

# MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS  
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

APRIL 2002

## ITEMS OF INTEREST

### THE ERB CLARIFIES WEINGARTEN “REASONABLE BELIEF” STANDARD

In a recent decision (summarized at page 7), the Employment Relations Board (ERB) addressed a represented employee’s rights to union representation at an investigatory interview.

These representation rights—generally called *Weingarten* rights—stem from a decision of the National Labor Relations Board, which was affirmed by the United States Supreme Court in *NLRB vs. Weingarten, Inc.*, 420 U.S. 251, 95 S. Ct. 972 (1975). They were first recognized by Oregon’s ERB in 1988, in *AFSCME, Local 328 vs. Oregon Health Sciences University*, 10 PECBR 922, 927-928. The ERB delineated their limited scope in a subsequent case, *Washington County Police Officers Association vs. Washington County*, 12 PECBR 693, *adhered to on reconsideration*, 12 PECBR 727 (1991).

Generally, *Weingarten* rights apply *if* the interview truly is investigatory, *if* the employee reasonably believes that the interview may lead to discipline, and *if* the employee expressly requests the presence of a union representative. The representative’s role at such an interview, however, is quite limited. For instance, during the employer’s questioning, the representative may not coach, counsel or question the employee. Instead, the representative’s participation during employer questioning is limited to seeking clarification of employer questions. (For more about *Weingarten* rights, see, *Management Insight*, January 1999, p. 10.)

The ERB’s recent decision—*Oregon AFSCME Council 75, Local 3940 vs. State of Oregon, Department of Corrections*, Case No. UP-3-00, January 10, 2002—concerns *Weingarten*’s “reasonable belief” requirement. In reaching its decision, the ERB explained that it was

### IN THIS ISSUE

#### ITEMS OF INTEREST

|  |   |
|--|---|
| ERB Clarifies Weingarten “Reasonable Belief” Standard .....          | 1 |
| US Supreme Court Strikes Down Penalty for Untimely FMLA Notice ..... | 2 |

#### FROM THE HR MANAGEMENT & CONSULTATION SECTION

|                                    |   |
|------------------------------------|---|
| Temporary Appointments Q & A ..... | 2 |
|------------------------------------|---|

#### NOTES FROM JUSTICE

|                                   |   |
|-----------------------------------|---|
| Drafting Reference Releases ..... | 5 |
|-----------------------------------|---|

#### ARBITRATION & CASE SUMMARIES

|  |   |
|--|---|
| AFSCME Local 3940 vs. DOC Union Representation at Investigatory Interviews ..... | 7 |
| SEIU and Employment Department Circumstantial Evidence; Pay Reduction .....      | 8 |

#### BACK TO BASICS

|  |    |
|--|----|
| Frequently Asked SEIU Recall Questions ..... | 10 |
|--|----|

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Executive and Management Service Employees

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taking the “totality of the circumstances” into consideration, and not just the announced purpose of the investigatory interview. It also explained that it was using an objective “reasonable employee” standard; that is, the

... continued page 2

## US SUPREME COURT STRIKES DOWN PENALTY FOR UNTIMELY FMLA NOTICE

question for the ERB was: "... from the perspective of the proverbial 'reasonable employee:' would the employee, based on the facts known to the employee, reasonably conclude that discipline might result."

The "totality of the circumstances" in this case included the fact that the three employees in question had initially submitted incomplete reports regarding an incident they observed which involved another employee. Omitted from the reports, in violation of agency policy, was any reference to the other employee's alleged assault on an inmate. The three employees later turned in corrected reports.

The employees were required to submit to investigatory interviews, but were informed by the agency investigator that they would be interviewed *as witnesses*. The investigator, who had no authority to discipline or to make disciplinary recommendations, also told the employees that they would receive no discipline as a result of their interviews. The ERB noted, however, that other employees had been disciplined for submitting incomplete reports; and others had been disciplined after being questioned as witnesses. The ERB also noted that under agency rules the employees' policy violation could subject them to significant discipline.

Based on these facts, the ERB found that regardless of whether the agency was considering discipline of the employees at the time that it interviewed them, the three employees could reasonably believe that discipline might result from the interviews. As such, they were entitled to union representation at the investigatory interviews.

The US Supreme Court decided a case in March which focused on the Family Medical Leave Act's notice requirements (*Ragsdale vs. Wolverine World Wide, Inc.*, No 006029, decided March 19, 2002). The FMLA regulation examined by the Court imposed a penalty for an employer's failure to give timely notice to an employee that leave would be counted against the employee's 12-week FMLA entitlement. Failure to provide such notice meant that the employer could not retroactively count the leave against the employee's 12-week FMLA entitlement. Characterizing this penalty as harsh and incompatible with the FMLA's remedial purpose, the US Supreme court ruled that it is unlawful, thereby striking it down. As a result, despite failing to provide timely notice of FMLA designation, the employer in *Ragsdale* was allowed to count the employee's leave as part of her yearly FMLA entitlement.

