

IN THE COURT OF APPEALS FOR 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

**PETITIONERS' OPENING BRIEF
AND EXCERPTS OF RECORD**

Appeal from June 8, 2021 Order
Certifying Exclusive Representative

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August 31, 2022

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STATEMENT OF THE CASE

Petitioners seek relief from usurpation of legislative power by a state executive agency – a usurpation that strikes at the heart of the people of Oregon’s choice to vest the power to legislate in the Legislature. Indeed, “[t]he fundamental genius of the constitution may be found in the creation and separation of three distinct branches of government.” *Rooney v. Kulongoski (Elections Division # 13)*, 322 Or. 15, 28, 902 P.2d 1143 (1995). “[E]nforcing the separation of powers isn’t about protecting institutional prerogatives or governmental turf. It’s about respecting the people’s sovereign choice to vest the legislative power in Congress alone. And it’s about safeguarding a structure designed to protect their liberties, minority rights, fair notice, and the rule of law.” *Gundy v. United States*, 139 S.Ct. 2116, 2135, 204 L. Ed. 2d 522 (2019) (Gorsuch, J., dissenting).

The bargaining unit at issue is also improper under the statutory criteria, and because of the unique positions Petitioners occupy as a Legislator and Legislative Assistant, respectively, they have standing to bring this Petition.

1. Nature of the Action and Relief Sought

Petitioners, Oregon State Representative Kimberly Wallan and her Legislative Assistant, Sarah Daley, seek review of the Employment Relations Board’s (“ERB” or “Board”) June 8, 2021 order certifying the election of IBEW Local 89 as the exclusive representative for Legislative Assistants (“LAs”). The Court should

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reverse the Board's order for three reasons: First, the Board's certification of this union as exclusive representative violates the Oregon Constitutional guarantee of separation of powers. Second, the designated bargaining unit is not consistent with the Public Employees' Collective Bargaining Act's requirements of a community of interest. This Court has jurisdiction, and Representative Wallan and Ms. Daley have standing to challenge agency action because the Board's certification of the bargaining unit directly and adversely affects them.

The Court should reverse the Board's order certifying IBEW Local 89 as the exclusive representative for the LA bargaining unit.

2. Nature of the Judgment

The ERB certified the election of IBEW Local 89 on June 8, 2021, as the exclusive representative for a bargaining unit comprising LAs.

3. Appellate Jurisdiction

This Court has jurisdiction over this petition pursuant to ORS 183.482, and Petitioners have standing as persons who are adversely affected or aggrieved by the decision in accordance with ORS 183.482(2).

4. Timeliness of Appeal

The petition for review is timely. The Employment Relations Board ("ERB") certified IBEW Local 89 as the exclusive representative for the LAs' bargaining unit

On June 8th, 2021. Petitioners filed this action on August 5th, 2021, within the designated 60 days provided by ORS 183.482(1). This petition for review is timely.

5. Questions on Appeal

- 1) Whether the ERB violates the separation of powers guaranteed by the Oregon Constitution by forcing LAs into a bargaining unit under its own authority as an Executive agency?
- 2) Whether the designation of a bargaining unit of LAs, regardless of their political affiliations, violates the Public Employee Collective Bargaining Act's requirement of a community of interest?
- 3) Whether Petitioners are adversely affected individuals and thus have standing to challenge the creation of the bargaining unit?

6. Summary of the Argument

Article III, section 1 of the Oregon Constitution establishes the state Legislature as the source of legislative powers. The insertion of a labor union, which is a private organization into the confidential relationship between a Legislator and her LAs is bad enough. But the introduction of collective bargaining inserts the ERB, which is an executive branch agency, into the confidential relationship between Legislators and their LAs. The result is the improper delegation of essential legislative functions to an executive agency.

Because of the significant differences in political positions that underly the work of the Legislature, there can be no true community of interest within a bargaining unit into which the Board forces members of all political parties. ER-0024. The decision to combine LAs into one unit is at loggerheads with Oregon's Public Employee Collective Bargaining Act (PECBA). Finally, the Board's creation of the union as Petitioners' exclusive representative directly, adversely, and uniquely injures the Petitioners. This injury is sufficient to confer standing to challenge the Board's order under ORS 183.482(2).

7. Statement of Facts

A. Legislative Function

The Legislative Branch¹ of the State of Oregon consists of a Senate and a House of Representatives, totaling 90 elected members. The elected members are comprised of 60 representatives, who serve two-year terms, and 30 senators, who serve four-year terms. ER-096. The Legislature derives authority for its functions, including internal functions such as personnel administration, directly from the Oregon Constitution Article IV, Section 1. *Id.*

¹ The terms "Oregon Legislature" or "Legislature" are used for the "Legislative Assembly," which was the respondent below. Unless otherwise indicated "Legislature" will be used to signify both houses of the Legislature.

The Legislature's position within the three branches of government dictates its functions, which are unique from functions of state executive agencies or other public employers. In order to accomplish their duty of legislating, most Legislators utilize the services of LAs who are hired by and work directly for each Elected Legislator. Not all Legislators hire the same number of personal staff, and not all staff are classified as LAs. ER-10 ¶ 8 (“[S]ince there are 90 elected officials, there are 90 different approaches possible to staffing member offices.”)

While LAs share a common work infrastructure that includes a compensation and benefits system, LAs duties derive from the their elected member. Their elected member for whom they work directly and closely. The Legislator must have complete confidence in the LA's undivided loyalty in order to function effectively in the political setting of the Legislature, which is divided along party lines.

In 2021 the Legislature adopted personnel rules that cover all employees, and it recently adopted a four-level classification system for the subject employees as Legislative Assistant 1, 2, 3, and 4. Together, these classifications represent a myriad of tasks regularly performed by LAs. But the classifications do not change the basic nature of the relationship between Legislators and their LAs. LAs “work within direct relationships with the elected officials who maintain appointing authority and direct and control the subject employees... serve[ing] as personal staff to the elected officials.” ER-010 ¶9. LAs may act as direct agents of Legislators, performing duties

such as speaking on their Legislator’s behalf at meetings with constituents and lobbyists, preparing official position statements for the press, and interacting with constituents. Declaration of Kimberly Wallan in Support of Petition for Judicial Review (“Wallan Decl.”) ¶ 6.

B. IBEW Petitions for Election

On January 13, 2021, the International Brotherhood of Electrical Workers, Local 89 (“IBEW” or “union”) petitioned for an election for a bargaining unit comprised of various levels of LAs pursuant to ORS 243.682(2) and OAR 115-025-0031. ER-026—027.² On February 4, 2021, the Oregon Legislature filed objections to the petition, including claims that the petitioned-for employees are excluded from the coverage under PECBA, that the proposed bargaining unit was not an appropriate bargaining unit, and that the petitioned-for employees are excluded on a classification-wide basis as confidential, managerial, or supervisory employees. ER-017 - 025.

C. Proceedings Below

After a hearing, the Board held that the Legislature’s objections were not valid and issued an Interim Order Directing an Election, on April 6, 2021. ER-094 –136. On May 6, 2021, the Board’s Election Coordinator sent ballots to eligible voters.

² This was an amended petition, the first having been filed December 8, 2020. ER-027.

The tally of ballots was held on May 28, 2021. ER-138. On June 8th, 2021, the Employment Relations Board (“ERB”) certified IBEW Local 89 as the exclusive representative for a bargaining unit of LAs. ER-137—138.

Petitioners filed this Petition for judicial review August 5, 2021. (Petition for Judicial Review, Aug. 5, 2021.) The Petition named IBEW Local 89 and Oregon Employment Relations Board (ERB) as Respondents. On August 13, 2021, the ERB moved for modification of the case title, to no longer be listed as party. (Motion – Modify Case Caption, Aug. 13, 2021). The ERB specified in its motion that its participation in petitions for judicial review of its orders is limited to filing the agency record with the court. Mot. to Modify Caption 1. The court granted the ERB’s motion September 29, 2021. (Order Granting Motion to Correct Case Caption; Order to Show Cause, Sep. 29, 2021.)

Respondent, the Oregon Legislature (“the Legislature”) then filed a motion to dismiss, which it withdrew after Petitioners filed their response. *See* Motion-Discard, Oct. 27, 2021; Petitioners’ Response in Opposition to the Oregon Legislative Assembly’s Motion to Dismiss, Nov. 10, 2021; Motion-Withdraw Filing, Nov. 15, 2021). On December 9, 2021, the Legislative Assembly filed a Motion to Dismiss (Mot-Determine Jurisdiction, Dec. 9, 2021). On December 10, 2021, the Records Clerk informed Respondents that the agency record was in default since it had been more than 30 days since the Petition was filed, and directed it to be

filed within 14 days or to show cause for failure to do so. Respondents filed a show cause explaining that they deferred filing the record awaiting determination of their motion to determine jurisdiction. (Response – Order to show cause, Dec. 10, 2021). Petitioners filed their Response in Opposition January 6, 2022 (Resp. in Opp. the Employment Relations Board’s Mot. to Determine Jurisdiction, Jan. 6, 2022).

On March 4, 2022, the Appellate Commissioner denied Respondents’ motion to dismiss, finding Petitioners had standing to bring the petition, and ordered that the record to be filed within 14 days. (Order Determining Jurisdiction, Mar. 4, 2022). The ERB filed a motion for reconsideration of its motion to determine jurisdiction, asking the court to dismiss the Petitioners’ claims. (Respondent Below’s Petition for Reconsideration, Mar. 25, 2022). While granting reconsideration, this Court held that a determination of jurisdiction would be deferred to the merits department. (Order, May 18, 2022). On June 1, 2022, the date on which the record was due, the Respondent the Oregon Legislature filed a motion for an additional 28 days because of the need to accommodate the “transcriptionist’s schedule.”

The record was finally filed with the Clerk of the Court on June 28, 2022, and the Court entered the current briefing schedule.

D. Petitioners

Petitioner Kimberly Wallan is the elected representative for House District 6 in Medford, Oregon. Wallan Decl. ¶2. She employs and works closely with LAs in

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her office and delegates sensitive duties to LAs that require their discretion, confidentiality, and loyalty. Wallan Decl. ¶ 5. The actions and opinions expressed by the Assistants are assumed to be a direct reflection of Wallan's office's positions. Wallan Decl. ¶6.

Petitioner Sarah Daley is a LA to Representative Wallan, and direct manages other LA in the office, including hiring and firing employees. Declaration of Sarah Daley in Support of Petition for Judicial Review ¶¶ 2-5, 4-6 ("Daley Decl."). Her position requires her to ensure trust and loyalty from the LAs, to avoid policy conflicts between Wallan and any LA.

IBEW informed Daley that she cannot be a member of the union due to her current managerial position but would still be considered a part of the bargaining unit. Daley Decl. ¶5 She did not, however, get a vote as to whether to certify the union. *Id.* However, Ms. Daley oversees and manages employees who fall into the categories of LAs that are represented by IBEW. Daley Decl. ¶¶ 4-7.

ASSIGNMENTS OF ERROR

Petitioners raise three assignments of error. First, the Board's decision to certify the LAs' bargaining unit violates the doctrine of separation of powers under the Oregon Constitution. Second, the certification of the bargaining unit is inconsistent with PECBA's requirement of a community of interest among members of the unit because no distinction is made between LAs who may support the Union's

political positions and those who do not. Lastly, Petitioners have standing because they can demonstrate unique injury from the Board's decision to certify IBEW, and this injury reparable by the relief they seek.

1. FIRST ASSIGNMENT OF ERROR: Creation of a Legislative Assistants' Bargaining Unit, Under the ERB's Authority as an Executive Agency, violates the Oregon Constitution's Guarantee of Separation of Powers.

A. Preservation of Error

The Oregon Legislature raised the issue of separation of powers below in its December 29, 2021 Objections to the Petition for Representation without Election. ER-001-002. Because they were not parties below, this proceeding represents Petitioners' first opportunity to raise this assignment of error.

B. Standard of review

Under Article III § 1 of the Oregon Constitution, "[t]he powers of the Government shall be divided into three separate departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." Under Article IV, § 1 of the Oregon Constitution, "[t]he legislative power of the state, except for the initiative

and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.”

A violation of separation of powers is shown by one department of government unduly burdening the actions of another department in an area of responsibility or authority committed to that other department; or by one department performing the functions committed to another department. *Rooney*, 322 Or. at 28.

C. Argument

“This court is prohibited by the express language of the constitution [Article 3 § 1] from exercising a legislative or executive function and the same language prohibits the legislature from imposing a legislative or executive function upon the court,” *In re Ballot Title*, 247 Or. 488, 496, 431 P.2d 1 (1967 Or. Sp. Ct., *en banc*) (justice McAllister concurring), and it is equally true that the Oregon constitution prohibits the imposition of a legislative function upon the executive branch, or vice versa. *See* Article III § 1. It is a violation of the separation of powers for one branch to deprive a coequal branch of the ability to effectively perform its essential functions. *Rooney*, 322 Or. 15 at 28, (Either an “undue burden” on the actions of a branch, or the performance of “functions committed to” a separate branch result in a separation-of-powers violation), and see, *In re Ballot Title*, 247 Or. 488, 495 (1967) (overruling a statute under which the court would perform a non-judicial function by providing an advisory opinion).

Protecting the separation of powers is not merely “about protecting institutional prerogatives or governmental turf.” *See Gundy*, 139 S.Ct. at 2134 -2135. Rather, it is about “respecting the people’s sovereign choice” to place the legislative power in the Legislature alone.” *Id.* To blur the lines between the Executive and the Legislative powers is to destroy our democratic form of government. It risks legislation becoming nothing more than the will of the current Executive. *Id.*³

By instituting collective bargaining, the Executive department unduly burdens the actions of the Legislative department in an area of responsibility or authority committed the Legislature— task of legislating on behalf of the people of the State. *Rooney*, 322 Or. 15 at 28. Further, through mandatory collective bargaining, an Executive agency attempts to perform the functions committed to the Legislature by taking authority over necessary aspects of employment for LAs. *Id.*

³ In his dissenting opinion, Justice Gorsuch identifies the practical realities of comingling powers between the branches. For example, the result would be a severe reduction in accountability, because each Branch can blame the other for policy blunders. For example, Legislators might seek to take credit for addressing a pressing social problem by sending it to the Executive, while at the same time blaming the Executive for the problems that attend whatever measures initiated. *See id.* “In turn, the [E]xecutive might point to [the Legislature] as the source of the problem. These opportunities for finger-pointing might prove temptingly advantageous for the politicians involved, but they would also threaten to “ ‘disguise ... responsibility for ... the decisions.’ ”” *Gundy*, 139 S.Ct. at 2134 -35

1. The Executive Unduly Burdens the Legislative through Mandatory Collective Bargaining because of the Special Relationship Legislators and LAs.

Subjecting LAs to collective bargaining unduly burdens the Legislature itself by giving the ERB direct authority over specific, essential terms of employment LAs. As is demonstrated by the numerous tasks delegated to LAs on a regular basis, LAs are an integral part of Legislators being able to accomplish their Constitutionally delegated duty of Legislating.⁴

The ERB is an executive Agency: it's three-member board is appointed by the Governor. The creation of LAs bargaining unit under the direct review of an Executive Agency, burdens Legislators' control over LAs – staff that are essential to the legislative function. Further, it makes the Legislature's use of specific employment options *subject to* the oversight and control of an Executive agency. An Executive agency – will now have final oversight of negotiation and arbitration of wages, hours and working conditions for LAs – staff upon which Legislators rely to perform their constitutional function of legislating. *See* Wallan Decl. ¶¶ 6-8. The Board will arbitrate stalemates in negotiating wages, hours and working conditions, among other decisions. *See* ORS 243.650—243.806. The Board will make determinations of whether the applicable Statutes and contract have been honored,

⁴ *See infra* at 23-30.

and whether the Legislature has committed unfair labor practices on matters that directly affect the making of law and policy. ORS 243.672. The Board will, in essence, control aspects of the working relationship between Legislators and staffers. This is not a mere inconvenience for Legislators – it makes it impossible for the Legislature to perform its essential function, which is to make laws.⁵

Oregon Courts have defined the difference between a mere intersection of roles of government and a true violation of the Separation of powers. *Rooney*, 322 Or. at 28. In *Rooney*, there was no undue burden on the Legislative Branch when a court reviewed a ballot title since review of a ballot title is not a function committed to the Legislative Branch, but rather to the Judicial Branch. *Id.* (*but see, In re Ballot Title*, 247 Or. 488 (1967) – an *advisory* opinion on the validity of a ballot title *would* violate the separation of powers since there is no actual adjudication.) In *State ex rel. Dewberry v. Kitzhaber*, 259 Or.App. 389, 313 P.3d 1135 (Or. Ap. 2013), the legislature’s statutory delegation of authority to the Governor to cooperate and negotiate with Indian tribes in Oregon regarding casinos was not an unconstitutional

⁵ *Rooney*, at 1151-52. An “essential function” is the “irreducible constitutional task” of the Branch of government. The Oregon Constitution designates each Branch’s essential functions. Article IV, § 1 of the Oregon Constitution defines the “irreducible constitutional task” of the Legislature: “[t]he legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives” (emphasis added). Thus, the task of the Legislature is to legislate, meaning to make or enact laws (Merriam Webster, <https://www.merriam-webster.com/dictionary/legislate>).

abdication of its legislative function since negotiating is not an inherently legislative task. Similarly in *Cascadia Wildlands v. Oregon Department of State Lands*, 293 Or.App. 127, 427 P.3d 1091 (Or. Ap. 2018) there was no separation of powers violation in statute that restricted state land board's ability to sell land, because it is within the Legislature's function to designate the purpose and functions of the land use board in the first place. This restriction placed no burden to land board's core function. In other words, the statute was direction to the board in how to use its authority, not a usurpation of that authority by the legislature.

While these cases involve the normal intersection of governmental branches each performing their designated functions, creation of the LAs' bargaining unit goes much farther. The Board oversees and arbitrates the negotiation of wages hours and working conditions for LAs. Deprivation of the ability to control, oversee, and establish working conditions for staff is deprivation of an essential tool for Legislators to effectively and efficiently carry out their duty to legislate. Further, the close, essential relationship between the Legislator and her LAs cannot be delegated to the Executive Branch, and the participation of the Executive Branch destroys that relationship, thereby compromising the legislative function. *See infra* 24-30.

Further, the Oregon Legislature nowhere delegated authority to the ERB to collectively bargain for LAs. Rather, the Board reasoned that if the Legislature had intended LAs *not* to be part of the general definition of "public employees" the

Legislature could have said so. ER-119 –121. But the ERB’s authority is prescriptive – unless specifically delegated by the Legislature, the Board does *not* have authority. And as an Executive Agency, the Board cannot usurp for itself functions of government that have *not* been delegated to it by the Legislature, and which interfere with the Legislative function. Further, even had the Legislature itself specifically authorized the creation of this bargaining unit (which it did not), the Separation of Powers issue would remain because of the essential nature of the functions of LAs to the Legislative process –whether or not that was an outcome the Legislature desired. ER-020. *See Rooney*, 322 Or. 28.

Indeed, within a different context, collective bargaining might not unduly burden an essential governmental function. This was held to be true for counselors assigned to juvenile court judges in *Circuit Court v. AFSCME*, 295 Or 542, 550, 669 P2d 314 (OR Sp. Ct. 1983) (ERB is not performing a judicial function when it compels the juvenile court to bargain collectively with its counselors). For example, in discussing the “irreducible constitutional task” of the judiciary, the Oregon Supreme Court determined that the judiciary’s task is *adjudication*. *Id.* The Court went on to analyze whether subjecting certain *judicial* staff to the PECBA would interfere with this function. Since the judicial branch retained its ability to control the processes of adjudication, resolve cases, and to make its own personnel decisions, there was no interference with this essential function. *Id.* at 548-9

(“[G]eneral institutional inconvenience is not enough to render legislation constitutionally defective. Only an outright hindrance of a court’s ability to adjudicate a case ... or the substantial destruction of the exercise of a power essential to the adjudicatory function, ... will prompt an article VII, section 1 violation). *Id.* at 551.

But LAs are situated very differently than juvenile court counselors. LAs do not work for the Legislature as a whole, as do certain nonpartisan staff positions such as the office of Legislative Counsel, or the Legislative Administrator (the bargaining unit excludes “supervisory, managerial, confidential, and caucus employees.” ER-135). Rather, LAs are the employees who support elected officials.⁶ Each Legislator is individually responsible for hiring their LAs, designating their duties and assignments, and overseeing their work. A close relationship of trust and loyalty necessary to the function of Legislators’ offices. ER-113-114; Wallan Decl. ¶¶ 5,8 (It is essential that Rep. Wallan’s LAs give her “absolute loyalty” and “understand and exercise confidentiality.”) For example, LAs read and respond to Legislators’ email. ER-041 LAs interact with constituents on behalf of their Legislator, and

⁶ While theoretically an individual Legislator could legislate without using LAs or staff, the reality is that LAs become essential at various times in order to effectively legislate. Wallan Decl. ¶6; ER-009; ER-042. For example, Legislators receive hundreds of emails. *Id.* The number of LAs varies depending on the Legislator’s workload, whether the Legislature is in active session, among other factors. ER-009 – 010.

perform a host of other duties. ER-077-079; ER-101 – 105; *and see* Wallan Decl. ¶6.

Whether a Legislator chooses to hire any LAs (which most do), the introduction of collective bargaining makes it more difficult and burdensome to do so, and destroys certain essential aspects of the role of LAs.⁷ Thus, the Executive effectively deprives the Legislature of the means to accomplish their constitutionally mandated task of legislating. This is an “undue burden” on the Legislature. *See Rooney*, 322 Or. at 28.

2. Mandatory Collective Bargaining for LAs Is Comparable to Mandatory Collective Bargaining for State Bar Employees: Both Damage an Essential Function of a Separate Branch of Government.

A Washington State Supreme Court case provides an excellent illustration of the separation of powers principle in the context of collective bargaining, *Washington State Bar Ass'n v. State*, 125 Wash.2d 901, 890 P.2d 1047 (Sp. Ct. WA 1995). In 1994, the Washington Legislator passed a statute that made the State Bar Association’s employees subject to collective bargaining, whether or not the Bar’s Board of Governors approved the decision. This statute was in direct conflict with the Washington Supreme Court’s rule of court, which gave discretion for collective bargaining to the Board of Governors. *State Bar Ass'n*. 125 Wash.2d 905. The

⁷ For example, it compromises confidentiality, ER-039. *See supra* at 16, 24 *and see infra* at 35.

Washington Supreme Court ruled that this action violated the separation of powers guaranteed by the Washington Constitution. *Id.* at 906. The court reasoned that control of the State Bar was necessary to the judicial branch's essential function, and the statute passed by the Legislature created a direct conflict with the rule of court giving the collective bargaining decision to the Board of Governors. The Legislature could not overreach to place a mandate on the Bar's use of collective bargaining. *Washington State Bar Ass'n*, 125 Wash.2d at 909-10.

Similarly, control of LAs is necessary to the Legislative branch's essential function, and the creation of collective bargaining by the ERB compromises Legislators' control. The ERB has given itself control over collective bargaining for this bargaining unit, to the detriment of the Legislature.

3. Mandatory Collective Bargaining for LAs Destroys Legislators' Ability to Rely on LAs when Union Political Positions Conflict with Legislators' Positions.

Legislators take political positions in support or opposition of various political issues or causes. LAs cannot effectively serve their Legislators unless they are loyal to the Legislator's positions on political questions. Wallan Decl. ¶¶6-8, ER-022. Being forced into a bargaining unit represented by IBEW, however puts LAs' loyalty into question. For example, if IBEW negotiates for higher wages or less-hours, and if a Legislator's position is that the state government should decrease expenditures and embrace fiscal responsibility, including, for example, freezing wages – these

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positions will be in direct conflict. Er-043; 046. The LA is caught between her exclusive representative for collective bargaining and the essential policy decisions made by her Legislator.

Thus, the union creates an inherent tension in Legislator-LA relations because IBEW takes political positions that may differ from Legislators. *See* ER-22; ER-114-115. By way of example, IBEW endorses candidates for local office, including candidates for Oregon Legislative races. *See* <https://nwlaborpress.org/2022/04/a-union-guide-to-oregons-may-2022-primary/> (for example, IBEW's has endorsed the following: Chelsea King for Senate District 13 (Wilsonville); Ken Helm for House District 27 (Beaverton); Lisa Reynolds for House District 34 (Beaverton/Bethany); Neelam Gupta House District 38 (Lake Oswego); Annessa Hartman for House District 40 (Oregon City); and Lisa Davidson for House District 51 (Clackamas County), among other endorsements).⁸

On representational matters, as the exclusive representative, IBEW is entitled to treat its political positions as the positions of those it represents – including every LA in the bargaining unit. This could easily become a direct conflict of interest for

⁸ Additional examples of IBEW participation in politics include the following publicly available information: IBEW Endorses Joe Biden for President, http://www.ibew.org/media-center/Articles/20Daily/2002/200205_IBEW-Endorses-Joe-Biden-for-President, February 5, 2020 (last visited August 30, 2022); President Biden Addresses the IBEW, available at <https://ibew89.com/president-biden-addresses-the-ibew/>, IBEW 89's website (last visited August 30, 2022).

a Legislative Assistant 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.” Wallan Decl. ¶5. As demonstrated by IBEW’s political endorsements, this is not a speculative problem. The forced representation creates an inherent erosion in the trust and loyalty necessary to the proper functioning of Legislators’ offices. *Id.* at ¶¶5-8. It has been said: “You cannot serve two masters.”

Ms. Daley provides practical examples of the conflict. She is deemed a “managerial employee,” and her job involves a close working relationship with other LAs. She relies on her ability to create these relationships in order to carry out the numerous duties and obligations essential to a Legislator. Daley Decl. at ¶¶7-8. Since non-managerial employees will now be in a bargaining unit represented by IBEW, IBEW, with all the political baggage it represents, has been inserted between Ms. Daley and the LAs she oversees. Whether or not an LA decides to join IBEW as a member, its existence as the exclusive representative destroys the basis for the close working relationship. The union’s decisions impact the entire bargaining unit, whether or not the LA is a member of the union.

Further, the policies of the union itself as well as the Collective Bargaining Agreement (CBA) negotiated by the union and the Legislature, will impact Ms. Daley directly in the performance of her duties. For example, the purpose of unionization is to impose uniform conditions on issues such as wages, hours, and

working conditions, the very same issues over which Ms. Daley would otherwise have much more oversight and control.

Further, because public sector unions represent governmental employees, they differ significantly from private-sector unions. *See Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S.Ct. 2448, 2480, 201 L. Ed. 2d 924 (2018). This difference has been recognized by the Supreme Court, which characterized collective bargaining with a government employer as involving “inherently ‘political’” speech. *See Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 226-27, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) (“decisionmaking by a public employer is above all a political process” driven more by policy concerns than economic ones); *Janus*, 138 S.Ct. at 2480. Thus, for a public employer, such as the Legislature, to even decide the terms on which to negotiate is a matter of political speech. *Id.* Thus, a union negotiating with a public employer is necessarily engaged in political speech. *Id.* Indeed, *Janus* points out that it is conceptually difficult – if not impossible – to distinguish “in public-sector cases between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends.” *Janus*, 138 S.Ct. at 2480.

