given hereunder or now or hereafter existing at law or in equity or by statute or otherwise, and may be enforced concurrently therewith or from time to time.

19. Severability. Each provision of this Agreement shall be considered separable and if for any reason any provision(s) hereof is determined to be invalid, such invalidity shall not impair the operation of or affect those provisions which are mutually agreed to be valid.

20. Compliance with Laws and Regulations. The Contractor agrees to follow the regulations as required by Executive Order 11246, Part II, Section 202, dated September 24, 1965 as amended and contained in Office of Federal Contract Compliance, Rules and Regulations, Chapter 60, Section 60-1.4(a); Regulations 41 CFR 60-20, entitled "Employment of the Handicapped"; and Executive Order 11625, promoting the use of minority business enterprises, are incorporated herein by reference. The Contractor hereby agrees to comply with all applicable laws of the federal government; the statutes of this state, including but not limited to Chapter 279 Oregon Revised Statutes with respect to public contracts and agrees to prefer goods or services that have been manufactured or produced in this state if price, fitness, availability, and quality are otherwise equal; and will comply with all requirements of Lane County, and the Municipal Code of the City of Eugene, including but not limited to Section 4.615 through 4.655.

21. Termination. This Agreement may be terminated by either party hereto without cause by providing 90 days prior written notice of intent to so terminate. If Contractor has not paid Contract Employees in full within 5 days of receipt of the corresponding payment from EWEB, EWEB shall then have the right to immediately terminate this Agreement. This Agreement may be terminated immediately, but only for cause set forth in writing and delivered to the other party.

22. Entire Agreement. This Agreement contains the entire agreement of the parties relating to the rights granted and obligations assumed in this Agreement and supersedes any prior understandings or agreements. Any oral representations or modifications concerning this Agreement shall be of no force or effect unless contained in a subsequent written modification signed by the party to be charged.

IN WITNESS WHEREOF, the parties have set forth their signatures below to signify their agreement on or as of this 23 day of October, 1987.

EWEB:

By: Larry A. Hunt

Its: Director, Power Management

Contractor:

By: Bruce Marshall

Its: President

Doc. #7522

EUGENE WATER & ELECTRIC BOARD

Business Services Agreement
(To be executed by Purchasing Department)

JOB #446

PURCHASE ORDER # 58525
DOCUMENT # 7189624

THIS AGREEMENT is entered into this 23 day of FEBRUARY, 1994, by and between EUGENE WATER & ELECTRIC BOARD, hereinafter called EWEB, and TEMP SOURCE, INC., hereinafter called the Contractor.

WHEREAS, EWEB has need for the professional services of an independent contractor with the particular training, knowledge, and experience offered by the Contractor,

NOW THEREFORE, in consideration of a sum at the rate of \$32 per hour the total of which shall not exceed \$5,000, to be paid to the Contractor by EWEB, the Contractor agrees to perform during the period January 1, 1994, through December 31, 1994, inclusive, the following personal and/or professional services:

SCOPE OF WORK:

Contractor shall supply educators subject to EWEB's approval. These educators will work on a variety of tasks needing diverse skills related to energy and water literacy education. Duties will include, but are not limited to: Research, writing, workshop design, model building, creating curriculum materials, test construction, teacher education, conducting energy and water workshops, and advising EWEB's education department.

IT IS FURTHER UNDERSTOOD AND AGREED THAT:

1. The recitals hereinbefore stated are by reference made a part of this agreement.
2. Contractor is engaged as an independent contractor in the performance of the work. Contractor is solely and personally liable for all labor and expenses, and any federal or state taxes or withholdings, other governmental payments, or fringe benefits and shall indemnify EWEB from all such labor, expenses, taxes, withholdings, benefits or other payments. No such tax, withholding, or other payment or benefit is provided by EWEB to, or on behalf of, Contractor or Contractor's workers. EWEB is interested only in the results achieved by Contractor. Contractor shall be in control of the means by which the results are achieved and substantially all necessary tools, equipment, and supplies will be furnished by the Contractor unless otherwise specified.
3. Contractor and Contractor's workers will adhere to applicable professional and ethical standards and will perform all work in a manner consistent with

Page 1 of 4

Exhibit C
Page 1

generally accepted skill and care in the types of work undertaken. Contractor will utilize only regularly employed workers of Contractor who are qualified and experienced in the work they are engaged to perform. Contractor shall adequately supervise the work. Work shall be performed and completed at Contractor's risk, and Contractor shall be liable for loss or damage occasioned by the acts of Contractor or those under Contractor's supervision. Contractor shall take all precautions and safety measures necessary to avoid damage or injury to persons or property.

4. If this payment is to be charged against federal funds, the Contractor certifies that the amount charged does not exceed the normal charge for the type of service provided.
5. The Contractor will forward invoices to EWEB to the attention of Judy Marsh, Contract Administrator, at: P. O. Box 10148, Eugene, Oregon 97440, identifying the Purchase Order No. Payment will be made within thirty (30) days of receipt of invoices.
6. The Contractor agrees to follow the regulations as required by Executive Order 11246, Part II, Section 202, dated September 24, 1965 as amended and contained in Office of Federal Contract Compliance, Rules and Regulations, Chapter 60, Section 60-1.4(a); Regulation 41 CFR 60-20, entitled "Sex Discrimination;" Regulation 20, CFR 741-3, entitled "Employment of the Handicapped;" and Executive Order 11625, promoting the use of minority business enterprises, and these provisions are incorporated herein by reference.
7. The Contractor hereby agrees to comply with all applicable statutes and regulations of the federal government and of this state, including but not limited to Chapter 279 Oregon Revised Statutes with respect to public contracts, and will comply with all requirements of Lane County and the Municipal Code of the City of Eugene, including but not limited to Section 4.615 through 4.650.
8. Contractor shall comply with all applicable Workers' Compensation Acts in the state of Oregon and shall furnish proof thereof satisfactory to EWEB prior to commencing work.
9. Contractor specifically and expressly agrees to indemnify, defend, and hold harmless EWEB, its Board of Commissioners, directors, employees, and agents (hereinafter collectively "Indemnitees") against and from any and all claims, demands, suits, losses, costs, and damages of every kind and description, including attorneys' fees, brought or made against or incurred by any of the Indemnitees resulting from, arising out of, or in any way connected with any negligent act, omission or fault of Contractor, its employees, agents or representatives, or subcontractors of any tier, their employees, agents or representatives in the performance or nonperformance

Page 2 of 4

Exhibit C
Page 2

of Contractor's obligations under this Agreement or in any way related to this Agreement. The indemnity obligations under this Section shall include without limitation:

- a. Loss of or damage to any property of EWEB, Contractor, or any third party;
- b. Bodily or personal injury to, or death of, any third person(s), including without limitation employees of EWEB, or of Contractor or its subcontractors of any tier; and
- c. Claims arising out of Workers' Compensation, Employer's Liability, Unemployment Compensation, or similar such laws or obligations applicable to employees of Contractor or its subcontractors of any tier.

Contractor's indemnity obligation under this Section shall not extend to any liability caused by the sole negligence of any of the Indemnitees.

10. Without limiting any liabilities or any other obligations of Contractor, at the time of execution of this Agreement, Contractor will be required to furnish evidence of liability insurance coverage. Such insurance shall include coverages and be in a form and with an insurance company satisfactory to EWEB in the following amounts: The specified limit of liability shall be a combined single limit of \$1,000,000 per occurrence.

Certificates of insurance coverage shall be submitted to EWEB prior to commencement of said business services, and shall provide for not less than thirty (30) days notice to EWEB of the cancellation of such insurance.

11. The Contractor shall maintain books, records and accounts of all costs for this project up to one year after completion of the Agreement in accordance with generally accepted accounting principles and practices.

EWEB, the Contract Administrator or their authorized representative shall have the right to audit the books, records and accounts of the contract.

12. This Agreement shall not be assigned, sublet or subcontracted prior to EWEB's written consent.
13. This Agreement may not be modified or amended except by agreement in writing between the parties.
14. Either party may terminate this Agreement by giving 30 days written notice to the other. In such event Contractor will be paid for services to date of termination.

THIS AGREEMENT and any amendments to this Agreement will not be effective until authorized by EWEB Purchase Order. Payments will be made by the Accounting Department after receipt of invoices and verification by the manager of the originating department that the specified services have been satisfactorily provided.

