

[09-20-02] Linn-Benton-Lincoln Education Association, Petitioner v. Linn-Benton-Lincoln Education Service District, Respondent / Case No. UC-28-01

Oral argument before the Board on May 22, 2002, on Petitioner's objections to a recommended decision issued by Administrative Law Judge (ALJ) William Greer on February 6, 2002, following a hearing on November 27, 2001, in Albany, Oregon. The hearing closed on December 28, 2001, upon receipt of the parties' post-hearing briefs.

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On July 3, 2001, Linn-Benton-Lincoln Education Association (Association) filed this OAR 115-25-005 (4) unit clarification petition. The Association sought to add unrepresented employees in the classification of family support liaison (liaison) to its existing Association bargaining unit of Linn-Benton-Lincoln Education Service District (ESD) employees. The ESD filed timely objections asserting that the petition was untimely and that the liaisons do not share a community of interest with the members of the Association's bargaining unit.

The issue presented for hearing is: Is it appropriate to add employees in the liaison classification to the Association's bargaining unit, subject to the results of a self-determination election?

The ALJ concluded that the liaisons are not required to have the same type of academic training required for other positions in the unit, nor do they perform work requiring the same level of discretion and professional judgment as unit members. We adopt the ALJ's rulings and factual findings, with minor modification. However, we reach a different conclusion in applying the law to those facts and conclude that it is appropriate to clarify the unit by adding the liaisons, subject to a self-determination election.

Having the full record before it, this Board makes the following:

RULINGS

1. The ESD moved to dismiss the petition as untimely. The Association filed this petition on July 3, 2001. The parties' collective bargaining agreement states that it is effective from July 1, 1999 through June 30, 2002. 1999 Oregon Laws ch. 572, section 1, establishes a three-year contract bar. ⁽¹⁾ However, section 2 of that chapter provides that the 1999 amendment applies only to collective bargaining agreements entered into on or after the effective date of the chapter, which was October 23, 1999. Accordingly, the timeliness of this petition is governed by the version of ORS 243.692(1) that existed prior to October 23, 1999. That statute provided for a two-year contract bar. Under that statute, and the

Board's rules [\(2\)](#) implementing it, this petition is timely. The ALJ correctly denied the ESD's timeliness objection to the petition.

2. The ALJ's other rulings were reviewed and are correct.

FINDINGS OF FACT [\(3\)](#)

1. The Association, a labor organization, is the exclusive representative of a bargaining unit of personnel employed by the ESD, a public employer.

2. The ESD employs approximately 250 personnel. The Association bargaining unit includes approximately 100 to 120 licensed professional employees. The ESD also employs about 150 unrepresented classified employees and 20 administrative personnel.

3. **Association bargaining unit--licensed employees.** The recognition clause of the 1999-2002 ESD-Association collective bargaining agreement provides that the Association is the exclusive representative of a bargaining unit of all regular employees of the ESD "whose job requires licensure by Teacher Standards & Practices Commission [TSPC] or a State of Oregon licensing board or an appropriate license and degree, as required by the Oregon Department of Education." (Emphasis added.) The bargaining unit excludes substitute, temporary, certain part-time, administrative, supervisory, confidential, and classified employees.

The bargaining unit includes personnel licensed by the State of Oregon and employed in the following classifications: autism consultant, behavior management consultant, early childhood interventionist, family services consultant, occupational therapist, physical therapist, school psychologist, speech language pathologist, and teacher.

Some of the ESD's early childhood interventionists do not have the license for that specialty that is issued by the Teacher Standards and Practices Commission. Instead, the Department of Education has authorized them, based on their experience, to work as interventionists. The ESD considers that authorization to be the equivalent of a license.

At least one family services consultant does not have a license, though he is in the process of obtaining one. He estimated that it would take four years to obtain the license. The ESD has hired unlicensed consultants previously, with the requirement that they obtain a license.

4. Of the 22 job titles in the Association's bargaining unit, 11 require a master's degree or equivalent; five require a bachelor's degree or equivalent. Six position descriptions do not specify a degree requirement.

5. Other employees. The ESD's unrepresented employees include personnel employed in a variety of classifications, including: accounting clerk, attendance officer, clerk/typist, custodian, customer service representative, educational assistant, network analyst, programmer/analyst, secretary, and transition specialist.

Most of the unrepresented classifications do not work directly with children or families. Of the eight classifications that list duties of working with children or families, five work with, or under the direction of, teachers or other licensed employees.

Three unrepresented classifications are responsible for managing caseloads of youths in their respective areas of service. *Attendance officers* work with youths who do not consistently attend school. *Liaisons*, the subjects of this petition, work with youths who are at risk of becoming juvenile delinquents. *Transition specialists* work with youths who are leaving institutions and returning to the community.

