

MANAGEMENT INSIGHT ON CONTRACT ADMINISTRATION

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Human Resource Services Division ~ Labor Relations Unit

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Distribution:

Executive and Management Service Employees

Editors: Mike Halpern & Pam Murdock, LRU

**Department of Justice v. Oregon Association Of
Justice Attorneys (ERB Case No. UC-64-95).**

The fact that a professional takes or effectively recommends discretionary actions which control or implement employer policy, does not alone establish that he or she is a “managerial employee” under the PECBA’s new definition. To meet the definition, the employee’s discretionary activities must fall outside the scope of routinely performed duties.

Question Presented: Are Assistant Attorneys General “managerial employees: under ORS 243.650(16), and thereby excluded from coverage under the Public Employee Collective Bargaining Act (PECBA)?

Facts: The Department of Justice (DOJ), employs Assistant Attorneys General (AAGs), who are lawyers engaged in the full-time practice of law. The DOJ has five legal divisions, each of which is headed by an administrator. Each division has three or more sections, each directed by an attorney-in-charge (AIC). AICs are excluded from the bargaining unit as supervisory employees. Legal opinions of AICs will prevail over those of AAGs.

The DOJ serves as the exclusive legal counsel for the State of Oregon and its agencies. Each AAG has full authority, under the direction of the Attorney General, to perform any duty required by law to be performed by the Attorney General. All AAGs exercise professional discretion while performing their assignments. However, When an AAG’s “client” is a state agency, the AAG’s discretion may be limited by the agency’s directions.

Discussion and Holding: This case was the Board’s first opportunity to construe the managerial employee exclusion added to the PECBA by Senate Bill 750. Because the new definition of managerial employee is “borrowed” from private sector labor

law, the Board inferred that the legislature intended it to interpret and apply the definition in a manner consistent with the practices and decisions of the NLRB and the federal courts.

Noting that managerial employees are now excluded from coverage by the PECBA, the ERB found that ORS 243.650(16), which defines “managerial employee,” sets up an alternative definition - either branch of which is sufficient to establish the exclusion. A managerial employee is thus an employee of the state who either (1) possesses authority to formulate and carry out management decisions, or (2) represents management’s interest by taking or effectively recommending discretionary actions that control or implement employer policy. Both alternatives also require that the employee have discretion in the performance of these management responsibilities beyond the routine discharge of duties.

HELPFUL HINT

If a management service designation is challenged by the union, the position description will be a key exhibit at the ERB hearing. It is thus very important to check and, if necessary, to update the position description when a management service designation is contemplated.

Finding that AAGs do not possess authority to formulate and carry out management decisions, the Board determined that they fail to meet the first branch of the managerial employee definition. As to the second branch - “Although all professional employees exercise their professional judgment on behalf of their employer when carrying out their duties, [o]nly if an employee’s activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management” [Citing from *NLRB v. Yeshiva University*, 444 U.S. 672, 103 LRRM 2526 at 2534(1980).]

AAGs exercise their professional discretion on a daily basis and may thus implement legal policies. However, while AAGs may make some decisions which are “far from ‘routine’ “ (i.e., commonplace or repetitious), their exercise of professional judgment is “routine” (i.e., in accordance with established procedure). They are hired to practice law, and do so, “[U]nder procedures and policy guidelines developed and administered by DOJ management.” As such, “[A]n AAG’s performance of any responsibility to ‘implement employer policy’ occurs during the routine discharge of his or her duties.”

This conclusion comports with the underlying purpose of the managerial exclusion, which is, “[T]o ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union.” [The ERB again quoting from the *Yeshiva* case.] The Board, moreover, found no

evidence in the record, “[T]o support even an inference that any represented AAG, during the performance of his or her regular duties, may be required to exercise discretion concerning a matter that would divide the AAG’s loyalty between DOJ and the [bargaining unit].” The Board also failed to find merit in the DOJ’s argument that AAGs should be considered managerial because they have a “close identity” with the Attorney General.

HELPFUL HINT

Under the PECBA definition, a “managerial employee” need not act in a supervisory capacity in relation to other employees.

Department of Administrative Services v. Oregon State Police Officers Association (ERB Case No. UC-35-95).