The Oregon Family Leave Act (OFLA) has no provision preventing an employer from retroactively designating an absence as OFLA leave. As such, the result in *Ragsdale*—that the employer could count the leave in question as FMLA leave despite lack of timely notice—would apply in Oregon for both OFLA and FMLA leave.

The Court in *Ragsdale* was careful to note that, "... we do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute." As such, it would be prudent practice to continue to provide employees with FMLA/OFLA designation notices in a timely fashion.

## FROM THE HRSD HR MANAGEMENT AND CONSULTATION SECTION

### FREQUENTLY ASKED QUESTIONS REGARDING TEMPORARY APPOINTMENTS

Since publication of the July 2000 *Management Insight* article concerning revisions to HRSD State Policy 40.025.01, Temporary Appointments, the DAS Human Resource Services Division has received many questions regarding the state's use of temporary appointments. This article, in question and answer form, addresses many of the issues repeatedly raised. Please contact HR Management and Consultation staff with any questions or concerns regarding these issues. In general, the state's use of temporary appointments is governed by ORS 240.309 and HRSD State Policy 40.025.01. Pursuant to the state policy and statute, *a temporary appointment may be made to meet emergency, nonrecurring or short-term workload demands in situations where the establishment of a permanently funded position is not appropriate or feasible.*

#### **Q: How long may an agency employ a temporary employee?**

**A:** Full-time state temporary employees may not work for more than six calendar months for the same workload need unless one of two exceptions is met: 1) a continuing emergency situation (where no other reasonable means exist

to meet the emergency), or 2) filling in behind a permanent employee whose leave lasts longer than six months. For state temporary employees working less than full-time schedules, length of employment may not exceed the equivalent of six calendar months (1040 regular hours) in a 12-month period. Employment of a full-time temporary employee for *different* workload needs also may not exceed the equivalent of six calendar months in a 12-month period. *The state's PPDB system automatically terminates all temporary appointments after six calendar months unless an extension is obtained through the HR Management and Consultation Section.* Extensions may not result in part-time or different-workload-need temporary employees working more than the equivalent of six calendar months in a 12-month period.

**Q: When may an agency re-hire a temporary employee?**

**A:** A state temporary employee who has worked six calendar months on a full-time basis, or the equivalent of six calendar months in a 12-month period, may work again as a state temporary employee during subsequent 12-month periods. The 12-month period begins on the initial date of appointment. For example, if the employee worked a full-time state assignment from January 21 through July 20, 2001, the temporary employee would be eligible to start a new assignment on January 22, 2002. If the employee worked a part-time assignment from January 21 through November 30, 2001, totaling 1,040 hours, the temporary employee would again only be eligible to start a new assignment on January 22, 2002. To ensure compliance with ORS 240.309 and HRSD State Policy 40.025.01, an agency should check the prospective employee's work history, including total temporary hours worked for the state, *before* an appointment is made.

**Q: How long may a temporary employee fill in behind an employee on approved leave?**

**A:** For the period of time that the person is on approved leave. HRSD State Policy 40.025.01 provides: "A temporary appointment made to fill in behind an employee on approved leave shall not exceed the period of the approved leave. Such an appointment may exist beyond six months only when the temporary employee is replacing a single employee on approved leave."

**Q: May a temporary employee hired to fill in behind an employee on approved leave continue his or her assignment after the regular-status employee returns from the leave to work *part-time*?**

**A:** Yes, on a reduced basis. The temporary employee may be used to cover the difference between the regular-status employee's part-time hours and a full-time schedule until the regular-status employee returns to work full-time.

**Q: May a temporary employee hired for a workload need be reassigned to fill in behind an employee on approved leave?**

**A:** While an agency may not reassign such a temporary employee, the agency could, instead, terminate the original appointment and initiate a new appointment. The new appointment could not exceed the period of the absent employee's approved leave.

**Q: May a temporary employee work for more than one agency in a year?**

**A:** Yes, however the temporary employee may not work more than the equivalent of six calendar months in a 12-month period unless one of the exceptions to that limit applies. Agencies, moreover, may incur overtime liability if a temporary employee works for two or more agencies at the same time (see, HRSD State Policy 20.005.20, Fair Labor Standards Act, for an explanation how such overtime liability is handled).

**Q: What are emergency, nonrecurring and short-term workload needs?**

**A:** [Emergency need means a sudden and unanticipated program or workload need. Nonrecurring need means a special one-time project that requires additional staff. Short-term workload need refers to covering workload for a duration of less than six months.](#)

**Q: What reasons are not appropriate for hiring a temporary employee?**

**A:** Reasons which do not correspond with those set forth in HRSD State Policy 40.025.01. For example, an agency may not hire a temporary worker for on-call duty to cover for agency employees who may be absent intermittently for sick leave. Sick leave is a regular occurrence and considered routine in nature; it is neither an emergency nor is it nonrecurring. If otherwise appropriate, agencies with a high incidence of sick leave may hire employees into limited duration or part-time positions to cover on-call shifts. Questions regarding available alternatives may be directed to the HR Management and Consultation Section.