EUGENE WATER & ELECTRIC BOARD

CONTRACTOR

ORIGINATING DEPARTMENT:

Judy Marsh
Contract Administrator

142
Dept. #

Jerry Stiltner
Signed

Simon Brody
Division Director

JERRY STILTNER
Name (Print or Type)

TEMP SOURCE, INC.
Company

Approved [Signature]
Purchasing Manager

1600 OAK STREET
Address

Date 2-23-94

EUGENE, OR 97401

Telephone No. (503) 342-5310

Tax ID No. 93-1019245

Doc. #7189-624

Page 4 of 4

Exhibit C
Page 4

Doc. #7189-1461

EUGENE WATER & ELECTRIC BOARD

Business Services Agreement

(To be executed by Purchasing Department)

JOB #210 & 6158

PURCHASE ORDER # 000699
DOCUMENT # 1461

THIS AGREEMENT is entered into this 19th day of April, 2000, by and between **EUGENE WATER & ELECTRIC BOARD**, hereinafter called EWEB, and **the Eugene Branch of OFFICE TEAM, A DIVISION OF ROBERT HALF INT.**, hereinafter called the Contractor.

WHEREAS, EWEB has need for the professional services of an independent contractor with the particular training, knowledge, and experience offered by the Contractor; and

WHEREAS, EWEB has negotiated the following agreement in Eugene, Oregon, and Contractor has agreed to deliver its services in Eugene, Oregon;

NOW THEREFORE, in consideration of a sum at the rate of \$12 per hour agreed to by the parties, to be paid to the Contractor by EWEB, the Contractor agrees to perform during the period **March 1, 2000**, through **September 30, 2000**, inclusive, the following personal and/or professional services:

SCOPE OF WORK:

Contractor shall provide temporary clerical assistance for EWEB's Customer Service and Field Services departments. Contractor's Terms and Conditions of Assignment are attached hereto as Exhibit #1, and by reference made a part of this Agreement.

In the event of a conflict between the terms and conditions of this Agreement and those of the Exhibit attached hereto, the terms and conditions of this Business Services Agreement shall control.

IT IS FURTHER UNDERSTOOD AND AGREED THAT:

1. The recitals hereinbefore stated are by reference made a part of this Agreement.
2. Contractor is engaged as an independent contractor in the performance of the work. Contractor is solely and personally liable for all labor and expenses, and any federal or state taxes or withholdings, other governmental payments, or fringe benefits.
3. Contractor and Contractor's workers will adhere to applicable professional and ethical standards and will perform all work in a manner consistent with generally accepted skill and care in the types of work undertaken.
4. Contractor shall comply with all applicable statutes and regulations of the federal government and of this state, including but not limited to Oregon Revised Statutes Chapter 279 with respect to public contracts.
5. Contractor shall comply with all applicable Workers' Compensation Acts, and shall furnish proof of coverage for its employees prior to commencing work
6. Without limiting any liabilities or any other obligations of Contractor, at the time of execution of this Agreement, Contractor will be required to furnish evidence of Comprehensive or Commercial General Liability insurance shall cover personal injury and property damage. Coverage limits shall not be less than \$1,000,000

combined single limit for each occurrence. If the coverage has a general aggregate limit, it shall not be less than \$1,000,000.

Automobile Liability insurance may be written in combination with the Comprehensive or Commercial General Liability insurance. Coverage limits shall not be less than \$1,000,000 combined single limit for each occurrence.

Certificates of insurance coverage shall be submitted to EWEB prior to commencement of said business services, and shall provide for not less than thirty (30) days notice to EWEB of the cancellation of such insurance.

7. The Contractor will forward invoices to EWEB to the attention of **Dawne Howard**, Contract Administrator, at: P.O. Box 10148, Eugene, Oregon 97440, identifying the Purchase Order No. Payment will be made within thirty (30) days of date of invoices.
8. The parties agree that a material part of this agreement is that Oregon substantive law will govern all rights, obligations and disputes arising out of this Agreement.
9. This Agreement shall not be assigned, sublet or subcontracted prior to EWEB's written consent.
10. This Agreement may not be modified or amended except by agreement in writing between the parties.
11. Either party may terminate this Agreement by giving thirty (30) days written notice to the other. In such event, Contractor will be paid for services to date of termination.

THIS AGREEMENT and any amendments to this Agreement will not be effective until authorized by EWEB.

EUGENE WATER & ELECTRIC BOARD

OFFICE TEAM, A DIVISION OF
ROBERT HALF, INT.

Dawne Howard
Dawne Howard
Contract Administrator

Kelli Jackson
Signed

J. Anderson
Division Director

KELLI JACKSON
Name (Print or Type)

Approved *E. J. Case*
Purchasing Coordinator

800 WILLAMETTE STREET
Address

Date 4/19/00

EUGENE, OR 97401

Telephone No. 541/345-9931

Tax ID No. 94-1648752



Doc. #7189-1461



Services Contract

Temporary Staffing Services

SC No. 1879

By and between
Eugene Water & Electric Board
and
Kelly Services

This Contract is entered into by and between the **Eugene Water & Electric Board**, hereinafter called EWEB, and **Kelly Services**, hereafter called Contractor.

WHEREAS, EWEB has need for the services of an independent contractor with the particular training, knowledge, and experience offered by the Contractor; and

WHEREAS, EWEB has negotiated the following agreement in Eugene, Oregon, and Contractor has agreed to deliver its services in Eugene, Oregon;

NOW THEREFORE, in consideration of a sum agreed to by the Parties, the Contractor agrees to perform the services as described in this Contract, in accordance with all requirements, terms and conditions of this contract, as set forth below:

1. Effective Date and Duration.

- a. This Contract shall become effective on the date this Contract has been signed by every party hereto and, when executed by EWEB's Purchasing/Risk Manager. Unless terminated or extended, this Contract shall expire when EWEB accepts Contractor's performance, or on June 30, 2008 whichever date occurs first. Expiration shall not extinguish or prejudice EWEB's right to enforce this Contract with respect to any breach of a Contractor warranty or any default or defect in Contractor performance that has not been cured.
- b. This Agreement may be renewed for additional period(s), in accordance with EWEB Rule 3-0850, subject to agreement by the Parties, at least thirty (30) days prior to the expiration of the initial term, on the term and price of the services hereunder. The maximum term for this Agreement shall not exceed five (5) years.

2. Statement of Work.

The statement of work (the "Work") is contained in Attachment E attached and incorporated by reference into this Contract. Contractor agrees to perform the Work in accordance with the terms and conditions of this Contract.

3. Consideration & Payments.

- a. The maximum, not-to-exceed compensation payable to Contractor under this Contract, which includes any allowable expenses, is **\$100,000**. Contractor's Fee Schedule and Rates will be attached to and included in this Contract by reference as Attachment F.
- b. Interim payments to Contractor shall be made according to the following:
Invoices shall be submitted and addressed to the appropriate and/or designated EWEB staff for the specific assignment or work performed under this Contract. All invoices must list the appropriate purchase order number.

The cost of the Work or Contractor services shall be determined by multiplying the number of Contractor hours for each Contractor employee multiplied by the applicable hourly billing rate identified in the Contract for that employee.

Contractor shall not submit invoices for, and EWEB shall not pay any amount in excess of the maximum not-to-exceed compensation stated in the Contract. If this maximum amount is increased by amendment of this Contract, the amendment must be fully effective before Contractor performs Work subject to the amendment. No payment will be made for any work performed or Deliverables, Developments or Work Products delivered before the beginning date or after the expiration date of this Contract, as it may be amended from time to time in accordance with its terms.

All invoices shall itemize and explain all expenses for which reimbursement is claimed. EWEB will have the right to review each such invoice for compliance with the requirements and any other pertinent provisions of this Contract. If Contractor uses a billing agent, responsibility for billing errors remains with Contractor.

EWEB will make payment in accordance with its regular payment schedule; Net 30 days upon receipt of a valid, undisputed invoice.

4. Price Adjustments.

Price increases may be considered by EWEB once annually. A positive means of substantiating the price increase shall accompany the request. The Purchasing Department shall determine what constitutes acceptable documentation.

Upon receipt of request, EWEB reserves the right to (1) accept the requested price increase or (2) reject the price increase and terminate the Contract.

EWEB shall be given the immediate benefit of any price decrease. Contractor shall promptly notify EWEB's Purchasing Department of the amount and effective date of each decrease. Decreases shall apply to services performed on or after the effective date of the decrease.

5. Inspection & Modification - Reimbursement for Unacceptable Work.

RESERVED

6. Deficiencies.

RESERVED

7. Deliverable Review & Approval.

RESERVED

8. Confidentiality / Non-Disclosure.

a. Confidential Information. Contractor acknowledges that it and its employees or agents may, in the course of performing its responsibilities under this Contract, be exposed to or acquire information that is confidential to EWEB or EWEB's clients. Any and all information of any form obtained by Contractor or its employees or agents in the performance of this Contract shall be deemed to be confidential information of EWEB ("Confidential Information"). Any reports or other documents or items (including software) which result from the use of the Confidential Information by Contractor shall be treated with respect to confidentiality in the same manner as the Confidential Information. Confidential Information shall be deemed not to include information that (a) is or becomes (other than by disclosure by Contractor) publicly known or is contained in a publicly available document; (b) is furnished by EWEB to others without restrictions similar to those imposed by this Contract; (c) is rightfully in Contractor's possession without the obligation of nondisclosure prior to the time of its disclosure under this Contract; or (d) is independently developed by employees or agents of Contractor who can be shown to have had no access to the Confidential Information.

b. Non-Disclosure. Contractor agrees to hold Confidential Information in strict confidence, using at least the same degree of care that Contractor uses in maintaining the confidentiality of its own confidential information, and not to copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give, or disclose Confidential Information to third parties or use Confidential Information for any purposes whatsoever other than the provision of services to EWEB hereunder, and to advise each of its employees and agents of their obligations to keep Confidential Information confidential.