In cases regarding the PECBA’s new supervisory definition, the ERB will consider all 12 supervisory powers enumerated in the statute, and will focus on the putative supervisor’s authority to use independent judgment in the exercise of these powers. As such, sergeants who were significantly involved in the disciplinary process, who exercised discretion in connection with this process, and who exercised independent judgment in assigning duties and in directing the day-to-day activities of bargaining unit members, were held to be supervisory employees – despite the absence of sufficient hiring or grievance adjustment roles to independently warrant such a determination.

Question Presented: Has there been a significant change of circumstance since the ERB’s 1990 decision which determined that the sergeants in question were not supervisory personnel? If so, are the sergeants now supervisory personnel under ORS 243.650(23), and thereby excluded from coverage under the PECBA?

Facts: The sergeants in question are employed by the Department of Oregon State Police (Department). In a previous decision, *OSPOA v. Oregon State Police Department*, Case No. UC-20-89, 12 PECBR 570 (1990), the ERB determined that the sergeants were not supervisory personnel. In May of 1991, however, the Department adopted a new discipline manual by which the Department intended to give the sergeants supervisory authority. Subsequently, in July of 1995, “every manager within the department” was given “[T]he authority and responsibility for all disciplinary decisions, up to and including dismissal, for all

See DAS v. OSPOA, pg 3

employees that they directly supervise.” To reduce the possibility of inconsistent discipline throughout the Department, personnel with disciplinary authority were directed to consult with the Department’s Professional Standards Section (PSS) regarding the range of acceptable sanctions. The manual incorporating the new disciplinary policy provides that, regarding a complaint, the sergeant who is the immediate supervisor is to “[A]ssess the complaint, investigate the allegations, review the investigation report, make findings, decide whether the complaint has merit, consider the range of corrective action (after consulting with PSS), impose corrective action or dismissal, and prepare a report closing the file.” Sergeants routinely grant time off, assign duties, direct the day-to-day activities of bargaining unit employees and authorize overtime. In doing so, they exercise independent judgment.

Discussion and Holding: Once a decision regarding a group’s public employee status has been made, the ERB, “[T]ypically will not reconsider that issue absent a showing that there has been a significant change in circumstances since the prior decision.” The change in the definition of “supervisory employee” which occurred when the legislature amended the PECBA in 1995 is, however, just such a change - and warrants the Boards once again considering the public employee status of the Departments sergeants.

As a result of the new definition, and the legislatures intent that it be interpreted to be consistent with Private sector precedent, “[T]he former near-exclusive reliance on certain supervisory factors - hiring, firing, discipline, and grievance adjustment - must give way to a more balanced consideration of all 12 statutory factors. Further, [the Board’s] focus must be on the putative supervisors authority to use independent judgment in the exercise

of supervisory powers on behalf of the employer.” In determining whether an individual exercises independent judgment, the Board considers such factors as whether superiors reinvestigate matters handled by the individual, and whether the individual merely follows a recipe provided in a management cookbook. In his case, the parties stipulated that the sergeants assign duties to and direct the day-to-day activities of bargaining unit members - and exercise independent judgment in doing so. Under the Board’s analysis in *Deschutes County Sheriff’s Association v. Deschutes County* Case No. UC-62-94, 16 PECBR 328 (1966) [*Management Insight*, June 1996, p.2], “[T]hat would perhaps be sufficient to find that the sergeants are indeed supervisors.” However, because of the various contentions of the parties, and the fact that this matter is concerned with a petition to remove represented sergeants from an existing bargaining unit, while the *Deschutes County* case concerned a petition to add unrepresented sergeants to an existing unit, the Board determined that it would not end its inquiry at this point.

Examining, in order, the areas of grievance adjustment, hiring and discipline/discharge - the Board first concluded that the sergeants’ role in adjusting grievances (the only evidence of which concerned their denying grievances), “[I]s neither substantial nor effective enough to support a conclusion that sergeants are supervisors.” Absent evidence that the sergeants have authority to affirmatively adjust grievances, the ERB is not prepared to conclude that they exercise independent judgment in this area. Likewise, “[T]he absence of the required independent judgment and the limited opportunity to participate dictate a conclusion that sergeants do not exercise supervisory authority in hiring.”