**Q: Does HR Management and Consultation approve extensions or monitor work hours of contract temporary employees (such as those working for St. Vincent dePaul or Goodwill)?**

... continued page 4

**A:** The HR Management and Consultation Section does not monitor contract employees or the number of hours that they work. The DAS Transportation, Purchasing and Print Services Division (TPPS) maintains several statewide contracts with qualified rehabilitation facilities (QRFs) for certain contract services. State agencies may order specific services authorized under these contracts from the contractor following contract procedures set by TPPS. The ordering agency is responsible for monitoring the performance of contract services. Agencies should refer to the contract between the vendor and the State of Oregon, or call TPPS for specific questions regarding the contracts.

**Q: May a state agency contract for temporary employees?**

**A:** No. If an employer-employee relationship between the state and a temporary worker is expected, then the state hiring process must be followed. If no employer-employee relationship will be established, the agency is free to contract for this service in accordance with the rules for public contracting established by TPPS (or to utilize a QRF contract temporary employee as noted above, in which case the employer-employee relationship is between the temporary employee and the QRF). [Agencies should work closely with their human resource offices to determine appropriate options. Other resources include HR Management and Consultation and—particularly on the employer-employee relationship issue—the Labor and Employment Section of the Department of Justice.](#)

**Q: How do state laws and policies pertaining to temporary employees affect PERS retirees?**

**A:** Laws and policies concerning PERS retirees and temporary appointments establish independent requirements. The state and individual employees must comply with both. PERS statutes provide that, in general, a PERS retiree may not exceed 1,039 hours as a public employee in a *calendar* year without affecting his or her PERS retired status. This would include time worked as a state temporary employee. State temporary appointments are not

based on a calendar year, but on 12-month periods. HR Management and Consultation neither monitors nor regulates PERS provisions, including those concerning retirees.

**Q: What is different now that some state temporary employees are represented by SEIU?**

**A:** Some direct-hire temporary employees are now represented by SEIU (see, *Management Insight*, April 2000, p.1). The state's 2001-2003 contract with SEIU sets forth the terms and conditions of employment which apply to these employees. *All* direct-hire state temporary employees, including those represented by SEIU, are governed by ORS 240.309 and HRSD State Policy 40.025.01.

**Q: What rules govern student workers and interns?**

**A:** Effective January 1, 2002, in accordance with ORS 240.309, agencies may use temporary status appointments for a period not to exceed 48 months for student interns who are enrolled in high school or who are under 19 years of age and are training to receive a General Educational Development (GED) certificate. Department of Justice student law clerks may work up to 24 months. The length of appointment of a student worker or intern who does not meet these criteria is governed by HRSD State Policy 40.025.01.

**Q: When is a limited duration appointment appropriate?**

**A:** When it meets the criteria set forth in OAR 105-40-040, Types of Appointments (and any applicable collective bargaining agreement). Generally, limited duration appointments are for a study, a project or when position reduction is anticipated. The emergency, nonrecurring and short-term workload criteria which apply to temporary appointments do not pertain to limited duration appointments. With prior approval of the DAS Budget and Management Division, an agency may establish a limited duration position and fill it with more than one part-time employee if necessary.

**Q: What will agencies be audited on?**

**A:** Audits will be based upon criteria in the state temporary appointments policy. For example, the upcoming

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For questions, or if you have an item of interest which you would like considered for an issue of the *Management Insight*, please contact Michael Halpern, Labor Relations Unit . . .

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audit in 2002 will verify whether the appointment was made to meet an emergency, nonrecurring or short-term workload need. The audit will also focus on the total number of hours a temporary employee worked during any 12-month period of time.

**Q: What documents need to accompany an extension request?**

**A:** A completed Form PD 412A (*Request to Extend a Temporary Appointment*), the 412A's requested

documentation regarding hours worked, and the original Form PD 412 (*Conditions of Temporary Appointment*). When completing the PD 412A, the employee's new separation date and, if applicable, the number of hours worked in the last 12-month period must be included. Also essential are explanations regarding the reason for the initial appointment and why the extension is being requested. The Form PD 412A will not be processed unless signed by an appointing authority.



## NOTES FROM JUSTICE

by The Labor and Employment Section, Department of Justice



### DRAFTING REFERENCE RELEASES

Employers, both public and private, have an obvious interest in receiving candid and thorough information about potential employees from former employers. As opposed to the "name, rank, and serial number" approach, detailed reflections on an applicant's ability to perform in the workplace can be of great assistance. Nonetheless, "former employers receiving such reference requests are sometimes hesitant to respond ... due to concern about potential exposure to defamation claims."<sup>1</sup> In response, many potential employers now ask an applicant to sign a waiver and release, permitting the employer to acquire much more information without exposing the former employer to lawsuits. This article focuses on the legal background and principles that should be considered when drafting a reference release extended to potential employees. By reviewing common law and case law concepts of "qualified" and "absolute" privilege, it is possible to effectively highlight ORS 30.178 and public records considerations with which public employers in Oregon must contend.

