

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

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

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

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¹ ORS 173.710, 173.720(1)(i).

26 ² ORS 173.710, 173.720(1).

³ ORS 173.730.

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

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

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

8
9 **a) The Oregon Legislative Assembly has adopted rules governing the
terms and conditions of employment for its workforce.**

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

15 Within the LBPR, Rule 1 clarifies the application of the rules to all employees of the
16 Legislative Assembly. This includes the subject employees who work for partisan offices in the
17 current petition. LBPR 1(4)(a) cites ORS 240.200, that Legislative Branch employees are exempt
18 from, and generally not subject to, the State Personnel Relations Law.⁷ Significantly, LBPR
19 1(5)(a) states that the LBPR’s “constitute rules of proceedings of the Legislative Assembly and
20 may take precedence over conflicting provision of state law to the extent that the rules expressly
21 provide for such precedence. Section 4, Mason’s Manual of Legislative Procedure (2010 ed.)”

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

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25 ⁴ ORS 243.650(6).

26 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

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

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

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

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

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

20 A recognition that the subject employees support members holding political offices and
21 that members may impose employment consequences on staff when necessary to advance
22 political objectives of their office is in stark contrast to other public officials and principles of
23 civil service. For example, the state civil service laws that apply to employees in the executive
24 branch expressly prohibit imposing personnel decisions for political reasons including requiring
25 Employment Relations Board review of personnel decisions taken for political reasons,
26 overturning of the same, and adopting rules to address under ORS 240.086(3) and similarly, with
27 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
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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
Branch. *Lent v. ERB*, 63 Or.App. 400 (1983).

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

¹¹ Notably, after the legislative amendment adding 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).

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.

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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).

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1 **HEARING REQUESTED**

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

4 DATED this 4th day of February 2021.

5 Respectfully submitted,

6 ELLEN F. ROSENBLUM
7 Attorney General

8 /s/ Tessa M. Sugahara
9 Tessa M. Sugahara, OSB# 993722
10 Attorney in Charge
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12 Oregon Legislative Assembly
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on February 4, 2021, I served a true and correct copy of

3 **RESPONDENT OREGON LEGISLATIVE ASSEMBLY’S OBJECTIONS TO PETITION**

4 **FOR REPRESENTATION WITH ELECTION** by the methods indicated below:

5 6 Employment Relations Board 528 Cottage Street NE, Suite 400 Salem, OR 97301-3807 7 Email: Emprel.board@oregon.gov ERB.Filings@oregon.gov	[] [] [] [] [X]	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY
8 9 Daniel Hutzenbiler McKanna Bishop & Joffe 1635 NW Johnson Street 10 Portland, OR 97209 11 Email: dhutzenbiler@mbjlaw.com	[] [] [] [] [X]	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY

12
13 Respectfully submitted,

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