The ESD and the Oregon Department of Education do not require employees in those three classifications to possess a state-issued professional license. However, the ESD does require attendance officers to have a bachelor's degree in education, juvenile justice, social work, or a related field. It requires liaisons to have a bachelor's degree in counseling, social work, or other human services professions. It requires transition specialists to have a bachelor's degree in education, criminal justice, or other related fields, and/or equivalent education and experience.

6. ESD organization. The ESD is organized into several divisions, including student services. That division includes the service integration program, which provides support to families and employs personnel in the classifications of family services consultant and liaison.

7. Family services consultants. The consultants primarily provide professional counseling for youths and families. Their job goal is to "[p]rovide intensive and comprehensive services * * * for children demonstrating risk behaviors and families experiencing multiple stresses." They are included in the Association bargaining unit.

The consultants provide clinical counseling and social work services to youths who are believed to be on the verge of committing crimes and manage caseloads of families with serious mental health issues. They each have caseloads of approximately 30 youths.

Consultants diagnose the mental conditions of youths in their caseloads, and provide therapeutic counseling services, and diagnose youths' emotions.

Consultants develop "intervention plans" that describe concerns about an individual that are to be addressed; the desired outcome of counseling; the strengths of the individual; the type, focus, and anticipated duration of intervention; and the outcome achieved. Youths and family members participate

in preparing the plans and sign them, indicating agreement to work together toward the identified goals.

The ESD requires consultants to possess both a master's degree in social work, or an equivalent, and an Oregon license in counseling. In addition, the ESD requires family services consultants to have had successful experience providing clinical services to youths and families.

The ESD employs three consultants. They report to Service Integration Program Coordinator Judi Edwards. Consultants are employed on a 190-day contract.

The 2000-2001 salary range for consultants was approximately \$30,303 to \$49,697. Assuming a 190-day work year and an eight-hour work day, their hourly wage rate was approximately \$19.94 to \$32.70.

8. Liaisons. The liaisons, who are the subjects of this petition, are not included in the Association bargaining unit.

Liaisons primarily perform case management for youths and families. In managing an individual case, a liaison may provide parent education, skill-building training, transportation, referrals to community resources, and other service coordination. They have caseloads of approximately 60 youths. Their job goal is to "[h]elp troubled children/youth and their families work together to locate and coordinate resources, organize support, develop skills and solve problems." Upon determining that a referred youth is experiencing mental health problems, liaisons refer the youth to a consultant or to appropriate mental health agencies.

Liaisons provide "friendly advice" to youths who have not broken the law in an effort to prevent them from committing crimes. Liaisons do not diagnose the mental conditions of youths in their caseloads. Liaisons help youths develop basic anger management skills.

Liaisons develop "comprehensive family plans" that describe the service goal; the strengths and resources required to meet the goal; the responsible party for particular actions; and the date portions of the plan are completed. Family members participate in preparing the plans and sign them, indicating agreement to work together toward the identified goals.

Neither the State nor the ESD require liaisons to have a professional license. The ESD does require them to possess a bachelor's degree in counseling, social work, or other human services professions, and to have had successful experience working with youths and families.

The ESD employs five liaisons. They report to Service Integration Program Special Projects Manager Vicki Harlos, who reports to Edwards. Liaisons are employed throughout the calendar year.

The 2001-2002 salary range for liaisons is \$2,389 to \$2,953 per month, which is approximately \$13.79 to \$17.04 per hour. The ESD provides liaisons and consultants with the same benefit package.

9. Working relationship. The ESD created the liaison classification around 1997 to perform case management duties (such as transportation and coordinating services) that consultants had been doing, thereby freeing consultants to perform counseling and other clinical work.

As the classifications have evolved, the work of consultants and liaisons occasionally overlap with shared duties. For example, a consultant may counsel a student while a liaison provides case management services for that student and the student's family. In certain situations, consultants and liaisons may work as a team on a case. In general, however, consultants and liaisons have their own separate caseloads.

A consultant may provide some case management services typically performed by a liaison. One consultant, who works in a region to which no liaisons are assigned, performs case management duties in addition to clinical duties, just as consultants did before the liaison classification was created. However, a liaison cannot provide the professional counseling services routinely performed by a consultant.

A liaison may be promoted to a consultant position only if he or she possesses an appropriate master's degree and has--or is in the process of obtaining--appropriate State licensure. At the time of hearing, a liaison had recently been hired as a consultant. He has the required degree but does not have a license, though he is working to obtain one.

10. Desires of the employees. If this Board orders the Association bargaining unit clarified to include the liaison classification, subject to the result of a self-determination election, the five liaisons believe that a majority of employees in their classification will not vote for representation by the Association. ⁽⁴⁾

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties and subject matter of this dispute.
2. The liaisons are appropriately included in the Association bargaining unit.