**Common Law Background.** As Robert K. Sholl notes in his article *Avoiding Liability When Responding to Job Reference Requests*, "Although common law recognized that an employer has a conditional privilege to make critical remarks concerning a current or former employer's job performance, fear of a defamation claim nonetheless caused many employers to provide limited information in response to a reference request."<sup>2</sup> This common law "conditional" or "qualified" privilege was embodied in Oregon law in *Wattenburg v. United Medical Laboratories*.<sup>3</sup> In the case, the Oregon Supreme Court articulated the test that would trigger the protections of "qualified" privilege. It stated: "A statement is conditionally privileged if: (1) it was made to protect the interests of defendants; (2) it was made to protect the interests of the plaintiff's employer; or (3) it was on a subject of mutual concern to defendants and the persons to whom the statement was made."<sup>4</sup> Importantly, although "qualified" privilege does offer protection, the burden resides with the *employer* offering the reference. Thus, before ORS 30.178 was passed, if a former employee alleged defamation due to a reference, the former employer-"defamer" would need to successfully raise the defense of "qualified" privilege. If it did so, the burden would shift to the former *employee* to prove malice or abuse of that privilege.

Three years after *Wattenburg*, the Oregon Supreme Court examined the employment context, defamation, and the scope of a release once again. Significantly, in *Walsh v. Consolidated Freightways, Inc.*,<sup>5</sup> the Court reiterated its stance that statements in the employment context triggered a "qualified," rather than an "absolute" privilege. A distinguishing characteristic of *Walsh*, however, was the presence of a release. Even with the release, *Walsh* held: "this kind of privilege is not absolute, and if the privilege is abused the defendant will still be liable to the plaintiff."<sup>6</sup> *Walsh*, therefore, reiterated the applicability of "qualified" privilege and the distribution of the burden of proof on the former employer.

Briefly, in distinction, "absolute" privilege was construed narrowly in *Lee v. Paulsen*<sup>7</sup> under Oregon law, although the Ninth Circuit Court of Appeals ruled in *Cox v. Naschle*<sup>8</sup> that a specific release under Alaska law was enough to

... continued page 6

confer absolute privilege in the release-employment context. Important to the analysis of these cases is the concept of consent. Consent is the fundamental exception permitting absolute privilege; if a person consents to a defamatory statement, the “defamer” enjoys an “absolute” privilege against suit. While in *Lee*, the Oregon Supreme Court ruled that in order for “absolute” privilege to apply the plaintiff needed to know the exact words in order to consent, the Ninth Circuit, under Alaska law, held the release was adequate to maintain consent to the references. Although the Oregon Supreme Court retreated slightly from its holding in *Lee*—noting in *Christensen v. Marvin*<sup>9</sup> that if the plaintiff knew the statement would be defamatory, “absolute” privilege may apply—it was generally accepted before ORS 30.178 that “qualified” privilege existed in the employment context, and the former employer had the burden of proof.

**Statutory Privilege.** This all changed in 1995 with the passage of ORS 30.178. It, in relevant part, states: “An employer who discloses information *about a former employee’s job performance* to a prospective employer of the former employee upon request of the prospective employer or of the former employee is presumed to be acting in good faith, and, unless lack of good faith is shown by a preponderance of the evidence, is immune from civil liability for such disclosure or its consequences.” (Emphasis added.) Now, in the employment context, if a former employer is sharing information about the former employee’s job performance, there is no liability unless the former *employee* demonstrates a lack of good faith. The former employer has no burden of proof. While this is not as iron-clad as “absolute” privilege, it is a significant shift nonetheless. Thus, in crafting a release for applicants to sign, a potential employer should attempt to remain within the “job performance” scope of ORS 30.178. If so, it will be the *employee’s* burden to prove lack of good faith, rather than the *employer’s* burden to prove “qualified” privilege.

**Public Records Law Considerations.** Lastly, in representing to former employers that the reference will be confidential, public employers need to be cognizant of Oregon’s public records law. Generally, “writings,” which may include references, are subject to public records disclosure. In *Gray v. Salem-Keizer School District*, the Oregon Court of Appeals ruled that the school district did not meet all of the prongs justifying an exemption from disclosure. Specifically, *Gray* noted the school district could not prove a harm to the public interest in retaining the “negative” job references. In a later Attorney General opinion, however, the Attorney General held if “source-identifying” information could not be effectively redacted, the reference may be exempt from disclosure.<sup>10</sup> It is important to note that public employers may not be able to represent to former employers that references will be absolutely confidential.

**Conclusion.** To summarize, in drafting releases to present to potential employees, in order to permit former employers as much latitude as possible, keep the concepts of “qualified” privilege and ORS 30.178 “good faith” in mind. Try to remain within ORS 30.178’s “job performance” scope in the information you request, and as public employers, be cognizant of potential public records implications. These steps should allow you access to as much information as possible, while minimizing liability significantly.

<sup>1</sup> Robert K. Sholl, *Avoiding Liability When Responding to Job Reference Requests*, <http://www.rbvdnr.com/Articles/lab/jobref.htm> (last visited Mar. 6, 2002).