By forcing LAs into a bargaining unit represented by a union that is inherently political – and not necessarily on the same side of politics as are the Legislators they serve – the working conditions essential for LAs to effectively assist Legislators are

destroyed. This makes it impossible for the Legislature to perform its essential function of Legislating.

D. Conclusion

An Executive Branch agency, such as the ERB, cannot unilaterally create a bargaining unit and certify a private party representative for that unit comprised of employees essential to the Legislative Function. The ERB's attempt to do so must be rejected.

2. SECOND ASSIGNMENT OF ERROR: The Legislative Assistants' Bargaining Unit Fails to Meet PECBA's Requirements Because it Lacks a Community of Interest.

A. Preservation of Error

The Legislature raised the community of interest objection below. ER-017, 024, 064, 085-086. The Board addressed the community of interest, among other factors, in certifying IBEW as the representative for the LAs' Bargaining Unit. ER-124 – 129.

B. Standard of review

Board decisions are reviewed for whether the Board has correctly identified the applicable legal principles, and whether the Board has correctly applied substantial evidence and substantial reason. *International Longshore and Warehouse Union v. Port of Portland*, 279 Or.App. 146, 379 P.3d 1167 (2016)

(review denied 360 Or. 422); *Portland Fire Fighters' Ass'n v. City of Portland*, 267 Or.App. 491, 341 P.3d 770 (2014).

The ERB must “consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees.” ORS 243.682(1)(a). *Oregon AFSCME Council 75 v. Oregon Judicial Department – Yamhill County*, 304 Or. App. 794, 813, 469 P.3d 812 (2020).

C. Argument

An appropriate bargaining unit is determined by the “community of interest” doctrine. *Yamhill*, 304 Or. App. at 813 (the ERB could not reasonably conclude that a proposed collective bargaining unit of county circuit court employees shared a distinct community of interest). This doctrine groups together employees based on the “mutuality” of their interests in “wages, hours, and other conditions of employment.” *Id.* For both private and public sector collective bargaining, unit determination is generally regarded as being “of fundamental importance,” because that determination is “both a prerequisite to negotiations and a vital factor in their structure and outcome.” *Id.* at 814.

When determining whether a unit is appropriate for collective bargaining, a court must “consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, Petitioners’ Opening Brief - 31

and the desires of the employees.” ORS 243.682(1)(a). That the petitioned-for employees share a community of interest with each other is a threshold requirement for an appropriate bargaining unit. *See, e.g., OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001).

Public employees subject to PECBA have been traditionally limited to executive governmental employers, and more recently to specific judicial branch employees. There is a good reason for this. The Oregon Legislature includes 90 elected officials, and there is no one “administrative head” analogous to a Chief Justice in the judicial branch or a director of the Department of Administrative Services as there is for executive Branch employers.⁹ This raises numerous practical problems. *See* ER-067 – 068 describing LAs as working at “cross-purposes” because of the political agenda and interests unique to the districts their elected official serves.

⁹ The Legislature created the Legislative Administration Committee (LAC), which acts for the Legislature. It, in turn, appoints a Legislative Administrator authorized to perform administrative service functions for the Legislature, including personnel administration. The Administrator serves at the direction of the LAC. ER-003, ER-083-084. This does not, however solve the problem of a community of interest as the topics of collective bargaining are broader than the merely “administrative” authority granted to the LAC.

1. The necessarily political nature of the Legislature destroys the basis for a consistent community of interest between Legislative Assistants.

The Oregon Legislature is itself a political body. Individual Senators and Representatives are elected along party lines. This creates inherent differences in the interests of the individual Legislators, and their choice of staff. The ERB failed to address or resolve this fundamental feature of LAs' interests. In fact, the real and important differences in political parties make it impossible for a bargaining unit that lumps members of all political parties into the same unit to include the same community of interest. The ERB did not adequately explain how it evaluated the shared and distinct interests of employees in the proposed unit because it did not even discuss the various political interests that can, and do, control Legislative priorities – political interests that union exclusive representatives will take positions and petition the government for (including during bargaining). *See supra* at 27-29.

Further, a “community of interest” encompasses, in addition to wages, hours, and working conditions, “similarity of duties, skills, benefits, interchange or transfer of employees, promotional ladders, common supervision, etc.” *Yamhill*, 304 Or. App. at 815 citing *AFSCME v. Douglas County*, 26 PECBR 358, 388 (2015) (citing former ERB rule). Each of these factors is, and needs to be, within the control of each individual Legislator's office. Whether to increase duties; whether to promote; whether to supervise and to what extent, are all decisions that are made at the level of the individual Legislator – and this is necessary because each of these decisions

may have a direct impact on the success or failure of a legislative effort. Wallan Decl. ¶7. Legislator A may have the same incentives and promotion schedule as Legislator B, but these may be different from the approach taken by Legislator C. Having the right people for the right job is essential.¹⁰

2. The proposed bargaining unit excludes Legislative Assistants who ought to come within the community of interest.

The ERB must also consider the interests of employees who will be excluded from the bargaining unit. *Yamhill*, 304 Or. App. at 835. When, as here, the proposed bargaining unit excludes other employees of the same employer, the community of interest factor subsumes two questions: (1) whether the employees in the proposed unit have a “shared” community of interest with each other; and (2) whether their shared community of interest is sufficiently “distinct” from the interests of the excluded employees to warrant the proposed separate bargaining unit. *E.g.*, *IBEW v. Eugene Water & Electric Board*, 23 PECBR 739, 765 (2010) (assessing whether shared interests of employees in proposed unit were “substantially different” from, and therefore distinct from, interests of employees excluded from unit); *AFSCME v.*

¹⁰ Historically, PECBA only contemplated the Oregon Department of Administrative Services (“DAS”) as representing “all state agencies” under what is now subsection (1) of ORS 243.696. Nor does the creation of the Legislative Administration Committee (ER-084 n. 45-46) change this analysis because while certain aspects of the employment relationship may be centralized, individual relationships remain the heart of the working relationship.

Washington County, 20 PECBR 745, 755-56 (2004) (similar); *Yamhill*, 304 Or. App. 794, 469 P.3d 812 (2020).

Petitioner Daley is a Legislative Assistant who – apparently – has been excluded from the bargaining unit representing the interests of LAs. Daley Decl. ¶ 5. Yet, her community of interest with other LAs is as important as is the interest of LAs within the unit but working for Legislators of different political parties. ER-024.

It might, for example, make good sense to create a bargaining unit, or several units, for the staff that provide building maintenance for the Capitol. For instance, groundskeepers might have similar interests, or janitors might have shared interests. But LAs are fundamentally different from other types of employees both because of the political nature of their positions, and because of the unique positions of agency, confidentiality and trust that they assume. *See supra* at 15, 24.

3. The identified bargaining unit lacks a natural representative, leading to problems with all aspects of collective bargaining.

As a practical matter, it remains unclear who, within the Legislature, has proper authority to bargain on behalf of the Legislature. While the Legislative Administrator performs administrative service functions for the Legislature, this does not mean the Administrator is positioned to represent the interests of all Legislators. Each legislator will have priorities for bargaining that may or may not be represented by the Administrator.

LAs act in a confidential capacity as defined by ORS 243.650(6) in many assigned roles. For example, they may formulate, determine and effectuate elected officials' policies –whether those policies affect legislation or the other LAs themselves.¹¹ ER-005, ER-090. These confidential employees would, in practicality, develop and administer the elected officials' collective bargaining policies in addition to all other policies of the elected official. If each Legislator chose to designate only one of their legislative employees to handle these confidential issues, then at least 90 employees who would otherwise be within the bargaining unit would be considered confidential employees under ORS 243.650(6). ER-006 (“If each elected official chose to designate only one of their legislative employees to handle these confidential issues, then at least 90 of the subject employees would be considered confidential employees under ORS 243.650(6)”).

Looking to the implementation of a CBA, it is unclear against whom a grievance would be brought on behalf of a Legislative Assistant. Would IBEW file a grievance on behalf of a Legislative Assistant against her elected official, or would the grievance be against the Legislature at large? Furthermore, final resolution of disputes whether against the elected official or the Legislature at large will be

¹¹ The Board identifies the “area of collective bargaining” as an essential component (ER-129), however, in the context of an LA, almost any topic could become relevant to collective bargaining.

resolved by the ERB – an agency whose members are appointed by the Governor – and which is therefore an Executive agency. *See supra* at 17-30.

It is further unclear who a Legislative Assistant would name should she wish to bring an Unfair Labor Practice complaint. ER-021-022; ER-035. Would the elected official be the responsible party, or should the Legislature as a whole be involved in the process? Since collective bargaining is done wholesale on behalf of all LAs within the unit, and individual Legislators do not control the bargained-for benefits, it would seem only just to enforce any violation of the CBA against the Legislature as a whole.¹² But if the Legislature as whole is liable for unfair labor practice committed by its members, elected officials become reduced to mere agents of the Legislature. But the elected officials who serve in the Legislature are not agents of the Legislature, nor are they employed by the Legislature: they *are* the Legislature.

D. Conclusion

The ERB erred when it concluded that certain LAs, but not others, share a community of interest as a bargaining unit, while simultaneously failing to consider

¹² If individual members can be individually liable for violations of PECBA or the CBA, then it is only fair to allow individual members to participate in bargaining on their own behalf.

the impact of political constraints on the interests of each elected official and their LAs.

3. THIRD ASSIGNMENT OF ERROR: the Board’s certification of the Legislative Assistants bargaining unit directly, adversely and uniquely affects Rep. Wallan and Ms. Daley, giving them standing to challenge the agency action under ORS 183.482.

A. Preservation of Error

Ms. Wallan and Ms. Daley assert their own, individual interests, not those of the Legislature as a body.¹³ Respondents raised the issue of whether petitioners have standing under ORS 183.482 by motion. *See* Mot. to Determine Jurisdiction, Dec. 9, 2021. The Appellate Commissioner held Petitioners have standing (Ord. Determining Jurisdiction, Mar. 4, 2022), holding that “as a result of the board’s order, if certain Legislative Assistantss, including those supervised by these petitioners, want to negotiate certain matter of employment with their employer, the exclusive mechanism for doing so is now through the union.” *Id.* Recognizing the substantial interest an elected representative and her delegee have in ensuring all who work in her office share the political view that will advance her agenda, the board’s order “causes a nonspeculative injury to that substantial interest.” *Id.*

¹³ The Oregon Legislature was itself the Respondent below, of which Ms. Wallan is a member.

Respondents moved for reconsideration, and the Court specifically asked the parties to brief the following questions as relevant to jurisdiction:

- (a) Are the injuries asserted by petitioners individual injuries or institutional injuries? Why?
- (b) If the injuries are institutional harms, have those harms “adversely affected or aggrieved” the petitioners within the meaning of ORS 183.480(1)?
- (c) How, if at all, would resolution by this court of the claims that petitioners wish to raise on judicial review redress the identified injuries alleged by petitioners?

B. Standard of review

Under ORS 183.400(1), “[t]he validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases.” Thus, standing to challenge a rule is conferred on “any person” adversely affected. *Kellas v. Dep’t of Corrections*, 341 Or 471, 145 P.3d 139 (Or. Sp. Ct. 2006). Adverse effect can be shown in three ways: (1) petitioners suffer an injury to a substantial interest resulting directly from the challenged governmental action; (2) petitioners seek to further an interest that the legislature expressly wished to have considered; and (3) petitioners have a personal stake in the outcome of the controversy sufficient to assure concrete adverseness to the proceeding. *Cascadia Wildlands v. Oregon Dept. of State*, 293 Or App 127, 131, 427 P3d 1091 (2018), citing to *People for Ethical Treatment v. Inst. Animal Care*, 312 Or 95, 101-102, 817 P2d 1299 (1991).

C. Argument

Petitioners have standing because they have a personal stake in the outcome of this litigation in at least two ways. *People for Ethical Treatment of Animals v. Institutional Animal Care and Use Committee of University of Oregon*, 312 Or. 95, 101-102 (1991) (“*PETA*”).

First, both Petitioners have demonstrated a substantial, personal interest that will be injured absent review of this decision since their ability to do their jobs as a Legislator and LA, respectively, will be directly impacted. *See* Daley Decl. ¶¶ 2-8; Wallan Decl. ¶¶ 2-8, ER-022—023. Second, Petitioners demonstrate that the Legislative function itself is endangered, which is a violation of the separation of powers guaranteed by the Oregon Constitution. Or Const Art. III, § 1. Such interests are exactly the type that an “adversely affected” or “aggrieved” person would raise in a challenge to an agency action.

1. The injuries asserted by petitioners are individual injuries because petitioners allege harms unique to themselves, not merely harm to the Legislature generally. ¹⁴

An institutional injury is one that affects all members of a given body equally, and toward which an individual member cannot identify a unique harm that would give her standing other than what would be suffered by the body generally. *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 576 US 787, 801-802, 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015); *Raines v. Byrd*, 521 US 811, 829-30, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997).

Here, while Petitioners identify harm that will certainly affect many legislators, they identify specific harms that are individual to their own circumstances. Wallan Decl. at ¶8 (noting the erosion of trust and loyalty, and the loss of independence of the Legislative branch); Daley Decl. ¶ 8 (noting that wages, hours and working conditions become subjects for bargaining, outside of what can be determined –or even discussed –by her office, and the potential for conflicts of interest.) For example, Rep. Wallan does not assert injuries on behalf of the

¹⁴ Oregon Courts have not addressed the issue of institutional standing as opposed to individual standing within the context of Oregon’s constitutional and statutory requirements for standing, as have federal courts under the federal constitution. Thus, the concepts of “institutional standing” or “individual standing” are most relevant in the context of federal constitutional claims. To the extent such a discussion has relevance on a standing determination under ORS 183.482(2), it is at most by analogy to the extent the interpretation of federal standing requirements shed light on Oregon’s constitutional requirements.

Legislature, rather she asserts the injuries done to her as an individual, an elected official, and as a member of the legislature. In the negotiating the collective bargaining agreement, there is no guarantee that Representative Wallan's concerns will be protected by whomever the Legislature chooses to negotiate with the Union. Yet she will be subject to the terms negotiated.

Wallan's injury is distinguishable from the injury asserted by legislators in *Kerr v. Hickenlooper*, 824 F3d 1207 (10th Cir 2016), in which the Tenth Circuit considered whether several Colorado legislators, had standing to challenge a revenue restriction. There, the legislators did not represent the legislature as a whole, and failed to allege an injury other than the alleged loss of legislative power. Here, Petitioners' position is more analogous to that faced by the leadership of the Idaho legislature in *Bedke v. Ellsworth*, 168 Idaho 83, 92, 94, 480 P.3d 121 (Sp. Ct. Idaho 2021), when they brought a declaratory relief action to evict the State Treasurer from her office space in the capitol building. The Idaho Supreme Court held that presiding officers had power under the statute to allocate the space. They therefor alleged a concrete injury, and in fact, are the only aggrieved parties who could bring suit under the applicable statute. ("If the Speaker and the Pro Tem have not been aggrieved, no one has.")

To the extent Petitioners assert the violation of the Oregon Constitution's Separation of Powers, they assert this injury not on behalf of the entire Legislature,

but merely on their own behalf. They do not have the authority to urge these injuries on behalf of the Legislature generally. (It should, however, be noted that these very concerns *were* raised by the Legislature itself below. ER-001-002.) That being the case, they nonetheless establish a personal stake in the case that is unique and that is redressable by the relief they seek because Wallan’s office is impacted directly. The union affects Wallan “because it creates a conflict of interest for [her] Legislative Assistants 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.” Wallan. Decl. ¶7

2. To the extent petitioners assert injuries that may also be institutional harms, petitioners remain individually adversely affected and aggrieved the within the meaning of ORS 183.480(1).

a. ORS 183.482 provides for individuals who were not parties below to challenge agency actions as “adversely affected individuals”

ORS 183.310(8) defines a person as “any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character other than an agency.” Petitioners are individuals, residents of Oregon and citizens of the United States, and on its face are subject to the and thus has standing under ORS 183.400(1). Under that same statute, this Court has jurisdiction to determine the validity of the challenged rule for constitutionality, among other things.

b. “Adverse effect” to petitioners’ direct control of Legislative Assistants, including their wages, hours and working conditions, is a substantial interest and a personal interest for Petitioners.

In *Friends of the Columbia Gorge v. Energy Facility Siting Council*, 367 Or. 258, 477 P.3d 1191 (2020) a nonprofit environmental protection organization had standing to challenge Energy Facility Siting Council’s administrative rules. *See also Powell v. Bunn*, 185 Or.App. 334, 59 P.3d 559 (2002) (taxpayer in a school district had standing to challenge a school’s decision to financially support religious activities.) Here, a sitting Legislator, who is also an employer, and her employee, challenge rulings made by the ERB that directly impact their jobs. As testified by Petitioners in their declarations, the creation of the bargaining unit and election of a union for LA effectively inserts an organization – and ultimately an administrative agency – between Ms. Daley and the LA she oversees. Daley Decl. ¶¶3-8. This will lead to an erosion of trust and loyalty to the extent a Union position may conflict with a position Representative Wallan supports or opposes and that Ms. Daley must protect. *Id.*, and see Wallan Decl. ¶¶ 6-8.

c. Because the Oregon Legislature is an inherently political body, the insertion of a Union adversely effects Representative Wallan in the performance of her duties as an elected official, and as a representative of her district.

The decision to certify the union results in the insertion of an Executive Agency into decisions regarding the operation of Ms. Wallan’s office. Because Ms. Wallan has to work very closely with, and has to be able to depend upon, her

Assistants, the insertion of an Executive Agency into decisions regarding wages, hours and working conditions erodes the trust and loyalty necessary to the proper functioning of Legislator's office. *Wallan Decl.* ¶¶ 7-8.

As a practical matter, the union may take a position on any issue or candidate, that may be in opposition to Rep. Wallan's position, creating a conflict for Assistants who are employed by Rep. Wallan, but represented by the union. The result will be that the union's decisions will control vital decisions to hire and dismiss assistants – an authority which is indispensable to the independence of the Legislative branch. *Wallan Decl.* ¶¶ 5-8.

There is no guarantee that Representative Wallan's concerns will be protected by the Legislature's representatives who negotiate with the Union. The lack of protection for Representative Wallan is even greater, if, as is currently the case, she is a member of the minority party. The majority party has greater control over all aspects of negotiation, including the choice of representatives negotiating with the Union. It is not safe to assume Petitioners' interest will be protected to any degree.

Unionization in this situation deprives minority party Legislators from meaningful control of decisions on employment conditions regarding LAs, leaving primary control to Legislators in the majority party who will have more control over any negotiations between Legislators and Assistants. But even worse, unionization delegates ultimate authority to the ERB which will determine the outcome of

stalemates between the Legislature and the union in collective bargaining. *See supra* at 17-30. These injuries are not speculative – Wallan and Daley remain in their positions as Legislator and LA, respectively, and IBEW is currently the representative for the bargaining unit including Wallan’s LAs. This year, IBEW has taken active positions on political matters and campaigns. *See supra* at 27.

Resolution by this court of the claims that petitioners raise on judicial review would redress the identified injuries by returning the authority Wallan to control her own office, her LAs, and thereby to perform her part in the legislative process.

d. The creation of the bargaining unit and the election of IBEW adversely affects Legislative Assistant Sarah Daley in the performance of her duties as a Legislative Assistant.

Petitioner Daley oversees and manages LAs for Representative Wallan. Daley Decl. ¶¶ 2-6. As such, she implements her Representatives’ decisions. She interfaces with the staff who are or who may be eligible for the union. She is adversely affected because the union effectively inserts an organization – and ultimately an administrative agency – between her and the LAs she oversees. *Id.* The purpose of unionization is to impose uniform conditions on issues such as wages, hours, and working conditions for LAs outside of the scope of what can be decided within the Legislators’ office. This will lead to an erosion of trust and loyalty to the extent a Union position may conflict with a position Representative Wallan supports or opposes and that Ms. Daley must protect. *Id.* at ¶8. The Union’s decisions (whether

unilateral or reached as a result of bargaining) will decrease Ms. Daley's ability to implement incentive structures and control conditions within Representative Wallan's office.

The injury described by Petitioners is not speculative. The injury is in the loss of control and ultimately Wallan's ability to perform her duties as a Legislator.

e. Public interest strongly supports an independent Legislature – an interest which these Petitioners also properly assert.

Oregon State Courts have power to hear public actions or cases that involve “matters of public interest that might otherwise have been considered nonjusticiable under prior case law.” *Couey v. Atkins*, 357 Or. 460, 355 P.3d 866 (Or. Sp. Ct., *en banc* 2015). In *Couey*, the Supreme Court affirmed the Oregon Courts' jurisdiction to determine cases, even those “brought by individuals *without* a personal stake in the outcome.” *Id.* at 508 (emphasis added). For example, an order regarding redemption of county-issued warrants operated “in a very general manner upon the entire body of taxpayers of the county.” *Id.* at 520 (internal citations omitted). Similarly, the validity of election notices was a question “of public right” and “the enforcement of a public duty.” *Id.* at 521-22 (internal citations omitted). The same was true when analyzing the authority of a public body to issue bonds. The Court concluded that “public actions” which allow for expanded standing under ORS 14.175 (regarding justiciability), “include [proceedings] challenging the lawfulness of an action, policy, or practice of a public body, and such matters...”

Thus, even if Petitioners challenged the ERB's decision merely as citizens of the State and taxpayers, they have standing because they present a direct interest in the proper function of government. Their petition directly involves the essential question of the Oregon Constitution's delegation of powers to three coequal branches of government. Since important matters of public interest are at issue, this Court has jurisdiction.

D. Conclusion

Thus, both Petitioner Wallan and Petitioner Daley amply demonstrate the injury they suffer as a result of the decision to certify IBEW Local 89, and thus have standing to bring this petition.

RELIEF REQUESTED

Pursuant to ORS 183.482(2), and for the reasons stated above, Petitioners request that the Rulings, Findings of Fact, Conclusion of Law, and Order by the Oregon Employment Relations Board, Dated June 9, 2021 be reversed and that judgment be issued overruling the certification, that this Court issue an injunction

against unionization of the Oregon Legislative Staff, and enter a judgment awarding Petitioners all relief to which they are entitled by law.

Respectfully Submitted,

DATED: August 31, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 9381 (excluding the cover, table of contents, table of authorities, excerpt of record, certificate of service, other certificates, and signature block). I further certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes.

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 31st of August, 2022, I electronically filed the Appellant's Opening Brief and Excerpt of Record with the Appellate Court Administrator, and electronically served upon

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attorneys for the IBEW and the Legislative Assembly, using the court's electronic filing system.

/s/Rebekah Millard

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EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-010-20

IBEW LOCAL 89,

Petitioner,

v.

STATE OF OREGON, OREGON
LEGISLATIVE ASSEMBLY,

Respondent.

**RESPONDENT OREGON LEGISLATIVE
ASSEMBLY's OBJECTIONS TO PETITION
FOR REPRESENTATION WITHOUT
ELECTION**

(Hearing Requested)

The State of Oregon, Oregon Legislative Assembly ("Employer"), objects to the Petition for Representation Without Election ("Petition") designated RC-010-20. Given the time constraints on filing, all potential objections are raised at this time to preserve for further consideration and provide the IBEW notice of the considerations from the employer's perspective that impact the viability and appropriateness of the proposed unit:

1. Recognizing the Proposed Unit will Violate the Separation of Powers

As the Employer in this case, the Legislative Assembly operates as an entirely separate branch of government within the State of Oregon. Article III, Section 1, of the Oregon Constitution, provides a separation of powers between the government branches:

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

The proposed bargaining unit seeks to include employees that work entirely within this separate branch of government. Moreover, the employees that are potentially subject to the

petition work directly for elected officials of the Legislative branch. These subject employees work to perform legislative related functions and duties. Any recognition of the bargaining unit by a branch of the government other than the Oregon Legislature would violate Article III, section 1 of the Oregon Constitution.

Nationwide, counsel for the Employer is unaware of any administrative or judicial branch rendering a constitutionally valid recognition of a bargaining unit within the legislative branch. In 1995, the Washington Supreme Court invalidated a state statute for violating the separation of powers doctrine as applied to the Judicial branch. *Washington State Bar Association v. State of Washington et al*, 890 P.2d 1047 (1995). In *Washington State Bar Association* (“WSBA”), the Washington Legislature adopted a statute requiring the Court to recognize the collective bargaining rights of the employees working for the WSBA. This statute, RCW 41.56, conflicted with the Court’s rules governing the WSBA. The Court noted the chief function of the WSBA as judicial in nature and “many of its functions are directly related to and in aid of the judicial branch of government.”¹

The factors assessed in the *WSBA* case align with considerations relevant to this petition because the proposed bargaining unit would capture employees whose functions are “directly related to, and in aid of the” legislative branch of government. For this reason, the petition should be denied.

2. The PECBA does not provide for representation of the Oregon Legislature

Assuming the Board could certify a bargaining unit for Legislative employees, the Public Employee Collective Bargaining Act (“PECBA”), does not provide a mechanism for Legislative representation in the collective bargaining process.² Historically, the PECBA only contemplated the Oregon Department of Administrative Services (“DAS”) as representing “all state agencies”

¹ *WSBA*, at 1051.

² ORS 243.650 to ORS 243.782.

under what is now subsection (1) of ORS 243.696. This effectively limited the PECBA to administrative or executive state agencies.

Oregon Supreme Court Chief Justice Berkeley Lent challenged this through a declaratory judgment; that DAS, which is set up as part of the *executive* branch, could not represent the *judicial* branch.³ The Oregon Legislature promptly responded to this challenge by adding subsection (2) to ORS 243.696, which designated the Chief Justice of the Supreme Court as representing the judicial department for the purposes of PECBA.⁴ Since the Chief Justice under ORS 2.045(1) acts as the administrative head of the judicial branch, this was a quick and easy fix. Not so for the Legislature.

The Oregon Legislative Assembly includes 90 elected officials. There is no “administrative head” analogous to a Chief Justice in the judicial branch or a “DAS” as there is for the executive and administrative branches. There is also no analogue with non-state political subdivisions subject to PECBA; each legislative employee subject to the proposed bargaining unit works directly for their respective elected official. By way of additional background, a Legislative Administration Committee (LAC), established as a joint committee, of the Legislative Assembly, appoints a Legislative Administrator who is authorized by statute to perform administrative service functions for the Assembly, including personnel administration.⁵ The Administrator serves at the direction of the LAC.⁶ In all likelihood, some decisions regarding collective bargaining would necessarily require input from the LAC. The LAC is a bipartisan committee with members from the House and Senate and fluctuating membership based on term limits established by statute.⁷ The personal staff of members of the LAC would likely

³ Chief Justice Lent was responding, as the plaintiff in response to a Circuit Court ruling, that PECBA applied to the judicial branch. The Court of Appeals agreed with the Circuit Court. *Lent v. ERB*, 63 Or.App. 400 (1983).

⁴ See *AFSCME v. OJD*, 304 Or.App. 794, page 826-827, fn 28, referencing *Lent*. After the legislative amendment adding of subsection (2), the Oregon Supreme Court denied review. *Lent v. ERB*, 63 Or.App. 400, *rev. den.* 295 Or. 617 (1983).v. *ERB*, 63 Or.App.400 (1983).

⁵ ORS 173.710, 173.720(1)(i).

⁶ ORS 173.710, 173.720(1).

⁷ ORS 173.730.