- c. Unauthorized Use. Contractor shall use its best efforts to assist EWEB in identifying and preventing any unauthorized use or disclosure of any Confidential Information. Without limitation of the foregoing, Contractor shall advise EWEB immediately in the event Contractor learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms of this Contract and Contractor will at its expense cooperate with EWEB in seeking injunctive or other equitable relief in the name of EWEB or Contractor against any such person.
- d. Return of Confidential Information. Contractor agrees that, except as directed by EWEB, Contractor will not at any time during or after the term of this Contract disclose, directly or indirectly, any Confidential Information to any person, and that upon termination of this Contract or at EWEB's request, Contractor will turn over to EWEB all documents, papers, and other matter in Contractor's possession which embody Confidential Information.
- e. Injunctive Relief. Contractor acknowledges that breach of this Section 9, including disclosure of any Confidential Information, or disclosure of other information that, at law or in good conscience or equity, ought to remain confidential, will give rise to irreparable injury to EWEB inadequately compensable in damages. Accordingly, EWEB may seek and obtain injunctive relief against the breach or threatened breach of the foregoing undertakings, in addition to any other legal remedies that may be available. Contractor acknowledges and agrees that the covenants contained herein are necessary for the protection of the legitimate business interests of EWEB and are reasonable in scope and content.
- f. Ensuring Confidentiality. Contractor agrees to comply with all reasonable requests by EWEB to ensure the confidentiality and nondisclosure of the Confidential Information, including without limitation (a) obtaining nondisclosure agreements, in a form approved by EWEB, from each of Contractor's employees and agents who are performing Work, and providing copies of such agreements to EWEB, and (b) performing criminal background checks on each of Contractor's employees and agents who are performing Work, and providing a copy of the results to EWEB.

Expenses (e.g., mileage) and all costs or administrative fees associated with any required screenings, etc. will be charged to the EWEB (without application of the agreed-upon markup, if any).

9. Insurance.

Contractor shall provide certificates of insurance as described below:

- a. **Certificates of Insurance.** As evidence of the insurance coverage required by this contract, the Contractor shall furnish Certificate(s) of insurance to the EWEB Purchasing Department, before final award can be authorized. The insurance coverage required under this contract shall be obtained from acceptable insurance companies or entities. The contractor shall be financially responsible for all deductibles, self-insured retention and/or self-insurance included hereunder.
- b. **Comprehensive Commercial / General Liability.** Contractor shall obtain, at Contractor's expense, and keep in effect during the term of this contract, Comprehensive or Commercial General Liability Insurance covering bodily injury and property damage. Combined single limit per occurrence shall not be less than \$1,000,000, when applicable. Each annual aggregate limit shall not be less than \$1,000,000, when applicable.
- c. **Automobile Liability.** Contractor shall obtain, at contractor's expense, and keep in effect during the term of this contract, Automobile Liability Insurance for Contractor's full-time, non-assigned employees.. This coverage may be written in combination with the Commercial

General Liability Insurance. Combined single limit per occurrence shall not be less than \$1,000,000, or the equivalent.

- d. **Workers' Compensation.** All subject employers working under this contract are either employers that will comply with ORS 656.017 which requires them to provide Oregon workers' compensation coverage that satisfies Oregon law for all their subject workers, or employers that are exempt under ORS 656.126. [2003 c.794 §76c]
- e. **Indemnification.** Contractor shall defend, save, hold harmless, and indemnify EWEB, its officers, employees and agents from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever resulting from, arising out of, or relating to the activities of Contractor or its officers, employees, subcontractors, or agents under this Contract based on their failure to properly perform Contractor's obligations as a provider of staffing services.
- f. **Additional Insured.** The General liability insurance coverage required for performance of the contract shall include EWEB, its' divisions, officers, and employees as Additional Insured but only with respect to the Contractor's activities to be performed under this contract.
- g. **Notice of Cancellation or Change.** There shall be no cancellation or material change, without 30 days' written notice from the Contractor or its insurer(s) to EWEB, Purchasing department. Any failure to comply with the reporting provisions of this insurance, except for the potential exhaustion of aggregate limits, shall not affect the coverage(s) provided to the EWEB, its' department, officers, and employees.

10. Contact Person.

Contractor shall designate one or more person(s) responsible for Contractor's work under this Contract. Contractor shall provide EWEB the names, addresses and telephone numbers of such person(s) and shall keep this information current at all times. The representative shall be thoroughly familiar with the terms of the Contract and shall have the technical knowledge to perform the work.

11. EWEB Contacts.

Following are EWEB's contacts for this contract:

Contract Administrator: Alison Lewis, (541) 341-1875
Purchasing Analyst: Quentin Furrow, (541) 334-4617

12. Contract Documents.

This Contract consists of the following documents, hereby incorporated by reference, which are listed in descending order of precedence: this Contract less all attachments and exhibits, attached Attachment A, Attachment B, Attachment D, Attachment E, and Attachment F.

This Contract and the attached Attachments and Exhibits constitute the entire agreement between the parties. All understandings and agreements between the parties and representations by either party concerning this Contract are contained in this Contract. No waiver, consent, modification or change in the terms of this Contract shall bind either party unless in writing signed by both parties. Any written waiver, consent, modification or change shall be effective only in the specific instance and for the specific purpose given.

13. Survival.

RESERVED

14. Assurances:

SC No. 1879

Temporary Staffing Services

The undersigned attests that:

S/he represents and warrants to EWEB that S/he has the power and authority to enter into and perform this Contract and that this Contract, when executed by EWEB, shall be a valid and binding obligation of Consultant enforceable in accordance with its terms.

CONTRACTOR, BY EXECUTION OF THIS CONTRACT, HEREBY ACKNOWLEDGES THAT CONTRACTOR HAS READ THIS CONTRACT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

CONTRACTOR:

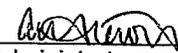
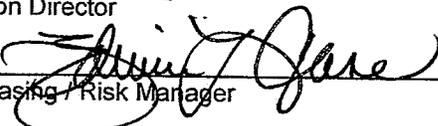
Kelly Services, Inc.
Company Name
999 W. Big Beaver Rd. Troy, Michigan 48084
Company Address
248-244-4223 248-244-4571 38-1510762
Telephone Number Fax Number FEDERAL ID NUMBER

Wm. Edward Meisenheimer Title Sr Vice President & General Mgr
Person Signing Contract (Please print or type Name)

Signature: 

EXECUTION

EWEB:


Contract Administrator 5/14/08
Date
Debra Smith
Division Director 5/27/08
Date

Purchasing / Risk Manager 5/27/08
Date

ATTACHMENT A

STANDARD TERMS & CONDITIONS FOR THE PURCHASE OF SERVICES

A.1 DEFINITIONS:

"Architect" means a person who is registered and holds a valid certificate in the practice of architecture in the State of Oregon, as provided under ORS 671.010 to 671.220, and includes without limitation the terms "architect," "licensed architect," and "registered architect." (See ORS 279C.100(1))

"Architectural, engineering and land surveying services" or "Architectural, engineering or land surveying services" means professional services that are required to be performed by an architect, engineer or land surveyor. (See ORS 279C.100(2))

"Consultant," for purposes of EWEB Rules, Division 4, means an architect, engineer, land surveyor, or provider of related services. A Consultant includes a business entity that employs Architects, Engineers, Land Surveyors, or providers of related services, or any combination of the foregoing. (See ORS 279C.115(1))

"Contract" or **"Contracts"** means the Written agreement(s), resulting from the Solicitation Document that sets forth the rights and obligations of the parties.

"Contractor" means the Person with whom EWEB enters into a Contract.

"Engineer" means a person who is registered and holds a valid certificate in the practice of engineering in the State of Oregon, as provided under ORS 672.002 to 672.325, and includes all terms listed in ORS 672.002(2). (See ORS 279C.100(3))

"Goods and services" or "Goods or services" means supplies, equipment, materials and services other than personal services designated under ORS 279A.055 and any personal property, including any tangible, intangible and intellectual property and rights and licenses in relation thereto, that EWEB or another contracting agency is authorized by law to procure. "Goods and services" or "Goods or services" includes combinations of any of the items identified in this Rule. (See ORS 279B.005(1)(b))

"Person" means a natural person capable of being legally bound, a sole proprietorship, a corporation, a partnership, a limited liability company or partnership, a limited partnership, a for-profit or nonprofit unincorporated association, a business trust, two or more persons having a joint or common economic interest, any other person with legal capacity to contract or a public body.