DISCUSSION

The Association seeks to add liaisons to its bargaining unit of ESD employees. The ESD opposed the petition on the grounds that the liaisons do not share a community of interest with other employees in the unit. Our review of the record leads us to conclude otherwise.

This case presents two basic questions. As in any subsection (4) unit clarification case, we must determine whether the positions in dispute are appropriately included in the bargaining unit. To reach that determination, we consider the appropriate bargaining unit factors (community of interest, wages, hours, working conditions, history of bargaining, and employee desires) as applied to the disputed positions. The parties approached the dispute focusing solely on that issue, and mainly litigated whether

the liaisons were sufficiently similar to the consultants to be included in the unit.

The second question concerns the application of ORS 243.650(1) to these positions. The ESD did not contend that this petition should be dismissed because the liaison positions were unlicensed and, therefore, could not be included in the unit. The ESD did not challenge either this Board's or the Court of Appeals' prior interpretation of ORS 243.650(1) and the phrase "academically licensed." We address the question because our dissenting colleague contends that the Court of Appeals' prior decision is wrong and that our prior decision should be overruled.

The appropriate bargaining unit factors support inclusion of the liaison positions in the association's bargaining unit

Community of Interest. In considering whether positions share a community of interest sufficient to warrant placing them in the same bargaining unit, this Board considers factors such as the similarity of duties, the similarity of skills required, benefits received, transfer of employees, interactions between the positions, promotional ladders, and common supervision.

Similarity of Duties. The liaison position was created to assume case management duties that had been performed by the consultants. The focus of these case management duties is to work with troubled youths and their families, primarily to assess which ESD or community services would benefit the youths and family, and arrange for those services to be provided. The liaisons also provide services such as anger management training and parental training.

The consultants also work with troubled youths and their families. They primarily do clinical counseling. The clientele they work with typically have more severe problems.

Occasionally, both a liaison and consultant will work with the same family or student. Also, liaisons sometimes refer clients to consultants, and consultants may refer a family to a liaison for additional services.

It is significant that, until the liaison position was created a few years ago, the consultants, who were in the bargaining unit at the time, performed all the case management duties. The evidence does not establish that the ESD created the liaison position because of concerns that the case management duties were more appropriate for classified employees. Rather, it appears that the decision was made to maximize the counseling and other clinical skills of the consultants, as caseloads became heavier and the cases became more complex.

It is also significant that consultants are expected to handle case management duties when necessary. The intertwined nature of the two positions' duties is demonstrated by the fact that one consultant continues to function as all the consultants did until the liaison positions were created. That consultant performs the clinical duties now reserved to consultants, and also the case management duties now largely the province of liaisons. That consultant is in the unit.

The ESD describes the duties of the positions as "complementary, but separate." That is an apt description. Indeed, it is the complementary nature of the duties that supports a conclusion that this clarification is appropriate. The fact that the duties are also separate is not necessarily a basis for excluding the liaisons. This is a unit of various classifications. It could be said of any of the positions in the unit that its duties are complementary but separate from the consultants. [\(5\)](#)

Similarity of Skills. The liaisons are required to have a bachelor's degree in counseling, social work, or a similar field. Liaisons must also have successful work experience with children and families. The ESD prefers that liaisons have experience in providing home visits, providing skills training in group settings, and training parents.

Consultants must have a master's degree in social work, or the equivalent, must have successful experience providing clinical services to children and families, and working in school or agency environments. Consultants also must have in-depth knowledge of, and ability to provide, consultation and intervention services.

Both positions require a college degree in the same or related fields. While the consultants require a master's degree, other positions in the unit require only a bachelor's degree, or have no college degree specified. [\(6\)](#) A majority of the unrepresented classified positions have no degree requirement.

Benefits Received. The benefits received by the liaisons and those received by the positions in the bargaining unit are essentially the same.

Transfers. There have been no transfers from liaison positions to bargaining unit positions or vice versa.

Interactions. The liaisons interact with consultants and other bargaining unit positions on a regular basis. Liaisons and consultants participate in meetings together on a monthly basis. As noted above, liaisons and consultants may share a case, or may communicate because each is working with the same child or family but at different times. Liaisons may also interact with other bargaining unit members to arrange for services for those in their caseload. Though both consultants and liaisons work mainly in the field, they are based in the same office in Albany.

Promotional Ladders. There is no formal promotional ladder from a liaison position to any position in the bargaining unit. However, given that the duties of the liaison position were previously included in the consultant position and are still performed to varying degrees by consultants, the consultant position is a logical promotional opportunity for liaisons. As discussed above, the education and experience requirements are similar, with those for consultants being more advanced.

