

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

THE CITY OF EUGENE, a municipal corporation, by and through Eugene Water & Electric Board,

Petitioner,

v.

STATE OF OREGON, PUBLIC EMPLOYEES RETIREMENT BOARD,

Respondent,

and

KAREN JENKINS, DIANE DAVIDSON, ARLYN STEPPER, GARY GILLESPIE, ANN MONTAGUE, JUDITH ANN SUGNET, GARY NAUTA, and ROGER GARVER,

Intervenors.

Case No. 99C-20235
Honorable Paul J. Lipscomb

RESPONDENTS/DEFENDANTS' ORCP 21 MOTIONS AGAINST SECOND AMENDED PETITIONS

(ORAL ARGUMENT REQUESTED)

CITY OF EUGENE, a municipal corporation,

Petitioner,

v.

STATE OF OREGON, PUBLIC EMPLOYEES RETIREMENT BOARD,

Respondent,

and

KAREN JENKINS, DIANE DAVIDSON, ARLYN STEPPER, GARY GILLESPIE, ANN MONTAGUE, JUDITH ANN SUGNET, GARY NAUTA, and ROGER GARVER,

Intervenors.

Case No. 99C-12794

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1 CITY OF EUGENE, LANE COUNTY,
 2 MULTNOMAH COUNTY, CITY OF
 3 PORTLAND, CITY OF ROSEBURG, CITY
 4 OF HUNTINGTON, and CANBY UTILITY
 5 BOARD, municipal corporations,

6 Petitioners/Plaintiffs,

7 v.

8 STATE OF OREGON, and STATE OF
 9 OREGON by and through PUBLIC
 10 EMPLOYEES RETIREMENT BOARD,

11 Respondents/Defendants,

12 and

13 KAREN JENKINS, DIANE DAVIDSON,
 14 ARLYN STEPPER, GARY GILLESPIE,
 15 ANN MONTAGUE, JUDITH ANN
 16 SUGNET, GARY NAUTA, and ROGER
 17 GARVER,

18 Intervenors.

19 ROGUE RIVER VALLEY IRRIGATION
 20 DISTRICT, a municipal corporation,

21 Petitioner,

22 v.

23 STATE OF OREGON, PUBLIC
 24 EMPLOYEES RETIREMENT BOARD,

25 Respondent.

Case No. 99C-12838

Case No. 00C16173

26 Pursuant to ORCP 21, respondents/defendants State of Oregon, et al. (State) hereby move
 27 to dismiss certain claims asserted in the Second Amended Petitions filed by petitioners/plaintiffs
 28 City of Eugene, et al. (petitioners) and Eugene Water & Electric Board (EWEB), as set forth
 29 below. Oral argument is requested and expected to require 30 minutes; official court reporting
 30 services are requested.

1 Court of Appeals, not this court.¹⁵ To the extent petitioners are invoking jurisdiction upon
 2 enforcement of the rule or use of the mortality tables to compute retirement benefits, this court
 3 still lacks jurisdiction. Such determinations give rise to a contested case hearing under OAR
 4 459-001-0030(11) and 459-001-0035. Again, jurisdiction to review the final order following a
 5 contested case hearing lies in the Court of Appeals.¹⁶

6 **IV. EWEB may not assert claims separate from the City of Eugene.**

7 The City of Eugene is one of the main petitioners in Case No. 99C-12794. The City of
 8 Eugene also asserts claims "by and through" EWEB in Case No. 99C-20235. The City of
 9 Eugene cannot assert the same claims in two separate actions.¹⁷

10 The appropriate course of action would be to dismiss EWEB's claim because EWEB has
 11 no authority to bring a claim separate from the City of Eugene. Oregon law authorizes a *city* to
 12 operate water and electrical power systems,¹⁸ but the statute does not recognize a "water and
 13 electric board" as a distinct legal entity separate and apart from the city. The Oregon Supreme
 14 Court has recognized the EWEB "is a department of the City of Eugene[.]"¹⁹ That conclusion is
 15 confirmed by the Eugene City Charter.