"Personal services" mean the services of a person or persons that are designated by the Board as personal services, and includes architectural, engineering and land surveying services, and related services, for purposes of EWEB Rules, Division 4. (See ORS 279C.100(5))

"Personal Services Contract" or "Contract for Personal Services," for purposes of EWEB Rules, Division 3, means a contract, or member of a class of contracts, other than a contract for the services of an Architect, Engineer, Land Surveyor or Provider of Related Services, and other than a contract for services not designated by the Board as personal services (see EWEB Rules, Division 6), whose primary purpose is to acquire specialized skills, knowledge and resources in the application of technical or scientific expertise, or the exercise of professional, artistic or management discretion or judgment, including, without limitation, a contract for the services of an accountant, physician or dentist, educator, information technology consultant, broadcaster, artist (including a photographer, filmmaker, painter, weaver or sculptor), or consultant (excluding an Architect, Engineer, Land Surveyor, or Provider of Related Services).

"Rule" means a Rule within the EWEB Public Contracting Rules.

"Work" means the furnishing of all materials, equipment, labor, and incidentals necessary to successfully complete any individual item or the entire Contract and successful completion of all duties and obligations imposed by the Contract.

"Working hours" means EWEB's regular business hours, which currently are Monday through Friday, 9 a.m. to 5 p.m., excluding EWEB recognized holidays.

All other terms not expressly identified above shall have the meanings as set forth in EWEB Public Contracting Rules, Division 1 - Definitions.

A.2 HEADINGS:

The section headings in this Contract are included for convenience only; they do not give full notice of any portion of the terms of this Contract.

If these Terms and Conditions are attached to a Request for Proposals (RFP) solicitation, then "ITB", whenever stated herein, shall mean "RFP".

A.3 STANDARD AND SPECIAL TERMS AND CONDITIONS; ORDER OF PRECEDENCE:

These printed Terms and Conditions are the Standard Terms and Conditions for EWEB contracts for the purchase of Services. EWEB may also provide "Special Terms and Conditions" elsewhere in the Contract which apply only to this Contract. Whenever possible, all terms and conditions are to be harmonized. In the event of a conflict between the standard and "special terms and conditions", the "special terms and conditions" take precedence, unless the standard term(s) in question is/are required by law. In the event of any other conflict, 1) the special terms and conditions, 2) these Standard Terms and Conditions, 3) the Invitation to Bid or Request for Proposal, and 4) the bid or response thereto shall be interpreted in the foregoing order of precedence. By

signing this Contract, Contractor agrees that, in the event of a conflict, all the terms and conditions of this Contract supersedes all preprinted terms and conditions on any forms used by the Contractor.

A.4 INDEPENDENT CONTRACTOR:

Any service or services to be rendered by Contractor under this Contract are those of an independent contractor. Contractor, its Subcontractors, Agents, Officers or Representatives are not officers, employee, or agents of EWEB as those terms are used in ORS 30.265. Contractor is responsible for all federal and state taxes or other payments or withholdings applicable to compensation or payments paid to Contractor under this Contract.

A.5 CONTRACTOR REPRESENTATIONS:

Contractor represents to EWEB that (1) Contractor has the power and authority to enter into and perform this Contract, (2) this Contract, when executed and delivered shall be a valid and binding obligation of Contractor, enforceable in accordance with its terms, (3) the Work under this Contract will be performed in accordance with the professional standards of skill and care ordinarily exercised by members of that profession under similar conditions and circumstances, (4) Contractor shall, at all times during the term of this Contract be duly licensed to perform the Work, and if there is no licensing requirement for the profession or work, be duly qualified and professionally competent.

A.6 SECURITY OF DOCUMENTS AND PROPERTY:

All EWEB property, materials and documents and all personal property of EWEB employees are to be left undisturbed and are not to be handled, read or otherwise used by Contractor or Contractor's employees, except to the extent required by the Contract. Contractor shall consider all documents confidential. Any disclosure of confidential information or removal of EWEB property by Contractor or Contractor's employees shall be cause for immediate contract termination. Any liability, including but not limited to, attorney fees, arising from any action or suit brought against EWEB because of Contractor's willful or negligent release of information, documents or property shall be borne by Contractor.

A.7 COMMENCEMENT OF WORK:

Contractor shall commence no work under this contract until all insurance requirements have been met and a Purchase Order or Notice to Proceed has been issued by EWEB.

A.8 NON INTERFERENCE WITH WORK SITE:

Contractor shall perform its work activities in such a manner that they will not interfere with the normal work activities of EWEB. Contractor shall not block access to any work areas, and shall maintain a safe passage for normal EWEB business activities.

A.9 NOTICE:

Except as otherwise expressly provided in this Contract, any communications between the parties hereto or notices to be given hereunder shall be given in writing by personal delivery, facsimile, or mailing the same, postage prepaid, to Contractor or EWEB at the address or number set forth on the signature page of this Contract, or to such other

addresses or numbers as either party may hereafter indicate pursuant to this Section. Any communication or notice so addressed and mailed shall be deemed to be given five (5) days after mailing. Any communication or notice delivered by facsimile shall be deemed to be given when receipt of the transmission is generated by the transmitting machine. To be effective against EWEB, such facsimile transmission shall be confirmed by telephone notice to the EWEB's Contract Administrator. Any communication or notice by personal delivery shall be deemed to be given when actually delivered.

A.10 INVOICING AND PAYMENT.

Contractor shall invoice weekly for services performed during that month. Invoices shall include itemization of all work performed during the billing period. EWEB reserves the right to withhold payment for services not performed. EWEB will make payment to Contractor for undisputed amounts in accordance with its regular payment terms: Net 30 days after acceptance of services and upon receipt of a valid invoice.

A.11 SAFETY AND HEALTH REQUIREMENTS:

Contractor warrants goods and services provided under this Contract comply with all applicable federal Occupational Safety and Health Administration (OSHA) requirements and with all applicable Oregon safety and health requirements, including those of the State Workers' Compensation Division. EWEB shall take every precaution to instruct temporary employees about and otherwise safeguard them against any possible injuries associated with chemicals or equipment as well as other potential hazards within the facility.

A.12 HAZARD COMMUNICATION:

Products which contain hazardous chemicals, as defined by Oregon Administrative Rules Chapter 437, must be labeled, tagged or marked with the following information:

- 1) Identity of the hazardous chemical(s);
- 2) Appropriate hazard warning; and
- 3) Name and address of the chemical manufacturer, importer or other responsible party.

EWEB shall keep Material Safety Data Sheets (MSDS) on file at the location where such chemicals are stored, as required by OAR 437-155-025, for the products listed above.

A.13 EWEB PAYMENT OF CONTRACTOR CLAIMS:

a. Contractor shall make payment promptly, as due, to all persons supplying Contractor labor, equipment or material for work under this Contract; pay all contributions or amounts due the Industrial Accident Fund from Contractor or any subcontractor incurred in the performance of the Contract; not permit any lien or claim to be filed or prosecuted against EWEB on account of any labor or material furnished; and pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.0167.

b. If Contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to Contractor or a subcontractor by any person in connection with this Contract as such claim becomes due, EWEB may, but is not obligated to pay such claim to the person

furnishing the labor or services and charge the amount of the payment against funds due or to become due Contractor by reason of this Contract. The payment of a claim under this section shall not relieve Contractor or Contractor's surety from any obligation with respect to any unpaid claims. ORS 279B.220.

A.14 PAYMENT FOR MEDICAL CARE:

As applicable, Contractor agrees to make payment promptly, as due, to any person, copartnership, association or corporation furnishing medical, surgical, hospital or other needed medical care to Contractor's employees. Such payment shall be made from all sums which Contractor has agreed to pay for such services and from all sums which Contractor has collected or deducted from the wage of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such services.

All subject employers working under this contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126. [2003 c.794 §76c]

A.15 PERFORMANCE:

Contractor shall perform all services required by this contract within the time specified in this contract, including extensions. All services shall be performed in highest professional manner, and in accordance with the utmost industry standards. Unless the means or methods of performing a task is specified elsewhere in this contract, Contractor shall employ methods that are generally accepted and used by the industry. Failure to meet the performance requirements of this contract shall constitute breach of contract. EWEB, by written notice to Contractor, may cancel the whole or any part of this contract:

- a. If Contractor fails to provide the services required by this contract within the time specified, or fails to perform any other provision of this contract; and
- b. If Contractor, after receipt of written notice from EWEB, fails to correct such failures within the number of days specified in the written notice.