As to discipline and discharge, “[The] Board considers five elements of the discipline process to determine supervisory status: (1) how the process is initiated; (2) who

investigates the conduct in question; (3) who defines and determines culpability; (4) how and by whom the type and severity of discipline is determined; and (5) who imposes the discipline and in what manner.” In this case, the record reveals that the sergeants have had a significant involvement in the disciplinary process for the past three years. At each stage of this process, the sergeants have considerable discretion, extending beyond a routine or clerical function. The fact that sergeants are expected to confer with PSS after determining culpability (to assure consistency of sanctions imposed), does not foreclose a supervisorial finding, since the Department has a legitimate desire for consistency (a necessary element of just cause) in discipline. “A supervisor must necessarily obtain information about past discipline in order to achieve list consistency.”

HELPFUL HINT

Under the new supervisory definition, the authority to exercise any of the 12 powers enumerated in the statute - hiring, transferring, suspending, laying off, recalling, promoting, discharging, assigning, rewarding, directing, disciplining and adjusting grievances - (or “effectively to recommend” such exercise), combined with the use of independent judgment in that exercise, may provide a sufficient basis for supervisory status.

In general, in cases such as this - involving a large number of allegedly supervisory personnel - the Board will make a “global determination” of the “pattern” of effectiveness of these individuals’ disciplinary-related recommendations. The Board’s global assessment in this case disclosed that between 1993 and the hearing date, the sergeants were involved in at least 15 cases in which discipline or discharge was considered, initiated “some” complaints, formally investigated eight, decided not to pursue the allegation or resolved it short of discipline in

“some” cases, determined culpability in seven cases and imposed the final discipline in five cases. In light of this showing, the Board concluded that, “[I]n exercising disciplinary authority, sergeants are supervisory employees, especially in light of their extensive independent authority to assign and direct troopers.”

Amalgamated Transit Union, Division 757 v. Rogue Valley Transportation District (ERB Case No. UP-80-95).

Despite SB 750’s removal of the PECBA’s communications bar, the employer violated ORS 243.672(1)(e) (its duty to bargain in good faith with the Union), in bypassing the union, meeting directly with employees to discuss its contract proposal, revising its proposal to address issues raised in the meeting, and then submitting new proposals directly to bargaining unit members. In addition, the employer’s telephone poll of union members regarding prospective strike participation failed to conform with the requirements discussed in NLRA precedent.

Question Presented: This case arose out of contract negotiations between the Amalgamated Transit Union, Division 757 (“Union”), and the Rogue Valley Transportation District (“District”). The Union alleged that the District engaged in eight separate PECBA violations, including violations based on the District’s direct contacts with bargaining unit members who were not part of the negotiating team; the District’s direct telephone contacts with union members to ask them whether they would work during a scheduled strike; the District’s submission of a final offer to the mediator which allegedly contained proposals which had not been subjected to bargaining or mediation; the District’s inclusion of a proposal in its final offer which would allegedly exclude all future employees from the bargaining unit; the District’s submission of an allegedly inaccurate and misleading cost summary with its final offer to the mediator the District’s alleged promises of promotions and other inducements to bargaining unit members if they crossed picket lines; the District’s alleged threats to terminate employees who chose to strike and alleged surface bargaining.

Facts: After four bargaining sessions, the District held a meeting with the Union employees during which a District representative explained the District’s proposal directly to the employees and distributed a document to them explaining the District’s proposed changes. After a subsequent mediation session, the District’s bargaining team, pursuant to an agreement with the Union, attended a Union meeting, explained the District’s final offer to the employees and fielded questions from them.

After another mediation session, the District informed the Union that it wanted to meet with the Union’s employee representative alone, without the Union’s president or ATU International representative present. The Union declined the District’s request, but instead offered to allow the District to meet with the Union’s employee representative and two other union members who were not part of the bargaining team. The District agreed, and the meeting took place. The following day, the District placed a revised version of the District’s

final offer in their employee’s lockers. The revisions, which included changes that apparently were made as a result of the previous day’s meeting, had not been presented to the Union before delivery to the employees.

Sometime later, after receiving notice of the Union’s intent to strike in ten days, the District contacted each of the employees by telephone. Each employee was informed by the District representative that the call was being taped for the protection of both parties, that the District had received notice of the proposed strike, and that the District was calling to ask whether the employee would show up for his job on the date of the intended strike. The employees were further told that they had to answer “yes,” “no,” or “no comment” to the question; and that a response of “no comment” would be treated the same as a “no.”