<sup>2</sup> *Id.*

<sup>3</sup> 269 Or. 377 (1974).

<sup>4</sup> *Id.* at 380.

<sup>5</sup> 278 Or. 347 (1977).

<sup>6</sup> *Id.* at 355.

<sup>7</sup> 273 Or. 103 (1975).

<sup>8</sup> 70 F.3d 1030 (9th Cir. 1995).

<sup>9</sup> 273 Or. 97 (1975).

<sup>10</sup> ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL, F-36 (2001).

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## ARBITRATION AND CASE SUMMARIES



*Oregon AFSCME Council 75, Local 3940 vs. State of Oregon, DOC (ERB Case No. UP-3-00; January 10, 2002)*

Three employees were directed to submit to investigatory interviews as *witnesses* to an incident. The employees had observed the incident, which involved a fourth employee, and had submitted incomplete reports to their employer about it. The employees' request for union representation at the interviews was denied on the grounds that they were witnesses and not subjects of the investigation. The Employment Relations Board found that the employees were entitled to union representation since it was reasonable for them to believe that discipline might result from information obtained in the interviews. The Board also found that assurances by the investigator that the employees would receive no discipline failed to abrogate the employees' right to union representation, since the investigator lacked the authority to discipline or to make disciplinary recommendations.

**Facts:** Three Department of Corrections (DOC) employees witnessed another employee hit an inmate shortly after the inmate had assaulted a staff member. The three employees (Employees) initially submitted incident reports to management which failed to include any reference to the assault on the inmate, but later corrected the omission. Subsequently, the Employees were required to submit to investigatory interviews by the DOC special investigation unit (SIU), whose primary function is to investigate employee misconduct. The Employees requested union representation at the investigatory interviews. The SIU investigator denied the request on the grounds that they were witnesses and not subjects of the investigation. He also allegedly informed the Employees that they would receive no discipline.

DOC rules require employees to submit complete reports of misconduct by other employees and prohibit employees from using the "code of silence" to avoid reporting such

misconduct. The rules also provide that employees who choose not to report employee misconduct may be subject to disciplinary action equal to that received by the employee who committed the act.

**Question Presented:** Did the state violate the statutory rights of employees who were witnesses to another employee's misconduct, by refusing to permit union representatives to accompany them at investigatory interviews?

**Discussion and Ruling:** Addressing a public employee's right to representation during an investigatory interview, the Employment Relations Board noted that under the Public Employee Collective Bargaining Act (PECBA), this right arises when, " ' 1) the employee reasonably believes that disciplinary action [against the employee] is being contemplated or may result; 2) the employer insists on the interview; and 3) the employee requests representation. [citation]' " The Board further explained that, "... the right to representation does not arise in ' ... conversations between a manager and an employe in which the latter is only given instructions, training, or needed corrections of his or her work techniques. ... Nor does it apply to noninvestigatory counseling sessions or meetings in which an employe is simply informed of disciplinary action. [citations]' " When reviewing a denial of union representation complaint, the Board examines "... the totality of the circumstances and not just the announced purpose of the interview."

Finding that the employees were required to attend the interviews and requested union representation, the Board turned to the "... crux of this dispute: whether it was reasonable for the officers to believe that they could be disciplined as a result of the investigatory interviews."

Citing federal labor relations authority, the Board ruled that under the circumstances it was reasonable for the employees to believe that their disclosures in the interviews could lead to later disciplinary action: "[The Employees] knew that they had submitted incomplete initial reports about the conduct of the lieutenant, and they knew that DOC rules required that reports of alleged misconduct be complete. It was reasonable for them to believe that [the SIU investigator] would ask them questions that would result in disclosures that, in turn, could provide a basis for DOC to discipline them. Although [the SIU investigator] told them that they were only witnesses, he did not promise them immunity, nor is there any indication he had the authority to do so. ... [the SIU investigator]

... continued page 8

does not make disciplinary determinations. He lacks the authority to discipline or to make disciplinary recommendations. Rather, it is the superintendent who has the authority to make such determinations. [The SIU investigator's] assurances thus could not bind the superintendent. Under these circumstances, regardless of [the SIU investigator's] truthfulness and good intentions, it was still reasonable for the officers to believe that their disclosures in the interviews could lead to later disciplinary action." Also supporting the reasonableness of the employees' belief are the facts that other employees had been disciplined for submitting incomplete reports; and others who were witnesses in investigations were later disciplined for conduct related to the investigations.

The Board noted that several "considerations" support the state's contention that an employee could conclude that the interviews were not intended to gather information that would lead to their discipline. These include the investigator's statement that he was going to interview them only as witnesses, that there was no evidence that the investigator was being untruthful in making this representation, and that the investigator did not provide the employees with the DOC notice which announces that an interview is being conducted regarding the interviewee's own alleged misconduct. The Board found, however, that "These considerations ... are insufficient to override the other factors ... that establish that it was reasonable for the [Employees] to believe that discipline could result from information obtained in the interviews."