The rights and remedies of EWEB provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

A.16 EARLY TERMINATION:

This Contract may be terminated as follows:

- a. EWEB and Contractor, by mutual written agreement, may terminate this Contract at any time.
- b. Either party may terminate this Contract for any reason on 30 days written notice to Contractor.
- c. EWEB's Right to Terminate For Cause.
EWEB may terminate this Contract, in whole or in part, immediately upon notice to Contractor, or at such later date as EWEB may establish in such notice, upon the occurrence of any of the following events:
 - (i) EWEB fails to receive funding, or appropriations, limitations or other expenditure authority at levels sufficient to pay for Contractor's Work;

- (ii) Federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the Work under this Contract is prohibited or EWEB is prohibited from paying for such Work from the planned funding source;

- (iii) Contractor no longer holds any license or certificate that is required to perform the Work

- (iv) Contractor commits any material breach or default of any covenant, warranty, obligation or agreement under this Contract, fails to perform the Work under this Contract within the time specified herein or any extension thereof, or so fails to pursue the Work as to endanger Contractor's performance under this Contract in accordance with its terms, and such breach, default or failure is not cured within 15 business days after delivery of EWEB's notice, or such longer period as EWEB may specify in such notice.

d. Contractor's Right to Terminate for Cause.

- (i) If EWEB fails to pay Contractor pursuant to the terms of this Contract, Contractor may terminate this Contract by giving notice to EWEB, and EWEB fails to cure within 15 business days after receipt of Contractor's notice, or such longer period of cure as Contractor may specify in such notice. EWEB shall pay Contractor for all work performed in accordance with the terms of the Contract prior to termination date, if Contractor is not otherwise in default.

- (ii) Contractor may terminate this Contract, for reasons other than nonpayment, if EWEB commits any material breach or default of any covenant, warranty, obligation or agreement under this Contract, fails to perform under the Contract within the times specified, or so fails to perform as to endanger Contractor's performance under this Contract, and such breach, default or failure is not cured within 15 business days after delivery of Contractor's notice, or such longer period as Contractor may specify in such notice."

A.17 PAYMENT ON EARLY TERMINATION:

Upon termination pursuant to paragraph A.16, payment shall be made as follows:

- a. If terminated under A.16a or A.16b for the convenience of EWEB, EWEB shall pay Contractor for work performed prior to the termination date if such work was performed in accordance with the Contract. EWEB shall not be liable for direct, indirect or consequential damages. Termination shall not result in a waiver of any other claim EWEB may have against Contractor.
- b. If terminated under A.16c by the Contractor due to a breach by EWEB, then EWEB shall pay the Contractor for work performed prior to the termination date if such work was performed in accordance with the Contract.
- c. If terminated under A.16c or A.16d by EWEB due to a breach by the Contractor, then EWEB shall pay the

Contractor for work performed prior to the termination date provided such work was performed in accordance with the Contract less any setoff to which EWEB is entitled.

A.18 REMEDIES:

In the event of breach of this Contract the parties shall have the following remedies:

- a. In addition to the remedies in paragraphs A.16 and A.17 for a breach by the Contractor, EWEB also shall be entitled to any other equitable and legal remedies that are available.
- b. If EWEB breaches this Contract, Contractor's remedy shall be limited to termination of the Contract and receipt of Contract payments to which Contractor is entitled.

A.19 HOURS OF LABOR:

Contractor shall pay employees, and Contractor will bill EWEB, for overtime work performed under the public contract in accordance with ORS 653.010 to 653.261 and the Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.).

A.20 RECYCLABLE PRODUCTS:

Contractor shall use recycled and recyclable products to the maximum extent economically feasible in the performance of the Contract work set forth in this document. Contractor shall specify the minimum percentage of recycled product in the goods provided under this Contract. Contractor agrees to abide by all covenants contained in ORS 279B.270, which is incorporated by reference.

A.21 TIME IS OF THE ESSENCE:

Time is of the essence in the performance of this Contract.

A.22 FORCE MAJEURE:

Unless this contract is executed to remedy an act(s), occurrence(s), or event(s) stated herein, neither Party shall be liable for delays in the execution of its obligations due to causes beyond its reasonable control including but not limited to acts of God, fires, strikes, labor disturbances, floods, epidemics, quarantine restrictions, war, insurrection or riot, acts of a civil or military authority, compliance with priority orders or preference ratings issued by the federal Government, acts of Government authorities with respect to revocation of export or re-export permits/licenses, wrecks, or unusually severe weather. The Party shall, however, make all reasonable efforts to remove or eliminate such cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligations under this Contract.

In the event of any such delay, the required date of services will be extended for a period of time equal to the period of the delay, or as short a period as is reasonably possible.

EWEB may terminate this Contract upon written notice after reasonably determining that such delay or default will likely prevent successful performance of this Contract.

A.23 LIMITATION OF LIABILITIES:

NEITHER PARTY SHALL BE LIABLE FOR (i) ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL OR SPECIAL DAMAGES UNDER THE CONTRACT OR (ii) ANY DAMAGES OF ANY SORT ARISING SOLELY FROM THE TERMINATION OF THIS CONTRACT IN ACCORDANCE WITH ITS TERMS

A.24 SUBCONTRACTS AND ASSIGNMENT:

Contractor shall not subcontract any of the work required by this Contract or assign or transfer any of its interest in this Contract, without the prior written consent of EWEB. No such written approval shall relieve Contractor of any obligations under this Contract, and any transferee or subcontractor shall be considered the agent of Contractor. Contractor shall remain liable to EWEB under the Contract as if no such transfer or subcontract had occurred.

A.25 SUCCESSORS IN INTEREST:

The provisions of this Contract shall be binding upon and inure to the benefit of the parties and their successors and approved assigns, if any.

A.26 NO THIRD PARTY BENEFICIARIES:

EWEB and Contractor are the only parties to this Contract and are the only parties entitled to enforce its terms. Nothing in this Contract gives or provides any benefit or right, whether directly, indirectly, or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Contract.

A.27 FOREIGN CONTRACTOR:

If the Contract includes services and the amount of those services exceeds \$10,000 and if Contractor is not domiciled in or registered to do business in the state of Oregon, Contractor shall promptly provide the Oregon Department of Revenue all information required by that Department relative to this Contract. EWEB may withhold final payment under this Contract until Contractor has met this requirement.

A.28 ACCESS TO RECORDS:

Contractor shall maintain fiscal records and all other records pertinent to this Contract. Records shall be maintained pursuant to generally accepted accounting standards, and other records shall be maintained to the extent necessary to clearly reflect actions taken in the provision of the products required herein. All such records shall be retained and kept accessible for at least three years following final payment. EWEB's authorized representatives shall have the right to direct access to documents, papers and records related to this Contract for the purpose of conducting audits and examinations and making copies, excerpts and transcripts, subject to confidentiality laws. EWEB shall reimburse Contractor for Contractor's cost of preparing copies.

A.29 COMPLIANCE WITH APPLICABLE LAW:

Contractor shall comply with all federal, state, and local laws applicable to the work under this Contract, and all regulations and administrative rules established pursuant to those laws.

Contractor shall maintain in effect all licenses, permits and certifications required for the performance of the work. Contractor shall notify EWEB immediately if any license,

permit, or certification required for performance of this Contract ceases to be in effect for any reason.

A.30 EWEB RESPONSIBILITIES:

EWEB is responsible for 1) providing adequate internal controls, supervision, and instructions for temporary employees, and be responsible for their conduct when they are required to handle cash, confidential or credit card information, trade secrets, valuables, or similar property and the use of any vehicle or powered mobile equipment by temporary employees in connection with an order, except for workers' compensation claims of Contractor's Temporary Employees.

A.31 WAIVER:

Waiver of any default under this Contract by EWEB shall not be deemed to be a waiver of any subsequent default or a modification of the provisions of this Contract.

A.32 GOVERNING LAW:

The provisions of this Contract shall be construed in accordance with the laws of the State of Oregon and ordinances of Lane County, Oregon. Any legal action involving any question arising under this Contract must be brought in Lane County, Oregon. If the claim must be brought in a federal forum, then it shall be brought and conducted in the United States District Court for the District of Oregon.

A.33 SEVERABILITY:

If any term or provision of this Contract is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Contract did not contain the particular term or provision held invalid.

A.34 ANTI-DISCRIMINATION:

Contractor shall not discriminate based on race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, source of income, or political affiliation in programs, activities, services, benefits or employment. Contractor shall not discriminate against minority-owned, women-owned or emerging small businesses.

A.35 EQUAL OPPORTUNITY EMPLOYER:

EWEB is an Equal Employment Opportunity and Affirmative Action employer and requires contractors and their subcontractors to follow EEO/AA practices in their performance of this Contract.

A.36 NON-APPROPRIATION CLAUSE:

If payment for work under this Contract extends into EWEB's next fiscal year, EWEB's obligation to pay for such work is subject to approval of future appropriations to fund this Contract by the EWEB Board of Commissioners. If such future appropriations are not approved, EWEB shall terminate the contract and pay Contractor for work performed in accordance with paragraph's A.17 and A18.