Subsequently, the Union rescinded its strike notice and the District imposed its last offer and had several further meetings with the employees — without Union involvement.

Discussion and Holding:

1. Direct contact with union employees during the bargaining process.

As a result of SB 750, there is “[N]o explicit statutory prohibition on the District’s contact with bargaining unit members.” However, it is nonetheless an unfair labor practice for an employer to, “[R]efuse to bargain collectively in good faith with the [employees’] exclusive representative.” And, in “Bypassing the exclusive representative, meeting directly with employees to discuss its contract proposal, revising its proposal in response to address issues raised in the meeting, and then submitting new proposals directly to bargaining unit members,” the District violated its obligation to bargain with the Union and committed a *per se* violation of ORS 243,672(1)(e). However, as the

See Rogue Valley, pg 5

Board also stated, “This would be an entirely different case if the District, in response to the meeting, had prepared and presented a new proposal to *the Union*.”

In addition to the subsection (1)(e) violation, the Board also found that the District’s conduct constituted a violation of subsection (1)(b), which prohibits an employer from interfering with the existence or administration of a union. To prove such a violation, the complainant must prove actual interference which has a direct effect on the union. In this case, the Union met their burden since, “In bypassing the Union and dealing directly with employees about employment relations matters, the District undermined and interfered with the Union’s role as the exclusive representative for the bargaining Unit.”

Finally, using an objective “reasonable employee” standard, the Board declined to find that the District interfered with or coerced employees in the exercise of their PECBA rights [subsection (1)(a)]; as the Union had asserted was the case because of the number of meetings the District had with the employees, and the allegedly coercive manner in which two of the meetings were arranged.

2. Contacting Union members by telephone to determine whether they would work during the strike.

Noting that this issue is a case of first-impression under the PECBA the Board cited NLRA precedent which, “[V]iews polling of employees concerning their support of a union to be inherently coercive and therefore violative of section 8(a)(1) of the NLRA, except in certain limited situations.” However, since the employees in this case provided bus transportation to the public, and since the ten-day strike notice required by the PECBA is designed to allow a public employer to prepare itself for a strike - the District’s avowed purpose in polling its drivers to allow it to schedule bus service for the public provides sufficient justification for the telephone contacts: “Although it is a close question, we find that the public interest in knowing whether and when bus transportation will be provided constitutes a sufficient justification for the District to poll its drivers about their intended participation in the announced strike.”

Nevertheless, because such conduct is “inherently coercive,” it must be circumscribed: “We conclude that, at the very least, such polling must conform with the requirements discussed in [NLRA precedent], in order to be lawful under the PECBA. Under that holding, an employer, in its polling concerning prospective strike participation, must (1) explain fully the purpose of the

questioning, (2) assure the employees that no reprisals will be taken against them as a result of their responses, and (3) refrain from otherwise creating a coercive atmosphere.”

And in this case, the District failed to meet these requirements. While the District met the first requirement by informing each employee of the purpose of the telephone calls, it fell short as to the other two safeguards. It did this by failing to promise that no reprisal would be taken against the employee regardless of the employee’s answer and by insisting on an immediate answer even though the strike was not to occur for ten days, combined with the statement that a “no” or “no comment” answer would cause the employee to be sent home even if they showed up for work (thereby creating a “coercive” atmosphere).

As such, the Board concluded that the District violated subsection (1)(a). However, since the calls did not have an impact on the Union directly, rather than just on its members, the Board declined to find that the calls violated subsection (1)(b).

3. Other issues.

Regarding the “final offer” requirement of ORS 243.712(2)(b), which requires publication by the mediator of each party’s final offer, the Board held that, “[I]t is unlawful to include a proposal [in the final offer submitted to the mediator] which has not been subjected to bargaining....”