1 have to be excluded from the unit as confidential employees because they assist a person who
 2 may formulate, determine or effectuate management policies in the area of collective
 3 bargaining.⁸

4 While the 1983 Oregon Legislature recognized the need for the judicial branch to have a
 5 separate mechanism for representation in collective bargaining activity, it has not created such a
 6 statutory mechanism for itself. For this reason, for collective bargaining purposes under the
 7 PECBA, there is no respective mechanism from which the PECBA can operationally apply to the
 8 Oregon Legislature as a separate branch of government.

9 **3. Some of the subject employees must be excluded from the proposed**
 10 **bargaining unit because they are supervisors, managerial, or confidential.**

11 The Employer generally objects to the description of the proposed bargaining unit as
 12 provided in the Petition. For instance, the Petition defines the proposed unit to include such titles
 13 as “Constituent Services, Office Manager/ Scheduler, Legislative Assistant, Outreach Director,
 14 Community Outreach Director, Legislative Aide, Office Manager, and District Director.” The
 15 definition broadly excludes “supervisory and confidential employees.” On its face, some of the
 16 specifically identified positions are management and exercise supervisory duties. These positions
 17 may exercise duties adverse to the proposed bargaining unit and therefore should be excluded.

18 The Employer also objects to the Petition’s more general designations of “LA1’s and
 19 LA2’s supporting elected officials” as too vague under the recent employee reclassification the
 20 Employer has adopted. As described in the previously filed Declaration of Jessica Knieling, with
 21 90 elected officials who independently select and hire their personal staff, there are 90 potential
 22 variations in the number of personal staff and their classifications (e.g. LA1 – LA4 under the
 23 new classification system). These variations are a result of the specific duties assigned or
 24 delegated by each elected official to their personal staff. For instance, many of the elected
 25

26 ⁸ ORS 243.650(6).

officials have a legislative aide designated as a “chief of staff” or, more informally, have legislative employees performing supervisory, managerial, and/or confidential duties.

Objection under ORS 243.650(23)(a). The Employer objects that some of the employees subject to the proposed bargaining unit act as supervisors under ORS 243.650(23)(a). Some of these employees have authority to act in the interest of the elected official to hire, suspend, promote, discharge, assign, reward, or discipline other employees. If each elected official chose to designate one of their legislative employees as a chief of staff or having these duties, then at least 90 of the subject employees would be considered supervisory under ORS 243.650(23)(a) and would potentially exercise duties adverse to membership in the proposed bargaining unit.

Objection under ORS 243.650(16). The Employer also objects that some of the employees subject to the proposed bargaining unit act in a managerial capacity under ORS 243.650(16). Some of these employees represent management’s interest by taking or effectively recommending discretionary actions and control or implement the elected officials’ policy. These employees exercise discretion in performing management oriented responsibilities “beyond the routine discharge of duties.” If each elected official chose to designate one of their legislative employees as a chief of staff or having these duties, then at least 90 of the subject employees would be considered managerial employees under ORS 243.650(16) and would exercise duties potentially adverse to membership in the proposed bargaining unit.

Objection under ORS 243.650(6). The Employer also objects that some of the employees subject to the proposed bargaining unit act in a confidential capacity under ORS 243.650(6). Some of these employees assist and act in a confidential capacity to their elected official; formulating, determining, and effectuating the elected officials’ policies regarding the elected officials’ other legislative employees. In other words, if a bargaining unit is recognized, the confidential employees would develop and administer the elected officials’ collective

1 bargaining policies. If each elected official chose to designate only one of their legislative
2 employees to handle these confidential issues, then at least 90 of the subject employees would be
3 considered confidential employees under ORS 243.650(6) and would retain confidential and
4 privileged information on behalf of the elected official, and potentially adverse to membership in
5 the proposed bargaining unit.

6 **4. Objection based on the uncertainty of the number of subject employees**

7 The above objections that are based on employee duties should render many of the
8 subject employees exempt from the proposed bargaining unit. Besides this, the dynamic and
9 fluctuating nature of the workforce at the Legislature also makes the number of employees
10 uncertain as described in the previously submitted Declaration of Jessica Knieling.

11 While the Employer is not aware of how many subject employees signed the
12 authorization document under OAR 115-025-0065(2), the Employer is concerned about the
13 accuracy pertaining to the number of subject employees interested in creating a bargaining unit
14 under ORS 243.682(2).

15 OAR 115-025-0065(3) seems to contemplate the contingency of a fluctuating or seasonal
16 workforce that includes employees on layoff. However, the rule does not appear to contemplate a
17 workforce organized like the Oregon Legislature that accompanies or attaches to 90 elected
18 officials and fluctuates not according to seasons, but to legislative sessions and the independent
19 hiring discretion of the elected officials.

20 By the end of December 2020, some of the employees included in the proposed unit who
21 may have been employed at the time the petition was filed will have left employment at the
22 Legislature due to a newly elected official replacing their member and that new member hiring
23 personal staff of their choosing. To be clear, this situation is not analogous to lay-offs or seasonal
24 appointments. Moreover, by the beginning of January 2021, some newly hired employees who
25 would be in the proposed unit will have arrived after the opportunity to sign/not sign the card
26

1 seeking representation. These employees will swell the ranks of subject employees but will not
2 have had the opportunity to express their intent regarding the proposed bargaining unit.

3 Based on the above, the Employer objects because of the uncertainty, and therefore
4 indefiniteness, of the employees subject to the proposed bargaining unit.

5 **HEARING REQUESTED**

6 The Legislative Assembly respectfully requests a hearing on the Petition, with the
7 opportunity to submit closing briefs.

8 DATED this 29th day of December 2020.

9 Respectfully submitted,

10 ELLEN F. ROSENBLUM
11 Attorney General

12 /s/ Tessa M. Sugahara
13 Tessa M. Sugahara, OSB# 993722
14 Attorney in Charge
15 Of Attorneys for Employer
16 Oregon Legislative Assembly
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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2020, I served a true and correct copy of
RESPONDENT OREGON LEGISLATIVE ASSEMBLY'S OBJECTIONS TO PETITION
FOR REPRESENTATION WITHOUT ELECTION by the methods indicated below:

Employment Relations Board 528 Cottage Street NE, Suite 400 Salem, OR 97301-3807 Email: Emprel.board@oregon.gov ERB.Filings@oregon.gov	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY
Tony Ruiz IBEW, Local 89 5450 SW Murray Blvd Beaverton, OR 97005 Email: tony.ruiz@ibew89.com	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

/s/ Tessa M. Sugahara
Tessa M. Sugahara, OSB# 993722
Attorney in Charge
Of Attorneys for Employer
Oregon Legislative Assembly



EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-010-20

IBEW Local 89,

Complainant,

v.

STATE OF OREGON, OREGON
LEGISLATIVE ASSEMBLY,

Respondent.

DECLARATION OF JESSICA KNIELING

I, Jessica Knieling, declare the following:

1. I am the interim Human Resources Director for the Oregon Legislative Assembly (the "Legislature"). In this capacity, my duties include receiving, reviewing, and administering personnel data on the Legislature's workforce for the purposes of personnel administration. Regarding the subject action, my responsibilities include identifying which employees are possibly subject to the proposed bargaining unit ("subject employees") based on the description provided in the petition.

2. Within the Legislature, the subject employees are part of a dynamic and changing workforce for many reasons. They work within and around legislative cycles that correspond to legislative sessions occurring every two years and a 'short session' convened during off years. The number of employees fluctuates within these cycles.

3. During the legislative session, most elected officials have at least two legislative assistants, but many have more, with variations spanning between 1 and 5 subject employees.

4. Based on the described fluctuations in the number of employees that are part of the proposed unit, providing a single list of employees in the proposed unit will not produce accurate

1 or dispositive information for the purposes of OAR 115-025-0065(4). For this reason, the
2 Legislature is providing more than one list to reflect the changing workforce as follows.

3 5. As of December 17, 2020, the names and addresses of the subject employees within
4 the classifications of the proposed unit is attached as Exhibit 1. This Exhibit 1 should be reviewed
5 in consideration of the other issues described in this declaration.

6 6. It is also necessary to account for the transition of elected officials and their
7 personal staff who are leaving the office and the newly elected officials who are assuming their
8 seats. As a result, the list of the names of employees who are scheduled to end their employment
9 with the Legislature because of their member's transition out of office is attached as Exhibit 2.

10 7. Even though new elected officials will be sworn in on January 11, 2021, many new
11 elected officials have already extended offers to personal staff whose classifications are in the
12 proposed unit. The list of names of new employees hired with a start date of January 1, 2021 or
13 later is attached as Exhibit 3.

14 8. The numbers reflected in the attached exhibits remain vague because the
15 Legislature provides each elected official with a budget to manage, but not specific position
16 allocations. Each elected official has the discretion to create various combinations and
17 permutations for levels of positions and FTE. In other words, since there are 90 elected officials,
18 there are 90 different approaches possible to staffing member offices. Hiring is ongoing and will
19 continue into January for legislative assistants.

20 9. Besides the uncertainty involved in the mere number of subject employees based
21 on how many are hired, and retained, there is also uncertainty regarding the subject employees
22 based on their functions and duties. For instance, the subject employees work within direct
23 relationships with the elected officials who maintain appointing authority and direct and control
24 the subject employees. In this capacity, the Legislative Assistants, as positions designated for the
25 proposed unit, serve as personal staff to the elected officials.

10. Moreover, after a lengthy classification and compensation study and project that began in 2019, the Legislative Administration Committee adopted a new job evaluation methodology in August 2020 for implementation on January 1, 2021. The new plan recognized discrepancies within the present LA1 and LA2 classification and compensation system because the existing classification system did not account for the span of decision-making exercised by the positions.

11. Specifically, some LA1 and LA2 positions exercise management and supervisory functions. For this reason, some of the subject employees are now classified within a range of LA1, LA2, LA3, and LA4. Some of the employees, that previously held LA1 or LA2 positions were identified informally as “chiefs of staff” or holding other leadership positions over staff and personnel that include management or supervisory functions. Attached as Exhibit 4 is the memo outlining the LA1, LA2, LA3, and LA4 assignments. All positions currently classified as LA1 or LA2 are moving to this structure January 1, 2021.

12. For this reason, a list of employees subject to the current LA1 and LA2 reclassifications and are scheduled to start in January 2021 is attached as Exhibit 5.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY AND PERJURY.

EXECUTED on December 17, 2020

Jessica Knieling
Interim Human Resources Director
Oregon Legislative Assembly

STATE OF OREGON
BEFORE THE EMPLOYMENT RELATIONS BOARD

IBEW LOCAL 89,

Petitioner,

v.

STATE OF OREGON, OREGON
 LEGISLATIVE ASSEMBLY,

Respondent.

Case No. RC-010-20

MOTION TO AMEND PETITION

In accordance with OAR 115-025-0023, IBEW Local 89 hereby moves to amend the petition for representation filed in this matter.

On December 8, 2020, the Union filed a representation petition (“Original Petition”) with the Employment Relations Board seeking to represent the following employees of the Oregon Legislative Assembly:

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

Since that time, the OLA has implemented a long-planned restructuring of staff, directly impacting many if not all of those included in the proposed unit. Specifically, the employees sought in the original petition are now classified as LA1s, LA2s, LA3s, and LA4s.

In addition, in accordance with historical practice, and since the petition was originally filed, the OLA has hired a number of new employees that should be included in the bargaining unit and have a voice in deciding whether to be represented. In order to ensure that all employees

performing bargaining unit work are properly encompassed within the proposed unit, and are afforded the opportunity to decide whether they desire representation, amendment of the Original Petition is both appropriate and necessary. The proposed amended petition would reflect the following bargaining unit description:

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

Due to the significant expansion of the number of employees that would be included in the proposed unit, the Union seeks to amend its Original Petition to seek an election of the unit employees.

Given the significant changes to the unit described in the Original Petition, the Motion to amend the Original Petition should be granted.

Respectfully submitted January 13, 2021.

By: /Daniel Hutzenbiler/
Daniel Hutzenbiler, OSB #176050
McKanna, Bishop & Joffe
1635 NW Johnson St.
Portland, OR 97209
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dhutznbiler@mbjlaw.com
Attorneys for Petitioner

STATE OF OREGON, EMPLOYMENT RELATIONS BOARD**LABOR ORGANIZATION PETITION FOR REPRESENTATION
OR UNIT CHANGES**

This form can *be filed only by a labor organization* that represents or wishes to represent Oregon public employees. Petitions for employees and public employers are available on the Employment Relations Board website.

Check one:

☐

Original Petition

OR

☒

Amended Petition

For ERB Use Only

Case No.

RC-001-21

Date Filed

1/13/21

1. PURPOSE OF PETITION

- ☐ **RC—Petition to Certify a New Bargaining Unit (Card Check) (ORS 243.682(2); OAR 115-025-0000(4)):** A majority of currently unrepresented employees in a proposed bargaining unit wish to be represented by a labor organization, and wish to have that labor organization certified as their bargaining representative by using the “card check” process, instead of an election.
- The petition must be accompanied by a showing of interest from more than 50% of employees in the proposed unit stating that they wish to be represented by the labor organization named below. (See Instructions for model card check authorization language.)
 - This type of petition is subject to the “election” and “certification” bars under Board rules. For an explanation of these timelines, see the attached instructions and OAR 115-025-0015(1) and (3).
 - The petition must not include employees who are represented by another labor organization at the time the petition is filed.
- ☒ **RC—Petition to Certify New Bargaining Unit or Change Exclusive Representatives (Election) (ORS 243.682(1); OAR 115-025-0000(1) or 115-025-0000(2)):** At least 30% of employees in a proposed or existing bargaining unit wish to be represented by the petitioning labor organization, and the labor organization is requesting an election.
- The petition must be accompanied by a showing of interest from at least 30% of employees in the proposed unit stating that they wish to be represented by the labor organization named below.
 - This type of petition is subject to the “election,” “contract,” and/or “certification” bars under Board rules. For an explanation of these timelines, see the attached instructions and OAR 115-025-0015(1) and (3).
 - This petition may be used either to create a new bargaining unit or to change the employees’ exclusive representative from one labor organization to another.
- ☐ **UC—Petition to Clarify Public Employee Status (OAR 115-025-0005(2)):** Petitioner seeks to clarify whether certain employees are supervisory, confidential, or managerial employees under ORS 243.650, and, as a result, whether they can be included in the existing bargaining unit. This type of petition can be filed at any time, unless the petition seeks to exclude a position that is expressly included in the existing certification or recognition clause; in such cases, a petition may be filed only during the open period under OAR 115-025-0015(4).
- ☐ **UC—Petition to Clarify Whether Certain Employees are in an Existing Bargaining Unit Based on Certification or Contract Language (OAR 115-025-0005(3)):** Petitioner seeks to clarify whether certain employees are included in an existing bargaining unit based on the express terms of a certification or collective bargaining agreement. Before the Board considers this type of petition, the parties may be required to exhaust any applicable grievance in process.
- ☐ **UC—Petition to Clarify Whether Unrepresented Positions Should be Added to an Existing Unit (Election) (OAR 115-025-0005(4)):** Petitioner seeks to add currently unrepresented positions to an existing unit by using the election process.
- The employees to be added to the existing unit must be *unrepresented* when the petition is filed.
 - This petition must be accompanied by a showing of interest from at least 30% of the unrepresented employees stating that they wish to be represented by the petitioner.
 - This type of petition is subject to the “election” bar under Board rules. Additionally, if this petition involves employees in positions that existed when the last collective bargaining agreement was negotiated, the petition may be subject to the “contract bar” under Board rules. For an explanation of these time lines, see the attached instructions and OAR 115-025-0015(2) and (3).
- ☐ **UC—Petition to Merge Bargaining Units (OAR 115-025-0005(5)):** Petitioner represents more than one bargaining unit of the same public employer’s employees and the petitioner wishes to merge the existing units into a single unit.
- This type of petition must be filed in the open period under OAR 115-025-0015(4), as that rule applies to the larger of the two bargaining units.
 - The petition must be supported by a petition or cards signed by more than 50% of the employees in *each* bargaining unit stating that they wish their bargaining units to be merged.

- ☐ **UC—Petition to Transfer Employees to a More Appropriate Bargaining Unit (OAR 115-025-0005(6)):** Petitioner seeks to move employees from a different labor organization's bargaining unit into its own unit, asserting that petitioner's unit is more appropriate.
- This petition must be supported by a showing of interest signed by more than 50% of the employees in the affected group, stating that the employees wish to be transferred to the petitioning labor organization's unit.
 - This petition must be filed in the open period under OAR 115-025-0015(4), as that rule applies to the petitioner's bargaining unit.
- ☐ **UC—Petition to Clarify Whether Unrepresented Employees Should be Added to Existing Unit (Card Check) (ORS 243.682(2), OAR 115-025-0005(7)):** On behalf of a group of unrepresented employees, the petitioner seeks to use the "card check" process to add those employees to an existing bargaining unit represented by the petitioner.
- The employees to be added to the existing unit must be *unrepresented* when the petition is filed.
 - The petition must be accompanied by a showing of interest from more than 50% of the unrepresented employees stating that they wish to be represented by this labor organization using the "card check" process instead of an election.
 - This type of petition is subject to the "election" bar under Board rules. Additionally, if this petition includes employees in positions that existed when the last collective bargaining agreement was negotiated, the petition may be subject to the "contract bar" under Board rules. For an explanation of these timelines, see the attached instructions and OAR 115-025-0015(2) and (3).
- ☐ **UC—Petition to Amend Certification or Recognition (OAR 115-025-0008):** The labor organization wishes to amend the certification or recognition to reflect a change to its name, affiliation with another labor organization, or to reflect a change in the name of the public employer. In cases involving an amendment to affiliate with another labor organization, the petitioner must submit documents demonstrating that an affiliation election was conducted with at least minimal due process.
- ☐ **UC—Petition to Revoke Existing Certification or Recognition (OAR 115-025-0009):** Petitioner no longer wants to be the exclusive representative for a group of employees. This type of petition may be filed at any time, but the Board will order a revocation only if (1) no collective bargaining agreement is in effect and (2) the labor organization disclaims any further interest in representing the employees (or the labor organization is defunct).
- ☐ **Intervention Petition (OAR 115-025-0035):** One labor organization has filed a petition to certify a new bargaining unit through the election process, but at least 10% of the employees in the same proposed unit wish to be represented by a different (the petitioning) labor organization. By filing this petition, the intervening labor organization seeks to be included as a choice on the ballot.
- The petition must be accompanied by a showing of interest from at least 10% of employees in the same proposed bargaining unit stating that they wish to be represented by the intervening labor organization.
 - This petition must be filed within 14 days of the notice of the initial petition.
- ☐ **RC—Petition for Certification as a Result of the Merger of School Districts (OAR 115-025-0090(2)):** School districts are merging, and a labor organization that already represents a majority of the employees seeks to represent the employees of the surviving district.
- This petition may be filed only between the date of final action by the State Board of Education or by a boundary board to merge the districts and the date that the merger takes effect.
 - In box 8 below, petitioner must also include: (1) a statement that it currently represents a majority of the employees who will be included in the proposed bargaining unit after the merger (this statement must be supported by collective bargaining agreements or certifications of representative, and must include the number of employees in the proposed bargaining unit and the number of employees represented by the labor organization in each current unit); (2) contact information for the superintendent of schools for each affected district; (3) the date of final action by the State Board of Education or by a boundary board to merge the districts; and (4) the effective date of the merger.

2. Name and address of public employer:
Oregon Legislative Assembly

Contact information for the employer's representative:

Name: Jessica N. Knieling

Address: 900 Court St. NE, Rm 140A Salem, OR 97301

Phone: (503) 986-1370 Fax:

Email: Jessica.knieling@oregonlegislature.gov

3. Name and address of petitioning labor organization: IBEW Local 89	Contact information for the petitioner's representative: Name: Tony Ruiz Address: 5450 SW Murray Blvd., Beaverton, OR 97005 Phone: (503) 941-0835 Fax: Email: tony.ruiz@ibew89.com
4. Name and address of any other labor organization that represents, or has sought to represent, employees subject to the petition:	Contact information for the other labor organization's representative: Name: Address: Phone: Fax: Email:
5. Describe the existing or proposed bargaining unit, briefly summarizing any proposed changes: Legislative Assistant I's, Legislative Assistant II's, Legislative Assistant III's, and Legislative Assistant IV's supporting elected officials in the Oregon Legislative Assembly, excluding supervisory, managerial, confidential, and caucus employees.	
6. Effective Dates of Any Collective Bargaining Agreement (please attach a copy of agreement): Beginning Date: Expiration Date: N/A <input checked="" type="checkbox"/>	7. Number of Employees: In Existing or Proposed Unit: 180 To be Added or Removed from Existing Unit:
8. Additional relevant facts. (May also be provided in an attachment):	

I certify that the statements in this petition are true to the best of my knowledge and information.

Petitioner's Primary Representative: **Daniel Hutzenbiler** Date: **1/13/2021**

Representative's Signature:  Title: **Attorney**

Address: **1635 NW Johnson St., Portland, OR 97209**

Phone: **(503) 226-6111** Fax: **(503) 226-6121** Email: **dhutzenbiler@mbjlaw.com**

Case No. RC-001-21

(Hearing Requested)

The Employer generally objects to the description of the proposed bargaining unit as provided in the Petition as some of these positions may exercise duties adverse to the proposed bargaining unit and therefore should be excluded. The petition proposes including:

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

4 While the Employer acknowledges the Petitioners’ recognition that supervisory,
 5 managerial, and confidential employees should be excluded from the proposed unit, the
 6 identified classifications of Legislative Assistant I, II, III, and IV, in fact perform duties that
 7 align with the excluded categories. There are 90 elected officials in the Oregon Legislature. Each
 8 elected member can hire staff, and delegate, assign, or direct the hired staff to perform any
 9 number of duties that include primarily acting in a supervisory, managerial, or confidential
 10 capacity. More specifically:

11 **Objection under ORS 243.650(23)(a) (Supervisory).** The Employer objects that some
 12 of the employees subject to the proposed bargaining unit act as supervisors under ORS
 13 243.650(23)(a). Some of these employees have authority to act in the interest of the elected
 14 official to hire, suspend, promote, discharge, assign, reward, or discipline other employees. If
 15 each elected official chose to designate one of their legislative employees as a chief of staff or
 16 having these duties, then at least 90 of the subject employees would be considered supervisory
 17 under ORS 243.650(23)(a) and would potentially exercise duties adverse to membership in the
 18 proposed bargaining unit.

19 **Objection under ORS 243.650(16) (Managerial).** The Employer also objects that some
 20 of the employees subject to the proposed bargaining unit act in a managerial capacity under ORS
 21 243.650(16). Some of these employees represent management’s interest by taking or effectively
 22 recommending discretionary actions and control or implement the elected officials’ policy. These
 23 employees exercise discretion in performing management-oriented responsibilities “beyond the
 24 routine discharge of duties.” If each elected official chose to designate one of their legislative
 25 employees as a chief of staff or having these duties, then at least 90 of the subject employees
 26

would be considered managerial employees under ORS 243.650(16) and would exercise duties potentially adverse to membership in the proposed bargaining unit.

Objection under ORS 243.650(6) (Confidential). The Employer also objects that some of the employees subject to the proposed bargaining unit act in a confidential capacity under ORS 243.650(6). Some of these employees assist and act in a confidential capacity to their elected official; formulating, determining, and effectuating the elected officials' policies regarding the elected officials' other legislative employees. In other words, if a bargaining unit is recognized, the confidential employees would develop and administer the elected officials' collective bargaining policies. If each elected official chose to designate only one of their legislative employees to handle these confidential issues, then at least 90 of the subject employees would be considered confidential employees under ORS 243.650(6) and would retain confidential and privileged information on behalf of the elected official, and potentially adverse to membership in the proposed bargaining unit.

The administrative service functions necessary to conduct the business of the Legislative Assembly are carried out by committee. By way of background, a Legislative Administration Committee (LAC), established as a joint committee, of the Legislative Assembly, appoints a Legislative Administrator who is authorized by statute to perform administrative service functions for the Assembly, including personnel administration.¹ The Administrator serves at the direction of the LAC.² In all likelihood, some decisions regarding collective bargaining would necessarily require input from the LAC. The LAC is a bi-partisan committee with members from the House and Senate and fluctuating membership based on term limits established by statute.³ The personal staff of members of the LAC would likely have to be excluded from the

¹ ORS 173.710, 173.720(1)(i).

² ORS 173.710, 173.720(1).

³ ORS 173.730.

unit as confidential employees because they assist a person who may formulate, determine or effectuate management policies in the area of collective bargaining.⁴

2. The PECBA does not harmonize with the operations and structure of the Oregon Legislative Assembly.

The collective bargaining policy objectives of the PECBA are irreconcilable with the policy objectives of the Oregon Legislative Assembly (“OLA”) and operationally the PECBA does not provide a mechanism for the OLA to meet these policy objectives.

a) The Oregon Legislative Assembly has adopted rules governing the terms and conditions of employment for its workforce.

The same Oregon Legislative Assembly that adopted the PECBA has also adopted the Oregon Legislative Branch Personnel Rules (“LBPRs”) which are comprehensive rules governing the terms and conditions of employment for the subject employees.⁵ Within the LBPRs, there is no provision recognizing the subject employees fall under PECBA for the purposes of collective bargaining.⁶

Within the LBPR, Rule 1 clarifies the application of the rules to all employees of the Legislative Assembly. This includes the subject employees who work for partisan offices in the current petition. LBPR 1(4)(a) cites ORS 240.200, that Legislative Branch employees are exempt from, and generally not subject to, the State Personnel Relations Law.⁷ Significantly, LBPR 1(5)(a) states that the LBPR’s “constitute rules of proceedings of the Legislative Assembly and may take precedence over conflicting provision of state law to the extent that the rules expressly provide for such precedence. Section 4, Mason’s Manual of Legislative Procedure (2010 ed.).”

For these reasons, the petition should be dismissed as effectively overriding an area in which the Legislative Assembly has exercised its authority.

⁴ ORS 243.650(6).

⁵ The LBPRs cite to the powers of the Assembly under the Oregon Constitution, Article III, Section I.

⁶ Senate Rule 2.01 and House Rule 2.01.

⁷ ORS 240.005-240.990

b) The OLA cannot share the policy objective of ORS 243.656(6)

Part of the policy statement for the PECBA found within ORS 243.656 asserts:

“(6) It is the purpose of ORS 243.650 to 243.806 to obligate public employers, public employees and their representatives to enter into collective negotiations with willingness to resolve grievances and disputes relating to employment relations and to enter into written and signed contracts evidencing agreements resulting from such negotiations.

The OLA identifies this part of the policy statement as underpinning the PECBA. Seldom in representation election hearings does this portion of the PECBA become an issue; its premise is almost always a fundamental given. Here, however, it sheds useful light for the purposes of our hearing on the legislative intent and affords guidance in the application of the subject provisions. The OLA is at odds with these objectives.

It is highly unlikely that adoption of this part of the PECBA policy contemplated the structure of the OLA workplace. For instance, this policy is unworkable when considering that Assembly member’s relatives and family members are often lawfully employed as personal staff and are now subject employees under the petition before the ERB. This situation raises both conflict and loyalty considerations that the PECBA policy did not anticipate; that it intended the PECBA to apply to the personal staff of members who may be sons, daughters, spouses, partners, or other familial relations.