16 Section 4 of the Eugene City Charter provides that "all power of the city is vested in the
 17 city council" and that the city has "all powers necessary or convenient for the conduct of its
 18 affairs, including all powers that cities may assume under state laws or the provisions of the state
 19 constitution regarding municipal home rule." Section 44 of the Eugene City Charter states that
 20 the "power of the *city*" to generate and distribute electricity is vested in the board created by the
 21 city, namely, EWEB. EWEB is required to "maintain and operate the water utility and the
 22

23 ¹⁵ ORS 183.400(1); *Alto v. State Fire Marshal*, 319 Or. 382, 395, 876 P.2d 774 (1994) (Court of
 Appeals has exclusive jurisdiction under the APA to review validity of agency rules).

24 ¹⁶ See ORS 183.482(1).

25 ¹⁷ ORCP 21A(3).

26 ¹⁸ See ORS 225.020(1).

¹⁹ *Myles v. City of Eugene*, 252 Or. 528, 530, 451 P.3d 59 (1969).

1 electrical utility of the city, subject to control by the Council of extension of water services."²⁰
2 EWEB is required to "make annual reports to the Council and whatever other reports the Council
3 requires."²¹ Thus, it is clear that EWEB derives all of its authority from the city. Nothing in any
4 Oregon statute or the Eugene City Charter gives EWEB the authority to sue independently of the
5 city.

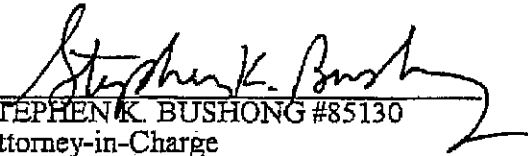
6 CONCLUSION

7 For all the foregoing reasons, the State's ORCP 21 motions against the second amended
8 petitions filed by petitioners and by EWEB should be granted.

9 DATED this 11th day of April, 2002.

10 Respectfully submitted,

11 HARDY MYERS
12 Attorney General

13 
14 STEPHEN K. BUSHONG #85130
15 Attorney-in-Charge
16 Trial Attorney
17 Of Attorneys for Respondents/Defendants
18 1162 Court Street NE
19 Salem, OR 97310
20 (503) 378-6313

21
22
23
24
25 ²⁰ Eugene City Charter, § 44(3).

26 ²¹ Eugene City Charter, § 44(6).

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Respondent,

and

KAREN JENKINS, DIANE DAVIDSON, ARLYN STEPPER, GARY GILLESPIE, ANN MONTAGUE, JUDITH ANN SUGNET, GARY NAUTA, and ROGER GARVER,

Intervenors.

Case No. 99C-20235
Honorable Paul J. Lipscomb

ORDER RE ORCP 21 MOTIONS AND MOTION TO COMPEL

CITY OF EUGENE, a municipal corporation,

Petitioner,

v.

STATE OF OREGON, PUBLIC EMPLOYEES RETIREMENT BOARD,

Respondent,

and

KAREN JENKINS, DIANE DAVIDSON, ARLYN STEPPER, GARY GILLESPIE, ANN MONTAGUE, JUDITH ANN SUGNET, GARY NAUTA, and ROGER GARVER,

Intervenors.

Case No. 99C-12794

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2 MULTNOMAH COUNTY, CITY OF
3 PORTLAND, CITY OF ROSEBURG, CITY
4 OF HUNTINGTON, and CANBY UTILITY
5 BOARD, municipal corporations,

6 Petitioners/Plaintiffs,

7 v.

8 STATE OF OREGON, and STATE OF
9 OREGON by and through PUBLIC
10 EMPLOYEES RETIREMENT BOARD,

11 Respondents/Defendants,

12 and

13 KAREN JENKINS, DIANE DAVIDSON,
14 ARLYN STEPPER, GARY GILLESPIE,
15 ANN MONTAGUE, JUDITH ANN
16 SUGNET, GARY NAUTA, and ROGER
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19 ROGUE RIVER VALLEY IRRIGATION
20 DISTRICT, a municipal corporation,

21 Petitioner,

22 v.

