

# MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS  
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

FEBRUARY 2004

## ITEMS OF INTEREST

### STATE WINS INTEREST ARBITRATION AFFIRMING STEP FREEZE

In a recently concluded interest arbitration between the Oregon Department of Administrative Services, on behalf of the Oregon Department of Corrections (State), and Oregon AFSCME Council 75 (AFSCME), Arbitrator Vincent M. Helm selected between the parties' last best offer packages. In his December 29, 2003 award, Arbitrator Helm chose the package proposed by the State.

The AFSCME bargaining unit in question includes nearly 1,600 corrections officers, corporals and sergeants, employed at nine correctional facilities. The parties' last best offer (LBO) packages included proposals regarding merit step increases, time trading and a one-time payment of \$350, as follows:

AFSCME's LBO package:

1. Continue merit step increases;
2. Change contract language so that a party who does not fulfill a time trade is charged with leave.

State's LBO package:

1. 24-month merit step freeze.
2. Current language on time trades;
3. One-time payment of \$350 to employees who were employed on July 1, 2003, and continuously through January 15, 2005, with certain exceptions and prorations.

In his analysis, Arbitrator Helm noted that, as a general proposition, "...the offer which, on balance, is more likely to provide the level of service required to maintain the public welfare at the most reasonable cost should be adopted." He further explained: "Viewed in the context of legislative intent, interest arbitration, as a substitute for a strike, should as closely as possible, mirror the result which would have occurred had the parties been in an

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environment where there could have been a strike or lockout, and the parties in terms of economic strength were evenly matched. ... Interest arbitration as the

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substitute for a strike or lockout, therefore, is not intended to be a vehicle whereby either party can obtain a windfall but rather obtain the result which it could be reasonably expected would have resulted had there been recourse to economic action.”

The Arbitrator also explained that, because the State’s proposed merit step freeze would be, “...a substantial departure from a long standing precedent of providing for annual step or merit increases,” it would be “particularly important” for him to “... ascertain whether economic necessity or reference to internal or external factors justify such an approach.”

Examining the State’s ability to meet the costs of the Union’s proposal, Arbitrator Helm noted that, “[c]ertainly no one can doubt that the state of Oregon is in serious economic difficulties.” Arbitrator Helm concluded, however, that in light of the small amount of additional funding required by the Union’s proposal compared with the State’s total budget, “... there is no question that revenue is in excess of that necessary to fund the last best offer package of the Union.” On the other hand, the Arbitrator also found that, “It ... cannot be said that the [State’s] last best offer can be reasonably expected to have a significantly deleterious effect on the [State’s] ability to recruit and retain qualified bargaining unit employees.” In addition, Arbitrator Helm found that the State’s proposal, “... will not adversely impact the relative comparability of wages, benefits, and terms and conditions of employment of bargaining-unit employees to comparable employees of other states ....”

In reaching his conclusion, Arbitrator Helm gave great weight to “internal equity,” which he found, “... particularly useful where, as here, consideration of specific statutory criteria provides no definitive basis for resolving the matter.” In assessing this criterion, “In essence, the interest arbitrator looks to terms and conditions of employment of other employees of the Employer to consider the impact of each parties’ proposals upon the overall labor relations environment.” In this case, “... of slightly over 28,000 represented and non-represented employees of the [State], nearly 85 percent have terms and conditions of employment in accord with the terms of the last best offer package of the [State] coupled with the parties’ agreement with respect to cost-of-living freeze and increased [State] contributions for health insurance. Over two-thirds of the [State’s] employees have agreed to ‘arm’s length’ collective bargaining agreements incorporating the merit freeze, which is at the very heart of the dispute herein. If a small minority of employees were to continue to receive merit increases during the two-year moratorium affecting all other employees throughout state government, the adverse impact upon morale and consequently upon performance of duties while incapable of precise calculation must be deemed to be severe and not in the public interest.” The decision of 22 of the State’s 23 strike-permitted units who have accepted contract terms which included a two-year freeze on merit increases without a strike, “... appears to reflect their collective judgment that a strike would not result in a more favorable settlement ....” This is significant since, as the Arbitrator noted earlier, “... interest arbitration is provided as an alternative to a strike with the result produced being that which might be expected to have resulted if the bargaining unit were able to strike in pursuit of its objectives.” Moreover, the agreement by the “overwhelming majority” of bargaining units, “... supplies the necessary ‘compelling need and changed circumstances’ to justify the substantial disruption to the status quo encompassed in the [State’s] last best offer package.”

As such, concluded the Arbitrator, “considerations of internal equity and public policy indicate that selection of the last best offer package of the [State] is in the interest and welfare of the public ....”



### **HELPFUL HINT . . . About Interest Arbitration**

To avoid endangering the public, certain represented public safety employees are prohibited from striking by the Public Employee Collective Bargaining Act. These employees include police officers, firefighters, correctional institution and mental hospital guards, and emergency telephone workers. In place of the strike option, these employees are entitled to use binding interest arbitration to resolve negotiation deadlocks regarding mandatory subjects of bargaining.

Interest arbitration hearings are usually informal, but similar to a trial. Each party to an interest arbitration must submit a written “last best offer” package to the arbitrator, which sets forth the party’s final offer on all unresolved

mandatory subjects of bargaining. A permissive subject may not be included in the last best offer if the other party objects to its inclusion.

The arbitrator is required by statute to base his or her decision on criteria set forth in ORS 243.746 (4). In reaching his or her decision, the arbitrator is to give first priority to the interest and welfare of the public, and secondary priority to the other enumerated criteria.