As to the “cost summary” which is to be included as part of the final offer - while a party has an obligation to make a good faith estimate of the costs of its proposal, submission of an inaccurate cost summary is not a subsection (1)(e) violation, absent evidence of a deliberate effort to misrepresent

The District did not violate subsection (1)(a) by promising promotions or other inducements to bargaining unit members if they crossed picket lines to help train replacement bus drivers. While an employer’s promise of a benefit to a unit member who agrees to forego a statutory right is unlawful under subsection (1)(a), this was not such a case. The hourly pay differential offered by the employer to help with the training merely maintained the status quo since the differential was required by the contract A lawful action to maintain the status quo does not violate subsection (1)(a). The promotions were lateral in nature and understood by the employees to be for the pay differentials.

As to the “surface bargaining” issue, the Board analyzed the “totality of conduct” during the negotiations in concluding that a violation had occurred: “The factors

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we consider include whether dilatory tactics were used, the content of a party's proposals, the behavior of a party's negotiator, the nature and number of concessions made, whether a party failed to explain its bargaining positions, and the course of negotiations. Applying those factors to the District's conduct in these negotiations leads us to conclude that the District engaged in surface bargaining."

The Board also found that the employer's inclusion in its final offer of a proposal that, "the terms of this agreement may only be applied to employees employed on the execution date of the agreement" did not violate subsections (1)(c),(e) or (f). While a party violates the duty to bargain in good faith by including a permissive subject in its final offer over the other party's objection; this proposal does not concern a permissive subject

Finally, the District did not unlawfully threaten to terminate employees who exercised their right to strike by informing them that they may be replaced during an economic strike.

McGuire v. Portland, Oregon (3 WH Cases2d 707 [9th Cir. 1996]).

City's express policy which allowed for disciplinary suspensions of fire battalion chiefs for periods of less than one full week with loss of pay, compromised the FLSA exempt status of employees subject to the policy, even though no such pay deduction had been made and the city did not intend to ever impose such a deduction.

Facts: In this case, battalion chiefs of the Portland Fire Bureau sued the city for overtime pay due under the Fair Labor Standards Act (FLSA), asserting that they had lost their FLSA exempt status because they were not compensated on a "salary basis," since they were "subject to" the possibility of salary reductions for periods of less than one week. The chiefs' claim was based on the city's express disciplinary policy which allowed the city's FLSA exempt employees to suffer disciplinary suspensions with loss of pay for a variety of offenses. This policy did not limit the reductions in pay to weeks in which the employee did not perform any work. No battalion chief, however, had ever actually suffered any pay reduction pursuant to the policy (though other city employees had).

Discussion and Holding:

FLSA overtime requirements do not apply to "any employee employed in a bona fide executive, administrative or professional capacity...." To maintain this exemption, FLSA exempt employees must be compensated on a "salary basis." In general, to be paid on a salary basis, employees must be paid a full week's salary for any week in which they perform any work. In this case, however, since the city's policy manual does not limit potential reductions in pay to weeks in which the employee does not perform any work, the city's policy means that, "In theory, an employee can work for three days, and be suspended without pay for two, contrary to the salary requirement"

As to the city's argument that it had never improperly docked any of the battalion chiefs' pay, nor would it do so in the future - the court noted that there is a split in the circuit courts on the issue of whether such docking must have actually occurred for there to have been an FLSA violation. The Ninth Circuit (which includes Oregon), has chosen to adopt the "subject to" side of the split. As such, in the Ninth Circuit, the dispositive factor is whether the employee's pay is "subject to" deductions in increments of less than a full

week's pay, whether or not any deductions have been or will actually be made. The very existence of an express policy allowing for such a deduction constitutes a violation of the salary basis test.

HELPFUL HINT

Pay docking penalties of less than a full week, "imposed in good faith for infractions of safety rules of major significance" will not cause an exempt employee to lose his or her FLSA exempt status. (29 C.F.R. § 541.118(a)(5).) This is an exception to the rule stated in the *McGuire* case.

FLSA UPDATE

The U.S. Supreme Court has agreed to hear a Fair Labor Standards case, *Auer vs. Robbins*. Issues which the Supreme Court might address include the validity of the salary basis test as applied to the public sector and the "subject to" rule.

In the Matter of the Arbitration between Oregon Public Employees Union and State of Oregon, Department of Revenue (Arbitrator, Luella E. Nelson; August 12, 1996).

The employer reasonably could rely on grievant's discipline for new instances of misbehavior. As such, termination was within the range of reasonable responses where grievant, a hearing officer, had recent disciplinary history, issued findings which had no basis in the record and sought to mislead the employer during its investigation of the most recent misconduct.