Shortly before the hearing in this matter, the ESD promoted a liaison to fill a consultant vacancy. The liaison who was promoted had the required degree, but did not have the required license or experience. The ESD is willing to let the promoted individual gain the experience required for a license on the job, a

process that could take up to four years.

Common Supervision. The liaisons and consultants are part of the same ESD program. The consultants report directly to the program head. The liaisons report to an intermediate supervisor. The intermediate supervisor is also responsible for the mentoring and oversight of the consultant who is working toward obtaining a license.

Wages. Wages for the liaisons are set unilaterally by the ESD. Wages for consultants are established by collective bargaining with the Association. The salary range for liaisons is \$28,668 to \$35,436 per year. Bargaining unit salaries range from \$27,241 to \$52,172 per year.

Hours and Working Conditions. The liaisons work different hours than most bargaining unit positions, including the consultants. Liaisons are eligible for overtime; bargaining unit positions are not. Liaisons work year round. Consultants and most bargaining unit positions work during the school year. At least at the time of this Board's earlier hearing involving these parties, some other bargaining unit positions worked year round.

Both the liaisons and consultants work primarily in the field. Much of the work is done directly with students and families. Some bargaining unit positions also work in the field, while others may spend most of their work time in schools or office environments. The "working conditions" section of the liaison and consultant job descriptions are essentially the same.

History of Bargaining. The liaison positions were created approximately four years ago. The positions have never been represented. The record does not establish how long consultants have been in the unit or how long the unit has existed.

Desires of Employees. The petition was supported by the required number of signatures of liaisons. During the processing of this case, liaisons submitted a letter indicating that they did not wish to be represented. Ultimately, the best indication of employee desires is a secret ballot election.

Summary. Though there are factors on both sides, the factors that this Board has traditionally viewed as the most important in unit clarification cases support placing these positions in the bargaining unit. Community of interest is primary. In that regard, liaisons share much in common with other employees in the unit. Their duties used to be, and in some cases still are, performed by unit members. The knowledge, skills, and experience required is similar to that required for other unit positions. Liaisons interact regularly with other unit positions and are part of the same department. A unit position is the logical promotional ladder for liaisons.

Factors like wages, hours, and working conditions generally are less persuasive in subsection (4) unit clarification cases because those factors are often established by bargaining, and differences between unrepresented employees and those in the unit are to be expected. Even among those factors, we note that the wage rate for liaisons is within the range paid to other unit positions, and the working conditions

as set out in the job description are nearly identical for liaisons and consultants.

ORS 243.650(1) does not bar inclusion of liaisons in the Association's bargaining unit

The Association's bargaining unit includes positions that require a teaching or occupational license, although the job descriptions for two positions in the unit--behavior management consultant and early childhood interventionist--do not list any licensure requirement. Neither the ESD nor the State require liaisons to have a license.

ORS 243.650(1) states, in relevant part:

"* * * an appropriate bargaining unit cannot include both academically licensed and unlicensed or non-academically licensed school employees. Academically licensed units may include but are not limited to teachers, nurses, counselors, therapists, psychologists, child development specialists and similar positions. * * *"

At no stage of this proceeding has the ESD argued that the above statutory language bars inclusion of liaisons in the Association's unit. In its objections to the petition, the ESD contended that the liaisons were not appropriately included in the unit because the positions did not share a community of interest with other unit positions. The ESD continued to rely on that argument throughout. At oral argument, the ESD specifically stated that it was not contending that the prior decisions of either this Board or the Court of Appeals, which interpreted the above language, were wrongly decided.

We believe that this Board's Order on Reconsideration in Case No. UC-22-96, 17 PECBR 228 (1997), was correctly decided. As explained below, we also believe that our decision here to clarify the unit by adding the liaison positions is consistent with the Court of Appeals' decision. 163 Or App 558 (1998).

As mentioned, this Board has interpreted the quoted statutory language before. In a 1997 case involving these parties, the issue was whether adding early childhood interventionists to the Association bargaining unit was appropriate. *Linn-Benton-Lincoln Education Association v. Linn-Benton-Lincoln ESD*, Case No. UC-22-96, 17 PECBR 140 (1997), *reconsid* 17 PECBR 228 (1997), *aff'd* 163 Or App 558, 989 P2d 25 (1999).

