

IN THE SUPREME COURT OF THE
STATE OF OREGON

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SUPREME COURT

D. GRANT WALTER and SERVICE
EMPLOYEES INTERNATIONAL UNION
LOCAL 140,

Petitioners, and
Petitioners-on-Review,

vs.

JAMES SCHERZINGER and PORTLAND
SCHOOL DISTRICT NO. 1J,

Respondents, and
Respondents-on-Review.

34
Supreme Court No. S51669
Court of Appeals No. A118491
Employment Relations Board
Case No. DR-04-02

BY _____
DEPUTY

BRIEF *AMICUS CURIAE* OF THE PORTLAND BUSINESS ALLIANCE IN SUPPORT
OF RESPONDENTS' MOTION FOR RECONSIDERATION

Petition to Review the Decision of the Supreme Court, Reversing Decisions of the Court of
Appeals and the Employment Relations Board

Date of Opinion: October 13, 2005
Date of Opinion: DeMuniz, J.
Dissenting: Balmer, J., joined by
Carson, C.J. and Gillette, J.

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INTRODUCTION

A. **The Portland Business Alliance and its Interest in this Case.**

The Portland Business Alliance ("PBA") is an organization of over 1,300 businesses representing over 325,000 business people in the Portland community. The mission of the PBA is to ensure economic prosperity in the Portland region by providing strong leadership, partnership, and programs that encourage business growth and vitality. Quality education is one of the PBA's many public policy initiatives, along with affordable public services, a vibrant central city and healthy small businesses.

Because of the PBA's interest in attracting new business and investment to Portland, it has a unique interest in the financial stability of our city schools. As is demonstrated below, the PBA's primary purposes in filing this brief are to present a position as to the correct rule of law and to promote the fair, reasonable and fiscally sound regulation of Portland public schools.

ARGUMENT

B. **The Court's Reading of the Custodians' Civil Service Law ("CCSL") Conflicts with the School District's Organic Statutes and Elevates the Authority of Civil Service Board ("CSB") Above the School Board's Authority.**

When the Court ruled that the CCSL's statutory definitions create an affirmative obligation on the part of the Portland School District to hire custodians as employees and not to contract out that work, it did so without even mentioning, let alone analyzing the effects of, the school district's organic statutes. Under *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), a complete analysis requires an examination of the statute's context, including other related statutes. See *Lewis v. CIGNA Insurance Co.*, 339 Or 342, 351, 121 P3d 1128 (2005). The PBA respectfully submits that the Court's analysis must consider the organic statutes. Otherwise, the Court's ruling will eviscerate certain powers the legislature has given the school board in a way the legislature could never have intended.

For example, the organic statutes give school boards the power to transact business and control district schools, ORS 332.072; the discretion to employ personnel, ORS 332.505(1)(b), which impliedly includes the power to dismiss personnel, *Owens v. Sch. Dist. Number 8R of Umatilla County*, 3 Or App 294, 473 P2d 678 (1970); and the discretion to compensate district employees, ORS 332.505(1)(c). Moreover, no analysis of school board powers can be complete without considering the Local Budget Law, ORS 294.305 to 294.565, which vests the school board, as the governing body of the district, with the authority to determine and adopt a final school district budget. ORS 294.435.

Finally, the analysis here also requires consideration of the changes the legislature made over a few short years in the Oregon Educational Act for the 21st Century, ORS 329.005 *et seq.* The 1991 legislative assembly began by setting forth certain expectations for school systems in former ORS 326.715 that included no mention whatsoever of local control over spending. Or Laws 1991, ch 693, § 3. In the very next session, the 1993 legislature added language to the now renumbered ORS 329.025 expressing, but not mandating, that local schools should have "adequate control of how funds are spent to best meet the needs of students in their communities." Or Laws 1993, ch 45, § 24. Two years later, the legislature added mandatory language to the previously hortatory preface to the statute. ORS 329.025 now reads in relevant part:

"It is the intent of the Legislative Assembly to maintain a system of public elementary and secondary schools that allows students, parents, teachers, administrators, school district boards and the State Board of Education to be accountable for the development and improvement of the public school system. The public school system **shall** have the following characteristics:

** * * * *

(15) Ensures that local schools have adequate control of how funds are spent to best meet the needs of students in their communities; * * *

Id. (emphasis added). "Adequate" means "sufficient for a specific requirement." *Webster's Ninth New Collegiate Dictionary* 56 (1989). The legislature announced its "specific requirements" for public education in ORS 329.025 and in the organic statutes discussed

above. Those requirements concentrate on educational quality, which means that the district is not assured of "adequate control" if it is forced to classify custodians as employees and therefore must divert funds from the "specific requirement" of teaching kids. Thus, ORS 329.025 demonstrates that, in a brief period of three sessions, the legislature went from no mention of local control over spending to mandatory local control over how funds are spent to best meet the needs of students.

