

1 **EMPLOYMENT RELATIONS BOARD**

2 **OF THE**

3 **STATE OF OREGON**

4 **Case No. RC-010-20**

5 IBEW LOCAL 89,

6 Petitioner,

7 v.

8 STATE OF OREGON, OREGON
9 LEGISLATIVE ASSEMBLY,

10 Respondent.

**RESPONDENT OREGON LEGISLATIVE
ASSEMBLY’S OBJECTIONS TO PETITION
FOR REPRESENTATION WITHOUT
ELECTION**

(Hearing Requested)

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

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

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

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

26 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

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

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

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

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

20 Assuming the Board could certify a bargaining unit for Legislative employees, the Public
21 Employee Collective Bargaining Act (“PECBA”), does not provide a mechanism for Legislative
22 representation in the collective bargaining process.² Historically, the PECBA only contemplated
23 the Oregon Department of Administrative Services (“DAS”) as representing “all state agencies”
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26 ¹ *WSBA*, at 1051.
² ORS 243.650 to ORS 243.782.

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

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

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

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23 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).

24 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.
25 617 (1983).v. *ERB*, 63 Or.App.400 (1983).

25 ⁵ ORS 173.710, 173.720(1)(i).

26 ⁶ ORS 173.710, 173.720(1).

26 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
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26 ⁸ ORS 243.650(6).

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

3 **Objection under ORS 243.650(23)(a).** The Employer objects that some of the
4 employees subject to the proposed bargaining unit act as supervisors under ORS 243.650(23)(a).
5 Some of these employees have authority to act in the interest of the elected official to hire,
6 suspend, promote, discharge, assign, reward, or discipline other employees. If each elected
7 official chose to designate one of their legislative employees as a chief of staff or having these
8 duties, then at least 90 of the subject employees would be considered supervisory under ORS
9 243.650(23)(a) and would potentially exercise duties adverse to membership in the proposed
10 bargaining unit.

11 **Objection under ORS 243.650(16).** The Employer also objects that some of the
12 employees subject to the proposed bargaining unit act in a managerial capacity under ORS
13 243.650(16). Some of these employees represent management’s interest by taking or effectively
14 recommending discretionary actions and control or implement the elected officials’ policy. These
15 employees exercise discretion in performing management oriented responsibilities “beyond the
16 routine discharge of duties.” If each elected official chose to designate one of their legislative
17 employees as a chief of staff or having these duties, then at least 90 of the subject employees
18 would be considered managerial employees under ORS 243.650(16) and would exercise duties
19 potentially adverse to membership in the proposed bargaining unit.

20 **Objection under ORS 243.650(6).** The Employer also objects that some of the
21 employees subject to the proposed bargaining unit act in a confidential capacity under ORS
22 243.650(6). Some of these employees assist and act in a confidential capacity to their elected
23 official; formulating, determining, and effectuating the elected officials’ policies regarding the
24 elected officials’ other legislative employees. In other words, if a bargaining unit is recognized,
25 the confidential employees would develop and administer the elected officials’ collective
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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
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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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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 29, 2020, I served a true and correct copy of

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

4 **FOR REPRESENTATION WITHOUT 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 Tony Ruiz IBEW, Local 89 5450 SW Murray Blvd 10 Beaverton, OR 97005 11 Email: tony.ruiz@ibew89.com	[] [] [] [] [X]	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY

12
13 Respectfully submitted,

14 ELLEN F. ROSENBLUM
15 Attorney General

16 /s/ Tessa M. Sugahara
17 Tessa M. Sugahara, OSB# 993722
18 Attorney in Charge
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