In our initial decision, we found that the above statutory language was added by the legislature in 1995, in response to cases in which this Board certified school district bargaining units that included both licensed and classified employees, such as *Welches Education Association v. Welches School District*, Case No. RC-78-89, 12 PECBR 304, *aff'd* 116 Or App 564, 842 P2d 437 (1992). We also found that the legislature's intent in using the terms "academically licensed" and "non-academically licensed" was to mandate a return to the approach for determining school units this Board explained in *Mid-Valley Bargaining Council v. Greater Albany Public School District*, Case No. C-17-81, 6 PECBR 4766 (1981), an approach that this Board continued to use until the *Welches* case was decided. In considering the specific question presented by the case, we held that since the interventionists were not required to

have a license, it was inappropriate to include them in the Association's unit.

On reconsideration, we reaffirmed our conclusion that the legislature's use of "academically licensed" in ORS 243.650(1) was based on this Board's use of that term in *Mid-Valley Bargaining Council v. Greater Albany School District*, 6 PECBR at 4772.⁽⁷⁾ However, we also decided that the original Order was too narrowly focused on the word "licensed," and that we thus failed to give meaning to the entire phrase. In re-examining the *Greater Albany School District* decision, we determined that this Board's focus there was not on licensure but rather on the *training* required ("academic") to perform the duties of the position. We found that the early childhood interventionists were required to possess a bachelor's degree (or comparable advanced training) and therefore were academically trained. We reasoned that: "[t]he degree or certificate that certifies that the holder has completed such academic training is a 'license' for purposes of the community of interest factor that this Board denominates 'academically licensed.'" Finally, we concluded that the classification of early childhood interventionist was of like character to those occupations (other than teacher) listed in the statute as "academically licensed." 17 PECBR at 231.

The Court of Appeals affirmed, observing that there are two plausible interpretations of the term "academically licensed" in ORS 243.650(1): "* * *the persons described must be both academically trained and must also be licensed by a competent legal authority" or "* * * the persons described must be entitled to engage in a particular occupation or profession by reason of academic training."⁽⁸⁾ 163 Or App at 565. The court determined that the legislature's general purpose in adopting ORS 243.650(1) "* * * was to require educators and others holding professional positions to bargain separately from those employees who perform other occupational tasks." 163 Or App at 568. The court concluded that: "[t]he [early childhood] interventionists' position requires academic training and involves a direct professional service to students. Including them in the academically licensed unit is in keeping with what appears to have been the legislature's general purpose in distinguishing between academically licensed and nonacademically licensed employees." (Footnote omitted.) 163 Or App at 571.

In keeping with the Court of Appeals' interpretation of the statute, we must decide whether the liaison position requires the same or similar academic training as the other positions in the Association's bargaining unit. We also must decide whether the liaisons provide a direct professional service to students within the ESD's jurisdiction, as do other unit positions.

The ESD requires liaisons to have a bachelor's degree in a specialized professional field. Other positions in the bargaining unit likewise require specific bachelor's degrees. Some positions require a master's degree, and a few have no degree requirement listed. There is no meaningful distinction between the academic training required of liaisons and that required for other positions in the unit.

It is true that neither the ESD nor State law requires the positions to have a teaching or other professional occupational license. However, one of the positions listed in the statute as an example of the positions that could be included in a unit of licensed employees is one for which no license was required at the time the statute was adopted. At the time of the earlier case between these parties, the same was true of the interventionist positions.⁽⁹⁾

The liaisons provide professional services to children and families, as do other unit positions. The services provided by the liaisons have been, and continue to be, performed by other members of the unit. Those services directly complement the services provided by other unit members and are an essential element of the ESD's overall mission to provide the services to students and families that will enable them to function and succeed in the school setting.

We find little to distinguish this case from the earlier case involving these parties. We adhere to the view expressed there that focusing only on the word "licensed" does not properly take into account the remainder of the statutory provision. As in the prior case, the liaison positions require academic training, evidenced by a degree in a particular professional field. That degree is a condition of employment to enter a liaison position. The services provided by the liaison positions are integrally related to services provided by other unit members. The liaison positions are of like character not only to the positions in the unit but also to the examples listed in the statute. Just as the duties of interventionists complement those of teachers, so to do the duties of liaisons complement the duties of consultants and other unit positions. Liaisons are part of the team of ESD employees who work with troubled students and their families. As the court said with respect to the interventionists, including the liaisons in the Association's bargaining unit is consistent with the legislature's apparent intent in separating academic and nonacademic employees for bargaining purposes.

We conclude that the liaisons are "academically licensed" as that term has been defined by the Court of Appeals and this Board, and therefore are appropriately added to the Association bargaining unit, subject to the results of a self-determination election.

ORDER

1. Subject to the results of a self-determination election, it is appropriate to clarify the Association bargaining unit to include the family support liaison position.
2. The elections coordinator shall conduct an election among the liaisons as soon as is practicable to determine if they wish to be represented by the Association for the purpose of collective bargaining with the ESD.

DATED this 20th day of September 2002.