A recognition that the subject employees support members holding political offices and that members may impose employment consequences on staff when necessary to advance political objectives of their office is in stark contrast to other public officials and principles of civil service. For example, the state civil service laws that apply to employees in the executive branch expressly prohibit imposing personnel decisions for political reasons including requiring Employment Relations Board review of personnel decisions taken for political reasons, overturning of the same, and adopting rules to address under ORS 240.086(3) and similarly, with ORS 240.560(3), permitting employees to appeal personnel decisions based on political reasons.

1 This consideration draws to the forefront the palpable tension with the discretion afforded
 2 members in how they handle employee relations against the intention of the PECBA. To
 3 summarize this inherent conflict, in contrast to other public officials, the 90 elected members of
 4 the OLA may lawfully:

- 5 i.) Hire or fire relatives or family members of their household and may
 6 lawfully appoint, promote, discharge, fire, demote, or advocate for such actions
 7 on behalf of their relatives and family members under ORS 244.177(2);
- 8 ii.) Engage in the aforementioned employment functions of their staff,
 9 whether they are relatives, family members, or any others, for political reasons or
 10 for advancement of a purely political objective;
- 11 iii.) Elect to advance the interests of their districts, and not necessarily
 12 government as a whole, if they so choose.

13 In contrast with the application of the policy goals of the PECBA, within the OLA, the
 14 interests advanced by each member are exactly and intentionally aligned to their political agenda
 15 and their district. Their staff are hired in part to advance the member's political interests which
 16 differ from one elected official to another. With 90 elected officials, there is the potential for 90
 17 separate voices, as it is a truly an "Assembly" in name and practice; it is not a single entity acting
 18 as one employer, mission, and voice.

19 This contrasts against the executive and judicial branches that, through their
 20 administrative heads, can speak with a unified voice (e.g., DAS for the executive branch
 21 agencies and the Chief Justice for the Judicial Branch). This discretion exercised by OLA
 22 members is unlike any other public employer/employee relationship and is fundamentally
 23 incompatible with the policy objectives served by the PECBA to enable workers to organize and
 24 negotiate collectively to alleviate various forms of strife and unrest and develop harmonious and
 25 cooperative relationship between government (as represented by a single entity with a collective
 26 interest). This is distinct from the OLA's structure and its employees.

1 **c) Operationally, the OLA is not recognized by ORS 243.696.**

2 Historically, the PECBA only identified the Oregon Department of Administrative
3 Services (“DAS”) as the management representative for “all state agencies” under what is now
4 subsection (1) of ORS 243.696.⁸ In the context of a legal challenge whether the PECBA applied
5 to the Judicial Branch, then Oregon Supreme Court Chief Justice Berkeley Lent argued that
6 DAS, which is an agency of the *executive* branch, could not represent the *judicial* branch.⁹ The
7 Oregon Legislature promptly responded to this challenge by adding subsection (2) to ORS
8 243.696, which designated the Chief Justice of the Supreme Court as representing the judicial
9 department for the purposes of PECBA.¹⁰ Since the Chief Justice under ORS 2.045(1) acts as the
10 administrative head of the judicial branch, this was a quick and easy fix.¹¹ Not so for the
11 Legislature.

12 As aforementioned, the Oregon Legislative Assembly includes 90 elected officials. There
13 is no “administrative head” analogous to a Chief Justice in the judicial branch or a “DAS” as
14 there is for the executive branch. While as earlier noted the Legislative Administration
15 Committee (LAC) has oversight over administrative services, including personnel services,
16 necessary for the branch to operate, this Committee cannot lawfully as a body conduct
17 management caucus sessions or convene the equivalent of an executive session enabling
18 discussion of management’s interests and direction in the area of collective bargaining. This
19 contrasts with non-state political subdivisions subject to PECBA; where the administrative
20 bodies are covered by public meetings law and may permissibly convene an executive session to
21 discuss collective bargaining proposals. No so for the Legislature. There is no clear path from
22

23 ⁸ ORS 243.650 to ORS 243.782.

24 ⁹ Chief Justice Lent was responding, as the plaintiff in response to a Circuit Court ruling, that PECBA applied to the
25 Judicial Branch. The Court of Appeals agreed with the Circuit Court that the PECBA applied to the Judicial Branch
26 notwithstanding the absence of express statutory language identifying a management representative for the Judicial
27 Branch. *Lent v. ERB*, 63 Or.App. 400 (1983).

28 ¹⁰ See *AFSCME v. OJD*, 304 Or.App. 794, page 826-827, fn 28, referencing *Lent*.

29 ¹¹ Notably, after the legislative amendment adding subsection (2), the Oregon Supreme Court denied review. *Lent v.*
30 *ERB*, 63 Or.App. 400, *rev. den.* 295 Or. 617 (1983).v. *ERB*, 63 Or.App.400 (1983).

1 which the LAC can functionally act as a management representative analogous to DAS or the
2 Chief Justice.

3 While the 1983 Oregon Legislature recognized the need for the judicial branch to have a
4 separate mechanism for representation in collective bargaining activity, it has not created such a
5 statutory mechanism for itself. For this reason, for collective bargaining purposes under the
6 PECBA, there is no respective mechanism from which the PECBA can operationally apply to the
7 Oregon Legislature as a separate branch of government. Meanwhile, the Legislative Branch has
8 explicitly exercised its legislative authority over its workforce by adopting the LBPRs.

9
10 **3. By nature of its function and design, the proposed bargaining unit is unable to share a community interest.**

11 The Oregon Legislative Assembly does not reflect a community of interest as identified
12 under ORS 243.682(1)(a) within the subject employees of the proposed bargaining unit. While it
13 is true that the subject employees share similar wages, hours, and working conditions, they do
14 not generally transfer between elected offices, promote between elected members' offices, or
15 enjoy shared supervision between elected offices. They are also often working at cross-purposes
16 against the objectives of other elected offices. The reason for this is because OLA is, by design, a
17 political entity, an assembly of 90 elected officials representing their various constituents in their
18 districts as a motivating objective. Likewise, their staff serves the elected official in the pursuit
19 of political and partisan objectives. While the various offices of each elected official may
20 collaborate and even strategize with fellow elected officials, each member's office is potentially
21 adverse to the other's office. To the extent each elected official represents a separate
22 constituency and geographic region in the state, they assemble in a political arena that is often
23 adversarial. For this reason, the proposed bargaining unit does not effectively share community
24 of interest under ORS 243.682(1)(a).

HEARING REQUESTED

The Legislative Assembly respectfully requests a hearing on the Petition, with the opportunity to submit closing briefs.

DATED this 4th day of February 2021.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

/s/ Tessa M. Sugahara
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Attorney in Charge
Of Attorneys for Employer
Oregon Legislative Assembly

STATE OF OREGON
BEFORE THE EMPLOYMENT RELATIONS BOARD

IBEW LOCAL 89,

Petitioner,

v.

STATE OF OREGON, OREGON
 LEGISLATIVE ASSEMBLY,

Respondent.

Case No. RC-010-20

STIPULATED FACTS

On behalf of their respective clients, Attorney Daniel Hutzenbiler for the Petitioner, and Jonathan Groux and Tessa M. Sugahara, Attorneys for the Respondent, hereby stipulate and agree that the following facts are true and correct:

1. The Legislative Branch includes: members (90) and employees of the Legislative Assembly (“the Assembly” or “OLA”), the parliamentary offices (Office of the Secretary of the Senate and the Office of the Chief Clerk of the House), and the Legislative agencies (Legislative Administration, the Legislative Counsel Office, the Legislative Fiscal Office, the Legislative Policy and Research Office, the Legislative Revenue Office, Legislative Equity Office and the Legislative Commission on Indian Services).
2. The term “State of Oregon” includes the Legislative Branch. The Oregon Constitution vests the legislative power of the state in a Legislative Assembly. Or Const, Art IV, § 1.
3. International Brotherhood of Electrical Workers, Local 89 (“the Union”) is a labor organization as defined in ORS 243.650(13).

4. Members of the Assembly hire personal staff who, effective January 1, 2021, are assigned to the classifications of Legislative Assistant 1 through 4 (LA1 – LA4) based on the duties assigned to them by members. The partisan offices of the Assembly which include the Caucus offices (minority and majority leaders of the House and Senate) and the Leadership offices for the House and Senate (Senate President’s Office and House Speaker’s Office) also hire staff.

5. On December 8, 2020, the Union filed a representation petition with the Employment Relations Board seeking to represent the following employees of OLA:

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

6. On January 13, 2021, the Union filed a Motion to Amend Petition and Amended Petition. The Amended Petition seeks to represent the following employees of OLA (“subject employees”):

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

7. A joint committee of the OLA, the Legislative Administration Committee (“LAC”), appoints a Legislative Administrator who is authorized by statute to perform administrative service functions for the Assembly, including personnel administration.

8. Subject employees are paid for their work by the Legislative Assembly. utilizing the Department of Administrative Services (“DAS”) payroll processing services for which OLA pays an assessment to DAS. Like all State of Oregon employees working for entities that use DAS for payroll, the subject employees can access and review their paystubs on a DAS

managed website.

9. Similar to other State of Oregon employees, subject employees receive other statutorily defined benefits through the state for their work with the OLA, including health care through the Public Employees' Benefit Board ("PEBB") and retirement benefits through the Public Employees Retirement System ("PERS").

10. Subject employees earn vacation and sick leave while working for the OLA. Vacation and sick leave accruals are generally transferrable when they move to other State of Oregon governmental entities. Additionally, employees who work for other Oregon governmental entities and transfer employment to OLA may generally transfer their leave accruals. The specific parameters are defined in the Legislative Branch Personnel rules and intergovernmental agreements, if applicable.

11. On behalf of those that it employs, OLA remits payment to the State of Oregon Workers' Compensation Division for each hour worked by subject employees.

12. The Workers' Compensation Division administers and regulates laws and rules that affect the participants in the Oregon workers' compensation system, including workers, employers, insurers, claims examiners, attorneys, medical providers, and others as authorized under ORS 656.001 *et seq* (the "Workers' Compensation Law"). The Workers' Compensation Law was created after the Legislative Assembly adopted findings and policy under ORS 656.012 and, with some exceptions, ORS 656.027 requires application of the Workers' Compensation Law to all workers employed in Oregon (ORS 656.023, ORS 656.005(27) and ORS 656.005(28). WCD is part of the Department of Consumer and Business Services, Oregon's largest business regulatory and consumer protection agency, and part of the Executive Branch of Oregon.

13. The WCD regulates disputes over Workers' Compensation benefits

regarding legislative employees at the OLA.

14. Subject employees are exempted from the Oregon State Personnel Law. Subject employees have a uniform compensation plan that applies to all legislative branch employees, partisan and non-partisan, and other branchwide terms and conditions of employment as set out under the Legislative Branch Personnel Rules.

Respectfully submitted February 22, 2021.

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Jonathan Groux
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IBEW Local 89,)
)
 Petitioner,) ERB Case No. RC-001-21
)
 vs.)
)
 Oregon Legislative Assembly,)
)
 Respondent.)
)
 _____)

TESTIMONY OF VIDEO HEARING

TRANSCRIBED BY:

Notary Public

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1 discretion over what duties they assign. We just have
2 the common structure. But what they do have is a
3 budget, and so they have to make those determinations
4 within their budget. So they will make changes to
5 accommodate the needs of their office over time.

6 But staff come and go with members or
7 sometimes they are in pools. It's a very dynamic
8 [inaudible].

9 Q. With regard to the hiring decisions made by
10 staff, are there any limitations in the branch on
11 members hiring relatives and persons in their
12 households?

13 A. There is absolutely no limitations.

14 Q. To your knowledge, is this practice permitted
15 elsewhere in state government to hire relatives and
16 members of the household?

17 A. No. That is what I think I had to get used to
18 here. It's statutorily prohibited in the other branches
19 of government.

20 Q. Just a ballpark here, in fact, are there -- is
21 the current proposed unit, does it also include
22 individuals who are relatives and individuals in
23 members' households?

24 A. Oh, yes, absolutely. Spouses, children,
25 parents.

1 Q. Do you have an approximate number on how many?

2 A. I could say at least a dozen. Oftentimes I
3 don't know of the relationship, particularly if there
4 are several last names, and I don't know who people's
5 children are or their wives. Oftentimes they are
6 introduced that way, so you'll learn that. I know of at
7 least a dozen, and it changes. Again, it changes
8 frequently.

9 Q. You mentioned now the discretion to hire staff
10 to choose kind of the configuration of how many staff at
11 what level are brought in.

12 My next question: In employee services, at
13 any given time, do you have a ground level perspective
14 on the duties and assignments that are being made by the
15 members as to the day-to-day work of the 180 employees?

16 A. No. Aside from the level of [inaudible]
17 assigning. There are 90 different assignments.

18 Q. Is that recognized to be within the discretion
19 of the member to shape those duties?

20 A. Absolutely. We have these descriptions to
21 guide, and in many of the communications that was a
22 common certain. It is not the role of employee services
23 to tell a member how to serve their district. It is our
24 role to ensure that we appropriately classify and
25 compensate for the work that they determine.

1 Q. Molding kind of the lifecycle of a position,
2 do these positions serve at will?

3 A. Yes. All employees in the branch with the
4 exception of the equity officer are at will.

5 Q. And is it acceptable in this context -- so let
6 me back up. What does it mean for a position to serve
7 at will?

8 A. That it is within the discretion of the
9 employer or the employee to part ways at any time for
10 any reason as long as it is not an unlawful reason.

11 Q. In the context of the assembly, is it
12 acceptable for a member to fire their personal staff for
13 partisan or political-based reasons?

14 A. These positions are partisan and political
15 based. So yes, if the employee were to do something
16 that compromised a member politically, absolutely.

17 Q. And from your experience in other parts of
18 state government, is this practice permitted elsewhere
19 in state government to fire based on political reasons?

20 A. Absolutely not.

21 Q. And, in fact, to your knowledge are there
22 prohibitions under law on doing just that for other
23 branches of government?

24 A. Yes. I think in the state personnel, there is
25 an intention to not have people be disciplined. And you

1 have to have a standard that says any discipline needs
2 to be taken for not political reasons. I think it's the
3 difference in the branch.

4 The executive branch has the ability of the
5 elected official. So the one elected official that
6 oversees it comes and goes to not have action taken
7 against employees for political reasons because those
8 agencies are nonpartisan.

9 Q. In the context now of the assembly, from your
10 perspective, why is it important for the way this branch
11 functions that members can hire staff and
12 correspondingly terminate staff based on support for
13 their political agenda?

14 A. Members get their jobs for their political
15 agenda. That is, their work -- they are not employees,
16 but the job of an elected official is to carry out the
17 commitment that they made to their constituents, and
18 those are political in nature. And so they look to have
19 staff that support the commitments that they need to get
20 their job and many of them seek to retain their job. So
21 they need alignment. It is personal staff in the way we
22 don't talk about personal staff in other branches.

23 Q. Is it fair to say that among many
24 responsibilities of these personal staff that this can
25 include a specific responsibility for advancing their

1 members' agenda, whether it be at the district level or
2 a political agenda for their member?

3 A. Yes.

4 Q. All right. I would like to now move to the
5 PEFA exclusions. And starting generally, are you
6 familiar with the provisions under the PEFA excluding
7 certain categories of employees from the definition of
8 an employee?

9 A. Yes.

10 Q. And what provision specifically?

11 A. The exclusions?

12 Q. Right.

13 A. The supervisory exclusion, the confidential
14 exclusion, and the managerial exclusion.

15 Q. In the context of this petition, have you had
16 an opportunity to think through and assess the
17 application of these exclusions to members of the
18 proposed unit?

19 A. Yes.

20 Q. If you could turn to Exhibit R6, please. Do
21 you recognize this document?

22 A. Yes. This is an excerpt from 243 PEFA.

23 Q. And what is this document demonstrating or
24 describing?

25 A. It's aligning the definitions for those

1 can provide them [inaudible].

2 Q. Why is it that at the granular level employee
3 services doesn't operate or have as a clearinghouse the
4 specific details of what these 60 people do day to day?

5 A. There is a couple of reasons. One is, I will
6 go back to, these are members' personal staff. They
7 make the decision about what their staff do to serve
8 their interests.

9 It is also very important for members to make
10 those decisions. And we are a nonpartisan office, but
11 members may not want to tell us all of the things that
12 they have their staff working on. That is, for many of
13 them, what they are working on for their own political
14 agendas, and we are a nonpartisan office. So they
15 wouldn't say: Here's the details.

16 And unlike other organizations where you say,
17 oh, we have these people; or even staff now, in IT, you
18 can say, these people do this. It's the same work.
19 These offices all operate independently. So there is
20 not a they all do the same thing or that they have
21 assigned duties. It depends on the member.

22 Q. So the documents then that might regularly be
23 generated as to the supervisory functions of the LA4s,
24 to the extent they exist, are those documents that would
25 be within the 90 different offices of the members?

1 A. Yes.

2 Q. And so there is no requirement or
3 responsibility of branch employee services to retain or
4 centralize control of such records.

5 A. No. We have a retention, that members have
6 their own retention that are carried out in the
7 [inaudible] records.

8 Q. And with regard to kind of just sensitivity of
9 some of the information and some of the work being done
10 by each of these offices, would you perceive any
11 objections if there was to be a requirement for
12 centralized control of these types of records?

13 A. Yes.

14 Q. And additionally, with regard to these
15 records, are you familiar with any restrictions on
16 producing such records of the type I've described,
17 demonstrating supervisory actions and getting those
18 records from members during session?

19 A. Generally we would think of that as a public
20 records request, which we deal with in all governments
21 in Oregon.

22 However, one of the unique pieces about the
23 legislature is that we don't have to respond to public
24 records request while they are in session. There is a
25 carveout in the law that essentially recognizes the work

1 they are doing during session and does not have the same
2 demands on them to produce records while they are in
3 session.

4 Q. Given the structural impediments with this
5 management relationship that you've described, then how
6 are you able to demonstrate that the LA4s meet the
7 supervisory definition?

8 A. Well, I think the demonstration of it is that,
9 one, the members said that the people have been
10 assigned, and recall that those descriptions that were
11 developed were not developed as hypotheticals, they were
12 developed from surveys done by employees that were also
13 reviewed by a manager.

14 I mean, of course, we get calls from those
15 folks that say, We are hiring this person or bringing on
16 this intern. So I have knowledge because of the work
17 that is done in our office. But I could not tell you
18 each individual person.

19 Q. Now, as part of the documentary record, did
20 the branch submit in its aggregate those completed job
21 descriptions from the employees from the personal staff?
22 I say job descriptions. The job surveys?

23 A. Okay. So we collected all of the
24 questionnaires that we sent to people [inaudible].

25 Q. Are you familiar with Employer Exhibit R12?

1 Q. I want to walk you through a series of
2 questions, operational questions, and then we'll get
3 down to some specifics --

4 A. Okay.

5 Q. -- related to this category. So bear with me
6 for a moment.

7 What role do personal staff have regarding
8 members' emails?

9 A. Again, the office is structured differently.

10 Q. I realize when I said "members' emails" I
11 meant a member's email account.

12 A. So most personal staff primarily use the
13 member's email account as their own email account. So
14 they have access to the members' emails and also
15 regularly [inaudible] so you can communicate. Also,
16 [inaudible] I would get something from a representative
17 or a senator, and upon reading it I was confused, and
18 then at the end I would see a signature block of the
19 legislative assistant and understand that it was
20 [inaudible] from the assistant that was sending it and
21 not the member.

22 So that's one of the things you have to learn
23 here is to read very carefully not to [inaudible].

24 Q. So structurally does the branch assign each of
25 the 90 members an official email account?

1 A. Yes, every member has either a reference and
2 an account.

3 Q. And that account then, just to walk this back
4 through, the personal staff and the office most often
5 have proxy or an ability then to access and review
6 things that are coming in for this senator or that
7 representative through their email account.

8 A. Yes. Interestingly here it's not often proxy.
9 It's more often signed in [inaudible].

10 Q. By that you mean signed into the account with
11 a password and the access for that account. And that is
12 contrasting with what we might other recognize as proxy
13 access to like an Outlook mail platform?

14 A. Both methods are used.

15 Q. Now, this matter of the personal staff being
16 signed in or accessing in some way the member's email
17 account, does this create practical challenges in
18 providing guidance or information on employee matters to
19 members?

20 A. It does. Unlike anyone else you are emailing
21 with you, assumes that we were sending it to is the one
22 who will read and receive it. Necessarily elected
23 officials receive hundreds and hundreds of emails. So
24 it's understandable that they can't go through them all,
25 and they have their staff that are responding to them.

1 So what does happen is if there is a
2 confidential matter, it is very difficult to make
3 contact via email or to share information via email
4 because first their staff will read it and determine if
5 the member needs to see it as part of their job and that
6 priority that communication is given.

7 Q. So if, for example, information about employee
8 relations or collecting bargain is sent out for the
9 members, is there then a likelihood based on this
10 operational model that those communications would be
11 reviewed or seen by the personal staff?

12 A. In most cases the personal staff will see it
13 before the member does.

14 Q. Now, understanding how at least the email
15 portion of how these offices run is set up for many, are
16 personal staff also in a position then from their policy
17 roles to review legislative concepts and legislation
18 generally for their member?

19 A. Absolutely.

20 Q. And at times can that legislation touch on
21 matters connected to collective bargaining?

22 A. It's always passed by this body.

23 Q. And can you explain, just on your general
24 observations, how that might come up in a given session
25 with legislation generally?

1 A. Sure. Matters relating to collective
2 bargaining and labor and employment laws are always a
3 part of any legislative session we have. It's the labor
4 committee which is designed to receive and address bills
5 that touch on PERS or benefits or collective bargaining.

6 Q. In fact, is the pending legislation something
7 that we discussed pertinent to an amendment to the PEFA,
8 is that something of a type that would have been
9 evaluated and/or might have been provided by the
10 personal staff to the member?

11 A. Sure. And as we went through it, staff
12 indicated they did, which was to advise on the
13 [inaudible] and help members prioritize and write
14 testimony and...

15 Q. Now, we earlier testified, this now feels
16 distant from this morning, about the process for what
17 has been approved by the LAC on the legislative branch
18 personnel rules to flow through the House and Senate for
19 floor vote. Is that summarized correctly?

20 A. Yes.

21 Q. And so to the extent that bargaining proposals
22 for the proposed unit likely would be voted on by the
23 House and Senate, did this implicate the personal staff?

24 A. I don't know how it wouldn't because anything
25 would go to the member, the personal staff would.

1 Q. And conceivably, how does this align with the
2 role of staff in reviewing and making policy
3 recommendations on matters that they vote on?

4 A. We put it through a survey. That is, in fact,
5 their job, and they are very skilled in doing so,
6 evaluating a policy that is being put forward, possibly
7 reviewing, because they are, again, so aligned to their
8 member, preparing their member for testimony and action.

9 Q. And now at a smaller scale I would like to
10 talk for a moment about the LAC.

11 Now, for the LAC members themselves they have
12 their own staff, their own personal staff, don't they,
13 because they are members of the assembly.

14 A. Sure. Of course.

15 Q. And so in that context of the personal staff
16 supporting the LAC members, how might they get
17 implicated when LAC reviews matters related to
18 collective bargaining?

19 A. I think, again, things would be sent to LAC,
20 the personal staff would see it first. And then,
21 necessarily, part of their job would be to prepare their
22 member for action on this proposal, and they typically
23 make a recommendation.

24 Q. Are there standing committees that will
25 conduct hearings on matters impacting collective

1 bargaining and labor interests?

2 A. Yes. From [inaudible] it's usually business
3 and labor, there might be something in [inaudible].
4 Yeah, there are standing committees that take up those
5 issues and a variety of employment.

6 Q. And how would the personal staff of the
7 members of these committees potentially be implicated in
8 that process?

9 A. They would be impacted by whatever that
10 legislation is. And, again, they are likely to see it
11 first and to do what they've outlined are their duties,
12 which is to advise on the policies and make
13 recommendations.

14 Q. Earlier in the review of the job survey
15 template, there was a section that was referred to as
16 human collaboration. Do you recall that section?

17 A. Yes.

18 Q. So in line with this section on human
19 collaboration, to your knowledge, do personal staff have
20 an outward facing role in engaging the lobbyists?

21 A. Yes. Again, I want to say every member is
22 structured differently, but many do. Right?

23 So oftentimes [inaudible] they accept
24 appointments on behalf of their members. So a lobbyist
25 may not always be able to get with the senator or

1 representative but they can an appointment with their
2 staff to [inaudible] information, get back to the
3 member, make recommendations, et cetera.

4 Q. So which flows to kind of the next part of
5 this question then. So in that capacity of engaging the
6 lobbyist, is there a potential that personal staff come
7 into contact with lobbyists who themselves may be
8 represented by labor unions, who may themselves
9 represent labor interests?

10 A. Absolutely. When it's not COVID time, we see
11 all labor organizations have special days and come in.
12 That is a significant part of what labor does is lobby.

13 Q. And is it conceivable that these staff might
14 be directed to, or as a practical matter in the routine
15 course engage with and discuss the policy direction of
16 the member with these different lobbying groups?

17 A. Absolutely.

18 Q. So let's go ahead then and work through -- I
19 had you turn to R6. And looking at the -- work
20 backwards here, page 2. You mentioned in this series
21 it's progressive. So LA1 would be entry level moving up
22 to the LA4. Could you describe how the LA fits this
23 confidential definition?

24 A. Yes. Again, this is formulating [inaudible],
25 working on collective bargaining. Right? And to the

1 extent that if we have organized labor or working with
2 organized labor, they are the first point -- if you look
3 at the LA1 they are the first point of contact
4 representing the member.

5 Q. So this sets up an important juxtaposition
6 because from what it sounds like collective bargaining
7 matters can be an external matter; correct?

8 A. Yes.

9 Q. It can be legislation that impacts many public
10 employers, for example; correct?

11 A. Yes.

12 Q. And in what you've described, it's also
13 possible that if this unit were authorized that these
14 individuals, these positions like the LA1, would seek
15 collective bargaining matters relevant to their own
16 union because of the position that they hold?

17 A. Yes.

18 Q. Now, I'd like to go through, at least with the
19 LA positions, another example of whether their position
20 surveys align with the job duties for the confidential
21 employees. I'm going to need you to go back to Exhibit
22 R12 if you could.

23 A. Which part of R12?

24 Q. Yes, exactly. R12, part 3. Are you there?

25 A. I am.

1 every member takes action on matters related to
2 collective bargaining.

3 Q. That would be true in terms of collective
4 bargaining generally?

5 A. True on behalf of PEFA, who every member voted
6 on it, and any changes would be ultimately in the
7 structure in the branches. There is committees that
8 work the bills and then they go to the floor.

9 Q. And then at a level if collective bargaining,
10 if bargaining was implemented for this group, there
11 would be that be next level of engagement with the
12 members and their personal staff?

13 A. Yes.

14 Q. Let's move to our final subject to discuss
15 generally the concept of community of interest. Are you
16 familiar with this concept of community of interest?

17 A. Yes.

18 Q. And have you considered that concept as
19 applied to the proposed unit?

20 A. Yes.

21 Q. And so some questions connected to this
22 concept. With regard to some of the turnover and
23 fluctuation in this workforce, how does that impact the
24 desire of this segment of the workforce to be unionized?