Allegations:

Grievant, a hearing officer for the Department of Revenue ("Department" and "Employer"), was discharged while covered by a collective bargaining agreement which provided that progressive discipline "shall be used when appropriate" and that, "Discipline shall be imposed only for just cause." The discharge was based on a charge that Grievant had knowingly prepared an incorrect draft Opinion and Order ('O&O'), and that he had made improper remarks during the tax appeal hearing in question.

Facts:

Grievant had been a Department hearing officer for 20 years. The principal issue at the tax appeal hearing which led to Grievant's dismissal was whether the Department had jurisdiction over the appeal. During the hearing, grievant commented that he was, "going to make an effort to just make this thing go away." He also referred to the hearing as a "nickel/dime thing." Grievant subsequently prepared an O&O which included a key finding which allowed him to rule that the Department had jurisdiction over the case. The recorded tape of the tax hearing, however, included testimony by the tax preparer that directly contradicted Grievant's finding.

Two months prior to the tax hearing, Grievant had been given a pre-dismissal notice which arose out of unrelated misconduct and resulted in his demotion from HO 2 to HO 1. The disciplinary notice included a long list of past instances of misconduct, and also advised Grievant that it was a final warning.

Decision and Ruling:

Noting that the Employer's response to the charged conduct "[M]ust be considered in the context of Grievant's work and disciplinary history," Arbitrator Luella Nelson observed that, "The employer reasonably could rely on his disciplinary history in determining the level of discipline for new instances of misbehavior that may have been discovered." Finding that Grievant had,

"[E]ngaged in some level of misconduct in preparing his findings," the Arbitrator explained: "Grievant was on a final warning. He knew or should have known, that his findings had to have a factual basis; those in the disputed O&O had no basis in the record."

In light of the foregoing, the Arbitrator found it unnecessary to determine whether Grievant's remarks at the hearing would have justified his discharge. In response to defense arguments, the arbitrator also determined that the pre-dismissal hearing was part of the investigatory process; and that Grievant had been given an opportunity to explain how he had reached his conclusions in the O&O and to present evidence in support of his explanation. Furthermore, the fact that Grievant was under more scrutiny than the other hearing officers during the period in question, by itself, did not suggest to the Arbitrator that the Employer had an improper motive in imposing discipline in light of the work issues previously raised with him.

Finding that Grievant sought to mislead the Employer during its investigation of the circumstances which gave rise to the charges in question, the Arbitrator concluded:

"When questioned about [the tax hearing], Grievant sought to mislead the Employer. That response was improper for any employee. Coupled with his recent disciplinary history, termination was within the range of reasonable responses to this misconduct."

Central Table Bargaining with AFSCME

The Department of Administrative Services and AFSCME have agreed to negotiate such statewide issues as wages, insurance and term of agreement at a central table. We may also be addressing other broad-impact issues centrally. An example which is being discussed is the implementation of the new information systems classification series. The union has informed DAS that it would like to begin central table bargaining in late January or early February.

A few AFSCME-represented units will not be participating at the central table. The Corrections non-security bargaining unit recently concluded its negotiations through June 1999. The Corrections security bargaining unit is currently under a five-year agreement with a limited re-opener anticipated for January 1997. The assistant attorneys general are continuing to negotiate their first agreement with the state and, as such, will not join the central table at this time. The physicians bargaining unit has not yet decided whether it will participate at the central table.

SAFETY COMMITTEES

ORS 654.176 requires that every public employer of more than ten employees establish and administer a safety committee. The purpose of such a committee is: “[T]o bring workers and management together in a non-adversarial, cooperative effort to promote safety and health in each workplace. A safety committee assists the employer and makes recommendations for change.” (OAR 437-01-765.)

The duties and functions of safety committees are set forth in detail in OAR 437-01-765(6). Among other things, such committees are required to develop a written agenda; hold regular meetings; and produce minutes, which must be maintained and either posted or otherwise made available to employees. Safety committees are given the responsibility of assisting the employer in evaluating its accident and illness prevention program, and of making recommendations to improve the program where applicable. They are also required to conduct workplace inspections, to locate and identify safety and health hazards and to make recommendations to the employer regarding how hazards and unsafe work practices may be eliminated. In addition, safety committees are given responsibilities regarding the employer’s safety and health accountability system, concerning the establishment of procedures for investigating safety-related incidents and regarding the establishment of an employee involvement system. The administrative rules also provide that safety committees shall establish a “reasonable time limit” for the employer to respond in writing to all safety committee recommendations.