A.37 TAXES:

EWEB is a tax-exempt municipal corporation.
TIN #93-6001482; Tax exempt #93-880393K.

A.38 COOPERATIVE PURCHASING:

Other public agencies may utilize the results of this solicitation in accordance with ORS 279A.215 and Rule 2-0210. If utilized, EWEB assumes no liability or responsibilities for the actions of the utilizing parties, or as may pertain to the resulting contract established by and between the utilizing agency and the Contractor. The utilizing agency and the Contractor assume full responsibility for any and all agreements established between the parties.

**ATTACHMENT B
BIDDER RESIDENCY INFORMATION**

ORS 279A.120 states, "For the purposes of awarding a public contract, a contracting agency shall":

(a) Give preference to goods or services that have been manufactured or produced in this state if price, fitness, availability and quality are otherwise equal; and

(b) Add a percent increase to the bid of a nonresident bidder equal to the percent, if any, of the preference given to the bidder in the state in which the bidder resides.

"Resident bidder" means a bidder that has paid unemployment taxes or income taxes in this state during the 12 calendar months immediately preceding submission of the bid, has a business address in this state and has stated in the bid whether the bidder is a "resident bidder" under this paragraph.

"Non-resident Bidder" means a Bidder who is not a "resident Bidder" as defined above

a. CHECK ONE: Bidder is a RESIDENT Bidder NON-RESIDENT Bidder.

b. If resident Bidder, enter your Oregon business address: (physical and mailing address)

1600 Valley River Drive, Suite 220
Eugene, Oregon 97401

c. If a non-resident Bidder, enter state of residency:

d. If a non-resident Bidder, do you or your Company receive, or are you or your Company eligible for any preference in award of contracts with your state's government or with other governmental bodies in your state?

CHECK ONE: YES NO

If YES, state the preference percentage: _____%

If YES, but not a percentage of bid price, describe the preference:

If YES, state the law or regulation that allows the preference described (legal citation):

ATTACHMENT D
CERTIFICATION STATEMENT FOR INDEPENDENT CONTRACTOR
 (Contractor completes if Contractor is not a corporation)

Business Designation: Contractor is a Corporation **OR (check one & complete form):**
 Professional Corporation Partnership Limited Partnership Limited Liability Company
 Limited Liability Partnership Sole Proprietorship Other

A. CONTRACTOR IS INDEPENDENT CONTRACTOR.
 Contractor certifies he/she meets the following standards:

1. I am registered under ORS chapter 701 to provide labor or services for which such registration is required.
2. I have filed federal and state income tax returns in the name of my business or a business Schedule C as part of the personal income tax return, for the previous year, or expect to file federal and state income tax returns, for labor or services performed as an independent contractor in the previous year.
3. I will furnish the tools or equipment necessary for the contracted labor or services.
4. I have the authority to hire and fire employees who perform the labor or services.
5. I represent to the public that the labor or services are to be provided by my independently established business as four (4) or more of the following circumstances exist. **(Please check four or more of the following:)**
 - A. The labor or services are primarily carried out at a location that is separate from my residence or is primarily carried out in a specific portion of my residence, which is set aside as the location of the business.
 - B. Commercial advertising or business cards are purchased for the business, or I have a trade association membership;
 - C. Telephone listing is used for the business that is separate from the personal residence listing.
 - D. Labor or services are performed only pursuant to written contracts.
 - E. Labor or services are performed for two or more different persons within a period of one year.
 - F. I assume financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance or liability insurance relating to the labor or services to be provided.

Contractor Signature _____ Date _____

Firm Name: _____

(EWEB completes B below when Contractor completes Section A above.)

B. EWEB APPROVAL.

ORS 670.600. Independent Contractor standards. As used in various provisions of ORS chapters 316, 656, 657 and 701, an individual or business entity that performs labor or services for remuneration shall be considered to perform the labor or services as an "independent contractor" if the standards of this section are met. EWEB certifies the contracted work meets the following standards:

1. The Contractor is free from direction and control over the means and manner of providing the labor or services, subject only to the specifications of the desired results.
2. The Contractor is responsible for obtaining all assumed business registrations or professional occupation licenses required by state law or local ordinances.
3. The Contractor furnishes the tools or equipment necessary for the contracted labor or services.
4. The Contractor has the authority to hire and fire employees to perform the labor or services.
5. Payment to the Contractor is made upon completion of the performance or is made on the basis of a periodic retainer.

EWEB Signature 

Date 5/14/08

SCOPE OF WORK

EWEB Temporary Staffing Services Criteria and Process Survey

Please refer to the following procedures and requirements when a temporary job order is needed to fulfill an EWEB business need.

Process for Filling a Temporary Job Order

1. A temporary tracking form with the Manager/Supervisor signature and Human Resource signature will be sent to the Agency in advance of placement. *(Attached)*.
 - o Please note: If an HR signature is not on the form, Agency will contact an HR Representative or the requesting M/S to verify approval has been granted.
 - o Phone or email orders can be placed if HR approval is confirmed.
 - o It's not necessary to fax a form or verify approval when reopening an existing order with an active PO (in which the assigned worker may vary depending on availability and need).
2. Managers and Supervisors may conduct interviews with several suitable candidates in order to identify a candidate that will best meet the needs of the project.
3. Once a suitable candidate has been identified that meets the requirements and screening criteria outlined below they may begin an EWEB assignment.

Candidate Qualification Requirements

Candidate qualifications will vary depending on the specific needs of the assignment. Although a formal job description typically doesn't exist for temporary assignments, minimum qualifications should be identified and provided prior to placement to ensure a successful match.

Screening Process

EWEB is a public, customer-owned utility; so pre-employment screening is an essential component in identifying candidates that meet the eligibility requirements for placement in an EWEB assignment.

In order to assess suitability for job assignments temporary agencies are **required** to conduct the following screening measures for ALL temporary placements at EWEB:

1. Interview candidates to assess knowledge, skills, abilities, experience, and clarify application information to get a sense of suitability for EWEB opportunities.
2. Conduct reference checks – obtain a minimum of two professional references, preferably supervisors, to verify employment information and job performance.
3. Conduct a drug screening. EWEB is a drug-free workplace and requires all employees to successfully pass a drug screening upon placement in each temporary assignment.
4. PERS retiree status - PERS retirees may not be hired as temporaries (exceptions may be considered with Executive Management Team and Board of Directors approval.)
 - o Agency will contact EWEB if they are interviewing a candidate with several years of previous EWEB experience to verify they aren't a PERS retiree.

Depending on the nature of the assignment there may be cases in which additional screening will be required. Such instances include:

- o Driving – Conduct driving record history checks to ensure candidates meet the criteria outlined in EWEB's driving policy (attached).
 - o Customer or public contact, or access to sensitive information - Conduct criminal background check to ensure candidates meet the criteria, and follow the procedures outlined in EWEB's post-job offer criminal background check policy (attached).
 - o Physically demanding assignments – May warrant conducting a physical aptitude test through: Cascade Health Solutions (Agency to Indicate)
- An Agency employee cannot begin an EWEB assignment until the applicable screening criterion has been conducted.

- o Once the candidate has verifiably passed the screening process the manager/supervisor or HR Representative should be notified and the selected candidate can begin their EWEB assignment.

Additional EWEB Requirements, Policies and Procedures

- If a temporary worker leaves an assignment prior to "exiting" the organization, EWEB will contact Agency to collect EWEB property (badge, parking sticker, etc.).
- Temporary assignments will not exceed 1000 hours in a calendar year. EWEB should receive monthly reports from Agency to track the total number of hours worked.
 - o EWEB will monitor for 1000-hour maximum for each worker per assignment per year (unless exception is necessary and approved).
 - o Temporary workers with 1000 hours or more will not be eligible for continued placement.
- A Manager/Supervisor can end the temporary job order at any time for any reason, and will notify Agency when the services of an Agency employee are no longer needed.

Types of Placement Requests

EWEB has varied workforce needs, so depending on the nature of the business need may place job orders for the following services:

1. Payrolling: Occurs when EWEB has identified suitable temporary candidates and refers them to the Agency in order to be considered for employment. *(Billing rates are negotiated and typically reduced for payrolling placements.)*
2. Direct Placement: Occurs when EWEB has a business need and contacts the Agency to provide prospective candidates to consider. *(Billing rates are negotiated.)*
3. Temp-to-Hire: Occurs when EWEB selects an Agency employee for a temporary assignment and an opportunity presents itself to hire them as an EWEB employee. *(If an Agency temporary is selected for an EWEB position within a designated period of time some additional finder fees may apply.)*

Agency Points of Contact

- Indicate key staff that would be in contact with EWEB and describe their duties/roles

Name	Title/Role	Contact Info (Phone/Fax/email)
Jim Ordway	District Manager	(p) 541.687.9558 (f) 541.345.6246 (e) ordwaja@kellyservices.com
Sarah Hutchinson	Recruiting Supervisor	(p) 541.687.9558 (f) 541.345.6246 (e) hutchsl@kellyservices.com
e-mail general delivery		ks5012@kellyservices.com

EWEB and Agency will communicate about requests for process and procedure adjustments as needed.