Member Thomas Dissenting:

The family support liaisons (liaisons) are not appropriately added to the Association bargaining unit.

In 1995, the legislature changed the law to mandate that we maintain separate bargaining units for academically licensed and unlicensed school employees. The legislature amended the ORS 243.650(1) definition of "appropriate bargaining unit" to provide:

"'Appropriate bargaining unit' means the unit designated by the Employment Relations Board or voluntarily recognized by the public employers to be appropriate for collective bargaining. However, an appropriate bargaining unit *cannot include both academically licensed and unlicensed or non-academically licensed* school employees. Academically licensed units may include but are not limited to teachers, nurses, counselors, therapists, psychologists, child development specialists and similar positions. This limitation shall not apply to any bargaining unit certified or recognized prior to June 6, 1995, or to any school district with fewer than 50 employees."(Emphasis added.)

Under the final 1995 amendments, both *unlicensed* employees and *nonacademically licensed* employees are excluded from academically licensed employee bargaining units.[\(10\)](#)

The Association seeks to add liaisons, who are unlicensed employees, to its bargaining unit. That bargaining unit includes professionally licensed employees, including the family services consultants (consultants). The ESD requires the liaisons to possess a bachelor's degree. However, neither the ESD nor State law provides that liaisons are to possess a teaching license, a certificate, or to be authorized by the State to provide professional services to children. In contrast, the ESD requires the consultants either to be a licensed teacher or be in the process of obtaining a State of Oregon counseling license.[\(11\)](#)

Oregon laws clearly define the requirements for school employee licensure, certification, and authorization. Specifically, the State Board of Education and the Teacher Standards and Practices Commission (TSPC) have criteria for issuing licenses and certificates or authorizing employee positions that provide professional educational services to children.

The State of Oregon, Department of Education, (ODE) requires that certain teaching licenses be issued by the TSPC. In addition to initial and continuing teaching licenses, TSPC " * * * may establish such other types of teaching licenses as it considers necessary for operation of the public schools of the state and may prescribe the qualifications for such licenses." ORS 342.125(4).

TSPC administrative rules specify the types of school employees who are required to hold licenses. OAR 584-036-0010 states:

"(1) Educators who are employed by public schools and who are compensated for their services from public funds must hold licenses except as provided in section (2) of this rule. Licenses are required for: teachers; counselors; school psychologists; supervisors; professional technical directors; principals, program directors, and other district administrators who evaluate licensed personnel; superintendents; athletic coaches; school nurses; substitute teachers; *and other personnel performing the above duties regardless of title.*" (Emphasis added.)

"(2) School districts may provide related services for handicapped children by employing a public agency, such as a community mental health program, *or by employing professionals who are licensed within their own specialties.* These personnel are not required to hold licensure from the Commission. See also ORS 343.221." (Emphasis added.)

ORS 343.221 provides for the administration of special education services to students. Subsection (6) states that a school district: "May contract for the provision of related services by a person in private practice if that person is *registered, certified or licensed* by the State of Oregon as qualified to provide a particular related service that requires registration, certification or licensing by the state." (Emphasis added.)

In a 1997 case involving these parties, we considered whether adding early childhood interventionists to the Association bargaining unit was appropriate. *Linn-Benton-Lincoln Education Association v. Linn-Benton-Lincoln ESD*, Case No. UC-22-96, 17 PECBR 140 (1997), *reconsidered* 17 PECBR 228 (1997), *affirmed* 163 Or App 558, 989 P2d 25 (1999). In our initial decision, we determined that those employees did not possess a license as interventionists and, therefore, were not appropriately included in the Association bargaining unit. [\(12\)](#)

On reconsideration, we wrongly determined that the legislature's use of "academically licensed" in ORS 243.650(1) was based on this Board's use of that term in *Mid-Valley Bargaining Council v. Greater Albany School District*, Case No. C-17-81, 6 PECBR 4766, 4772 (1981). [\(13\)](#) We also incorrectly concluded that *Greater Albany* was part of the "context" of the 1995 statutory change because "the legislature employed a term, 'academically licensed,' that was used and is not in general use as a term of art in other contexts." The term "academically licensed" does not appear in the *Greater Albany* decision.

On reconsideration, we based our decision on language that did not actually exist in *Greater Albany*, and we claimed that this nonexistent language was part of the context for the 1995 statute amendment. Based on this error, we then went on to conclude that, because our focus in *Greater Albany* was not on licensure but rather on the *training or degree* required ("academic") to perform the duties of the position, the 1995 legislature also must have intended to focus solely on academic training or degree when it amended the statute in 1995.