The issues of safety committee formation and membership composition are addressed in OAR 437-01-765(5). Safety committees must consist of no fewer than four members for each employer with more than twenty employees and - unless workers and management agree otherwise - must be composed of an equal number of employer and employee representatives. Employee members, moreover, must be “volunteers” or “elected by their peers.” In addition, “reasonable efforts” must be taken to ensure that safety committee members are, “representative of the major work activities of the firm.” “Employee representatives” on the committees must serve a continuous term of “at least” one year. These

terms, however, “[S]hall be alternated or staggered so that at least one experienced member is always serving on the committee.” All committee members are required to undergo specified instruction and training, and to be given access to applicable OR-OSHA Codes. Employee representatives attending safety committee meetings, or participating in instruction or training required for committee members, must be compensated by the employer at their regular hourly wage.

The administrative rules require that safety committees be established at each of the employer’s primary places of employment (defined as “a major economic unit at a single geographic location, comprised of a holding, group of buildings, and all surrounding facilities...”). Examples of a primary place of business given by the rules include, a school district and a state agency. According to the rules, “As a primary place of employment the location would have both management and workers present, would have control over a portion of a budget, and would have the ability to take action on the majority of the recommendations made by a safety committee.” Key questions are whether the branch, division or department operates autonomously; and whether it has the authority to budget money for and to purchase safety equipment. Auxiliary, mobile and satellite locations - such as branch or field offices - may have a combined, single centralized committee. Finally, an employer with work locations which include fire service activities must also establish a Fire Service Safety Committee as required by OAR 437-02-182(7).

The administrative rules do provide for some flexibility. On application, OR-OSHA may approve safety committees which, “[A]re innovative or differ in form or function, when such committees meet the interest of these rules.”

OR-OSHA has published a guidebook to developing and implementing safety and health committees, entitled, *Workplace Safety Committees*. Copies may be obtained from the OR-OSHA Resource Center, Labor & Industries Building, 350 Winter Street, NE, Salem, OR 97310. For more information, contact OR-OSHA Standards and Technical Resources Section at (503) 378-3272.□

About the Management Insight

The *Management Insight* is produced periodically by the Labor Relations Unit, Human Resource Services Division, Department of Administrative Services and is distributed to Executive and Management Service employees of the State of Oregon. It consists of items of interest in the labor/management realm of employment.

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Or Call: (503) 378-2705

Or Fax To: (503) 373-7530

Recent Developments Regarding Donated Leave Programs

Donated Leave and PERS

Several questions have arisen regarding the effect which donated leave programs would have on certain PERS policies. These questions concern whether state agencies would continue to pay the 6% PERS "pickup" when an employee uses donated leave; whether used donated leave would be included in the donee's final average salary for purposes of PERS benefits and whether the leave donations would be considered salary to the donee for PERS purposes. These questions were recently answered in a letter to DAS from PERS Member Services Division. In short:

1. Payment of donated leave to the donee will continue to be considered salary to the donee for PERS purposes and contributions collected on same.
2. State agencies participating in the 6% PERS "pickup" will continue to make the 6% payment when the employee uses donated leave.
3. Salary paid to the donee for donated leave will continue to be included in the final average salary calculation for purposes of PERS benefits.

Donated Leave and Disability Payments

Problems recently experienced by a state employee suggest the need for state agencies to inform employees regarding the potentially adverse impact which their use of donated leave could have on their receipt of disability payments. As such:

1. State agencies should inform both represented and unrepresented employees that the use of donated vacation leave as sick leave may offset disability payments to which the employee may otherwise be entitled.
2. The following language is suggested for inclusion on agency donated leave request forms: "I understand that my use of donated vacation leave as sick leave may offset the receipt of any disability payments."
3. If other written materials are provided to employees regarding the use of donated vacation leave as sick leave, the same statement should appear in these materials.