Presumably, when the legislature passes a statute, it does so aware of laws passed earlier in time. When two statutes of different vintages are inconsistent, the later-enacted statute prevails over the earlier-enacted statute. *See, e.g., Koennecke v. Lampert*, 198 Or App 444, 453 n.6, 108 P3d 653 (2005). The Oregon Educational Act for the 21st Century was passed long after the 1937 CCSL. ORS 329.025 demonstrates recent legislative intent mandating that the school board, not the CSB, exercise control over the district's purse strings. To the extent the CCSL may be interpreted to interfere with this school board authority, the school board's power must prevail.

The Court's decision here has posed just such a conflict. Despite the broad legislative grant of authority to school boards, and the mandatory language contained in 329.025, the Court's reading of the CCSL elevates the CSB above the Portland School Board for purposes of making budgetary decisions. Specifically, the following passage from the majority opinion expands and elevates the authority of the CSB:

"[P]ositions' can exist even when they are vacant and regardless of the category of workers who ultimately fill them, be they employees, subcontractors, or even volunteers. In creating authority in the civil service board to classify such 'positions' by character of work and compensation, the legislature essentially granted the civil service board authority over the *concept* of custodial positions within the qualifying school districts as much as it granted the civil service board authority to make the concept a concrete reality through a classified civil service."

Walter v. Scherzinger, 339 Or 408, 423, 121 P3d 644 (2005).

By reading the CCSL as giving the CSB authority over the *concept* of positions, the Court effectively bestows upon the appointed CSB a type of veto power over the budgetary decisions of the elected school board. There is no way to reconcile this power with the district's organic statutes. When making difficult—and often times political—budgetary decisions, it is the district, and not the CSB, who should, and does, have the final word on resource allocation. Each year, meeting the statutory obligation of determining and adopting a final budget is an intensive undertaking for the Portland School Board. The board must decide how to allocate increasingly scarce resources among many competing interests. For obvious policy reasons, the allocation of resources tends to favor school employees who work with students every day. Even with this prioritization, however, state funding decreased in the amount of \$611 per student, adjusted for inflation, between the years 1990 and 2004, challenging the school board's ability to properly fund classroom learning.

If the district chooses to hire additional teachers rather than staff one of its janitorial positions, it has the authority to do so without the CSB's stamp of approval. Indeed, the legislature drafted ORS 332.505(1)(b) using discretionary language: "A district school board *may*: [e]mploy personnel * * * necessary to carry out the duties and powers of the board and fix the duties, terms and conditions of employment and the compensation." (Emphasis added). There is no discretionary language in ORS 329.025(15), where the legislature has expressly stated that school systems shall retain "adequate control of how funds are spent to best meet the needs of students in their communities."

As a general principle of statutory construction, courts should interpret related statutes in harmony whenever possible. *See, e.g., State v. Thompson Seed*, 162 Or App 483, 491, 986 P2d 732 (1999) (discussing repeals of statutes by implication). Reading the CCSL as granting the CSB authority over the *concept* of positions conflicts with the district's expressly stated powers under the organic statutes and the legislature's mandate that school districts exercise local control over budgetary decisions. Were the Court to consider the context provided by the statutes discussed above, it may conclude that the CSB's authority

begins once the school board has decided to advertise for a custodial *employee* position but not over the decision whether to hire custodial employees in the first instance.

C. The Court's Interpretation Turns a Definition into an Affirmative Obligation, Ignoring Key Substantive Sections of the CCSL.

Two further reasons cause us concern over the majority's conclusion that "when the 1937 legislature defined custodians and assistant custodians as 'employe[e]s,' it intended to define the legal status of those workers." *See Walter*, 339 Or at 426. First, as noted by the dissent, Oregon case law discourages elevating a definition section into an affirmative duty. *See Walter*, 339 Or at 431 (Balmer, J., dissenting) (citing *Jackson County v. Bear Creek Authority*, 293 Or 121, 126, 645 P2d 532 (1982) ("Ordinarily the function of a definition section is not to impose duties but to specify the meaning of the defined term whenever it appears elsewhere in the statute.")). Thus, the majority's prescriptive reading runs counter to its previous applications of statutory interpretation principles.

Second, the interpretation ignores legislative intent evidenced within the CCSL itself. Specifically, reading the statute as giving the CSB authority over "the concept of positions" ignores the exception written into the statute for part time janitorial assistance. The exception is most clearly expressed in the definition of assistant custodian: "Assistant custodian means any employee who works under the supervision of a custodian except those who: (a) Work less than eight hours per day; or (b) Work less than 12 months per year; or (c) Receive an hourly rate of pay." ORS 242.320(1). The same exception reappears at ORS 242.510, which sets forth the duties of the CSB: "The [CSB] shall classify, with relation to the character of work and the compensation attached thereto, all positions in the service of the school board within the district including those under the supervision of a custodian *except those described in* [242.320(1)]." (Emphasis added).

Even the original text of the 1937 CCSL included an exception: "Any assistant custodian receiving less than \$60 per month as a wage shall not be deemed to come within the provisions of the Act." OCLA § 111-1502. The CCSL, when read as a whole and in context, leads to a result different than the majority's holding. When the legislature

created the CSB, it would not have included the exception unless it meant to limit the scope of the CCSL. Indeed, as the majority itself points out, ORS 174.010 instructs courts to construe statutes in a manner that gives effect to all provisions. When the majority opined that the authority of the CSB "begins with the custodial positions themselves," it failed to give effect to the exception in the same statutory provision it was analyzing. *See Walter*, 339 Or at 422-423. Had the majority considered the exception, it may have read the provision more narrowly.