25 A. I'm sorry. Could you repeat the question.

1 Q. Yeah. Is there a connection between the
2 turnover of workforce fluctuation in determining the
3 desire of employees in this proposed unit to be
4 unionized?

5 MR. HUTZENBILER: I'm going to object -- I am
6 objecting. This is pure speculation. I don't see how
7 she could possibly testify to the desires of the people
8 in the proposed bargaining unit.

9 ALJ KAUFMAN: Okay. Mr. Hutzenbiler, I
10 understand your objection. But the interest of the --
11 the preferences of the employees is a factor, and I
12 think the board can accord it the appropriate weight and
13 make the determination of whether to accord it any
14 weight given that it's speculation on her part. So I'll
15 give her some leeway to go ahead and answer the
16 question.

17 MR. HUTZENBILER: Thank you.

18 THE WITNESS: I would never want to speculate
19 on what the employees -- it's the change of the
20 workforce. So on any given day -- we hired 180 people
21 in the last 3 months. And so the fluctuation, the eyes
22 of the workforce, it's a snapshot on any given day. And
23 because it's such a transitory workforce, you don't get
24 hired necessarily to stay on like you would in other
25 organizations. You are hired working for the session or

1 working for the member. There are some that are longer
2 term, but it's just the nature of the workforce and how
3 it expands and contracts is difficult to say what is the
4 workforce.

5 Q. (BY MS. SUGAHARA) And that ebb and flow that
6 you speak to, where you explain how many employees you
7 recently brought on. Correspondingly, when it contracts
8 what do numbers look like?

9 A. It will go down and level out. Generally,
10 members will have at least one staff person more times
11 than they don't. So a unit might have 90 at a lower
12 point, personal staff, and then we might have right now
13 180. And I would note that that 180 is [inaudible]
14 personal staff. The interns come and go as well. And
15 this session is also different because of the pandemic.

16 Generally, if they counted for members, of
17 course, like it has for all of us, that the end
18 buildings, they will have somebody staffing their desk.
19 So I think this is a different session as well.

20 Q. And as far as a trend, would that mean that
21 there would be more people hired if it were ,I dare to
22 say, a traditional session?

23 A. Right. We've been kind of looking at how our
24 number of interns are down a bit. Some members are
25 hiring more staff. I think generally we would see more

1 for some period of the session. It also is at what
2 point in the session when members will start, again,
3 individually making decisions about how many staff they
4 need and what percentage they need.

5 Q. So among these proposed unit members, is there
6 typically transfer between the 90 offices of LAs?

7 A. It's not a transfer in the traditional sense.
8 Right? It goes back to that alignment to the member.
9 So you sometimes will see a transfer from one office to
10 another in the same party. I'm not aware that anyone
11 has ever switched from one office to another of a
12 different party.

13 But generally individuals are working for
14 their member. They have skill sets so they might get
15 hired to attend, or a new member might come on and want
16 somebody with experience. But it's certainly not an
17 automatic.

18 Q. This next question may be informed by your
19 response to what I just asked. But do these individuals
20 generally promote between elected members' offices, go
21 from an LA3 to a chief of staff position in a different
22 office?

23 A. It happens. Typically, and more specifically,
24 I think you'd see somebody progress within their own
25 office. So if a member's chief of staff moves on to

1 bigger and better things, then someone else in the
2 office might move up. They might come from another
3 office. But it's not a traditional workforce in terms
4 of, oh, there is an opening over there on the other
5 side.

6 Q. Would it be atypical to have staff reporting
7 to two different members, so shared supervision?

8 A. Yes. We have it occasionally, for somebody
9 that is 50 percent for one and 50 percent for another.
10 But it is not common.

11 Q. Now, with regard to the way they, staff and
12 offices relate to one another, are they serving the
13 interests of the member or the assembly at large?

14 A. They are hired by and serve the member.

15 Q. Now, with regard to the collaboration between
16 staff and the member offices, is that a given that they
17 collaborate with one another?

18 A. I think on particular issues where there is
19 alignment, but there is not an automatic you work
20 together because there is scheduling and coordination
21 that happens, but each member has their own priorities
22 and agenda.

23 Q. Does this present challenges that they may
24 work at cross purposes with one another?

25 A. Sure.

1 Q. And what are those challenges?

2 A. Well, they are in partisan offices. Right?

3 So they are not -- they are working -- their motivations
4 are different. They are working for members that have
5 different interests.

6 Q. Now, other than recognizing this is a COVID
7 year, these are all staff who also have to share the
8 same space and the same office location and so on,
9 right, so that they will see each other day to day.

10 A. Yes.

11 Q. Now, with regard then to this model that we've
12 described and employees of the executive branch, of
13 which there are many, many thousands of employees in the
14 executive branch who may be under one union or another,
15 how does this unit present a challenge for the branch
16 when, say, the executive branch has thousands of
17 employees in a different bargaining -- in different
18 bargain units?

19 A. The distinction is it's not so much the size
20 of the unit, it's the boss. And in the executive branch
21 there is a chief, there is the governor. We have 90.
22 And so there is not -- you can have many employees. All
23 of those lead up to a single chief executive. We have
24 90 chief executives.

25 So there is not a common -- there is not a

1 supervisory authority approximately 50 percent of the
2 time?

3 A. I don't recall that.

4 Q. Do you know of any LA4s that supervised more
5 than one person?

6 A. Yeah.

7 Q. Who?

8 A. Additional staff and interns.

9 Q. Okay.

10 A. Actually, I think I was just speaking with Rep
11 Howard's office, and their intern and another LA that I
12 know who the chief of staff is. I have to look at which
13 offices have more than one other person and also have an
14 LA4, and I have not done that analysis.

15 Q. Okay. So we talked about that the employees,
16 while they work at the direction of LAs, while they work
17 at the direction of legislators, they are employees of
18 the legislative branch of the State of Oregon; right?

19 A. Yes. They often refer to it as a dual
20 employment.

21 Q. What authority do LAs, any LAs, have to carry
22 out management decisions of the State of Oregon?

23 A. I would not be able to answer what their
24 authority is. It would be working with their appointing
25 authority. I don't know which members have given them

1 decisions on their behalf.

2 Q. To your knowledge, do LAs control or implement
3 the legislative assembly's policy?

4 A. To the extent that they support their member
5 in doing so. Members have different rules within
6 effectuating the branch's policies as well, members of
7 LAC, or members of other committees. So it would depend
8 on which member.

9 Q. So they would only do that at the direction of
10 the member.

11 A. I don't think it has to be specific direction
12 of the member. It depends on what their assignment is,
13 who they are working for.

14 Q. Would they be able to do it independently of
15 the member?

16 A. [Inaudible] with a hypothetical, I think they
17 could, yes. Members, I think as we went through some of
18 the surveys had said, do these things independently.

19 Q. I guess what I'm talking about is more
20 particular. Do LAs formulate or effectuate high level
21 legislative branch policies?

22 A. They may on behalf of their member.

23 Q. So within the confines of working with the
24 member they may do that.

25 A. It's much like -- I am starting with the

1 question you could ask if I do as well. So the
2 assignment could be broad. They work for the member,
3 and I think many members have their staff doing that
4 work for them.

5 Q. Can you name anybody specifically that a
6 member has delegated that task to?

7 A. So I know that members of LAC, I had a number
8 of calls from Jack asking about the personnel rules when
9 they were before LAC, where I would say, examples that
10 staffing had [inaudible], the member wants to know what
11 this means, or I am working on a briefing or a
12 recommendation, those type of things.

13 Again, I'm not in the day to day of what the
14 members and the staff and how they assign or what their
15 priorities are.

16 Q. You talked a bit about confidential employees.
17 And I believe one of your specific concerns was that the
18 LAs often or maybe always have access to the members'
19 email; is that correct?

20 A. Yes. They often, not just access, but they
21 are the ones that prioritize [inaudible] first.

22 Q. Are there other ways that people can
23 communicate with legislators that are more private than
24 email?

25 A. You can certainly call usually another staff

1 member, oftentimes the LA is the one that answers, and
2 then even if you ask for a meeting. But certainly I
3 think there are other ways that you would typically work
4 through a staff member in order to do so.

5 Q. Can you turn to R6, Exhibit R6.

6 A. Yes, I've got it.

7 Q. Thank you. You testified it's possible
8 because of that email access that LAs would see
9 information related to their own bargaining. Do you
10 recall saying that?

11 A. Yes.

12 Q. There is a description at the bottom of R6 of
13 confidential employee?

14 A. Yes.

15 Q. Do you see the word "possible" in that
16 description anywhere?

17 A. In the 6, no.

18 Q. You testified that it's not traditional that
19 individuals transfer between offices but it does occur;
20 correct?

21 A. Transfers do occur, yes.

22 Q. Are you familiar with Clare Prohoda [ph]?

23 A. I am familiar with the name.

24 Q. Do you know that she transferred from working
25 with a house member to working with a senator?

1 Q. That's fine. I'm trying to draw a distinction
2 between the actual bargaining process that a school
3 district might engage in with the union, sitting down,
4 having a meeting, exchanging proposals, providing
5 information. That's different than the legislature
6 itself just drafting a bill and proposing it. It's a
7 different process; correct?

8 A. Oh, yes.

9 Q. That's all I was trying to clarify. I think
10 we'll move on, but I appreciate the answer.

11 MR. HUTZENBILER: If I could just take a
12 moment, I think I may be wrapping, but I just want to go
13 through.

14 ALJ KAUFMAN: Yes, go ahead.

15 (Recess taken.)

16 MR. HUTZENBILER: That is all the questions I
17 have for you right now. Thank you.

18 THE WITNESS: Okay.

19 ALJ KAUFMAN: Thank you.

20 Ms. Sugahara, redirect?

21 MS. SUGAHARA: I do. Thank you, Judge
22 Kaufman.

23 REDIRECT EXAMINATION

24 QUESTIONS BY MS. SUGAHARA:

25 Q. So, Jessica, could you make a distinction

1 between the branch funding the salaries for members of
2 the proposed unit and the level at which a member has a
3 budget that is used to pay for a member's proposed
4 bargaining unit member's salary?

5 A. I will do my best. So the branch, so like any
6 government agency, we have a legislatively adopted
7 budget for the branch, and each agency has a budget.
8 Members, each member office is a fixed budget proposed
9 session in the interim. And I am just slightly outside
10 of my know-how, but to the extent that our financing
11 [inaudible]. But they get their own budget, and within
12 that budget they need to manage it. They have both
13 services apply through staff, and salaries. So they are
14 afforded an amount that they are able to use for staff
15 salary.

16 Q. And through this process then you can only say
17 in a given session, bring on the number of staff that
18 you can pay for depending on the level of designation of
19 the staff.

20 A. Correct.

21 Q. When you were contacted, you gave some
22 examples of being contacted in employee services with
23 questions from LAs about how to manage or address
24 situations, personnel situations in the office. Do you
25 recall that testimony?

1 A. Yes.

2 Q. And in employee services, do make a
3 distinction in providing this kind of guidance between
4 options and directives about what an LA may or may not
5 do?

6 A. Yes. We generally don't give directives
7 except for something that is lawful or unlawful that we
8 are aware of or part of the rules. And so oftentimes
9 that is what we are asked for, what can we do, and we
10 say, well, here's some things to think about, here are
11 the options that you have.

12 Q. And in that way, and based on what you have
13 described, is that control over managing employment
14 maintained then with the elected official versus
15 employee services?

16 A. Absolutely. We have no ability to hire or
17 fire at all, or even to say you must discipline or
18 otherwise. We advise and counsel and give options, and
19 oftentimes it's much more in how to be helpful than
20 otherwise, but we don't take any action ourselves.

21 Q. Let's turn to Exhibit R6. You analyzed some
22 questions about the role of LAs in implementing the
23 policy or making policy-level decisions on behalf of the
24 member. And if you look at the managerial employee
25 definition, do you see that on R6, page 1?



LEGISLATIVE ADMINISTRATION

Employee Services

December 2, 2020

To: Members of the 2021 Legislative Assembly

From: Employee Services

Subject: 2021 Legislative Assistant Assignments

The Presiding Officers have approved the Segal recommended compensation plan for the Legislative Assistants to be effective January 1, 2021. In order to move forward implementation of the new compensation plan, [Employee Services](#) needs each of you to indicate which level of duties you will be assigning to your current staff in 2021 no later than **December 8, 2020**. Many of you were advised of the initial Segal evaluation of your current staff. However, we recognize that you may choose to organize differently or assign different duties to your staff as you move into the upcoming session so we wanted to be sure to have you indicate which description you would be assigning.

As you may recall, the new structure for legislative assistants (LAs) provides for four levels. Enclosed are the Segal drafted descriptions for each of the four levels. These descriptions were developed from the dozens of JDQs submitted by LAs. It is understood and expected that each office will have unique duties and expectations to serve the member and district. The structure developed captures the substantive differences in job evaluations factors.

Included in the structure are distinguishing features as outlined below. Next to each of the levels are also some of the common working titles associated with the position. It is important to note, it is the duties assigned rather than the title that determines the level. Under the current structure there were only two levels of LA. The level 1 was the senior level and paid at a salary range 20. The level 2 was the junior level and paid at salary range 17. Generally, the current level 2 aligns to the new levels 1 or 2 and the current level 1 aligns to the new levels 3 or 4.

Many questions have been raised about the distinguishing features of the level 4. There are two significant distinctions. The level 4 position is supervisory with authority to hire, discharge, assign and evaluate work and discipline or effectively recommend these actions to the appointing authority. This is distinguished from the lead work duties inherent in the level 3 of training/orienting new employees, assigning and reassigning tasks to other employees, giving direction to other employees concerning day-to-day work procedures, communicating established standards of performance to affected employees, reviewing the work of other employees to ensure conformance to

LEGISLATIVE ADMINISTRATION

established standards and providing informal assessment of employees' performance to the supervisor. Second, the level 4 regularly acts as a proxy for the member in matters of import. While all levels represent the member, the level four regularly makes independent decisions on behalf of the member on significant matters.

Level 1 (Receptionist, Office Assistant, Constituent Services Coordinator, Legislative Assistant) - This position is the first level in the Legislative Assistant job family. Its primary responsibility is general administrative support for the smooth and efficient day-to-day operations of the Member's office.

Level 2 (Legislative Assistant, Constituent Services, Office Manager) - While the focus of this position is to providing day-to-day office support for the Member, this position is distinguished from the level 1 in that it is more involved in the research and analysis of issues in the review and development of legislation.

Level 3 (Legislative Director, Policy Director, Chief of Staff) - This position is distinguished from the 2 level in that it conducts research, analysis, and **advises** the Member on legislative strategy. The position exercises a wide range of independent discretion and independent actions when interacting with other Legislative offices, Member, and constituents. It is involved in the development of legislative strategies and advancement of the policy agenda and legislative goals of the office.

Level 4 (Legislative Director, Policy Director, Chief of Staff) - This position is the highest level in the Legislative Assistant job family. While many of the duties and responsibilities are similar to the level 3 position, it is distinguished from the III level in that it typically has responsibility for supervision of staff and interns. Like the Legislative Assistant III, the position supports the Member in the research, analysis, and development of legislation, often involving highly complex issues. The position often represents the Member in community events and legislative committees and interacts with little oversight with Legislative offices, Members, the media, constituents, and the public in general.

The pay ranges* for each level are outlined below. The pay equity methodology adopted by LAC determines what step staff are placed at on the scale.

	1	2	3	4	5	6	7	8	9	10
Level 1	\$37,911	\$39,617	\$41,400	\$43,263	\$45,210	\$47,244	\$49,370	\$51,715	\$54,172	\$56,867
Level 2	\$42,597	\$44,514	\$46,517	\$48,610	\$50,798	\$53,084	\$55,472	\$58,107	\$60,868	\$63,896
Level 3	\$50,734	\$53,017	\$55,403	\$57,896	\$60,501	\$63,224	\$66,069	\$69,207	\$72,494	\$76,101
Level 4	\$60,425	\$63,144	\$65,985	\$68,955	\$72,058	\$75,300	\$78,689	\$82,426	\$86,342	\$90,637

*PERS participating. Salaries for non PERS participating are 6.95% lower.

Finally, as always, if you have questions or concerns, please reach out and we will be happy to assist you.

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-001-21

IBEW LOCAL 89,

Petitioner,

v.

STATE OF OREGON, OREGON
LEGISLATIVE ASSEMBLY,

Respondent.

RESPONDENT'S POST-HEARING BRIEF

I. INTRODUCTION

The Employment Relations Board should deny the petition. As recent as 2021, the Oregon Legislature exercised its constitutional authority to adopt rules governing the employer-employee relationship of the subject employees. This effectively removed the subject employees from the Public Employee Collective Bargaining Act ("PECBA"). As adopted, the rules are based on how the Oregon Legislature is required to function and do not harmonize with either the PECBA policy goals or mechanism required for the operation of the PECBA. Assuming the PECBA did apply, the subject employees do not share a community of interest under ORS 243.682(1)(a) and the proposed bargaining unit would improperly include supervisory, managerial, and confidential employees exempt under ORS 243.650.

II. CORE ISSUES

The parties agreed to the proposed issues (##1 through 3) asking whether the proposed bargaining unit included supervisory employees, managerial employees, or confidential employees within the respective meanings of subsection (23)(a), (16), and (6) of ORS 243.650. The parties also agreed to the proposed issue (#4) asking whether the proposed bargaining unit was inappropriate for collective bargaining because the petitioned-for employees share an

1 inadequate community of interest. Finally, the parties agreed to the proposed issue (#5) asking
 2 whether the proposed bargaining unit was inappropriate for collective bargaining because the
 3 policy objectives of the PECBA are irreconcilable with the operations and structure of the
 4 Oregon Legislative Assembly? The Respondent answers in the affirmative for these questions
 5 based on the evidence received at hearing and the legal argument raised below.

6 **III. RELEVANT STANDARDS**

7 The hearing was conducted under the expedited hearings process set out in OAR 115-
 8 025-0065(1)(c) and (2). As representation matters are investigatory, there is no burden of proof
 9 on any party except sufficient evidence is required as to whether exclusions apply to public
 10 employees. OAR 115-025-0065(4) and OAR 115-010-0070(5)(a).

11 **IV. FACTS IN EVIDENCE**

12 The evidence submitted at hearing is described and summarized below. The evidence
 13 shows that the Legislative Branch of the State of Oregon functions very differently than other
 14 state executive agencies or public employers. The authority for its internal functions, including
 15 personnel administration, derives directly from its constitutional authority. Through this
 16 authority, the Oregon Legislature adopted personnel rules that cover all employees of the branch
 17 in 2021 as it does before every session. In addition, the Oregon Legislative Assembly recently
 18 adopted a four-level classification system for the subject employees as Legislative Assistant 1, 2,
 19 3, and 4 (“LA1, LA2, LA3, and LA4”). The evidence shows these legislative assistants are hired
 20 and work directly for the Elected Members of the Oregon Legislature. While they share the work
 21 infrastructure that includes a common compensation and benefits system, these assistants
 22 uniquely serve the interests of their Elected member, who has their undivided loyalty, and at
 23 times may work at political cross-purposes with one another.

24 **1. THE OREGON LEGISLATIVE ASSEMBLY AND ITS EMPLOYEES**

25 To the extent the Oregon Legislative Assembly (“OLA”) is just that – an *assembly* of
 26 elected legislators– it does not resemble the normal hierarchical structure of other state agencies

1 or public employers.¹ Each elected official is an “appointing authority” within OLA. The OLA
 2 Human Resources office, referred to as Employee Services, provides support to the OLA by
 3 providing feedback to the Elected Members when they ask for guidance on, such things as how
 4 to hire or interview. Otherwise, Employee Services is not involved in the decision-making.²

5 Personnel Rules adoption under the Oregon Constitution. As described more in depth
 6 below, the Oregon Senate and Oregon House of Representatives, through the adoption of their
 7 own respective Senate and House Rules, adopted separately the Legislative Branch Personnel
 8 Rules (“LBPRs”). Adoption of the LBPRs constitutionally requires open deliberations. For this
 9 reason, unlike school districts, the OLA cannot exclude the public to discuss collective
 10 bargaining; there is no carve-out permitting closed hearings, meetings, or deliberations to
 11 determine what collective bargaining terms can be adopted by the OLA.³

12 The fluid workforce. As mentioned, the subject employees are part of a highly
 13 fluctuating workforce of personal staff hired directly by Elected Members. For instance, even the
 14 list provided to the Board remains subject to variation since its generation in December of 2020
 15 and January 2021.⁴ Personal staff tend to exit with their outgoing elected members. Newly
 16 elected members bring on new personal staff. The number of employees further fluctuates in
 17 response to the workload needs of the interim and legislative sessions.⁵

18 The subject employees are personal staff to their elected member and may have familial
 19 connections to one another. Often, the personal staff are family, relatives, friends or political
 20 allies, of the elected members. There are no civil service requirements as that term is
 21 traditionally understood that apply to personal staff. Staff are hand-picked by a member and
 22 there is no so-called ‘common pool’ from which staff are hired.⁶ Moreover, there is a carve out

24 ¹ Respondent Exhibit 5.

25 ² Knieling testimony.

26 ³ Knieling testimony and Respondent Exhibits 15 and 16. Also, school districts have laws permitting the elected
 board members the ability to caucus in confidence in collective bargaining deliberations.

⁴ Respondent Exhibit 11.

⁵ Knieling testimony.

⁶ Testimony of Knieling

1 from the state ethics laws that otherwise prohibit nepotism by public officials. Uniquely,
 2 members may hire or fire relatives or members of their household and may lawfully appoint,
 3 promote, discharge, fire, demote, or advocate for such actions on behalf of their relatives and
 4 family members.⁷ As presently constituted, the proposed bargaining unit includes spouses,
 5 children, parents, siblings and other close relations who are employed by a member of which
 6 there are at least a dozen members in the Assembly who employ spouses and family members.⁸
 7 There is also no requirement for retention or transference of staff upon the exit of an elected
 8 member and promotion into another office is not a recognized practice.

9 Moreover, the elected member can unilaterally assign the subject employee a higher
 10 classification. For this reason, wide variation exists in the scope of legislative staff duties given
 11 to the subject employees.⁹ This is described more fully below in the discussion involving the
 12 distinctions between the LA1, LA2, LA3, and LA4 positions.

13 The subject employees work at cross-purposes. The Elected Members arrive at the
 14 Oregon Legislative Assembly with political agendas and interests unique to the districts they
 15 represent. As personal staff, the legislative assistants function similar to executive assistants in
 16 executive state agencies – but for singular purpose of supporting with undivided loyalty *their*
 17 Members’ political and district agendas. In this capacity, within the LA1 and LA2 positions, the
 18 subject employees have access to and control the elected members’ email, communications,
 19 scheduling, and act as a point of contact for the Member.

20 Within the LA3 and LA4 positions, the subject employees exercise independent decision-
 21 making authority, speak on behalf of the Member, and direct and supervise other staff working
 22 for the Member. All the Members must rely on—and confide in—their personal staff. Every
 23 session, collective bargaining matters becomes a subject of legislative concern with triggers that
 24 include legislation that touches on labor or bargaining matters and lobbying by labor interests. If
 25

26 ⁷ ORS 244.177(2)

⁸ Testimony of Knieling

⁹ Knieling testimony.

1 a bargaining unit was adopted, the Member would need to confer regularly with their personal
 2 staff, as their legislative assistants, on strategy and planning connected to collective bargaining,
 3 both in the broad scope of legislative functions engaged in by the Member and at the granular
 4 level regarding the subject bargaining unit. Simultaneously, legislative assistants working for
 5 some Members regularly oppose legislative assistants working for other Members.¹⁰ It is a
 6 political certainty this will occur in matters of collective bargaining as it does on matters of
 7 proposed legislation or for any potential bargaining unit.

8 Legislative assistants sometimes collaborate with other aides but this collaboration, when
 9 it does occur, almost always occurs solely within the narrow columns of party affiliation.

10 Legislative assistants working for democrat elected members never caucus with assistants
 11 working for republican elected members.¹¹ Collaboration is further confined within the
 12 Member's focused policy agenda. More often than collaboration there is competing legislation,
 13 or opposition to legislation. This puts the legislative assistants at cross-purposes with each other
 14 where their loyalty is in serving their Member's agenda.¹²

15 Unlike the common union membership shared by sports leagues (e.g., NFL), legislative
 16 assistants occupy the same building and answer directly and solely to their Elected Member.
 17 There is no singular voice, like a coach, for a team of legislative assistants or like an executive
 18 state agency under the direction of the Department of Administrative Services and the Governor.
 19 Rather, there are 90 voices, one for each Elected Member. One useful analogy provided in the
 20 hearing was to compare the 90 Elected Members who exercise their authority like 90 chief
 21 executives.¹³ The subject employees each work for their respective Member often in opposition
 22 to other Members. In this way, they cannot share a community of interest.

23 / / /

24 / / /

25 ¹⁰ Knieling testimony.

26 ¹¹ IBEW witness Anne Marie Backstrom under cross examination.

¹² Knieling testimony.

¹³ Knieling testimony.

2. **EVIDENCE SHOWS THE SUBJECT EMPLOYEES ARE EXEMPT**

The strongest evidence why the subject employees are exempt from the proposed bargaining unit came from the employees themselves. For reasons entirely unconnected to the petition – but highly relevant to the exemption question – the OLA obtained focused and specific responses from the subject employees about the duties performed through exhaustive questionnaires. OLA then reclassified the employees, enhanced their compensation and crafted position descriptions following a data analysis of the survey responses.

A. An independent third-party determined the scope nature of the work performed by the employees based on extensive analysis drawn from substantive employee and supervisor feedback and data.

To ensure fairness in the compensation of its employees, OLA retained Segal Group, Inc. (“Segal”) to undertake a classification and compensation analysis of Legislative Branch employees. Segal met with the employees around October 2019 to inform them about the pending project analyzing their positions.¹⁴ The presentation carefully alerted the employees that the Legislature wanted the employee’s job descriptions “updated to accurately reflect the work performed by the employees.”¹⁵ Segal also informed them that their pay ranges might be updated upwards to reflect market data.¹⁶

As part of this, the employees were informed they would be asked to fill out and return a Job Description Questionnaire (“JDQ”) that would ask them what they did in their job.¹⁷ Importantly, what the employees reported in their JDQs could not be altered by the supervisors, (e.g., the 90 members) reviewing the JDQs.¹⁸ Members in their review could comment or expand on the responses reported by their legislative assistants and some did.¹⁹

¹⁴ Respondent Exhibit 3.

¹⁵ Respondent Exhibit 3, pages 3 and 4.

¹⁶ Respondent Exhibit 3, page 4.

¹⁷ Respondent Exhibit 3, page 7.

¹⁸ Respondent Exhibit 3, page 7.

¹⁹ See for example Respondent Exhibit 12, part 1, page 152 and other parts. Senator Dennis Linthicum supervises his Chief of Staff – and wife – Diane Linthicum. On page 152, he praises her knowing his “heart” and “motivating” his soul.