23 STATE OF OREGON, PUBLIC
24 EMPLOYEES RETIREMENT BOARD,

25 Respondent.

Case No. 99C-12838

Case No. 00C16173

26 This matter came before the court for hearing on May 28, 2002, on (1) respondents/
27 defendants' and intervenors' ORCP 21 motions against second amended petitions; and
28 (2) petitioners' motion to compel. Petitioners City of Eugene et al. (petitioners) were represented
29 at the hearing by their attorneys, William F. Gary and Jeffery J. Matthews. Petitioner Eugene
30 Water & Electric Board (EWEB) was represented at the hearing by their attorney, Eric DeFreest.
31 Intervenors were represented by their attorney, Gregory A. Hartman. Respondents/defendants

1 (the State) were represented by their attorney, Assistant Attorney General Stephen K. Bushong.

2 The court, having considered the oral and written arguments of the parties and being fully
3 advised, hereby ORDERS as follows:

4 1. Petitioners' motion to compel is denied for the reasons asserted by the State.

5 2. The State's ORCP 21 motions are allowed and denied as follows:

6 Motion 1: Denied.

7 Motion 2: Denied.

8 Motion 3: Denied.

9 Motion 4: Allowed.

10 Motion 5: Denied as moot.

11 3. Intervenors' ORCP 21 motions are allowed and denied consistent with the above
12 rulings on the State's corresponding motions.

13 DATED this ____ day of June, 2002.

14
15
16 HONORABLE PAUL J. LIPSCOMB
17 Circuit Court Judge

18 Submitted by: Stephen K. Bushong
19 Assistant Attorney General
20 Of Attorneys for Respondents/Defendants
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ENTER DT	FILE DT	EVENT/FILING/PROCEEDING	SCHD DT	TIME	ROOM
122	5/29/02	5/28/02 Court Notes args heard re rule 21 motions; sj set for 6/6 CJU 1 Lipscomb Paul J			
123	6/05/02	6/05/02 Memorandum Trial DEF 1 State Of Oregon Public PRV 2 Bushong Stephen K			
* [124	6/07/02	6/06/02 Order RE: RULE 21 MOTIONS & MOTION TO COMPEL 6/06/02 Signed CJU 1 Lipscomb Paul J			
125	6/10/02	6/06/02 Motion Compel Production by Intervenors 6/06/02 Oral Argument Requested			
126	6/10/02	6/06/02 Memorandum Support Motion			
127	6/11/02	6/11/02 Trial Subsequent Da Scheduled 2ND DAY OF TRIAL	6/12/02	9:15 AM	PJL1
128	6/14/02	6/14/02 Trial Court Length of time 22 Hour(s) CJU 1 Lipscomb Paul J			
129	6/14/02	6/14/02 Court Notes case called;witnesses testify; exh off'd & rec'd;see court journal CJU 1 Lipscomb Paul J			
130	6/17/02	6/17/02 Memorandum Trial (BY INTERVENORS)			
131	6/17/02	6/17/02 Answer TO SECOND AMENDED PET. & CROSS CLAIMS (BY INTERVENORS)			
132	6/24/02	6/24/02 Hearing Scheduled CLOSING ARGUMENTS 5TH FLOOR/COURTROOM 5C Est length of time 2 Hour(s) Related event # 133	7/24/02	9:30 AM	PJL1
		7/15/02 Set-Over Aty			
133	6/24/02	6/24/02 Notice Hearing			
134	6/24/02	6/10/02 Memorandum Trial Intervenors' PRV 3 Hartman Gregory A			
135	6/24/02	6/10/02 Answer to 2nd amend ptn & affirmative defenses DEF 1 State Of Oregon Public PRV 2 Bushong Stephen K			
136	6/24/02	6/10/02 Answer of intervenors to 2nd amend ptn of City of Eugene et al & amend cross-claims PRV 3 Hartman Gregory A			
137	7/15/02	7/15/02 Hearing Scheduled CLOSING ARGUMENTS - 1/2 DAY (reset from 7/24/02) Est length of time 3 Hour(s) Related event # 138	8/22/02	9:30 AM	PJL1
138	7/15/02	7/15/02 Notice Hearing			