If the school board uses its discretion to form three half-time janitorial positions, thus falling under the statutory exception, then the process the district uses to fill those positions would not fall within the purview of the CSB. The majority justified its inclusive reading by noting that "even though such positions [falling under the exception] are not part of the classified civil service, the [CSB] nevertheless maintains a degree of authority over who will fill them" because applicants for "custodial positions in general . . . are subject to the [CSB's] scrutiny during the hiring process." *Walter*, 339 Or at 424. Even *applicants* for half-time, volunteer or contract positions would not fall under the purview of the CSB, however, because the positions to which those applicants are applying are different than a "custodian" or "assistant custodian" position as defined in the statute.¹ Pragmatically, the school board already takes advantage of the exception by hiring some part-time janitorial assistants who do not work enough to meet the "assistant custodian" definition, as well as eight part-time student "custodial helpers." ER 28-29. What the school board has done here—hire contract custodians—is a logical extension of the district's already existing, and unquestionably lawful, practice.

The Court should give effect to all of the provisions of the CCSL by recognizing what the legislature intended to carve out of the statute: power over those individuals whose positions are not entitled "custodian" or "assistant custodian."

¹ As discussed in the amicus brief of the Portland Habilitation Center, this process does not pose a safety risk for children because protection is provided by other statutes.

D. The Court's Interpretation of the CCSL Impairs the District's Ability to Follow its Budgeting Mandate and Leads to Extreme, Unintended Results

The Court's decision will force the Portland Public School District to deplete the district's classrooms of desperately needed resources. Oregon schools are already struggling financially at a time when expectations regarding the quality of public education are on the rise.² At the same time, the Court's decision punishes the school district for doing exactly what the Oregon legislature and the public have demanded: namely, exercising fiscal responsibility.

The City of Portland needs a great public school system to attract investment and new business. It not only makes sense to allow the district to determine for itself its janitorial needs versus its educational needs; the legislature has specifically empowered school districts to do so by providing that they *shall* have adequate control of how funds are spent to best meet the needs of students in their communities. ORS 329.025(15). Thus, the number of "positions" available should not be dictated by the CSB.

An example may help to illustrate the consequences of the majority's interpretation of the CCSL. In a budget year, the school board has a set amount of funds with which to work. One year the board may decide to dedicate more funds to decreasing class size by hiring four new teachers. To afford the teachers' total compensation, including benefits, the district may decide to eliminate five custodial positions and lay off that portion of the custodial staff. By giving the CSB broad authority over "positions," it is possible that, under ORS 242.620 ("Dismissal") and ORS 242.630 ("Extent of investigation; reinstatement; appeal"), the CSB could order reinstatement of the terminated janitorial staff, thus substituting its judgment for the judgment of the school district.

Finally, the Court's opinion could lead to absurd results. The majority concluded that "'positions' can exist even when they are vacant and regardless of the category of workers who ultimately fill them, be they employees, subcontractors, or even volunteers." *Walter*, 339 Or at 423. The majority also noted that, despite the exception written into the

² Please refer to the Notables' amicus brief for more information on the funding crises hampering Portland schools.

statute, "even though such positions are not part of the classified civil service, the [CSB] nevertheless maintains a degree of authority over who will fill them." *Id.* at 424. If the "positions" over which the CSB has authority include every task resembling janitorial work, such as picking up garbage, then parent playground volunteers, student helpers and all other similarly situated individuals fall under the authority of the CSB. The legislature could not have intended such a result when it drafted the CCSL. Reading the definition section as prescriptive, and broadening the definition of "position," elevates the authority of the CSB and subjugates the authority of the school board in a way that was never intended by the legislature.

CONCLUSION

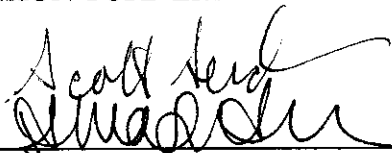
The legislature has firmly entrusted budgetary decisions to the hands of the Portland Public School Board to make choices that best serve the educational needs of the students. The Court's interpretation of the CCSL places that body of law in unnecessary conflict with the school board's express powers under its organic statutes. The Portland Business Alliance respectfully asks the Court to reconsider that decision and instead affirm the original decision of the Employment Relations Board for the reasons stated above.

DATED this 19th day of December, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF *AMICUS CURIAE* OF THE PORTLAND BUSINESS ALLIANCE IN SUPPORT OF RESPONDENTS' MOTION FOR RECONSIDERATION by mailing the original and 15 copies to :

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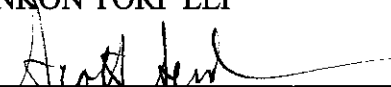
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by mailing two copies thereof in a sealed, first-class postage prepaid envelope, addressed to each attorney's last-known address and depositing in the U.S. mail at Portland, Oregon on the date set forth below.

DATED this 19th day of December, 2005.

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