In response to the state's argument that the Board is applying a "subjective" standard in this case, the Board replied: "The question for us in such cases is always an objective one, from the perspective of the proverbial 'reasonable employee.' would an employee, based on the facts known to the employee, reasonably conclude that discipline might result. The answer to that question is affirmative here."

Citing federal authority which provided that—"... it is whenever the risk of discipline reasonably inheres in an investigatory interview that a union representative is required, and not merely when disciplinary action is 'probable' or 'seriously considered.' ..." —the Board concluded, "Regardless of whether DOC was considering discipline at the time it interviewed [the Employees] ... these employees could reasonably believe that discipline might result from the interviews. DOC, therefore, violated ORS 243.672 (1) (a) by denying [the Employees'] request for union representation in the interviews."

***In the Matter of the Arbitration Between SEIU Local 503, OPEU and the State of Oregon, Employment Department (Arbitrator, Timothy D.W. Williams; February 27, 2002)***

**The grievant—an administrative law judge who worked independently—was given a one-week suspension for misrepresenting on a timesheet that he had performed work on the date in question. The Arbitrator found that the circumstantial evidence supported the state's case and that the grievant's testimony lacked credibility. Since the grievant had previously been disciplined for a similar offense, the penalty was appropriate.**

**Facts:** The grievant has been employed by the state as an administrative law judge since 1990. As a professional employee, he is expected to travel throughout the state for hearings and to work with little or no direct supervision. His primary duties are to conduct hearings, to draft final and proposed orders, to participate in group projects and to remain current in his area of the law. During the week of February 14 – 18, 2000, the grievant was scheduled to spend three days conducting four hearings in eastern Oregon. Two of the hearings were cancelled at the last moment, resulting in the grievant spending a day in Pendleton and LaGrande with no hearings to conduct. When he returned to his office, he was questioned by his lead worker about the work he had completed on his trip. He replied that he had not written up any orders from his hearings because he had not felt like it and that he was sick on the day he spent in Pendleton and LaGrande. When his lead worker indicated that perhaps the grievant should take sick leave for the day, the grievant replied that he did not believe he had to take sick leave while on the road. When the grievant turned in his timesheet the next day, it did not reflect any sick time. When questioned about this by his supervisor, the grievant again said that he did not need to report sick leave while traveling. After his supervisor disputed this contention, the grievant stated that even though he did not feel well enough to write up orders, he spent the time in his hotel room reading and sorting through a pile of accumulated paperwork. When questioned about the work he said he had completed, the grievant was unable to provide any examples of it.

Prior to the incident in question, the grievant had received two written reprimands, in July 1998 and September 1999, both concerning work performance issues. The September 1999 reprimand, among other things, cautioned the grievant against conducting personal activities on work

time. It also included the admonition: “You are not to represent on a state timesheet that you spent eight hours engaged in productive work for the state when you have not.”

After a predissmissal notice and hearing, the grievant was given a one-week suspension.

**Question Presented:** Was the Employee disciplined for just cause?

**Discussion and Ruling:** Addressing the question of the grievant’s illness, the Arbitrator initially noted that in light of the recent written reprimand, “...there is little doubt in this Arbitrator’s mind that the Grievant is on clear notice that he should not claim hours of work when he did not work those hours – whatever the reason.” The issue of the grievant’s illness, furthermore, is not relevant to the charges, since the grievant claims that he worked a full day. Finally, while not relevant to the charges, the question of the grievant’s illness is relevant to his credibility. The grievant’s “... extended argument about his illness and not having to file for sick leave seem contradictory to his strong contention that he did do ‘more’ than eight hours of work on the 16<sup>th</sup>. If he did the work ... the issue around whether sick leave should have been claimed is irrelevant. ... Instead, the Grievant, over and over, kept saying, ‘I should not have had to take sick leave since I was on assignment and couldn’t go home—but I worked anyway.’ The Arbitrator ponders the question, why do you even argue sick leave if you put in the time?”

In addition to the issue of the grievant’s illness, the Arbitrator also found that, “the Grievant’s story has grown and changed over time.” As an example, the Arbitrator cited the issue of why it took the grievant two and one-half hours (according to his timesheet) to check out from his hotel in Pendleton, travel 52 miles and check into his hotel in LaGrande. When questioned about this at the arbitration hearing, the grievant—for the first time—cited bad conditions on the drive. Maybe, noted the Arbitrator, “... this fact had just not seemed relevant prior to the Arbitration hearing, but the changes in the Grievant’s story, all of which buttress his position, seem surreal.”

The Arbitrator also observed, as his last point regarding the grievant’s credibility, that he, “... cannot ignore the fact that four different management employees had the opportunity to evaluate the Grievant’s story and did not find it credible.