1 Under cross-examination, Petitioner witness Nolan Plese (“Plese”), testified in his
 2 capacity as an LA4 for State Representative Pamela Marsh. Plese admitted he attended Segal’s
 3 presentation and knew that employees were directed to accurately fill out the JDQs. Plese also
 4 testified that he truthfully and accurately filled out the JDQs identifying himself as a “Legislative
 5 Director” for Representative Marsh at the time.²⁰

6 Likewise, Segal Vice President and Project Manager Ruth Ann Eledge (“Eledge”)
 7 testified about providing the presentation to the employees and that Segal created the JDQs.
 8 Without being filled out, the JDQs ask an exhaustive list of 28 pages of questions and topics,
 9 and includes boxes for supervisor comments.²¹ This type of evidence and resulting data analysis
 10 offered in a representation petition to support a conclusion that the positions are management,
 11 supervisory, and/or confidential appears to be an issue of first impression for the Board. As
 12 explained below, the documentary evidence provided, as supported by the testimony of the
 13 outside consultant who performed the analysis and the administrative context supplied by the HR
 14 director, provide direct and specific evidence sufficiently supporting Respondent’s position.

15 The JDQs asked employees the extent they engaged in management and supervisory
 16 duties. It also asked the extent employees exercised independent judgment, decision-making, and
 17 how the employees work with others. In this way, the JDQs are directly relevant to the
 18 exemption questions under ORS 243.650.

19 Each JDQ also contained a basic job summary statement on its second page allowing the
 20 employee to describe their position in narrative form. For instance, witness Plese described his
 21 position in part as “supporting the Representative to achieve policy and legislative goals, remain
 22 connected with her constituents and community leaders, establish and build relationships with
 23 relevant stakeholders, . . .”²²

24
 25
 26 ²⁰ Respondent Exhibit 12, part 3, pages 1180-1207 (pages 178-205 in search)

²¹ Respondent Exhibit 4.

²² Respondent Exhibit 12, part 3, page 1183 (page 181 in search)

While not all the legislative assistants filled out the JDQs, some described or identified themselves as “Legislative Directors” or “Policy Directors.” Many assistants also identified themselves as the “Chief of Staff” for their Elected Member. It is accurate to say that some of assistants described their duties as performing a minimalist role, handling paperwork, schedules, etc. However, most of the assistants describe themselves as exercising responsibility, discretion, judgment, and/or supervision of others at levels sufficient to meet the relevant exemptions.

B. Most of the employees describe themselves as exercising significant discretion and judgment.

Each JDQ asked employees to describe the extent they exercised discretion and independent judgment and guided the answer with specific examples as follows:

- “Making decisions that affect the overall policies of the department or organization
- Ability to depart from standards or division/department protocols without prior approval
- Forming recommendations regarding changes to departmental policies or standards
- Participating significantly in the formation of policies for the department
- Providing consultation or expert advice to Oregon State Legislature senior leadership
- Planning long-term or short-term business objectives
- Representing Oregon state legislature in handling complaints, arbitrating disputes, or resolving grievances (both union and non-union)
- Investigating and/or independently resolving matters of significant on behalf of Oregon State Legislature
- Committing Oregon State Legislature in matters that have a significant financial impact (such as decisions that bind [client name] to pay for significant purchases)”²³

The vast majority of employees answered in the affirmative, with some answering by giving examples how they exercised judgment and discretion on these topics as follows:

Employee²⁴	Exhibit R-12	Employee	Exhibit R-12
Moore	Part 1, page 13	Fadden	Part 2, page 814
Kounovsky	Part 1, page 42	Watson	Part 2, page 872
Heimdahl	Part 1, page 71	Levitt	Part 2, page 902
Jakusovsky	Part 1, page 131	Linhares	Part 2, page 955
Linthicum	Part 1, page 161	Kraus	Part 3, page 1044
Hitzert	Part 1, pgs 228-229	Vargas	Part 3, page 1075

²³ Respondent Exhibit 4, page 12.

²⁴ Employee last name used.

Khan	Part 1, page 263	Lehman	Part 3, page 1103
Reschke	Part 1, page 301	Jordan	Part 3, page 1134
Byerley	Part 1, page 333	Offenbecher Newgard	Part 3, page 1162
Mintz	Part 1, page 367	Carroll	Part 3, page 1220
Bernert	Part 1, page 426	Enriquez	Part 3, page 1248
Leif	Part 1, page 455	Withem	Part 3, page 1307
Giles	Part 1, page 485	Swenson-Harris	Part 3, page 1364
Perry	Part 2, page 514	Walsh	Part 3, page 1428
Unger	Part 2, page 573	McClain	Part 3, page 1456
Baker	Part 2, page 604	Norden	Part 3, page 1489
Janzen	Part 2, page 634	Boquist	Part 3, page 1555
Goddard-Kropf	Part 2, page 665	Jones	Part 3, page 1584
Klingmann	Part 2, page 697	Crawford	Part 3, page 1614
Soltz	Part 2, page 726	Kubler	Part 3, page 1644
Wallan	Part 2, page 755	Williams	Part 3, page 1706
Balm	Part 2, page 784		

In contrast, the remaining employees that filled out the JDQs either answered in the negative or did not answer whether they exercised significant discretion or judgment as follows:

Employee	Exhibit R-12	Employee	Exhibit R-12
Dominguez	Part 1, page 102	Wright	Part 3, page 1018
Colette	Part 1, page 192	Nolan	Part 3, page 1191
Punian	Part 1, page 396	Ryan	Part 3, page 1278
Girod	Part 2, page 544	Kim	Part 3, page 1336
MacDonald-Factor	Part 2, page 844	Snook	Part 3, page 1399
Prihoda	Part 2, page 929	Sorce	Part 3, page 1523
Trout	Part 2, page 986	Olson	Part 3, page 1674

The above reflects a **75%** to **25%** split. In other words, most of the legislative aides answering the JDQs said they exercised discretion and independent judgment in their jobs.

C. Most of the employees describe having decision-making power regarding policy implementation, recommendation, and development.

Besides a set of questions involving discretion and independent judgment, each JDQ contained a “human collaboration” set of related questions and rankings as well.²⁵ Petitioner witness Plese identified himself at a “Level 4 – Moderate” which means he was involved in interactions and communications that “may result in recommendations regarding policy

²⁵ Respondent Exhibit 4, page 17.

development and implementation.”²⁶ Under cross-examination, Plese also admitted that Representative Marsh trusted Plese to advance her policy directives.

Using a ranking system, employees identified themselves at the highest Levels 4 and 5, fluctuating between moderate and significant involving “human collaboration”. This required work duties whereby the subject employees’ communications and discussions may or can result in “decisions regarding policy development and implementation” as follows:

Employee	Exhibit R-12	Employee	Exhibit R-12
Moore	Part 1, page 19	Fadden	Part 2, page 820
Kounovsky	Part 1, page 45	Watson	Part 2, page 878
Jakusovsky	Part 1, page 137	Levitt	Part 2, page 907
Hitzert	Part 1, page 235	Linhares	Part 2, page 961
Khan	Part 1, page 269	Kraus	Part 3, page 1051
Reschke	Part 1, page 307	Vargas	Part 3, page 1080
Byerley	Part 1, page 338	Jordan	Part 3, page 1139
Mintz	Part 1, page 372	Offenbecher Newgard	Part 3, page 1168
Punian	Part 1, page 401	Plese	Part 3, page 1196
Bernert	Part 1, page 431	Carroll	Part 3, page 1226
Leif	Part 1, page 461	Ryan	Part 3, page 1283
Giles	Part 1, page 490	Swenson-Harris	Part 3, page 1371
Perry	Part 2, page 520	Walsh	Part 3, page 1433
Girod	Part 2, page 549	McClain	Part 3, page 1463
Unger	Part 2, page 577	Norden	Part 3, page 1496
Baker	Part 2, page 610	Sorce	Part 3, page 1529
Janzen	Part 2, page 639	Boquist	Part 3, page 1558
Goddard-Kropf	Part 2, page 671	Jones	Part 3, page 1590
Klingmann	Part 2, page 702	Crawford	Part 3, page 1620
Soltz	Part 2, page 731	Kubler	Part 3, page 1650
Balm	Part 2, page 790	Olson	Part 3, page 1679
		Williams	Part 3, page 1710

In contrast, the number of employees that could choose to describe their position as merely exchanging information, or having no influence or limited influence in the form of “advice” (Level 2) or interactions that “may result” in decisions regarding implementation of policies (Level 3) were as follows:

²⁶ Respondent Exhibit 12, part 3, page 1196 (page 194 in search)

Employee	Exhibit R-12	Employee	Exhibit R-12
Heimdahl	Part 1, page 77	Trout	Part 2, page 991
Dominguez	Part 1, page 107	Wright	Part 3, page 1020
Linthicum	Part 1, page 167	Lehman	Part 3, page 1110
Colette	Part 1, page 197	Enriquez	Part 3, page 1255
Wallan	Part 2, page 761	Withem	Part 3, page 1313
MacDonald-Factor	Part 2, page 849	Kim	Part 3, page 1341
Prihoda	Part 2, page 936	Snook	Part 3, page 1404

This was another 75% to 25% split with most of the employees answering the JDQs identifying their job to involve their communications and independent decision-making authority that could result in policy implementation. Many of these employees in the 25% category have since been reclassified upwards reflecting greater independent decision-making authority.

D. Many of the employees describe themselves playing supervisory roles or managing the performance of other employees.

The JDQs also contained questions and rankings related to the nature the employee exercised in management and supervisory responsibilities. When Plese filled out the JDQ he chose “Level 4 – Semi – Complex” which defined his work as “supervising and monitoring performance for a regular group of employees.”²⁷ Plese did not choose Levels 1, 2, or 3, which ranges from “no responsibility” for directing others to “providing guidance”.

Level 5 in the JDQ was defined in bold as “directing multiple groups of employees across more than one business function within an organization unit.” Level 6 was defined in bold as “managing and monitoring work performance of an organizational unit.” The subject employees that described themselves as exercising supervisory or managerial roles therefore checked off Levels 4, 5, and 6 as follows:

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²⁷ Respondent Exhibit 12, part 3, page 1194 (page 192 in search)

Employee	Exhibit R-12	Employee	Exhibit R-12
Moore	Part 1, page 17	Soltz	Part 2, page 729
Kounovsky	Part 1, page 45	Wallan	Part 2, page 759
Heimdahl	Part 1, page 75	Balm	Part 2, page 788
Dominguez	Part 1, page 105	Watson	Part 2, page 876
Jakusovsky	Part 1, page 135	Levitt	Part 2, page 905
Linthicum	Part 1, page 165	Linhares	Part 2, page 958
Khan	Part 1, page 267	Wright	Part 3, page 1018
Reschke	Part 1, page 305	Kraus	Part 3, page 1049
Byerley	Part 1, page 336	Jordan	Part 3, page 1137
Mintz	Part 1, page 370	Plese	Part 3, page 1194
Leif	Part 1, page 459	Carroll	Part 3, page 1224
Giles	Part 1, page 488	Ryan	Part 3, page 1281
Perry	Part 2, page 518	Swenson-Harris	Part 3, page 1369
Unger	Part 2, page 577	Walsh	Part 3, page 1431
Janzen	Part 2, page 638	McClain	Part 3, page 1461
Klingmann	Part 2, page 700	Norden	Part 3, page 1493
		Sorce	Part 3, page 1527

Meanwhile, the remaining employees chose to depict their jobs as exercising no responsibility for the direction of others (Level 1); occasional direction of “helpers, assistants, seasonal employees, interns, or temporary employees (Level 2); or providing guidance and the potential to oversee another employee” (Level 3) as follows:

Employee	Exhibit R-12	Employee	Exhibit R-12
Colette	Part 1, page 195	Lehman	Part 3, page 1108
Hitzert	Part 1, page 233	Offenbecher Newgard	Part 3, page 1166
Punian	Part 1, page 399	Enriquez	Part 3, page 1253
Bernert	Part 1, page 429	Withem	Part 3, page 1311
Girod	Part 2, page 547	Kim	Part 3, page 1339
Baker	Part 2, page 608	Snook	Part 3, page 1402
Goddard-Kropf	Part 2, page 669	Boquist	Part 3, page 1558
Fadden	Part 2, page 818	Jones	Part 3, page 1588
MacDonald-Factor	Part 2, page 847	Crawford	Part 3, page 1618
Prihoda	Part 2, page 934	Kubler	Part 3, page 1648
Trout	Part 2, page 989	Olson	Part 3, page 1677
Vargas	Part 3, page 1078	Williams	Part 3, page 1710

1 This split above was more even with **57%** of the employees answering the JDQs
 2 describing their roles as supervisory, managing, or monitoring the work of others. In contrast,
 3 **42%** described not performing supervisory or managing duties.

4 The Petitioner offered Exhibit P-4, which was an email generated by witness Plese to
 5 IBEW organizer Tony Ruiz on February 17, 2021 – well after the petition in this matter was
 6 filed. In the email, Plese said that while he was “considered a manager, I don’t seem to have any
 7 of the authority that comes with that.” However, in the same email, Plese said he “had staff”
 8 although this was “not always the case” because of the session. Plese appeared to be speaking for
 9 other employees and stated, “I see ourselves more as supervisors.”

10 Under cross-examination, Plese could not explain what had changed since his February
 11 17, 2021 email and the JDQ he filled out in 2020 that unequivocally described him as
 12 supervising and monitoring a regular group of employees.

13 Witness Emerson Hamlin (“Hamlin”) also testified for Petitioner as an LA 3 working for
 14 Representative Zach Hudson. While Hamlin described a collaborative work environment, she
 15 admitted her job included managing intern Arianna Kahn, who was “easy to manage.”

16 Petitioner presented Anne Marie Backstrom (“Backstrom”) as an LA 2 –who only
 17 worked in the Legislature for a few weeks. Backstrom testified she worked for Representative
 18 Ken Helm and described an office environment in which she only received direction from
 19 Representative Helm. Backstrom denied being managed or supervised by Representative Helm’s
 20 Chief of Staff, Gregory Mintz, who is a Legislative Assistant 4. However, Ms. Backstrom could
 21 not explain Mr. Mintz’s answers in the JDQs in which he described himself as supervising and
 22 managing “staff, including participate[sic] in hiring, training, dismissal and evaluation.”²⁸

23 Backstrom’s testimony of a lack of supervision by Mr. Mintz is directly contradicted by
 24 Mr. Mintz’s feedback on his own JDQ, ranking himself as a “Level 4 to 6, Semi – Complex” in
 25

26 _____
²⁸ Respondent Exhibit 12, part 1, page 357.

management and supervision of others, which in boldface states he directed “multiple groups of employees” in his capacity as Chief of Staff.²⁹

E. Based in part on their own recent feedback, the legislative assistants were reclassified in four levels as Legislative Assistants 1, 2, 3, and 4.

After the employees filled out the JDQs, their supervisors provided feedback as well. Segal then analyzed the data and proposed a new classification system to more accurately reflect the actual scope of duties performed by the employees. On behalf of Segal, witness Eledge presented the fruits of the analysis and the proposal for the new classifications in August 2020.³⁰

The new classification structure created four levels of Legislative Assistant.³¹ Presiding Officers of the Legislative Administration Committee approved the proposed changes and asked the elected Members to designate which classification would apply to their respective employees.³² In progressing compensation and responsibility, pertinent duties of the four classifications are as follows:

Legislative Assistant 1. The LA1 was designated as the lowest level of classification with duties in pertinent part to include:

“1. Oversees the day-to-day operations and functions of the Legislative Member’s Office.
2. Acts as the primary point of contact for the Legislative Member’s Office. Answers phone calls, greets visitors, coordinates visits, assists with requests, and responds to general inquiries.
8. Responds to constituent requests and questions.”

Keeping in mind all the legislative assistants are hired as “personal staff” by and for their elected member with undivided loyalty to them, the LA1s play an important role. They are often the face and point of contact for the elected member much like an executive assistant in an executive state agency. Elected members must be able to confide in LA1s for this reason.³³

²⁹ Respondent Exhibit 12, part 1, page 370.

³⁰ Respondent Exhibit 2 and Eledge testimony.

³¹ Respondent Exhibit 2, pages 11 and 13.

³² Respondent Exhibit 1, page 1.

³³ Respondent Exhibits 6 and 7 and Knieling an Eledge testimony.

Legislative Assistant 2. The LA2 positions are the next step up from LA1s. These are sometimes called “Office Manager” positions and in pertinent part LA2 duties include:

“3. Develops messaging, writes floor speeches, composes letters, drafts responses to legislation, writes press releases, drafts bills, and evaluates policies. 4. Researches and writes policy analyses. Analyzes proposed legislation. 8. Manages incoming communications, including emails, mail, and in-person visitors. 9. Meets with constituents and stakeholders.”

The LA2s must perform the same duties as the LA1s but are more relied upon to perform research, provide analysis, and develop legislation.³⁴ Elected Members must also confide in LA2s, like executive assistants, but also rely on LA2s for enhanced analysis and feedback.

Legislative Assistant 3. The LA3 and LA 4 positions are sometimes called Legislative Director, Policy Director or Chief of Staff positions. In pertinent part, the LA3s:

“1. Supports the Member in efforts to advance the policy agenda and legislative goals of the office. Develops and implements legislative strategies. 2. Provides counsel, guidance, and feedback on legislative and policy decisions. 12. Interfaces with the general public, constituents, lobbyist, business leaders, other legislators, legislative staff, and interest groups to understand issues, draft legislation and help get legislation passed and signed into law.”

In other words, LA3s provide research, analysis, and advise the Elected Member on legislative strategy, and is explicitly expected to exercise independent discretion, engage in independent actions, develop legislative strategies and advance the policy agenda and legislative goals of the Elected Members’ office. The Member must confide in the LA3 for the same reason as LA1s and LA2s, but more so because the LA3 position description depicts LA3s as deployed by the Member; attending meetings and making decisions in the Member’s absence.³⁵

Legislative Assistant 4. The LA4 is distinguished from the LA3 by having responsibility for the “supervision of staff and interns.” In pertinent part, the LA4 duties include:

³⁴ Respondent Exhibits 1 and 2, page 16 and Eledge and Knieling testimony.

³⁵ Respondent Exhibits 6 and 9 and Eledge and Knieling testimony.

1 “2. Provides counsel, guidance, and feedback on legislative initiatives and policy
2 decisions. 5. Researches bills, policies, current laws, and topics. Creates reports based on
3 findings. 15 Builds and sustains relationships with elected officials, community leaders,
4 lobbyists, and various other outside groups.”

5 The Elected Members’ reliance and ability to confide in an LA4 is even more critical
6 than the LA3s because LA4s must also represent the Elected Member in community events,
7 legislative committees and interacts with “little oversight.”³⁶

8 **V. ARGUMENT**

9 As discussed below, the evidence shows that in 2021 the Oregon Legislature exercised its
10 constitutional authority to adopt rules governing the terms and conditions of employment for the
11 subject employees. It is within the design, function, and obligation of the Legislative Branch to
12 adopt such rules and this does not harmonize with the PECBA. The Oregon Legislative
13 “Assembly” comprises 90 elected officials and each elected official separately hires the subject
14 employees as their own personal staff to pursue political legislative goals, often working along
15 partisan lines and at cross-purposes against other subject employees. In doing so, they do not
16 share a community of interest under ORS 243.682(1)(a). As personal staff, these employees are
17 loyal to their Elected Member, keep confidential information, supervise, and manage additional
18 staff hired by their elected official and are therefore exempt under ORS 243.650.

19 **1. Under its constitutional authority, the Oregon Legislature adopted rules 20 governing the terms and conditions of the subject employees.**

21 The Oregon Legislature that adopted the PECBA also adopted, through its constitutional
22 authority, the LBPRs. This effectively exempts the subject employees from the PECBA. In doing
23 so, each chamber of the Oregon Legislature exercised its authority to make rules under Article
24 IV, section 11 of the Oregon Constitution. The deliberations were open, as required under Article
25 IV, section 14 and required a quorum under Article IV, section 12. Adopting the LBPRs were
26 therefore legislative acts authorized and required by the Oregon Constitution.

³⁶ Respondent Exhibits 1, 2, page 16, and 6 and 10. Also, Eledge and Knieling testimony.

Under the Oregon State Senate Rules adopted on January 11, 2021, the Senate adopted *Mason's Manual of Legislative Procedure* to apply to "cases not provided for by the Oregon constitution, the Senate Rules, custom of the Senate or statute."³⁷ In addition, Senate Rule 18.01 adopted the LBPRs. The Oregon House of Representatives likewise adopted *Mason's Manual of Legislative Procedure* to apply to "cases not provided for by the Oregon constitution or in these rules."³⁸ The Oregon House likewise adopted the LBPRs under House Rule 2.03.

Rule 1 of the LBPRs clarifies that the LBPRs apply to all Legislative Assembly employees and includes the subject employees working in partisan offices in the current petition. LBPR 1(4)(a) cites ORS 240.200, that Branch employees are exempt from, and generally not subject to, the State Personnel Relations Law.³⁹ LBPR 1(5)(a) states in part that the LBPR's "constitute rules of proceedings of the Legislative Assembly and may take precedence over conflicting provision of state law to the extent that the rules expressly provide for such precedence" Reaching farther, LBPR(1)(6)(a) states:

"The authority for the personnel rules is derived from Article IV, section 11, of the Oregon Constitution, and, where otherwise not in conflict with the rules, ORS 173.005, 173.007, 240.200 and 240.245."

In other words, the Oregon Legislature identified laws that apply within its employer-employee relationship. This is a catch-all in which the LBPRs declare its rule-making authority under the Oregon Constitution and recognizes the authority of the cited statutes – unless there is a conflict. This is consistent with the use of permissive language in ORS 173.005; that the Legislative Administration Committee --which is only part of the Oregon Legislature-- "may" adopt policies consistent with State Personnel Relations laws.⁴⁰

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³⁷ Exhibit 15. Senate Rule 2.01.

³⁸ Exhibit 16. House Rule 2.01.

³⁹ ORS 240.005-240.990

⁴⁰ ORS 173.007 is confined to vacation and sick leave; ORS 240.200 defines the exempt service, and ORS 240.245 is confined to salary.

1 The LBPRs cite the Oregon Constitution and the separation of powers as the basis for its
2 authority, specifically Article III, Section 1.⁴¹ Within the LBPRs, there is no specific provision
3 recognizing the subject employees fall under PECBA for the purposes of collective bargaining.

4 As aforementioned, the LBPRs were adopted in 2021 through the Oregon Legislature's
5 rule-making authority under the Oregon Constitution. While it is axiomatic that constitutional
6 authority overrides statutory authority, even the rules of statutory construction as codified under
7 ORS 174.020 direct courts to "pursue the intention of the legislature if possible." Here, the
8 adoption the LBPRs in 2021 show the legislature's intent to establish the terms and conditions of
9 the work relationship with the subject employees.

10 **a. Constitutional authority preempts statutory construction.**

11 ORS 174.020 codified the "cardinal rule" of statutory construction. *State v. Gaines*, 346
12 Or. 160, 165 (2009). In the *Gaines* case, the Oregon Supreme Court modified statutory
13 construction to permit court review of legislative history even if the text and context of a statute
14 is not ambiguous. If the legislative intent remained unclear, the court could also resort to the
15 general maxims of statutory construction cited in ORS 174.020(2):

16 When a general provision and a particular provision are inconsistent, the latter is
17 paramount to the former so that a particular intent controls a general intent that is
18 inconsistent with the particular intent.⁴²

19 Unlike *Gaines*, this case does not involve statutory construction but the primacy of the
20 Legislature's constitutional authority to establish rules regarding its operations. Despite this, the
21 *Gaines* analysis may prove useful as a tool to answer threshold questions as follows:

22 **b. OLA is a public employer, but not under the PECBA.**

23 It is of course true that the Oregon Legislative Branch is part of the State of Oregon.
24 However, the premise behind ORS 243.650(20) is to determine if a public employer is subject to
25 PECBA. Respondent urges the Board to review ORS 243.650(20) alongside the Legislature's

26 ⁴¹ LBPR 1(6) and (9). Exhibit 14. Also see Article IV, section 14.

⁴² *Gaines*, 346 Or. at 171-172, citing to, *PGE v. BOLI*, 317 Or. 606 (1993).

1 authority to create rules for itself under Article IV, Section 11 of the Oregon Constitution and
 2 promulgate rules through the legislative action of the Assembly. No other public employer is
 3 vested with such authority. The Legislature also exercised this authority through legislative acts
 4 in both the Senate and House, adopting the LBPRs for its employees as late as 2021.

5 The LBPRs apply to the subset of the subject employees. As such, it is inconsistent with
 6 the earlier adopted and more generally worded PECBA. Even under *Gaines* and ORS 174.020,
 7 the LBPRs control by showing the legislative intent to set the terms and conditions of the work
 8 relationship with the subject employees. Yet *Gaines* was premised more on conflicting statutes.
 9 Here, the LBPRs were created through the Legislature's constitutional authority.

10 In other words, the LBPRs are not analogous to employer adopted policies. This is not
 11 simply because they were adopted by a separate branch but because the Oregon Constitution is
 12 the legal authority that created the LBPRs. To permit collective bargaining by the proposed unit
 13 under the PECBA permits a challenge to the legislatively adopted LBPRs and improperly
 14 subverts the Oregon Legislature's constitutional authority under Article IV, Section III.

15 It is anticipated that Petitioner will argue that if the Oregon Legislature wished to exclude
 16 the subject employees from the PECBA it should have done so expressly through statute.
 17 Petitioner will likely argue that the failure to make such changes indicates a legislative intent to
 18 *permit* the extension of the PECBA to the subject employees. This is only a valid argument
 19 when dealing with conflicting statutory construction under a *Gaines* type of analysis that
 20 involves a legal entity without the constitutional authority to adopt rules governing its operations.
 21 That is not the case here and the Legislature has spoken. The constitutional authority and basis
 22 for the LBPRs exercises primacy over the statutory authority and through that authority the
 23 Legislature made its intent clear. As such, creating a statutory carve-out was unnecessary.

24 **c. The LBPRs do not harmonize with the PECBA policy goals.**

25 While continuing to use *Gaines* and ORS 174.020, the text and context of the PECBA
 26 cannot be harmonized with the LBPRs which are based on the operations of the Oregon

Legislature. As raised in Respondent's objections, the PECBA policy statement found in ORS 243.656(5) declares a goal of obligating public employers to enter collective negotiations with public employees to resolve grievances and disputes relating to employment relations.

The body authorized to adopt rules, hold hearings, and review appeals from bargaining units regarding grievances is, of course, this Board. ORS 240.086(2) and (3). This Board may also hear appeals of any adverse employment "action" such as dismissal, reduction, suspension, or demotion, taken by the employer for "political" reasons. ORS 240.560(3).

The Oregon Legislative Assembly is composed of 90 elected officials. All the subject employees are hired for political reasons; their political views and loyalty are aligned with the elected member they support. Likewise, all the subject employees may be dismissed for purely political reasons. The LBPRs contemplate this highly personalized and politically motivated arrangement which likewise permits the hiring and firing of family members under a carve out from the ethics laws that apply to public officials and LBPR 24.⁴³ Meanwhile, the Board's exercise of its own rule-making authority under ORS 240.086(3) and its ability to hear appeals and over-rule political motivated personnel actions under ORS 240.560(3) cannot be reconciled with what is permitted by the 90 elected officials in regards to the subject employees.

d. The LBPRs do not harmonize with how the PECBA must operate.

The LBPRs were adopted based on the operational realities of a legislative assembly and do not harmonize with the mechanism required for the PECBA to operate.

