

IN THE COURT OF APPEALS OF THE STATE OF OREGON

IBEW LOCAL 89, a labor organization,  
Respondent,

v.

OREGON LEGISLATIVE ASSEMBLY,  
Respondent below,

and

KIMBERLY WALLAN and SARAH DALEY  
Petitioners.

Employment Relations Board No. RC00121

Court of Appeals No. A176604

**ORDER DETERMINING JURISDICTION**

Respondent Oregon Legislative Assembly moves<sup>1</sup> for an order determining jurisdiction and argues that the court lacks jurisdiction over this judicial review. Petitioners--an elected member of the Legislative Assembly (Kimberly Wallan) and one of Wallan's staffers (Sarah Daley)--oppose the motion and argue that the court has jurisdiction over the judicial review. For the reasons explained below, the court determines that it has jurisdiction over the judicial review.

The background facts are these. In January 2021, the labor union IBEW Local 89 filed a petition, requesting election, on behalf of a group of legislative assistants to members of the Legislative Assembly seeking to be represented by a union for collective bargaining purposes. The Legislative Assembly filed objections to that petition on various grounds. A hearing was held, and the matter was transferred to the board in April 2021. The board determined that the Legislative Assembly's objections were not valid and issued an interim order directing an election. Ultimately, the majority of the valid ballots cast were for IBEW Local 89 representation. Accordingly, the board issued a final order, dated June 8, 2021, certifying IBEW Local 89 as the group's exclusive bargaining representative.

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<sup>1</sup> Although the order is signed by the attorney for the Legislative Assembly, the text of the order is such that it purports to have been filed by the Employment Relations Board (ERB). Petitioners argue that the board lacks standing to file the motion. By way of reply, the Legislative Assembly asserts that it joins in the motion. Under the circumstances, the court treats the motion as filed by the Legislative Assembly and does not address the question whether ERB would independently have standing to request the court to determine jurisdiction in this case.

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Petitioners seek judicial review of the board's final order, asserting that the union certification was invalid. Petitioners, who were not parties to the administrative proceeding underlying this judicial review, assert that they are "adversely affected or aggrieved" by the board's final order and, in supporting affidavits, state facts to support that assertion. See ORS 183.482(2). Wallan explains that she works closely with legislative assistants in her office and that it is essential that her legislative assistants give her "absolute loyalty" and "understand and exercise confidentiality." In Wallan's view, having a labor union exclusively represent her legislative assistants on certain work-related matters undermines Wallan's control over her working relationships with her legislative assistants and "creates a conflict of interest" if "the Union takes a position on a political issue or in a political race and [her] office holds a different position on that issue." In other words, she asserts that the board's order "erodes the trust and loyalty necessary to the proper functioning" of her office. Daley, who manages the legislative assistants in Wallan's office, makes similar assertions: It is essential that she be permitted to address issues related to wages, hours, and working conditions, ensure trust and loyalty from the legislative assistants, avoid policy conflicts between Wallan and their staff, and hire and fire employees in consideration of their political views.

The Legislative Assembly, for its part, argues that petitioners' assertions do not demonstrate that they have been adversely affected or aggrieved by the final order. It argues that Wallan's assertions that the union might take a political position that differs from her office's, or that it might support her opponent in an election, are too speculative to establish that she has standing to seek judicial review. It argues that "unionization does not in and of itself change the at-will nature of the employment contract, absent an agreement between the union and the Legislative Assembly, whose representatives will naturally be sensitive" to that issue. It also points out that Daley, as a managerial employee, is excluded from the bargaining unit.

ORS 183.482(2) provides that, if nonparties to the agency proceedings underlying the judicial review petition for judicial review of an agency order, they must demonstrate how they are "adversely affected or aggrieved by the agency order." ORS 183.482(2) does not, itself, impose a standing requirement. See *Lovelace v. Board of Parole*, 183 Or App 283, 288, 51 P3d 1269 (2002). "Instead, it requires that the petition state the basis for the petitioner's standing to contest the order," and the "requirement that a petitioner must be adversely affected or aggrieved by an agency order in order to seek judicial review is found in" ORS 183.480(1). *Id.* (emphasis in original). That statute, in turn, provides that "any person adversely affected or aggrieved by an order \* \* \* is entitled to judicial review of a final order \* \* \*." A person is aggrieved if the person shows one or more of the following: (1) the person has "suffered an injury to a substantial interest resulting directly from the challenged governmental action;" (2) the person "seeks to further an interest that the legislature expressly wished to have considered;" or (3) the person "has such a personal stake in the outcome of the controversy as to assure concrete adverseness to the proceeding." *People for Ethical Treatment*, 312 Or at 101-02. Here, the court is persuaded that petitioners have shown that they have suffered an injury to a substantial interest resulting directly from the challenged governmental action.

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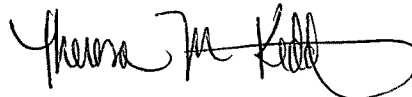
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As the Supreme Court has explained, "[w]hat is a 'substantial' interest will be, in close cases, a question of degree. A formula to fit all cases does not exist." *Ore. Newspaper Pub. v. Peterson*, 244 Or 116, 121, 415 P2d 21 (1966). In recent years, however, this court has taken a relatively broad view of what constitutes a "substantial interest" under Oregon's Administrative Procedures Act. See, e.g., *Cascadia Wildlands v. Dept. of State Lands*, 293 Or App 127, 134, 427 P3d 1091 (2018) (concluding that nonprofit environmental advocacy organizations had standing to seek judicial review of a Department of State Lands order to sell a parcel of forest to a timber company, based on the petitioners' assertions that they had "actually used and enjoyed [the land] and [had] concrete plans to return" to it). Nonetheless, a would-be petitioner's assertions must support a nonspeculative inference that their substantial interests will be injured as a result of the order at issue. See *McNichols v. Dept. of Fish and Wildlife*, 308 Or App 369, 372, 482 P3d 208 (2021).

Here, as a result of the board's order, if certain legislative assistants, including those supervised by these petitioners, want to negotiate certain matters of employment with their employer, the exclusive mechanism for doing so is now through the union. Further, unions are, themselves, a political issue, as they are capable of participating in politics. Petitioners--a political representative and her delegee--have a substantial interest in ensuring that all who work in Wallan's office share the political views that will advance Wallan's political agenda, including political views on unions themselves and a union's ability to represent certain employees on certain employment issues. The court is persuaded that, by subjecting those in Wallan's office to union representation--exclusive representation as pertains to certain matters--the board's order causes a nonspeculative injury to that substantial interest. Accordingly, the court concludes that petitioners have shown that they have suffered an injury to a substantial interest resulting directly from the board's order, for purposes of seeking judicial review.

For those reasons, the court concludes that it has jurisdiction over this judicial review. However, the parties are, of course, free to reraise the jurisdictional issues presented by the instant motion in briefing to be considered by the panel that decides the case on the merits.

The record on judicial review is due 14 days from the date of this order.



Theresa M. Kidd  
APPELLATE COMMISSIONER  
3/4/2022 8:50 AM

c: Rebekah C Millard  
Denise G Fjordbeck  
Daniel Hutzenbiler

ej

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