In addition, we concluded that, because the early childhood interventionists were required to possess a bachelor's degree (or comparable advanced training) and therefore were academically *trained*, "[t]he degree or certificate that certifies that the holder has completed such academic training is a 'license' for purposes of the community of interest factor that this Board denominates 'academically licensed.'" Finally, we concluded that the classification of early childhood interventionist was of like character to those occupations (other than teacher) listed in the statute as "academically licensed." 17 PECBR at 231.

The Court of Appeals affirmed, first noting that the term "academically licensed" does not actually appear in the *Greater Albany* decision, but based on the court's use of a *PGE* analysis, it observed that there are two plausible interpretations of the term "academically licensed" in ORS 243.650(1): "* * * the persons described must be both academically trained and must also be licensed by a competent legal authority" or (2) "* * * the persons described must be entitled to engage in a particular occupation or profession by reason of academic training." 163 Or App at 565.

The court determined that the legislature's general purpose [\(15\)](#) in adopting ORS 243.650(1) " * * * was to require educators and others holding professional positions to bargain separately from those employees who perform other occupational tasks." 163 Or App at 568. The court concluded that: "[t]he [early childhood] interventionists' position requires academic training and involves a direct professional service to students. Including them in the academically licensed unit is in keeping with what appears to have been the legislature's general purpose in distinguishing between academically licensed and nonacademically licensed employees." 163 Or App at 571.

The problem with this conclusion is that the court, and the majority here, ignore the fact that *unlicensed* employees are also specifically listed in the statute.

In his dissent, Judge Landau correctly concluded that the language in ORS 243.650(1) is not ambiguous. He notes that " * * * the legislature has gone to the trouble of telling us what, at a minimum, must be considered a common characteristic: There must be a 'license.'" 163 Or App at 572 .

I agree with his confusion regarding the majority opinion when he writes:

" * * * The problem is that the majority has not offered two plausible interpretations of the term 'academically *licensed*,' given that its second interpretation explicitly assumes that the term "licensed" has no meaning. I do not understand, and the majority does not explain, how a plausible construction of a term includes declaring that it simply means nothing." 163 Or App at 573, fn. 2.

All of the occupations listed in the 1995 amendments to ORS 243.650(1) are professional school employee positions which are governed by specific terms of ODE and TSPC licensing or certificating rules. The majority of the court in *Lincoln ESD* noted that the specific professional qualifications required by the State for child development specialist "are closely identifiable with the plain and ordinary meaning of the word 'license.'" (Footnote omitted.) 163 Or App at 564.

A liaison must possess a bachelor's degree, which is an academic as opposed to nonacademic or occupational degree. But the ESD and the State do not require him or her to possess a professional license or certificate. In contrast, the Association bargaining unit consists of all regular ESD employees "whose job requires *licensure* by [TSPC] or a State of Oregon licensing board or an *appropriate license and degree*, as required by the Oregon Department of Education." Because liaisons are not required to possess licenses, this Board should infer that they have not received the same type of specialized professional training that has been obtained by Association unit members. In sum, liaisons are not entitled to professional licensure, certification, or authorization. Association bargaining unit members are entitled by specialized academic training and experience for licensing, certification, or authorization by ODE.

Moreover, liaisons do not perform the same type of professional counseling work as that performed by Association bargaining unit members. The liaisons primarily coordinate and perform case management services; they do not continually exercise the discretion and professional, clinical counseling, or

diagnostic judgment that the ESD requires of Association bargaining unit employees such as the consultants and which would require them to be licensed, certificated, or authorized by the State.

Under OAR 584-036-0010, the law requires licensing of employees who are performing duties which are the same as other named licensed professionals, regardless of the title of the position. If the liaisons were actually performing the same professional duties as the consultants, who are required to obtain teacher or counselor licensure, the TSPC would acknowledge the professional nature of their duties and license or authorize these positions. However, there is no evidence in this record to indicate that the liaisons work or academic training would entitle them to a professional license, certification, or authorization by the ODE.

The liaisons have academic degrees but are "unlicensed" and therefore are prohibited by ORS 243.650 (1) from being added to the Association bargaining unit of academically licensed employees. The Association's petition should be dismissed.

I respectfully dissent.