HIGHER ED EMPLOYEE RIGHTS UNDER DAS/OPEU AGREEMENT

In July of this year the Oregon State System of Higher Education (OSSHE) entered into a collective bargaining agreement with OPEU for classified employees at OSSHE's colleges and universities. Before this agreement those employees were covered by the State of Oregon, Department of Administrative Services agreement with OPEU. The new OSSHE agreement supersedes all prior collective bargaining agreements negotiated between OPEU and DAS.

Do OSSHE employees continue to have rights under the DAS-OPEU agreement? No, not unless they are hired by an agency subject to the DAS-OPEU agreement. OSSHE employees have the same rights as other state agency employees applying for transfer or promotion into an OPEU represented position. If granted a position, their time with higher ed would count as state service under the current DAS-OPEU agreement. Consequently, vacation transfer/accrual rates would recognize higher ed

service and sick leave would be transferred to the gaining agency. The current DAS-OPEU agreement does not give an employee the right to return to higher ed, nor does the higher ed agreement give a former higher ed employee such a right.

What rights do employees under the DAS-OPEU agreement have when taking a position subject to the OSSHE-OPEU agreement? Questions about rights upon arrival at the college or university need to be answered by OSSHE. Should the employee accept the position as a promotion and be removed from trial service, the current DAS-OPEU agreement continues to give that employee a return right to their former agency.

Agencies considering applicants whose current employer is OHSU face a different situation. OHSU has not been a state agency since June 30, 1995. Persons employed by OHSU as of that date have through June 30, 1997 to be considered for reemployment by state agencies. If rehired, their time at OHSU through June 30, 1995 would count as state service for the purpose of vacation accrual.

Sick leave balances would not be transferable.

TEMPORARY INTERRUPTION OF EMPLOYMENT/INCLEMENT WEATHER POLICY REMINDER

In order to maintain the salary status of FLSA exempt employees, DAS has advised all agency heads and personnel managers to refrain from applying the contract language or the prior policy requiring FLSA exempt employees to use leave, with or without pay, in temporary interruption of employment or inclement weather situations when the employer/agency closes its operation. FLSA exempt employees who have the option of reporting to their work sites or alternate work sites and choose not to do so, or who have prior approval to be off on the affected days, are not covered by this decision. This policy also excludes situations in which employer closures last for periods longer than one full workweek.

STATE OF OREGON/OPEU CENTRAL TABLE NEGOTIATIONS

OPEU distributed a summary of their negotiation proposals at the first bargaining session between the state and the union, held on December 4. The union submitted all of their proposals except for those concerning salaries, insurance, differential pay and on-the-job protection for on-the-job injuries. While the number of issues to be dealt with are far fewer than in the past, they are particularly complex and difficult.

By agreement, coalition issues will be submitted at coalition tables. Agency specific issues will be submitted at the central table.

The union identified the following agencies whose bargaining unit employees have elected to use the negotiated expedited problem solving bargaining model: AFS, SCF, DCBS, SDS, Health, Forestry, VRD, Employment and OSH.

After the December 12 session, central table negotiations are expected to resume in mid-January, on a continuing basis, on Wednesdays and Thursdays.

SUPERVISION AND LEADERSHIP TRAINING OFFERED BY DAS

The Department of Administrative Services offers courses in supervision and leadership which provide a common framework for managing and leading across all state agencies. Besides covering the state's policy expectations for managers, the classes also provide for learning about "best practices" in various agencies. The two courses are:

CORE: Core is a four day class (conducted in two blocks of two days each), targeted at employees new to supervision, or aspiring to become supervisors, and covering basic supervisory issues. Core provides an overview of state government, and the "how to's" of performance management, including interviewing and selecting employees, gaining agreement on job expectations, giving positive feedback, constructively addressing performance gaps, documentation and discipline, and providing recognition and rewards. Core also covers the why's and how's of building a work team and maintaining a safe, legal and productive work environment

ENCORE: Encore is a two and one-half day program designed for middle managers, such as department heads and program managers. The class covers creating a high performance organization, building an effective team, fostering change and innovation, leadership and creating performance accountability within the team.

More information about either of these classes can be obtained from Jan Miller at 378-6334, Mary Alice Hammond at 378-3869 or Pete Schmidt at 378-2744.