EWEB Points of Contact:

- Alison Lewis: Primary point of contact for all temporary inquiries
 - Alison.lewis@eweb.eugene.or.us
- ~~Julia Hoskins~~ ^{Christina Bennett}: Back up contact for inquiries
 - ~~Julia.Hoskins@eweb.eugene.or.us~~
- Christina Bennett: Back up contact for inquiries
 - Christina.Bennett@eweb.eugene.or.us
- Laurie Muggy: Back up contact for inquiries
 - Laurie.muggy@eweb.eugene.or.us

Pricing

EWEB Temporary Staffing Services
Criteria and Process Survey

Please refer to the following procedures and requirements when a temporary job order is needed to fulfill an EWEB business need.

Contractual Pricing**PAYRATE/BILLRATE:**Payrates

Payrates are to be determined per assignment, based on requirements and skills needed for assignment.

Markup Rate

REGULAR SERVICE				PAYROLL SERVICE W/BENEFITS
Office	Light Industrial	IT/Engineering	Accounting/Finance	Office, Accounting/Finance, IT, Engineering
1.357	1.402	1.450	1.450	1.281

Bill Rate

Bill Rate = Payrate x Markup Rate

FEES/EXPENSES (Paid to Kelly):Assigning and Screening Fees:

All fees associated with drug screening, criminal background screening, physical aptitude tests and driver history checks are to be passed through to EWEB (including a \$10.00 administration cost).

Pass-through Fees

Kelly will pay our employee and bill EWEB a minimum of four (4) hours if our employee shows up for scheduled work and is sent home at EWEB's request prior to completing four (4) hours of work (not performance related).

CONVERSION:

Office Services	
1 – 520 Hours	\$1200.00
Greater than 520 Hours	No Charge
Light Industrial	
1 – 520 Hours	\$800.00
Greater than 520 Hours	No Charge
Accounting/Finance, IT and Engineering (% of annual salary)	
1 – 350 hours	15%
351 – 700 Hours	10%
701 – 1,040 Hours	5%
Greater than 1,040 Hours	No Charge



Oregon

John A. Kitzhaber, MD, Governor

Public Employees Retirement System

Headquarters:
11410 S.W. 68th Parkway, Tigard, OR
Mailing Address:
P.O. Box 23700
Tigard, OR 97281-3700
(503) 598-7377
TTY (503) 603-7766
www.oregon.gov/pers

November 18, 2011

TO: Members of the PERS Board
FROM: Joseph O'Leary, Administrator, PPLAD
SUBJECT: Eugene Water and Electric Board 9/23/11 Petition for Declaratory Ruling

THE PETITION AND PROCESS

The Eugene Water and Electric Board (EWEB) filed a petition for declaratory ruling with PERS pursuant to ORS 183.410¹ on September 26, 2011. EWEB's petition requests a ruling by PERS on the membership and creditable service for workers who were under the control and supervision of EWEB, a public employer, but whose salaries were entirely paid by a non-public agency staffing company. The only facts included in the petition pertain to an unnamed hypothetical worker who was hired and paid by a staffing company and placed at EWEB for seven months under the control and direction of EWEB. The petition also states the worker was subsequently hired by EWEB, which began paying the worker's salary and benefits.

EWEB asks PERS to conclude that the hypothetical worker described in the petition is not entitled to PERS membership or creditable service for the time served while working for the staffing company. EWEB also asks PERS to decide that the worker's membership and creditable service be counted from the date that EWEB began to pay the salary of the worker.

The statutes and administrative rules concerning petitions for declaratory rulings require the agency to respond to a petition within 60 days of receipt notifying the petitioner whether it will issue a ruling. November 24th is the 60th day for response on this petition. If the agency decides to issue a ruling, it must notify all persons named in the petition, must allow for intervention by interested parties, must provide opportunity for briefing and oral argument by interested parties, and must issue a written ruling within 60 days of the close of the record. Parties may seek judicial review of the ruling to the Court of Appeals. Alternatively, the agency may decline to issue a declaratory ruling. A declination is not subject to review by the court.

EWEB has provided a list of interested persons in its petition, consisting of 32 workers placed at EWEB by staffing companies and later hired by EWEB. The petition acknowledged that this is

¹ **183.410 Agency determination of applicability of rule or statute to petitioner; effect; judicial review.** On petition of any interested person, any agency may in its discretion issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. However, the agency may, where the ruling is adverse to the petitioner, review the ruling and alter it if requested by the petitioner. Binding rulings provided by this section are subject to review in the Court of Appeals in the manner provided in ORS 183.480 for the review of orders in contested cases. The Attorney General shall prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition. The petitioner shall have the right to submit briefs and present oral argument at any declaratory ruling proceeding held pursuant to this section.

not a complete list. All of the interested parties listed in the petition have established membership in the OPSRP Pension Program or the PERS Chapter 238 Program; some are active and others are retired. Attached to EWEB's petition are five different temporary services agency contracts, each with varying provisions.

The significance of issuing a declaratory ruling is that it becomes binding between the agency and the petitioner with respect to the facts alleged in the petition, unless it is set aside or altered by the court.

EMPLOYEE VS. INDEPENDENT CONTRACTOR STATUS

ORS 238.015 (1) provides that "no person may become a member of the system unless that person is in the service of a public employer and has completed six months' service uninterrupted by more than 30 consecutive working days during the six months' period." The statute goes on to state that "every employee of a participating employer shall become a member of the system...following the six months' period." However, not every worker in the service of a participating public employer for more than six months becomes a member of the system. ORS 238.005(7)(a) specifically excludes "persons engaged as independent contractors" from the definition of "employee" for purposes of Chapter 238. Similarly, "persons engaged as independent contractors" are specifically excluded from the definition of "eligible employees" for purposes of Chapter 238A. ORS 238A.005(4)(a).

The determination of whether a worker is a member of PERS under ORS Chapter 238 or 238A is, in part, driven by a threshold determination whether the worker is an employee or independent contractor. Employees are eligible to become members of PERS, but independent contractors are not. The determination of whether a worker is actually an independent contractor or an employee is not always clear.

If a worker alleges that he or she was an employee rather than an independent contractor, PERS asks the public employer for information relevant to this determination and relies on OAR 459-010-0030 which contains the common law rules for determining whether an individual is an employee, and the IRS 20-factor test published in IRS Ruling 87-41 that further expands upon the common law "right to control" test. Under OAR 459-010-0032, unless it is clearly established that a worker is an independent contractor, "that person shall be deemed to be an employee." The determination whether a worker is an employee is made by applying the common law and IRS tests to individualized facts in each case. Specific details of the behavior and relationship between the parties are relevant for determining whether a worker is an employee or independent contractor.

BACKGROUND

In early 2009, PERS began receiving inquiries from members about their creditable service with EWEB with respect to this issue. Since then, PERS completed eligibility determinations for five EWEB employees who claimed creditable service for the time they worked as temps for EWEB. In many of those cases, EWEB was asked by PERS to make a determination as to whether the members were employees or independent contractors, and in response EWEB communicated to PERS that the affected workers met the legal definition of employees even during the times their salaries were paid by a staffing company. As a result, PERS followed the employer's

characterization that the workers were employees of EWEB and invoiced EWEB a total of \$279,355.21. EWEB did not appeal these five invoices, which resulted from EWEB's report that the members were employees and not independent contractors.

CONCERNS REGARDING EWEB'S PETITION

1. The petition contains insufficient facts.

PERS does not have adequate information to determine the true nature of the relationship between EWEB and the worker described in its petition. In determining whether a worker is an employee or independent contractor, the common law tests or the IRS 20-factor test must be applied in each circumstance by the employer in determining whether to report the person to PERS as an eligible employee. Persons working for a staffing agency but assigned to a public employer would seem to fall outside of the standard, but EWEB's reporting has concluded otherwise and they are in the best position to judge how an individual person's interaction with them fits into the applicable laws and rules. Note that, if such persons were EWEB employees for PERS purposes, they would likely also be considered employees for other labor law purposes, raising a myriad of issues outside of the PERS context.

PERS also does not have sufficient information to determine membership and service credit for the hypothetical worker in the petition; the determination would depend on whether that person had any prior membership status with PERS, the total number of hours that the worker performed in any calendar year (for EWEB and any other participating employer), and whether any exclusions would apply to disqualify them from membership.