1. ORS 243.692(1).
2. OAR 115-25-015(2).
3. We take notice of the Order and record in Case No. UC-22-96 involving these same parties.
4. An October 24, 2001 letter signed by all five liaisons states: (we) "* * * have come to the conclusion that we, as a group, will not have a majority vote to join the union. We are therefore, no longer interested in pursuing representation in this matter."
5. We do not see the relationship between liaison and consultant to be analogous to that between teachers, who are in the unit, and educational assistants, who are unrepresented. Teachers and educational assistants work closely together, typically in the same classroom. Educational assistants work under the direction of the teacher to assist in educating the teacher's "caseload." In contrast, liaisons do not work under the direction of consultants. They have their own caseload, and duties that, though related, are separate and distinct.
6. For example, the occupational therapist and physical therapist job descriptions require graduation from a school approved by the American Occupational Therapy Association and American Physical Therapy Association, respectively.
7. As the Court of Appeals pointed out in the earlier case between these parties, this Board did not use the precise phrase "academically licensed" in *Greater Albany School District*. This Board did designate a bargaining unit of all employees: "who are required, as a condition of employment, to possess an academic certificate, license, degree, or the equivalent, issued by the State of Oregon, an institution of

higher education, or a professional society * * *." We specified that the " * * * certificate, license, degree, or the equivalent must be 'academic,' as opposed to solely occupational, in order to preclude inclusion in the unit of persons who are required to possess a nonacademic license, such as a driver or chauffeur * * * or journeyman plumber * * *." 6 PECBR 4780. In that case, and subsequent cases, this Board sought to create and distinguish school district bargaining units: one for academic employees and one for nonacademic employees. *See Salem Federation of Classified Employees v. Salem School District and OSEA*, Case No. C-169-83, 7 PECBR 6187 (1983).

8. Judge Landau, in dissenting from the majority opinion, argued that the majority's interpretation of the statute essentially rendered the word "licensed" meaningless. The difficulty with that argument is that placing all the focus on "licensed" ignores the context in which the word appears, both as part of the phrase "academically licensed" and the overall text of the statute. Such single-minded focus on "licensed" would render the legislature's use of the word "academically" meaningless. That narrow focus also ignores the fact that at least one of the positions listed as exemplars did not require a "license" in the strict meaning of the word.

9. There is still no strict requirement that the interventionist positions we previously clarified into the unit have a license. TSPC now offers a license, and the Department of Education offers "authorization" to perform interventionist duties. That is also true for the childhood development specialists listed in the statute.

10. The initial enrolled 1995 amendments contained in Senate Bill 750 proposed the following:

"However, an appropriate bargaining unit cannot contain both teachers and school employees who do not have teaching licenses." The B-Engrossed version of SB 750, with the House amendments proposed: "However, an appropriate bargaining unit cannot include both *academically licensed and nonacademically licensed* school employees." (Emphasis added.) The final version of SB 750, the enacted current law, contains a conference committee amendment which inserted the words "*and unlicensed or*" between academically licensed and nonacademically licensed.

11. The work of the consultants and liaisons do appear to overlap in a manner similar to the overlaps in other occupational pairings, such as teachers and instructional assistants or aids, therapists and assistants, attorneys and paralegals, and physicians and physicians' assistants.

12. In footnote 5 of that decision, we incorrectly concluded that it was irrelevant that early childhood interventionists (EI) may hold a teacher's certificate. Under the statute, academically licensed units include teachers. If a certified teacher was working as an EI and providing professional services to children, the position would appropriately be included in the academically licensed unit. Relatedly, the Court of Appeals cited OAR 581-015-1100, noting that the TSPC provides for authorization, licensure, or endorsement of EIs, which is not unlike similar TSPC provisions for childhood development specialists. *Linn-Benton*, 163 Or App at 564.

13. In *Greater Albany* we designated a bargaining unit of all employees: "* * * who are required, as a condition of employment, to possess an academic certificate, license, degree, or the equivalent, issued by the State of Oregon, an institution of higher education, or a professional society * * *." We specified that the "* * * certificate, license, degree, or the equivalent must be 'academic,' as opposed to solely occupational, in order to preclude inclusion in the unit of persons who are required to possess a nonacademic license, such as a driver or chauffeur * * * or journeyman plumber * * *." We sought to distinguish complementary school district bargaining units: one for employees holding academic degrees and professionally licensed employees and one for nonacademic employees. [\(14\)](#)

14. Addressing the different considerations that exist in small school districts, in later cases we designated bargaining units that included both certificated and classified employees. See *Welches School District v. Welches Education Association*, 12 PECBR 304 (1990), *affirmed* 116 Or App 564, 842 P2d 437 (1992); *Malheur ESD Association v. Malheur ESD*, Case No. RC-21-92, 14 PECBR 57 (1992).

15. Although the majority stated that it would not rely on testimonial history for early versions of SB 750 (1995), it relied solely on the legislative testimony of John Danielson, an Oregon Education Association lobbyist, and decided his testimony "tips the scales in favor of ERB's construction of the statute." 163 Or App at 570. This is troubling since the court's analysis and application of the lobbyist testimony completely ignores the legislature's final conference committee change to the statute. At that time, language was added to specifically exclude "unlicensed" employees from being placed in the same bargaining unit with academically licensed employees.