IN THE SUPREME COURT FOR THE STATE OF OREGON

D. GRANT WALTER and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 140, Petitioners, and Petitioners-on-Review v. JAMES SCHERZINGER and PORTLAND SCHOOL DISTRICT NO. 1J, Respondents, and Respondents-on-Review	Supreme Court No. S51669 Court of Appeals No. A118491 Employment Relations Board Case No. DR-4-02

PETITIONER'S RESPONSE TO SCHOOL DISTRICT'S MEMORANDUM OF ADDITIONAL AUTHORITY

District's Petition to Reconsider the Decision of the Supreme Court, Reversing Decisions of the Court of Appeals and the Employment Relations Board

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

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MEMORANDUM OF ADDITIONAL AUTHORITY

The school district has submitted *Abel v. City of Pittsburgh*, ___A2d___, 2005 WL3478351 (Pa. Cmwlth., Dec. 21, 2005) as additional authority. The *Abel* decision does not support the district's argument for the following reasons:

This court held that the Custodian's Civil Service Law (CCSL) requires the school district to employ its custodians pursuant to the terms of the CCSL. *Walter v. Scherzinger*, 339 Or 408, 426 (2005). The district does not challenge that holding in its Petition for Reconsideration. Petition at 2, 8. Rather, the district argues that the CCSL and the Public Employee's Collective Bargaining Act (PECBA) are in conflict on the question of contracting out, that they cannot be construed together and that PECBA must control. *Id.* at 8-12 (statutes conflict); 12-20 (PECBA should control).

The fundamental problem with the district's argument is that there is no conflict between the CCSL and PECBA. While the CCSL requires the district to employ its custodians and therefore prohibits contracting out, PECBA says nothing at all about contracting out. The district's argument is, in effect, that PECBA has impliedly repealed the CCSL as to the question of contracting out. However, repeal by implication is not favored and must be established by "plain, unavoidable, and irreconcilable repugnancy." *State ex rel Huddleston v. Sawyer*, 324 Or 597, 604-05 (1997), *quoting State v. Shumway*, 291 Or 153, 162 (1981), *quoting Messick v. Duby*, 86 Or 366, 371 (1917). The district has demonstrated no such plain, unavoidable, irreconcilable conflict, nor any conflict at all.

In *Abel*, by contrast, there was a conflict between the applicable city employees' Collective Bargaining Agreement and the state Civil Service Law. The Agreement

provided for layoff by seniority in individual job titles and departments. The state Civil Service Law provided for layoff by seniority, without regard to job title or classification. The conflict was direct, clear, and explicit. When the city laid off 700 employees, the court had to choose between the Collective Bargaining Agreement and the Civil Service Law. *Abel v. City of Pittsburgh*, (Slip opinion) at 2 (attached to the District's Memorandum of Additional Authority). The Collective Bargaining Agreement in the present case does not address contracting out. Nor does PECBA. The CCSL does not conflict with any law or agreement on the issue of contacting out.

Further, the common law of labor relations in Pennsylvania appears to be that "as a matter of sound policy, collective bargaining agreements are binding on the public employer even where not fully consonant with statutory law." *Id.* at 8, *citing Grottenthaler v. Pennsylvania State Police*, 488 Pa. 19, 410 A.2d 806 (1980). Policy does not trump statutory language in Oregon.

The Pennsylvania decision in *Abel* has no factual or legal relevance to the present case, and the district's Petition for Reconsideration should be denied.

DATED this 6th day of January, 2006.

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