2. Issuing a declaratory ruling is not likely to dispose of the issue.

If the agency makes a declaratory ruling, it is unlikely that it would diminish the incidence or need for individual member determinations. If EWEB employees dispute this issue in the future, it is more likely that the facts presented by the employees will be more specific and more comprehensive than the hypothetical presented by EWEB's petition. Thus, future cases with distinguishing facts would accordingly be beyond the binding effect of the declaratory ruling.

3. Making a declaratory ruling on a hypothetical situation is inconsistent with PERS' longstanding practice to avoid speculative decisions.

A broad declaratory ruling based on minimal, insufficient facts involving one hypothetical worker would not be useful in resolving individual employment situations. Such a ruling should not be applied to other workers with different employment relationships and covered under different and specific temporary services contracts. Applying a declaratory ruling broadly is not a fair or accurate determination for each individual member. Making a broad declaratory ruling will not prevent individuals from filing disputes, appeals, and contested case hearing requests and receiving individualized eligibility determinations.

BOARD OPTIONS

1. Decline to issue a declaratory ruling.
2. Request an amended petition from EWEB with additional, specific facts sufficient to make a determination of employee or independent contractor status.
3. Issue a declaratory ruling and begin the notice and hearing process required under ORS 183.410.

In light of the concerns outlined above, staff recommends the PERS Board choose Option 1 and decline to issue a declaratory ruling.

-----Original Message-----

From: PERS MAPP [mailto:pers.mapp@state.or.us]
Sent: Thursday, April 22, 2010 1:05 PM
To: MCCLENNEN Janet
Cc: Maureen WILLIAMS
Subject: Requested Information ER 2132 (Williams)

Janet,

I am following up on our requests for information about Thomas Williams. Our legal department (PPLAD) has asked that the Eugene Water and Electric Board review OAR 459-010-0030, Determination of Employee Status, and OAR 459-010-0032, Determination of Independent Contractor Status, to evaluate if EWEB would like to adjust the reporting of Mr. Williams for the years 1985-1990. Based on this decision, if there are adjustments to how Mr. Williams was reported, an invoice may be generated.

I have been asked to provide this decision to PPLAD by May 3. Please let me know if you have any questions.

Thank you for your help,

Christy Blankenship
Retirement Counselor 2
MAPP - Legacy Eligibility Unit
phone 503-603-7723
fax 503-431-8935

CONFIDENTIALITY NOTE: All information in this email, including attachments, is approved solely for delivery to and authorized use by intended recipients. Use, dissemination, distribution, or reproduction of this message and/or any of its attachments by unintended recipients is not authorized and may be unlawful. If you are not an intended recipient of this message or an authorized assistant to an intended recipient, please notify the sender by replying to this message and then delete it from your system.

SL2

From: Joe OLEARY
To: GARY, William F; MARMADUKE, Susan
CC: RODEMAN, Steven
Date: 12/9/2011 3:25 PM
Subject: EWEB petition

Bill and Susan:

I am writing to let you know that the disposition of the EWEB petition is still under consideration by the board, and to ask whether you are willing to agree to the following additional facts for purposes of a declaratory ruling should the board decide to begin the process you've requested:

- 1) The temporary services agency paid the workers funds out of funds paid to the temporary services agency by EWEB pursuant to a contract between the temporary services agency and EWEB; and
- 2) The workers would be considered "employees" for all purposes other than PERS membership, including IRS withholding and Oregon Employment Department Unemployment Insurance taxes.

By asking if you are willing to agree to these facts for purposes of your petition, I do not intend to raise expectations that the Board will decide to pursue the declaratory ruling process. The board reserves its discretion to decline to issue a ruling regardless of your response. However knowing your answer will further inform the decision it makes.

Please let me know by Tuesday December 13 by 1:00 pm.

Regards,
Joe

Joseph A. O'Leary
Administrator
Policy, Planning & Legislative Analysis Division
Oregon Public Employees Retirement System
o: 503.431.8902
c: 503.784.1544
joe.oleary@state.or.us

CONFIDENTIALITY NOTE: All information in this email, including attachments, is approved solely for delivery to and authorized use by intended recipients. Use, dissemination, distribution, or reproduction of this message and/or any of its attachments by unintended recipients is not authorize and may be unlawful. If you are not an intended recipient of this message or an unauthorized assistant to an intended recipient, please notify the sender by replying this message and then delete it from your system.





HARRANG LONG
GARY RUDNICK P.C.
ATTORNEYS AT LAW

SUSAN MARMADUKE

Admitted in Oregon, Washington, and California
1001 SW Fifth Avenue, 16th Floor
Portland, OR 97204
susan.marmaduke@harrang.com
503.242.0000
503.241.1458 (fax)

December 13, 2011

VIA EMAIL: joe.oleary@state.or.us

Mr. Joseph A. O'Leary
Oregon PERS
11410 SW 68th Pkwy
PO Box 23700
Tigard, OR 97281

Re: EWEB Petition for Declaratory Ruling

Dear Joe:

Your email of December 9, 2011, provides an opportunity to clarify the relationships among the temporary staffing agencies, public employers such as EWEB, and the workers who are placed at public employers by staffing companies. EWEB does not agree to the stipulations you propose (quoted below) because they are inconsistent with the way staffing companies operate, with the law, and with the contracts attached to EWEB's petition for declaratory ruling.

Your first proposed stipulation is as follows:

"1) The temporary services agency paid the workers funds out of funds paid to the temporary services agency by EWEB pursuant to a contract between the temporary services agency and EWEB[.]"

This statement is incorrect. When EWEB contracts with a staffing company for services, EWEB pays the staffing company for the services provided pursuant to that contract. EWEB has no control over how the staffing company processes EWEB's payments or how, when, or out of what revenues the staffing company pays its employees. Payment of the staffing company's employees is a matter entirely between the staffing company and its employees.

Your second proposed stipulation is as follows:

"2) The workers would be considered 'employees' for all purposes other than PERS membership, including IRS withholding and Oregon Employment Department Unemployment Insurance taxes."

PORTLAND • EUGENE • SALEM
HARRANG.COM

This is also incorrect. As described in the contracts that EWEB attached to the petition for declaratory ruling, the workers are employees of the staffing company and the staffing company pays their wages. The staffing company is responsible for the taxes associated with wages paid to workers placed at EWEB. See Petition for Declaratory Ruling, Ex. A, p. 1 (the services provided under the contract "shall be performed by persons in the employ of the contractor and contractor assumes all legal responsibility as the employer of said person, including payment of wages and other compensation due said person and compliance with all applicable federal, state and other payroll tax requirements"); Ex. C, p. 1 ("Contractor is solely and personally liable for all labor and expenses and any federal and state tax withholdings [and] other governmental payments...[n]o such tax, withholding or other payment or benefit is provided by EWEB to, or on behalf of, Contractor or Contractor's Workers."); Ex. D, p. 1 ("Contractor is solely and personally liable for all labor and expenses, and any federal or state taxes or withholdings, other governmental payments, or fringe benefits."); Ex. E, p. 8 ("Contractor is responsible for all federal and state taxes or other payment or withholdings applicable to compensation or payments paid to Contractor under this Contract.") EWEB does not withhold taxes, pay unemployment insurance or any other payroll taxes on the workers. If they are considered employees, they are employees of the staffing companies with which EWEB contracts.

EWEB's contracts with various staffing companies are consistent with the tax code. See e.g. 26 USC § 3402(a)(1) ("every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary"); IRS Publication 15-A ("Under certain circumstances, a firm furnishing workers to other firms is the employer of those workers for employment tax purposes. For example, a temporary staffing service may provide the services of secretaries, nurses, and other similarly trained workers to its clients on a temporary basis. The staffing service enters into contracts with the clients under which the clients specify the services to be provided and a fee is paid to the staffing service for each individual furnished. The staffing service has the right to control and direct the worker's services for the client, including the right to discharge or reassign the worker. The staffing service hires the workers, controls the payment of their wages, provides them with unemployment insurance and other benefits, and is the employer for employment tax purposes.") (emphasis added).

The contracts are also consistent with state statutes on Oregon Unemployment Insurance tax payments. See ORS 657.015 ("employee" for purposes of state unemployment insurance is "any person . . . employed for remuneration or under any contract of hire, written or oral, express or implied, by an employer subject to this chapter in an employment subject to this chapter") and ORS 657.105(1) (remuneration includes wages and the value of noncash benefits such as housing and meals). Therefore, the entity paying the worker's wages is the employer for purposes of unemployment insurance.

Mr. Joseph A. O'Leary
December 13, 2011
Page 3

EWEB's contracts are consistent with the industry practice with respect to withholdings and unemployment insurance.

While we are not able to agree to the additional facts that you propose, we still firmly believe that a declaratory judgment is the most efficient way to address the temporary worker issues. Please let us know if there is additional information that we could provide to assist the Board in deciding whether to issue a declaratory ruling.

Sincerely,



Susan Marmaduke

SDM:vrs

cc: Client
P0258242.DOC;1