In contrast, “... the circumstantial evidence does strongly support the State’s position.” The state argued that the two written reprimands made it clear that the grievant was expected to work on orders when time was available. In addition, the grievant’s supervisor testified that he had emphasized to the grievant that orders were to be worked on first. Nevertheless, “...according to his own testimony, [the grievant] chose not to do the type of work that he had been strongly advised needed to be done when he was on the road.” Furthermore, the Arbitrator “... can find no evidence, beyond the Grievant’s testimony, of any work product.” Finally, “...a review of the type of work the Grievant claims to have completed ... is all of a nature that it cannot be tracked. The claim of having done this work can be made with the virtual certainty that no one can refute it. ... The Grievant claims that he did busy work of a non-trackable type. Having made the claim, he now needs to meet the burden of putting forth persuasive evidence. The Arbitrator is not persuaded.”

The grievance was denied.

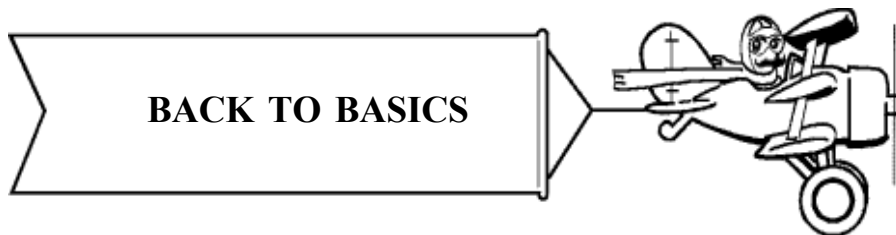
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 **HELPFUL HINT . . .**

**Direct and Circumstantial Evidence** – Direct evidence is evidence that goes directly to the point to be proved: “I saw what happened.” Circumstantial evidence, on the other hand, proves a fact *other than* the fact which ultimately must be proven. For circumstantial evidence to be effective, the trier of fact (usually a judge, jury or arbitrator) must draw an *inference* from the fact established by the circumstantial evidence to establish the fact that must be proven.

In the above arbitration, for example, one of the facts established by circumstantial evidence was that the grievant knew that he was supposed to work on orders when he had free time. An inference which could be drawn from this fact was that since the grievant did not work on orders during his free time in LaGrande, he must not have performed *any* work during that time.

Direct evidence is not necessary “stronger” than circumstantial evidence. For instance, since direct evidence may be falsified (that is, the witness may not tell the truth), it may prove to be weaker than persuasive circumstantial evidence. As such, strong circumstantial evidence may be sufficient by itself to establish grounds for disciplinary action.



## FREQUENTLY ASKED SEIU RECALL QUESTIONS

The following questions and answers are based on the SEIU contract's recall provisions. While many of the state's other collective bargaining agreements contain recall language similar to SEIU's, several provisions described below are found only in the SEIU agreement. *The secondary recall list is limited to SEIU-represented employees and agencies. Also unique to the SEIU agreement are provisions granting regular status employees who are transferred outside of state government due to intergovernmental transfer the right to be listed on the secondary recall and layoff lists.*

Please check your agency's labor contract before relying on the information in this article. Questions should be directed to agency personnel offices. For FAQs regarding layoff, please see *Management Insight*, February, 2002.

**Q: What is a layoff list and how does a regular status employee get on it?**

**A:** A layoff list, also sometimes referred to as a recall list, is a list maintained by an agency which includes the names of regular status employees who have priority rights to be recalled to state service after they have been laid off or, for SEIU, transferred outside of state government due to intergovernmental transfer. The list also includes regular status employees who have demoted in lieu of layoff who have priority rights to be recalled to their former classifications. Regular status employees who are laid off, transferred outside of state government or demoted in lieu of layoff may designate in writing the geographic area layoff lists on which they wish to be placed. Such employees, at their option, may be placed on multiple geographic area layoff lists for their agency.

**Q: Do temporary employees have recall rights?**

**A:** No, they have neither layoff nor recall rights.

**Q: Do limited duration employees have recall rights?**

**A:** It depends. A newly hired employee on a limited duration assignment has no layoff or recall rights. However, a newly hired employee on a limited duration appointment *for workload needs* would be entitled to layoff and recall rights *after two years*. Such recall rights are limited to the same agency and classification. Special rules also apply to transfers from regular status to limited duration. A regular status classified employee who accepts a limited duration assignment in the same agency is entitled to layoff and recall rights in the employee's former regular-status classification. If a regular status classified employee accepts a limited duration appointment in a *new* agency, that employee would have layoff and recall rights only in the new agency, and only if the new agency uses the employee's former regular-status class or its successor. If the new agency does not utilize the employee's former regular-status class or its successor, the employee would have no layoff or recall rights.

**Q: Do initial trial service employees have recall rights?**

**A:** No. An initial trial service employee who is laid off or demoted in lieu of layoff is restored to the eligible list from which certification was made if the eligible list is still active.

**Q: How are employees recalled?**

**A:** Employees are generally recalled to their agency by geographic area, in seniority order, by classification.

**Q: How long does an employee remain on a layoff list?**

**A:** Up to two years from the date of placement on the list. An employee appointed to a position from a layoff list or from the SEIU secondary recall list (see below) is removed from all layoff lists.