The PECBA does not provide for a Legislative representative. Continuing to apply *Gaines* to determine legislative intent, it is significant that members of the Oregon Legislature recently proposed Senate Bill 759. This bill would amend ORS 243.696 by designating the Legislative Administrator as the representative for the Legislature for purposes of collective bargaining. As this bill is only proposed, it highlights a deficit within the PECBA because it was not drafted to provide a mechanism for representation within the Legislative Branch.

⁴³ Respondent Exhibit 14, page 68, not applicable to personal staff of OLA.

Historically, the PECBA only contemplated the Department of Administrative Services (“DAS”) as representing “all state agencies” under what is now subsection (1) of ORS 243.696. In 1983 Supreme Court Chief Justice Berkeley Lent issued a declaratory judgment that DAS, as part of the *executive* branch, could not represent the *judicial* branch.⁴⁴ The Legislature responded by adopting subsection (2) to ORS 243.696, which designated the Chief Justice as representing the judicial department for the purposes of PECBA.⁴⁵ Since the Chief Justice under ORS 2.045(1) is the judicial branch administrative head, this was a quick and easy fix.

Senate Bill 759 is not as clean a fix as the 1983 amendment. The Oregon Legislative Assembly includes 90 elected officials and the unelected Legislative Administrator is not analogous to the Chief Justice or DAS. The Legislative Administration Committee (LAC) as a joint committee of the Legislative Assembly appoints the Legislative Administrator who is authorized by statute to perform administrative service functions for the Assembly, including personnel administration.⁴⁶ The Administrator serves at the direction of the LAC.⁴⁷

While the 1983 Legislature recognized the need for the judicial branch to have a separate mechanism for representation in collective bargaining, as of this writing it has not created such a mechanism for the Legislature. Hence for collective bargaining purposes under the PECBA, the mechanism remains absent for the Legislature to find representation under the PECBA.

The disconnect between the right to representation and the implementation of other rights under the PECBA. From the Petitioner’s perspective, the right to representation for organizing purposes and bargaining is fundamental and its downstream impact on branch operations are not of the Petitioners’ or by extension the Board’s concern. This is because the PECBA does not consider as a factor in representation hearings the implementation barriers

⁴⁴ Chief Justice Lent was responding, as the plaintiff in response to a Circuit Court ruling, that PECBA applied to the judicial branch. The Court of Appeals agreed with the Circuit Court. *Lent v. ERB*, 63 Or.App. 400 (1983).

⁴⁵ See *AFSCME v. OJD*, 304 Or.App. 794, page 826-827, fn 28, referencing *Lent*. After the legislative amendment adding of subsection (2), the Oregon Supreme Court denied review. *Lent v. ERB*, 63 Or.App. 400, *rev. den.* 295 Or. 617 (1983).v. *ERB*, 63 Or.App.400 (1983).

⁴⁶ ORS 173.710, 173.720(1)(i).

⁴⁷ ORS 173.710, 173.720(1).

1 experienced by an employer engaged in collective bargaining. This argument seeks to relegate
 2 the significance of the authority questions raised in this brief. However, the authority questions
 3 must resolve to determine whether representation of the subject employees is even possible.

4 **There is no constitutional authority to bind the Oregon Legislative Assembly to a**
 5 **collective bargaining agreement.** As mentioned, under Article IV, section 11, the Legislature
 6 adopted its rules and thereby adopted the LBPRs. It did so after convening a quorum, as required
 7 under Article IV, Section 12 and through an open hearing as required under Article IV, Section
 8 14. For this reason, it is not a small matter that quorums and open hearings are constitutionally
 9 required. Presuming the proposed bargaining unit is brought into existence, the Legislature will
 10 be constitutionally prevented from negotiating with a bargaining unit in any meaningful way. It
 11 cannot deliberate regarding management prerogatives behind closed doors and with limited
 12 representatives as other public employers routinely do. To be sure, some decisions regarding
 13 collective bargaining issues could receive input from the Legislative Administrator and LAC.
 14 However, the LAC is a bi-partisan committee with members from the House and Senate and
 15 fluctuating membership based on term limits established by statute.⁴⁸ Despite legislative
 16 statutory efforts to the contrary, neither the LAC nor the Legislative Administrator can bind the
 17 entire Oregon Legislative Assembly under a Collective Bargaining Agreement unilaterally
 18 without violating the Oregon Constitution. As Knieling explained in her testimony, personnel
 19 matters ratified by the LAC only apply to employees of the Legislative Administration agency
 20 and a full vote of the Assembly is required for application to other branch employees.⁴⁹

21 **2. The subject employees do not share a community of interest.**

22 The appropriateness of the bargaining unit is critical. In pertinent part, under ORS
 23 243.682(1)(a), the Board shall designate an appropriate bargaining unit by considering “such
 24 factors as community of interest, wages, hours and other working conditions of the employees
 25

26 ⁴⁸ ORS 173.730.

⁴⁹ Testimony of Knieling.

involved, the history of collective bargaining, and the desires of the employees.” In the public sector, unit determination is important because the scope and nature of the unit will:

“* * * affect the range of subjects which can be negotiated meaningfully, the role played in the process by the separate branches of government, the likelihood of peaceful resolution of disputes, order versus chaos in bargaining, and ultimately, perhaps, the success of the whole idea of collective bargaining for public employees.”

AFSCME V. OJD, 304 Or.App. 794, 814 (2020), *review denied* 367 Or. 75 (2020), *citing* Eli Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 Mich L Rev 1001, 1001 (1969). Due to the lack of a community of interest within the proposed unit, the typical range of collectively bargained subjects cannot be negotiated meaningfully. The adversarial role played by the subject employees themselves within the process imperils the chance for a successful bargaining unit.⁵⁰

The *OJD* case recognized that the community of interest as a comprehensive term encompassing other factors. *Id.*, at 815. Evidence of “meaningful factual distinctions” within the same workforce is necessary “to lawfully change the terms on which the two groups may exercise their right to collectively bargain.”⁵¹ The *OJD* opinion asserted that the Board must examine the extent in which employee interests might diverge when considering the community of interest.⁵² In *OJD*, the petitioner failed to produce adequate evidence showing how the proposed bargaining unit held a “distinct” community of interest from the rest of the workforce thereby justified a separate bargaining unit.

In the case before the Board, the subject employees’ interests do not diverge by not sharing the same compensation scheme, partaking in PERS, PEBB, other benefits and sharing a common work infrastructure. Their interests do not diverge by not sharing the same type of work as their fellow legislative assistants. Rather, after the stipulated commonalities, the interests of the legislative assistants diverge extensively by design of their very *raison d’être*.

⁵⁰ *AFSCME v. OJD*, 304 Or. at 814.

⁵¹ *Id.*, at 832, footnote 33.

⁵² *Id.*, at 837.

Legislative Assistants are hired and supervised directly by the Elected Member. Their loyalty is not to the agenda or mission of the Oregon Legislative Assembly; they are solely loyal to their Member. These employees are sometimes family, friends, or political appointments of the elected official. In advancing their Members' policy and legislative agenda, their employees oppose countervailing or oppositional policy and legislative agendas pursued by political opponents within the Assembly. If the employees are not loyal or choose to not advance the Members' agenda, the employee can be dismissed, solely for these political purposes. This is consistent with the functioning of an Assembly of 90 different members reporting to different constituents in districts with divergent interests. This stands in sharp contrast to present executive branch hierarchical structures or other public employers speaking with a single voice.

3. The subject employees are exempt under ORS 243.650.

Assuming PECBA applies, some of the employees are exempt from membership in the proposed bargaining unit under ORS 243.650. For instance, many of the elected officials have a legislative assistant designated as a "chief of staff" or, more informally, have legislative employees performing supervisory, managerial, and/or confidential duties as follows.

Subject employees are supervisory under ORS 243.650(23)(a). As defined in pertinent part, supervisory employees are defined as follows:

"Supervisory employee" means any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection therewith, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment. . . ."

At hearing, Respondent stipulated that the following factors in the above definition align with the LA4 job duties to: hire, promote, discharge, assign, or responsibly to direct or effectively to recommend such action.

The Board properly excluded positions that fit the statutory definition of supervisor from proposed bargaining units that include non-supervisors. *SEIU v. Portland State Univ.*, UC-002-

17 (2018). In *Portland State*, the Board held that campus police sergeants were supervisory and therefore excluded from ORS 243.650(23). The Board made factual findings summarizing the evidence in categories of the sergeants' duties and responsibilities that included hiring, assigning, directing, disciplining, and adjusting grievances of supervised employees. Under Board precedent, determining supervisory status requires resolution of three questions:

(1) Does the employee have the authority to take action or to effectively recommend action be taken in any one of the 12 listed activities?

(2) Does the exercise of that authority require the use of independent judgment? and

(3) Does the employee hold the authority in the interest of management? ⁵³

A substantial majority of the subject employees have the authority to act in the interest of the elected official to hire, promote, discharge, assign, responsibly direct other employees, or effectively recommend adjustment of employee grievances. If each elected official chose to designate one of their legislative employees as a chief of staff or having these duties, then at least 90 of the subject employees would be considered supervisory under ORS 243.650(23)(a) and would potentially exercise duties adverse to membership in the proposed bargaining unit.

In most of the JDQs provided, employees described themselves as exercising the authority to hire, promote, discharge, assign, or direct other staff. Likewise, in most of the JDQs employees described themselves as having the authority to recommend such actions. The LA4 job description explicitly requires LA4s to hire, train, supervise, and mentor other employees or interns.⁵⁴ This is consistent with the supervisory exemption defined in ORS 243.650(23)(a).⁵⁵

Petitioner witness Plese, as an LA4 described himself more as a "supervisor." However, when Plese filled out the JDQ he identified himself as supervising or managing a regular group

⁵³ *Portland State Univ.*, UC-002-17 at 12 citing *City of Portland v. Portland Police Commanding Officers Association*, Case No. UC-017-13 at 22-23, 25 PECBR 996, 1017-18 (2014) (citing *Deschutes County Sheriff's Association v. Deschutes County*, Case No. UC-62-94, 16 PECBR 328, 339 (1996)).

⁵⁴ Respondent Exhibit 10

⁵⁵ Respondent Exhibit 6, page 1.

1 of employees. Likewise, the Petitioner's witness Hamlin, as an LA3, admitted she managed an
 2 intern and assigned the intern work. The Petitioner's other witness, Backstrom, as an LA2 denied
 3 she was supervised, but her own Chief of Staff emphasized his extensive supervisory status when
 4 he filled out the JDQ. The Respondent's and the Petitioner's own evidence therefore shows a
 5 supervisory structure exercised by the legislative assistants consistent with ORS 243.650(23)(a).

6 **Subject employees are managerial under ORS 243.650(16).** Managerial employees
 7 have authority to formulate and carry out management decisions or represent management's
 8 interest by taking, or effectively recommending discretionary actions that control or implement
 9 the employer's policy. These employees have discretion to perform such responsibilities beyond
 10 the routine discharge of duties. It is not required that the "managerial employee" act in a
 11 supervisory capacity in relation to other employees.

12 The Board addressed this exemption in *DOJ vs. OAJA*, Case No. UC-64-95 (1996). The
 13 exemption establishes two alternative definitions; both are modified that such employees must
 14 exercise discretion in the performance of the responsibilities beyond a routine discharge of
 15 duties. Employees whose decision making is limited to a routine discharge of professional duties
 16 in projects they are assigned do not qualify. In *OAJA*, the Board distinguished managerial from
 17 professional employees by evaluating the professional employee duties falling outside the scope
 18 of duties routinely performed by similarly situated professionals. The Board noted:

19
 20 "The managerial (and also supervisory exclusion) are predicated on a concept that an
 21 employer is entitled to the undivided loyalty of its representatives and the goal of the
 22 exclusions is to ensure that employees who exercise discretionary authority on behalf of
 23 the employer will not divide their loyalty between the employer and the union."⁵⁶

24 About 75% of the employees filling out the JDQs identified themselves as exercising
 25 independent decision-making authority and discretion advancing policy "beyond the routine
 26 discharge of duties." They described this as primarily manifesting through communications and
 interactions with others at work. Under cross-examination, witness Plese admitted his duties

⁵⁶ *DOJ v. OAJA*, UC-64-95, at 10 (1996)

1 included advancing his Elected Member's policy agenda in her absence. Likewise, Petitioner's
 2 witness Emerson Hamlin described a lack of direction from her Elected Member and that she
 3 would propose options to him for the purposes of fulfilling the policy agenda. Ms. Hamlin's
 4 description was consistent with the general tenor of the feedback provided by the JDQs regarding
 5 the amount of discretion and judgment legislative assistants exercise.

6 The LA4 must also provide counsel, guidance, and feedback on legislative initiatives and
 7 policy decisions, research bills, policies, current laws, and topics, and create reports based on
 8 findings. The LA4 must also "build and sustain relationships" with others including elected
 9 officials, community leaders, lobbyists and various other groups." This fits into the exemption
 10 for the managerial employee as defined in ORS 243.650(16).⁵⁷

11 Similarly, the LA3 must support and advance the Elected Members' policy agenda and
 12 legislative goals, develop and implement legislative strategies, and "provide counsel, guidance,
 13 and feedback on legislative and policy decisions." The LA3 must also interface "with the general
 14 public, constituents, lobbyists, business leaders, other legislators, legislative staff, and interest
 15 groups." It is expected that in this capacity the LA3 must understand issues, draft legislation, and
 16 help get legislation passed. These LA3 duties also fit into the ORS 243.650(16) exemption.⁵⁸

17 **The subject employees are confidential under ORS 243.650(6).** Under this exemption,
 18 confidential employees assist and act in a confidential capacity to a person who formulates,
 19 determines and effectuates management policies in the area of collective bargaining. This was
 20 discussed in *AFSCME v. City of Lincoln City*, UC-003-19 (2019). In *Lincoln City*, the Board
 21 held a payroll administrator position was a confidential employee under and properly excluded
 22 from the bargaining unit. The Board examined several factors making its decision whether:

23
 24 (1) [T]he allegedly confidential employee provides assistance to an individual who
 25 actually formulates, determines, and effectuates management policies in the area of
 collective bargaining;

26 ⁵⁷ Respondent Exhibits 6 and 10.

⁵⁸ Respondent Exhibits 6 and 9.

1 (2) Whether the assistance relates to collective-bargaining negotiations and
administration of a collective-bargaining agreement; and

2 (3) Whether it is reasonably necessary for the employee to be designated as confidential
3 to provide protection against the possibility of premature disclosure of management
collective-bargaining policies, proposals, and strategies.⁵⁹

4 The payroll administrator provided assistance to the HR director, who formulated,
5 determined and effectuated management policies involving collective bargaining and
6 participated in bargaining strategy meetings, bargaining sessions, and management caucuses.
7 This all amounted to “confidential assistance”. In addition, exclusion of the administrator would
8 not be a matter of mere convenience because no other employee was available to perform the
9 work needed for bargaining.

10 It is anticipated the Petitioner will argue the confidential employee exemption does not
11 apply because of a lack of collective bargaining at the Legislature. This argument must presume
12 that until collective bargaining occurs, it is *unknowable* which employees would need to keep
13 confidential information. This is mistaken because here it is *knowable*. As described, the duties
14 described in all the position descriptions put LAs into a working relationship where they all must
15 act in a “confidential capacity” to their Elected Member as a person who would formulate,
16 determine, and effectuate policies in the area of collective bargaining.

17 For instance, LA2s must “develop messaging, write floor speeches, compose letters, draft
18 response to legislation, write press releases, draft bills, and evaluate policies.” If collective
19 bargaining occurs through a recognized bargaining unit, or if proposed legislation involves
20 collective bargaining, or if stakeholders involved with collective bargaining seek to meet with
21 the Elected Member, the Member must be able to confer in confidence with the LA2 regarding
22 how to communicate the Member’s policy position and develop strategy.⁶⁰

23 It may seem like the LA1 would not require confidential status. However, the LA1 in the
24 position description must act as a primary point of contact for the “Legislative Member’s Office
25 which includes answering phone calls” and responding to general inquiries. If the LA1 is in a

26 ⁵⁹ *City of Lincoln City*, UC-003-19 at 6.

⁶⁰ Respondent Exhibits 6 and 8.

bargaining unit, the elected member cannot communicate in confidence with the LA1 regarding contacts pertaining to collective bargaining.⁶¹

VI. CONCLUSION

In 2021 the Oregon Legislature exercised its constitutional authority by adopting the LBPRs governing the terms and conditions of its workforce. It adopted these rules in the context of its function as a Legislative Assembly that functions apart from the policy objectives and mechanism established by the PECBA. As an Assembly of 90 elected officials, the subject employees working for the 90 members do not share a community of interest; their political interests are often in conflict and their loyalty is exclusively to their Member. In pursuit of purely political objectives the subject employees work as personal assistants for the elected members and must exercise confidential, supervisory, and management duties. Based on this and the evidence received at the February 25 hearing, the Respondent State of Oregon Legislative Assembly respectfully request dismissal of the petition.

DATED this 4th day of March 2021.

Respectfully submitted,

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⁶¹ Respondent Exhibits 6 and 7.

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2021, I served a true and correct copy of
RESPONDENT'S POST-HEARING BRIEF by the method indicated below:

Jennifer Kaufman Administrative Law Judge Employment Relations Board 528 Cottage Street NE, Suite 400 Salem, OR 97301-3807 Email: Jennifer.kaufman@oregon.gov	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY
Daniel Hutzenbiler McKanna Bishop & Joffe 1635 NW Johnson Street Portland, OR 97209 Email: dhutzenbiler@mbjlaw.com	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input checked="" type="checkbox"/>	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY

Respectfully submitted,

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EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-001-21

(REPRESENTATION)

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

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

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

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

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

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

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

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

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

RULINGS

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

FINDINGS OF FACT

The Parties and Structure of the Legislative Branch

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

²In their submissions to this Board, the parties used the phrase “Legislative Assembly” and “Legislative Branch” interchangeably to refer to the employer. For readability, we use the term “Legislative Branch” or the word “Branch” to refer to the employer, and the term “Legislative Assembly” to refer to the assembly of 90 elected members.

³As explained further below, consistent with our rules, and in a manner consistent with this order, both parties may challenge, on an *individualized* basis, the eligibility of *specific* employees to vote, based on an individual employee being a confidential, managerial, or supervisory employee. *See* OAR 115-025-0073(2). Any challenged ballot will be impounded, and the Board will only resolve a challenge if such a resolution is necessary to certify the results of the election. *Id.*

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

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

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

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

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

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

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

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

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

11. Each elected member is allocated an allowance provided in the Legislative Assembly budget to appoint personal staff. The Rules of the Senate for the 2021 session provide that a “member may appoint personal staff for a session or the interim or both, according to the allowance provided in the current Legislative Assembly budget.” Senate Rules 15.05(1). Compensation and benefits for personal staff “shall be determined by Legislative Administration.”⁴ Similarly, the Rules of the Oregon House for the 2021 session provide that a “member may appoint personal staff for the session, the interim or both, according to the allowance provided[,]” and shall establish salaries payable to personal staff “in accordance with the policies and procedures as adopted by the Legislative Assembly.” House Rules 15.10(1)(a) and (b).

The Legislative Branch Personnel Rules

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

13. The LAC holds the authority to review, amend, and adopt the LBPRs. At the staff level, Employee Services, the Legislative Administration division overseen by Knieling, facilitates the preparation and review of new or amended LBPRs. Before the adoption, amendment, or repeal of any personnel rule by the LAC, the Legislative Administrator must provide a copy of the changes to all legislative agency heads, parliamentarians, and leadership chiefs of staff at least 30 days before the rule’s effective date. The rules are subsequently considered and adopted by the LAC.⁵

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

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

⁴The Senate Rules further provide that if a “member has a balance in the member’s staff allowance account at adjournment *sine die* of the preceding regular session, the member may use the balance during the interim for personnel or for legislative newsletters or other informational material.” Senate Rules 15.05(1)(b).

⁵In addition, the President of the Senate and the Speaker of the House of Representatives may establish an alternative procedure for considering modifications to the LBPRs, “except that no modification to a personnel rule may be made without notice and deliberation before committees of the Senate and the House or a joint committee of both houses.” LBPR 1(3)(c).

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

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

“* * *

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

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

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

“* * *

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

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

17. The LBPRs provide:

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

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

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

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

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

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

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

⁶For purposes of the State Personnel Relations Law (SPRL), officers and employees of the Legislative Branch are “exempt service” employees of the State of Oregon and generally are not subject to the SPRL or the rules and policies of the Oregon Department of Administrative Services or its Chief Human Resources Office. ORS 240.245; LBPR 1(4). However, ORS 240.245 provides that, for a position in the exempt service where the salary is not fixed by law, there shall be “a salary plan equitably applied to the exempt position and in reasonable conformity with the general salary structure of the state.” ORS 240.245.

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

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

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

24. In summer 2019, the Branch undertook a branch-wide review of its classification structure and compensation plan, in part to ensure pay equity compliance.⁷ The Branch contracted with Segal Waters Consulting (Segal) to conduct a classification, compensation, and pay equity study. The primary goals of the study were to ensure that position responsibilities were updated and well documented, job descriptions were updated to accurately reflect the work performed by employees, classification levels were clearly distinct, and compensation for jobs in the Legislative Branch was “market competitive.”

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

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

⁷House Bill 2005, enacted in 2017, amended Oregon’s equal pay law, with most changes effective on January 1, 2019. *See* Or Laws 2017, Ch 197, Section 2.

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

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

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

30. Segal also conducted a market evaluation, comparing jobs in the Legislative Branch to peer employers, and conducted a pay equity analysis.⁸ Ultimately, Segal recommended a classification system and a pay structure for jobs across the Legislative Branch, including the Legislative Assistants who comprise the personal staff of elected members.

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

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

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

⁸Segal used the following peer employers: the legislative branch of California; the legislative branch of Washington; the State of Oregon executive branch; the counties of Multnomah, Marion, Lane, Clackamas, and Washington; and the cities of Beaverton, Eugene, Portland, and Salem. Segal made geographic adjustments "based on cost of labor in the market."

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

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

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

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

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

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

The Job Descriptions of the Legislative Assistant I through IV Positions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Roles and Responsibilities of the Legislative Assistants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

69. When Representative Marsh's office seeks to hire, Plese is sometimes involved.⁹ On those occasions, Representative Marsh and Plese both look at resumes and select applicants for interviews. Plese schedules the interviews and sits in the interviews with Representative Marsh. Plese may ask questions during the interview. Representative Marsh makes her own hiring decision, although she sometimes asks for Plese's opinion.

⁹When Plese testified about his involvement in the hiring process, he was not asked to limit his response to his involvement in the hiring of other employees (as opposed to interns), and he did not specify whether he was referring to the hiring of employees, interns, or both.

70. In addition to witness testimony from Hamlin, Backstrom, and Plese, the record includes 52 job description questionnaires related to the petitioned-for positions.¹⁰ The JDQs for the petitioned-for employees in the record are distributed among the four classifications as follows:

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

71. The JDQ included a section on discretion and independent judgment in which the employee was asked, “Does your job involve using discretion and independent judgment?” The JDQ also asked the employee to describe at least two examples of their use of discretion and independent judgment on the job.¹¹ In 43 of the JDQs in the record, the responding employee indicated that they use discretion and independent judgment in their positions. As an example, James Williams, Legislative Assistant IV to Senator Brian Boquist, gave “[d]rafting legislative bill requests for constituents and preparing testimony” and “[r]ecommending bill drafts for introduction to the legislative process” as examples of decisions or actions he takes that require discretion and independent judgment.

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

¹⁰In addition, the record includes two JDQs for positions not in the proposed unit, and several JDQs that appear to have been completed by individuals no longer employed by the Legislative Branch. The JDQs in the record comprise 1,723 pages.

¹¹The JDQ referred to nine examples of actions that “may” constitute discretion and independent judgment, including “[m]aking decisions that affect the overall policies of the department or organization[.]” “[a]bility to depart from standard or division/department protocols without prior approval[.]” “[p]roviding consultation or expert advice to Oregon State Legislature senior leadership[.]” and “[c]ommitting Oregon State Legislature in matters that have a significant financial impact[.]” The JDQ also provided seven examples of actions that do not constitute discretion and independent judgment, including “[a]pplying technical knowledge to follow procedures (or to decide which procedures to follow)[.]” “[t]abulating data, conducting research or collecting facts and information[.]” and “[m]aking decisions that do not commit Oregon State Legislature in matters that have significant financial impact[.]” The JDQ did not specifically ask whether the responding employee exercises independent judgment while exercising “supervisory” authority over other employees.

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

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

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

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

77. The JDQ also included a section entitled “Management and Supervision Responsibilities,” which asks the employee to identify one of five ranked levels for “nature of supervision”: Level 1 (no responsibility for the direction or supervision of others); Level 2 (occasional direction of helpers, assistants, seasonal employees, interns, or temporary employees); Level 3 (providing guidance and the potential to oversee another employee); Level 4 (supervising and monitoring performance for a regular group of employees (one or more full-time employees)); Level 5 (managing and monitoring work performance by directing multiple groups of employees across more than one business function within an organization unit); Level 6 (managing and monitoring work performance of an organizational unit).¹²

¹²The JDQ did not define any of the terms relevant to our analysis, such as the terms “supervise,” “manage,” “direct,” “assign,” or “employee.” The JDQ was not intended to address the PECBA exclusions

(Continued ...)

78. In 33 of the JDQs in the record, the responding employee chose Level 4, 5, or 6 for their level of supervision responsibilities.¹³ In the same section, the JDQ asked the responding individual to identify the number and type of positions over which they exercise managerial or supervisory responsibility, and then to identify those employees by job title and name. Although the JDQ used the term “employee,” the JDQ did not define “employee” or direct the responding individual to limit their response to paid employees. In the section that asked for job titles and names, many of the responses include “interns” or “policy interns.”

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

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

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

(Continued ...)

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

¹³Not all 33 individuals who indicated they have supervisory or managerial responsibilities are included in the list of petitioned-for employees.

82. Five of the employees who selected Level 4 or higher when asked to indicate the nature of their supervisory responsibilities also indicated in the “independent judgment” section of the JDQ that they do *not* exercise independent judgment when performing their jobs.¹⁴

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

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

84. Employees of the Legislative Branch, including the Legislative Assistants, are employees of the State of Oregon. All Legislative Branch employees are paid through the Executive Branch Department of Administrative Services (DAS) payroll processing services, for which the Legislative Branch pays an assessment to DAS. Like all State of Oregon employees working for entities that use DAS payroll processing services, Legislative Branch employees can access and review their pay stubs on a DAS-managed web site.¹⁵

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

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

¹⁴Those employees are Andrea Dominguez, Rebecca Wright, Nolan Plese, Katherine Ryan, and Evan Sorce.

¹⁵The Legislative Branch remits payment to the State of Oregon Workers Compensation Division for each hour worked by its employees. The Workers Compensation Division administers the Workers Compensation Law that, with some exceptions, requires application of the law to all workers employed in Oregon. *See* ORS 656.023, 656.005(27), and 656.005(28). The Workers Compensation Division is part of the Department of Consumer and Business Services, part of the Executive Branch. The Workers Compensation Division regulates disputes over Workers’ Compensation benefits for the employees of the Legislative Branch, including the petitioned-for employees.