**Q: May an employee refuse an offer of recall and remain on the layoff list?**

**A:** Yes, but generally only once per geographic area. Upon a second refusal in the same geographic area from which the employee was laid off, transferred outside of state government or demoted, the employee's name is removed from the layoff list for that geographic area. Upon a second refusal for a geographic area other than that from which the employee was laid off, transferred outside of state government or demoted, the employee's name is removed from the layoff list for that geographic area only if the second refusal is more than 60 days after the first refusal. For either situation, declining to accept a temporary position does not count as a refusal.

**Q: If an employee is recalled to a position in a different geographic area, does the employee receive moving expenses?**

**A:** It depends. When an employee has left state service as a result of layoff and is called back from the layoff list to a geographic area other than the one in which he or she was laid off, moving expenses are paid. This provision does not apply to employees who are transferred outside of state service by intergovernmental transfer or who choose demotion in lieu of layoff.

**Q: Does an employee on a layoff list have recall rights to a temporary position in the employee's classification and geographic area?**

**A:** Generally, no. However, if a temporary position is to last more than 45 days, an employee on the agency layoff list for the applicable geographic area and classification must be offered the job before a temp may be hired. The employee would occupy the position as a temp and remain on the layoff list. This provision only applies to employees separated from state service.

**Q: What is the SEIU secondary recall list and how does an employee get on it?**

**A:** Unlike layoff lists, which are intra-agency, the SEIU secondary recall list is an inter-agency list which consists of regular status employees who have been separated from state service by layoff from SEIU-represented positions. Inclusion on the list is by voluntary election. Placement on the secondary recall list is by geographic area, for SEIU represented agencies which utilize the same classification from which the employee in question was laid off. Employees placed on the list specify in writing the agencies and geographic areas of their choice. Recall from an agency layoff list takes precedence

over recall from the secondary recall list. After exhaustion of an agency's layoff list for a specific classification within a geographic area, or if there is no such list, the secondary recall list must be used to fill all agency positions within the specific classification and geographic area, before the agency may use the other options set forth in the filling of vacancies article (for SEIU – Article 45). To be eligible for appointment, employees on the secondary recall list must meet the position's minimum and special qualifications. Designated individuals on the secondary recall list may also be given first preference for appointments to positions in order to ensure adequate numbers of protected class employees, based on the Affirmative Action Plan goals developed by the agency effecting the recall.

**Q: How long may an employee remain on the secondary recall list?**

**A:** Up to two years from the date of placement on the list, or until appointed to a position from the secondary recall list or an agency layoff list.

**Q: May an employee be listed on the secondary recall list as well as an agency layoff list?**

**A:** Yes.

**Q: May an employee be hired from the secondary recall list if there is an active agency layoff list for the applicable classification and geographic area?**

**A:** No, unless all employees on the agency layoff list refuse or are not selected for the assignment.

**Q: May an agency fill a position through open competition if there is only one person on the secondary recall list matching the position's geographic area and job classification?**

**A:** No, unless the employee does not meet the position's minimum and special qualifications.

**Q: If an employee laid off from one agency accepts a job with another agency through the secondary recall list, would the employee still have recall rights to a vacancy which subsequently occurs in the employee's original agency?**

**A:** No.

**Q: What happens if an employee refuses an offer of recall from the secondary recall list?**

**A:** The employee's name is removed from the list.

**Q: Must an employee appointed to a position from the secondary recall list serve a new trial service?**

... continued page 12

Department of Administrative Services  
Human Resource Services Division  
**Labor Relations Unit**  
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*continued from page 11. . .*

**A:** Yes. Such an employee must serve a trial service period not to exceed three full months. Employees who fail to successfully complete this trial service have their names restored to the agency layoff lists on which they previously were included, for the remaining period of eligibility that existed at the time of the appointment from the secondary recall list.

**Q: Are employees appointed to positions from the secondary recall list entitled to moving expenses?**

**A:** No, even if the appointment is in a different geographic area.

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***About the Labor Relations Unit . . .***

The Labor Relations Unit is a part of the Human Resource Services Division in the Department of Administrative Services. The Administrator of the Division is Dan Kennedy. Currently, the LRU negotiates and administers 32 collective bargaining agreements with 11 different labor organizations, covering over 30,000 employees in the Executive Branch of Oregon State Government. The following is a list of the LRU staff and contact phone numbers for your convenience. The LRU's fax number is 503-373-7530.

|  |              |
|--|--------------|
| Eva Corbin, Deputy Administrator, LRU .....          | 503-378-8321 |
| Craig Cowan, State Labor Relations Manager .....     | 503-378-5611 |
| Kevin B. Dull, State Labor Relations Manager .....   | 503-378-3138 |
| Michael Halpern, State Labor Relations Manager ..... | 503-378-2705 |
| Lois Harrup, Administrative Assistant .....          | 503-378-3141 |
| Pamela Murdock, Office Manager .....                 | 503-378-2616 |
| Tom Perry, State Labor Relations Manager .....       | 503-378-4201 |
| Cathy Schuh, State Labor Relations Manager .....     | 503-373-7608 |
| Jan Weeks, State Labor Relations Manager .....       | 503-378-6483 |