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

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

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

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

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

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

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

applicant's application to Employee Services for record keeping purposes. Employee Services is not, however, otherwise involved in the elected members' hiring decisions.¹⁶ Under LBPR 32, all employees, interns, and externs appointed as personal staff "serve at the pleasure of the member[.]" and apply for employment "in the manner prescribed by the member of the Legislative Assembly."¹⁷

93. Elected members may hire, supervise, and evaluate family or household members as personal staff, and some do so.¹⁸ Knieling testified that the Branch does not document which employees are related to or reside in the same household as an elected member, but she believes approximately 12 of the Legislative Assistants are family members of elected members. Otherwise, LBPR 24 governs family and personal workplace relationships, and broadly speaking, permits the employment of qualified relatives of legislative employees only if the employment does not create a conflict of interest. Under LBPR 24, an employee may not initiate or participate in an employment action involving a relative, or supervise or evaluate a relative. However, LBPR 24 applies only to the legislative agencies and parliamentary offices. It does not apply to members of the Legislative Assembly, personal staff, leadership office staff, or caucus office staff.

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

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

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

¹⁶LBPR 32 also provides that, after it receives an application, Employee Services notifies the Legislative Equity Officer of the start date of the new employee, intern, extern, or volunteer, and the Legislative Equity Officer provides training, and copies of harassment and respectful workplace policies.

¹⁷For open competitive and limited internal recruitments elsewhere in the Branch, Employee Services is responsible for determining which applicants meet the minimum qualifications for positions in Legislative Administration, and legislative agencies and parliamentary offices determine which applicants meet the minimum qualifications for positions in those agencies and offices.

¹⁸ORS 244.177(2) provides, "A member of the Legislative Assembly may appoint, employ, promote, discharge, fire or demote, or advocate for the appointment, employment, promotion, discharge, firing or demotion of, a relative or member of the household to or from a position on the personal legislative staff of the member of the Legislative Assembly."

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

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

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

99. When the Legislative Assembly is in session, the personal staff typically work in offices in the capitol building.¹⁹ The record also indicates that there is a group of legislators in the Portland metropolitan area who share office space, and Legislative Assistants, including Legislative Assistant IV Nolan Plese, work in that shared office space for some portion of time. The record does not indicate how many of the Legislative Assistants employees work remotely or work at times in a member's office in the district, and if so how frequently they do so.

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

Interchange and Promotional Ladders

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

¹⁹The work location changed during the COVID-19 pandemic, when personal staff worked remotely.

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

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

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

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

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

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

107. Some personal staff have worked for multiple elected members over time.²⁰ LAs who are hired on a temporary basis, *e.g.*, for only one legislative session, must search for other open positions if they would like a year-round position or would like to continue working for the Branch. They are more likely to find another LA position if they search for openings in other assembly members' offices, and some LAs have secured new positions by doing so. Hamlin testified that she previously worked for Representative Mitch Greenlick before moving to Representative Hudson's office. Hamlin has also observed other Legislative Assistants work in multiple elected members' offices. Plese previously worked for Senator Diane Rosenbaum, and before that for the senate majority caucus; he presently works for Representative Pam Marsh. It is not common for personal staff to move from an office in one political party to an office in the other political party.

108. The JDQs also indicate that at least some of the LAs have worked for multiple members over time. For example, Andrea Dominguez works as a Legislative Assistant IV in Representative Mark Owens's office; previously, she worked as personal staff to Cliff Bentz.²¹ Alexa Jakusovsky previously served as personal staff for Representative Akasha Lawrence Spence; she now works for Representative Lisa Reynolds.

109. There is little information in the record regarding promotion from one level of LA to another, presumably because the LA I-IV classification system was implemented only recently. However, there is some evidence in the JDQs that LAs may be promoted from one level to another. For example, Devon Norden, Legislative Assistant IV to Representative Dacia Grayber, indicated on the JDQ that there are two other LAs in the office, but commented, "Typically one LA2 and couple of interns depending on the time of year. Current office make-up is a little different as I am transitioning out of this position and my LA2 will be taking my place."²² Additionally, Knieling testified that LA promotions occur both within the same office and across offices.

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

²⁰The Branch does not track the movement of LAs from one office to another. However, Hamlin testified without rebuttal that it is common for LAs to move from one office to another, and the examples provided in the record tend to corroborate that testimony.

²¹Senator Bentz resigned from the Oregon State Senate in January 2020 to campaign for Oregon's Second Congressional District; he was elected to represent the Second Congressional District on November 3, 2020. See <https://bentz.house.gov/about> (visited March 31, 2021).

²²At the time that the JDQs were completed, the prior classification system with only two LA levels was still in use.

The Petition

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

1. This Board has jurisdiction over this matter.

Under PECBA, “[p]ublic employees have the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations.” ORS 243.662. To exercise that right, an employee or a labor organization may obtain voluntary recognition from the employer, ORS 243.666(1), or may file a petition with this Board to obtain certification of a labor organization as the exclusive representative of a petitioned-for group of public employees. ORS 243.682 through ORS 243.686. This Board’s jurisdiction over representation matters under PECBA extends only to “public employers” and “public employees.”²³ Here, the Branch concedes that it is a public employer, but asserts that it is not a “public employer” within the meaning of PECBA. To determine whether the Branch is a “public employer” as defined under PECBA, we must turn to the statutory text.

Before doing so, it is not lost on this Board that it is the legislature that, through statute, defines the scope of this Board’s authority. Certainly, if the legislature had included in PECBA a provision that excludes Branch employees from the definition of “public employees” or excludes itself from the definition of a “public employer,” this Board would, without hesitation, recognize and adhere to such statutory language. As set forth below, however, those statutory exclusions are absent. Using the principles of statutory construction developed by the courts, we ultimately conclude, for the reasons set forth below, that PECBA includes the Branch as a public employer and includes the petitioned-for employees as “public employees.”²⁴

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

²³The Board has jurisdiction under a separate statute for certain employers who do not meet the jurisdictional standards of the National Labor Relations Board under the National Labor Relations Act. *See* ORS 663.005(3)(i), (4)(f).

²⁴We address the statutory exclusions of supervisory, managerial, and confidential employees later in this order.

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

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

We also note that the legislature has expressly excluded both Legislative Assembly officers and employees from the coverage of the State Personnel Relations Law (SPRL). ORS 240.200(4) (defining “exempt service” as including “officers and employees of the Legislative Assembly”); ORS 240.245 (providing that the exempt service is not subject to SPRL, except for a requirement that salary plans be “equitably applied” to exempt positions “in reasonable conformity with the general salary structure of the state”). With respect to PECBA, however, the legislature expressly excluded only “elected officials,” not employees working directly under elected officials. The fact that the legislature expressly exempted employees from SPRL—but not PECBA—also weighs in favor of the conclusion that the legislature did not intend to exclude Branch employees from the coverage of PECBA.²⁵ Thus, based on the words that the legislature chose in enacting PECBA, which is the best evidence of legislative intent, we conclude that the Legislative Branch is a public employer and that the petitioned-for employees are public employees (except to the extent that they may be confidential, supervisory, or managerial within the meaning of PECBA).

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

²⁵We also note that when the legislature has sought to exclude an elected official’s staff or an entire employer from the coverage of a chapter of the Oregon Revised Statutes, it has done so expressly. *See* ORS 177.050(3) (“Except as provided in subsection (4) of this section, ORS chapter 240 does not apply to the office of the Secretary of State.”); ORS 178.060(3) (“Except as provided in subsection (4) of this section, ORS chapter 240 does not apply to the office of the State Treasurer.”); ORS 656.753(1) (“Except as otherwise provided by law, the provisions of ORS 279.835 to 279.855 and 283.085 to 283.092 and ORS chapters 240, 276, 279A, 279B, 279C, 282, 283, 291, 292 and 293 do not apply to the State Accident Insurance Fund Corporation.”).

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

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

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

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

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

The Branch also argues that permitting collective bargaining would permit a “challenge to the legislatively adopted LBPRs and improperly subvert[] the Oregon Legislature’s constitutional authority” under Article IV, Section 11.²⁶ But the Branch does not explain how collective bargaining would “subvert” its authority and, in any event, the Branch, like all public employers, would have the option to condition any collective bargaining agreement on ratification by the Assembly. Further, as explained above, the legislature retains its authority to amend PECBA to exempt some or all of its employees from PECBA, or to exempt specific subjects from mandatory collective bargaining. Accordingly, we do not agree that permitting the petitioned-for employees to engage in collective bargaining necessarily subverts the legislature’s rulemaking authority in a manner that compels us to interpret PECBA as excluding the petitioned-for employees from its coverage, despite the absence of any such express exclusion.

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

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

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

²⁶The Branch’s objections to the petitioned-for unit do not include any contention that the application of PECBA to the legislative employees is unconstitutional. Accordingly, we understand the Branch to be arguing only that the potential effect of collective bargaining on the application of the LBPRs to represented employees is a policy consideration that should affect our statutory interpretation of PECBA.

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

The Branch next argues that PECBA does not contain a designated bargaining representative for the legislative branch, whereas PECBA does provide for a designated bargaining representative for state agencies (ORS 243.696(1)) and the judicial branch (ORS 243.696(2)). In the absence of such a designated collective bargaining representative, the Branch argues, PECBA cannot be harmonized with the operational structure of the Branch. How the Branch might elect to conduct collective bargaining with its employees is beyond the scope of our inquiry here, and we would be overstepping our bounds to suggest what that structure might look like, or to require the Branch to designate a particular position or positions to perform that function.²⁷ The Branch, through its legislative authority, rulemaking authority, or some other mechanism can determine how it will be represented for purposes of collective bargaining (in the event that the petitioned-for employees vote for the Petitioner to be their exclusive representative). That such a determination has not yet been made does not persuade us that the legislature intended that the Branch is not a public employer or that its employees are not public employees within the meaning of PECBA.

Finally, the Branch asserts that it “cannot deliberate regarding management prerogatives behind closed doors and with limited representatives as other public employers routinely do,” citing Article IV, Section 14, of the Oregon Constitution, and that, as a result, it “will be constitutionally prevented from negotiating with a bargaining unit in any meaningful way.”²⁸ We do not determine whether that interpretation of the constitution is correct, because even assuming that it is, this argument sets forth only additional logistical and policy concerns about how and whether the Branch and its employees should be subject to PECBA. Those concerns may or may not be good policy reasons for excluding the Branch and its employees from PECBA. We reiterate that such a policy determination can be made only by the legislature, and it is inappropriate for this Board to make such a policy determination and then base our interpretation of PECBA on that policy instead of the statutory text.

²⁷The Branch notes that there is currently a bill before the legislature (SB 759) that would designate the Legislative Administrator as the collective bargaining representative of the Branch. Because that bill has not been enacted as a statute, it is not appropriate for us to consider it when interpreting PECBA in this matter.

²⁸The Branch acknowledges that “some decisions regarding collective bargaining issues could receive input from the Legislative Administrator and [the Legislative Administration Committee (LAC)],” but argues that “neither the LAC nor the Legislative Administrator can bind the entire Oregon Legislative Assembly under a Collective Bargaining Agreement unilaterally without violating the Oregon Constitution.” However, the record also shows that the legislature has a process by which it reviews and decides whether to adopt recommendations made by the Legislative Administrator or LAC regarding employees’ terms and conditions of employment. Further, the Branch does not cite a constitutional provision that prohibits the Branch from honoring the terms of a collective bargaining agreement or from collectively bargaining in good faith with its employees.

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

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

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

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

When determining whether a unit is appropriate for collective bargaining, we must "consider such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees." ORS 243.682(1)(a); see also *Douglas County*, CC-004-14 at 30-31, 26 PECBR at 387-88; *OPEU v. Dept. of Admin. Services*, 173 Or App 432, 436, 22 P3d 251 (2001).²⁹ Moreover, when making an appropriate unit determination, we have "discretion to decide how much weight to give each factor" in any particular case. *OPEU*, 173 Or App at 436; see also *OSEA v. Deschutes County*, 40 Or App 371, 376, 595 P2d 501 (1979). Thus, "our analysis of the propriety of a proposed unit is necessarily fact-driven, with the outcome depending on the specific facts and circumstances of the workplace and workforce at issue." *Douglas County*, CC-004-14 at 31, 26 PECBR at 388.

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

²⁹Those statutory factors are not exclusive, and we may also weigh other non-statutory factors, including our administrative preference for certifying the largest possible appropriate unit. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. Here, the Branch does not object on the ground that the proposed unit is too small and that a larger group of Branch employees would be an appropriate unit.

We begin by examining the community of interest, wages, hours, and working conditions of the proposed unit. “Community of interest” has long been understood to depend on factors such as similarities of duties, skills, and benefits; interchange or transfer of employees; promotional ladders; and common supervisors. *Douglas County*, CC-004-14 at 31, 26 PECBR at 388. Here, the Branch acknowledges that the employees “shar[e] the same compensation scheme, partak[e] in PERS, PEBB, other benefits,” “shar[e] a common work infrastructure,” and share in “the same type of work.” The petitioned-for Legislative Assistants are all subject to the LBPRs, which determine their terms and conditions of employment, including compensation (including shift differentials), vacation and sick pay, and the administration of pay upon demotion or promotion. The petitioned-for employees receive similar pay and benefits and perform largely similar job duties. They also frequently interact with each other in performing those job duties. As detailed in the job descriptions, the knowledge, skills, and abilities to perform the job are identical across all four classifications, with the single exception that the job description for the LA IV position states only one additional skill not listed in the other three classifications: “management and supervision of staff, volunteers, and interns.”³⁰ LAs sometimes transfer to different assembly members’ offices, and when they do so, they retain their accrued compensation and benefits. Occasionally, although not often, two assembly members share supervision of a single LA. Additionally, LAs may be promoted from one level in the LA classification series to another, such as from an LA I to an LA II, either while remaining in the same office or when hired by one member from another member’s office. Such commonalities in terms and conditions of employment weigh in favor of a conclusion that the petitioned-for LAs share a community of interest.

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

³⁰As discussed below, this reference to the ability to “manage and supervise” in the LA IV job description does not establish that the LA IVs are categorically managerial or supervisory employees under PECBA.

workplaces to ensure that employees' duties, work schedules, and work assignments are handled similarly across member offices.³¹

However, even assuming that some differences in assembly members' exercise of discretion and district office locations cause some LA working conditions to vary, such differences do not necessarily mean that the petitioned-for employees do not share a community of interest.³² When we analyze the community of interest factor, we examine the employees' *collective bargaining* interests, not more general interests. See, e.g., *State of Oregon, Mental Health Division, Fairview Training Center v. American Federation of State County and Municipal Employees, Council 75*, Case No. C-1-84 at 23, 8 PECBR 6666, 6688 (1984) (contrasting the "labor relations" community of interest with more general interest in the mission of the employer); *Revenue Hearing Officers Association v. Oregon Department of Revenue and Oregon Public Employees Union, Local 503*, Case No. C-155-83 at 6, 7 PECBR 6086, 6091 (1983) (when evaluating community of interest, we evaluate the "collective bargaining interests" of employees). The purpose of our analysis is to ensure that the resulting bargaining unit will work "for the mutual benefit of all included employees." See *United Employees of Columbia Gorge Community College v. Columbia Gorge Community College*, Case No. UC-19-01 at 7, 19 PECBR 452, 458 (2001). Unit determinations that ensure a sufficient community of interest "help effectuate policies of [PECBA] by decreasing potential sources of labor unrest and increasing equality of bargaining power." *Id.* (citing *AFSCME Council 75 v. State of Oregon and AOCE*, Case No. UC-37-97 at 8-9, 17 PECBR 767, 774-75 (1998)).

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

³¹LAs who testified explained that assembly members may have different supervisory or management styles, which one LA testified may result in "subtle differences" in how they choose to run their offices. A few employees indicated in their JDQs that every legislative office operates differently. For example, Linda Heimdahl, Legislative Assistant IV to Senator Kim Thatcher, wrote in her JDQ that "[e]very legislative office is different" and you "cannot compare one office to another." Kimberly Goddard-Kropf, Legislative Assistant I to Representative Rachel Prusak, wrote that "Every office is different, and each legislative aide has a unique relationship with their member." However, those employees did not provide specific examples of differences in the JDQs or testify at hearing, and the conclusory comments in the JDQs standing alone are insufficient to establish that there are significant differences in LAs' terms and conditions of employment across offices.

³²Generally, when a group of employees share the same basic terms and conditions of employment (such as compensation and benefits), that is sufficient to establish that the employees have a shared community of interest, including on a classification- or state-wide basis. See, e.g., *Or. AFSCME Council 75 v. State*, 304 Or App 794, 469 P3d 812, rev den, 367 Or 75, 472 P3d 268 (2020). In some cases, we have held that differences in supervision or location are sufficient to establish that a particular group of employees have a sufficiently distinct community of interest to justify the creation of a separate bargaining unit, even though those employees also share a community of interest with other employees excluded from the proposed unit. See, e.g., *Washington County*, RC-30-03 at 12-13, 20 PECBR at 756-57; *City of Corvallis*, RC-41-03 at 11-16, 20 PECBR at 694-99. However, such differences generally do not cause the larger group of employees who share basic employment terms to *lack* a shared community of interest. *Id.*

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

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

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

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

in this matter warrant exclusion of the LAs from PECBA, it has the authority to statutorily enact such an exclusion, but, to this point, the legislature has not done so. And we, as previously stated, lack the authority to make that policy decision, which is reserved for the legislature.³³

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

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

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

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

³³To the extent that the Branch argues that the petitioned-for employees do not share a community of interest because some of the petitioned-for employees are family members of the elected legislator who hired them, as permitted by ORS 244.177(2) (carve-out from government ethics limitations on hiring family members for “the personal legislative staff of the member of the Legislative Assembly”), we also disagree. We acknowledge that those individuals could potentially have different collective bargaining priorities than other employees (*e.g.*, job security provisions may be less important to those employees than to others in the bargaining unit). We do not conclude, however, that such differences in priorities resulting from personal relationships to elected members are sufficient to outweigh the commonalities among the petitioned-for employees.

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

Confidential Employee Exclusion

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

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

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

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

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

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

Managerial Employee Exclusion

We turn to the Branch's contention that some of the petitioned-for employees are managerial employees.³⁴ Under ORS 243.650(16), a "[m]anagerial employee" means "an employee of the State of Oregon * * * who possesses authority to formulate and carry out management decisions or who represents management's interest by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties." Additionally, a "'managerial employee' need not act in a supervisory capacity in relation to other employees." ORS 243.650(16). The managerial employee exclusion was added to PECBA by Senate Bill 750 in 1995. Unlike the supervisory and confidential exclusions, the managerial exclusion applies only to employees of the State of Oregon and the Oregon public universities listed in ORS 352.002. The exclusion is based on the judicially implied exception to the National Labor Relations Act, which grew out of the concern that "an employer is entitled to the undivided loyalty of its representatives." *NLRB v. Yeshiva University*, 444 US 672, 682 (1980). Managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* (quoting *NLRB v. Bell Aerospace Co.*, 416 US 267, 288 (1974)). They must "exercise discretion within, or even independently of, established employer policy and must be aligned with management." *Yeshiva University*, 444 US at 683.

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

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

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

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

³⁴In its objections, the Branch objected that "some" of the petitioned-for employees are managerial employees. In its post-hearing brief, it cited as examples only LA IIIs and IVs, and consequently we limit our discussion here to LA IIIs and IVs.

PECBA. We need not decide whether every elected assembly member has sufficient authority over the Branch's policies *as an employer* to qualify as "management" for purposes of PECBA,³⁵ because, even assuming that they do, this record does not establish that all the LA IIIs and LA IVs, on a classification-wide basis, exercise the level of discretion required by ORS 243.650(16) to also qualify as managerial employees. For an LA to be excluded as a managerial employee, that LA would need to have the authority to take discretionary actions (or effectively recommend them), that are outside the scope of their professional duties *and* control or implement the Branch's policies *as an employer*. To the extent that LA IIIs and IVs have the authority to take or effectively recommend discretionary actions regarding proposed legislation, this record does not establish that all LA IIIs and IVs exercise that authority outside the scope of professional duties routinely performed by LA IIIs and IVs. "Although all professional employees exercise their professional judgment on behalf of their employer when carrying out their duties, *only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management.*" *Oregon Association of Justice Attorneys*, UC-64-95 at 8, 16 PECBR at 784 (quotation marks and citation omitted; emphasis added). Further, the record does not establish that all LAs exercise non-routine authority regarding the Branch's *employer* policies, as opposed to other types of legislative policies. Although there may be individual LAs who actually exercise managerial authority, the record does not establish that all employees in the LA III and IV classifications should be categorically excluded as managerial employees.

Supervisory Employee Exclusion

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

³⁵The record establishes that the Branch makes its employer policies through the assembly of the elected members or by statutorily delegating some authority to the Legislative Administration Committee and the Legislative Administrator. See ORS 173.710 ("The Legislative Administration Committee hereby is established as a joint committee of the Legislative Assembly. The committee shall select a Legislative Administrator who shall serve at the pleasure of the committee and under its direction."); ORS 173.720 (prescribing the duties of the Legislative Administrator).

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

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

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

In this case, for evidence of supervisory status, the Branch relies exclusively on the LA job descriptions and questionnaires that were designed for the purposes of a classification, compensation, and pay equity study (not to determine the employees’ supervisory status under PECBA).³⁶ Both the job descriptions and the JDQs (even though completed by the employees themselves) are largely conclusory and non-specific, and therefore insufficient on their own to establish supervisory status. See *Portland Police Commanding Officers Association*, UC-017-13 at 23, 25 PECBR at 1018 (“Mere inferences and conclusory statements regarding supervisory authority are insufficient to render an employee a supervisor.”).

³⁶The Branch’s witnesses, Knieling and Eledge, acknowledged that they lacked personal knowledge of the purported authority exercised by LAs, and that their testimony was based on the job descriptions and questionnaires.

For example, the Branch contends that LA IVs are supervisors because the list of essential duties in the LA IV job description includes: “Hires, trains, supervises, and mentors other employees or interns.” This description alone does not establish supervisory status, for several reasons. Because the common understanding of the term “supervise” is much broader than the statutory definition, the mere use of that term in a job description or title is insufficient to establish supervisory status under PECBA. *See, e.g., City of Union v. Laborers’ International Union of North America, Local 121*, Case No. UC-9-08 at 4, 22 PECBR 872, 875 (2008) (concluding that public works superintendent was not supervisor despite job description stating that essential job functions include “[s]upervise subordinate employees including assigning and reviewing work, evaluating performance, scheduling work, recommending disciplinary actions and hiring/termination decisions”). Additionally, the LA IV job description refers to the supervision of “interns,” but, as noted above, the supervision of interns is not relevant to our analysis here.³⁷ Similarly, “training” and “mentoring” are not one of the 12 indicia of supervisory status under PECBA. *See* ORS 243.650(23)(a); *Laborers’ International Union of North America, Professional Law Enforcement Officers Association, Aurora v. City of Aurora*, Case No. CC-06-10 at 11, 24 PECBR 38, 48 (2011) (officer’s role in training employees does not confer supervisory status). Although “hiring” authority is supervisory under PECBA, the record does not establish that all LA IVs actually make or effectively recommend hiring decisions for other employees. For example, one LA IV testified that he does not making hiring decisions, and that his role in the hiring process is limited to scheduling and participating in interviews and sharing his opinion about the interviewees. To the extent he shares his opinion, there is no specific evidence establishing that he has done so regarding employees (as opposed to interns), or that his input rises to the level of “effective recommendation.”³⁸

The Branch also contends that the questionnaires establish that LA IIIs and IVs are supervisory because some employees in those classifications indicated that they “supervise” other employees. However, the questionnaire’s description of supervisory authority did not conform to PECBA’s definition of “supervisor.” For example, the questionnaire did not direct the employees to consider only their authority regarding other employees, and as a result, many of their responses refer to their authority over interns, which is not relevant to their status as supervisors under PECBA. For another example, the questionnaire did not direct the employees to indicate whether they use independent judgment when exercising their purported supervisory authority, which is a requirement for supervisory status under PECBA.³⁹ The questionnaire also did not indicate

³⁷For this reason, the testimony of an LA III regarding the assignment of work to interns does not, as the Branch contends, establish that LA IIIs are statutory supervisors.

³⁸We also note that the LA job descriptions indicate that the LA III classification is *not* supervisory. The LA III job description does not state that the LA III possess any supervisory authority. And, the LA IV job description states that the level IV “is distinguished from the III level in that it has responsibility for supervision of staff and interns.” That is, according to the Branch’s job descriptions, the LA III classification *lacks* responsibility for supervision of staff.

³⁹The questionnaire, in a section separate from the supervisory authority section, asked the employees to indicate whether they exercise independent judgment when performing their job duties. Some
(Continued ...)

whether any supervisory authority was exercised in the interest of management, as opposed to the interest of the LA in the routine performance of the LA's duties. Consequently, the mere fact that some LAs indicated that they have supervisory authority in their questionnaire responses does not establish that they are "supervisors" as that term is defined under PECBA.⁴⁰

Conclusion

In sum, we conclude that we have jurisdiction over this matter and that the petitioned-for unit is an appropriate unit. Further, none of the petitioned-for classifications are categorically supervisory, managerial, or confidential.⁴¹ Accordingly, we will direct the Election Coordinator to conduct a secret, mail-ballot election as set forth below. Because this matter was heard on an expedited basis, the Board will grant any petition for reconsideration that is filed within 14 days of our final order. OAR 115-025-0065(2)(g). Because, however, we are only directing an election to be conducted, this order is not a final order. *Klamath Co. v. Laborers Inter. Union*, 21 Or App 281, 534 P2d 1169 (1975). *Cf. Linn-Benton-Lincoln Educ. Ass'n/OEA/NEA v. Linn-Benton-Lincoln ESD*, 152 Or App 439, 448, 954 P2d 815 (1998) (a *post-election* certification order is a "final order"). After the election is conducted, the Board will issue a final, post-election order certifying the results of the election. At that point, both parties will have 14 days to request reconsideration of that final order. OAR 115-025-0065(2)(g).

ORDER

1. An appropriate bargaining unit is:

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

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

(Continued ...)

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

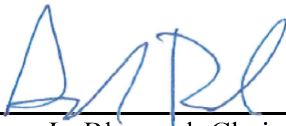
⁴⁰The amount of variation in the questionnaire responses also weighs against a finding that all of the employees in the LA III and LA IV classifications are categorically supervisory.


⁴¹As noted above in this order, either party may challenge the ballot of a specific employee on an individual basis, consistent with this order.

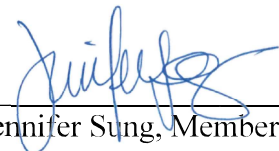
classifications above on the date of this order and who are still employed on the date of the election. The date of the election is the date that the Election Coordinator determines mail ballots are due. The choices on the ballot shall be IBEW Local 89 or No Representation.

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

DATED: April 6, 2021.


Adam L. Rhynard, Chair


Lisa M. Umscheid, Member


Jennifer Sung, Member

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

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

EMPLOYMENT RELATIONS BOARD

OF THE

STATE OF OREGON

Case No. RC-001-21

(REPRESENTATION)

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

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

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

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

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

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

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

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

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

IBEW LOCAL 89


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

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

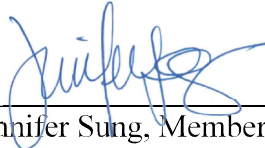
DATED: June 8, 2021.



Adam L. Rhynard, Chair



Lisa M. Umscheid, Member



Jennifer Sung, Member

This Order may be appealed pursuant to ORS 183.482.