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### **“EATING” A MAJOR LIFE ACTIVITY UNDER THE AMERICANS WITH DISABILITIES ACT**

The Ninth Circuit Court of Appeals recently addressed the definition of “major life activities” under the Americans With Disabilities Act (ADA). In this case, the Portland employee had severe type 1 insulin-dependent diabetes, a potentially life-threatening form of the disease, which required her to check her blood sugar four or more times a day and strictly regulate her diet and activity. After collapsing at work one day, she asked her employer if she could eat at her desk. The employer refused. The employee had also complained about her supervisor to her employer, but the employer took no action.

The employer discharged the employee several months later, and the employee sued her employer under the ADA and Oregon’s disability laws. In the lawsuit, the employee claimed that she was disabled because she was substantially limited in the major life activities of eating, thinking and communicating, and caring for herself. She argued that her employer violated the disability laws by failing to accommodate her disability and then fired her in retaliation.

The Ninth Circuit ruled that eating is a major life activity. However, the court also said that “we do not thereby invite all those on a diet to bring claims of disability.” In this case, the court found that the employee’s condition was “perpetual, severely restrictive, and highly demanding,” and that her condition substantially limited the major life activity of eating.

This case clearly demonstrates that employers need to carefully examine requests for accommodation. Carefully review each request and gather all relevant information about the employee’s claimed disability. Examine how the disability limits the employee, focusing on major life activities, including eating. Then consider potential reasonable accommodations.

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## **FROM THE HR MANAGEMENT & CONSULTATION SECTION**

### **TEMPORARY APPOINTMENT – COORDINATING PERS STATUTE WITH HRSD POLICY**

Recent legislative changes to the PERS statute covering re-employment of PERS retirees do not supersede the restrictions on temporary appointments to state government contained in HRSD State Policy, 40.025.01, Temporary Appointments.

In general, the PERS statute (ORS 238.082) permits a retiree to be re-employed by any public employer for a period of employment not to exceed 1,039 hours in any calendar year, or the number of hours allowed by Social Security for a calendar year, if the retiree is receiving Social Security benefits.

The 2003 Legislature amended the PERS statute with the passage of HB 3020. HB 3020 allows retired PERS members working in *specific employment situations* to exceed the 1,039 hour limit in a calendar year without it impacting their retirement benefits.<sup>1</sup> The situations include:

1. Employment by the sheriff of a county with a population of fewer than 75,000 inhabitants;
2. Employment by the municipal police department of a city with a population of fewer than 15,000 inhabitants;

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3. Employment by the state or a county for work in a correctional institution located in a county with a population of fewer than 75,000 inhabitants;
4. Employment by the Oregon State Police for work in a county with a population of fewer than 75,000 inhabitants;
5. Employment to temporarily replace an employee who serves in the National Guard or in a reserve component of the Armed Forces of the United States and who is called to federal active duty;
6. Employment by a road assessment district organized under ORS 371.405 to 371.535.

It is important to point out, however, that these exceptions to the 1,039-hour limit in the PERS statute do not change the administration of HRSD State Policy, 40.025.01, Temporary Appointments. *A PERS retiree, employed under ORS 238.082 as a temporary state employee, is still subject to the restrictions imposed by HRSD state policy. In general, this policy continues to limit the duration of a temporary appointment to six calendar months within a 12-month period. For less than full-time employment, temporary employees shall not exceed the equivalent of six calendar months (1,040 regular hours) in a 12-month period.*

An exception to the HRSD six-calendar-month policy allows a temporary appointment to exceed the 1,040 hours when the temporary employee is filling in behind an employee on approved leave. As such, the employment situation listed in situation 5, above, meets the criteria of approved leave under HRSD state policy. PERS retirees can be used to fill in behind a state employee called to active duty as a temporary employee and will not be limited to the 1,039-hour restriction in the PERS statute or the 1,040 hour restriction under HRSD State Policy.

<sup>1</sup> Subsections (3) to (6) of HB 3020 do not apply to any member who retires under the provisions of ORS 238.280(1).

## ARBITRATION & CASE SUMMARIES



*In the Matter of the Arbitration between the State of Oregon (ODOT) and SEIU Local 503, OPEU (Arbitrator, Catherine Harris, Esq.; June 20, 2003)*

**A shift assignment clause provides that an employee volunteering for a shift will be assigned to it, subject to “the requirements of the Agency to have qualified employees on all shifts to provide the best service to the motoring public.” The clause also provides that when two or more employees volunteer for the same shift, it shall be given to the “most senior” employee “qualified” to work the shift. The Arbitrator found that under this clause, an employee who volunteers for a shift has the right to be assigned to it in favor of a less senior employee, as long as the employee is “qualified” to perform the duties in question. In such a case, management may not pick the “most qualified” employee over the most senior “qualified” employee. The most senior employee could, however, be denied the preferred shift if the employer made a reasoned determination that no less senior qualified employee was available to fill the position to which the volunteer was originally assigned.**

**Facts:** An ODOT project to seal the surface of a road required three overlapping shifts. The night shift operated motorized brooms to sweep loose material from the road surface created by the day crew. Unlike the day and swing shifts, the night crew operated without supervision and was required to have detailed knowledge of the area and experience with the equipment since there are limited places to turn around. After they were assigned by management to operate brooms on the night shift, three ODOT employees requested assignment to the day shift. Management denied the requests without reviewing the seniority and qualifications of the three employees compared with the seniority and qualifications of the employees assigned to the day shift. A motorized broom is a “fairly common” piece of equipment. No certificate is required to operate it.

The Collective Bargaining Agreement (CBA) provides:

“Shifts are assigned by the supervisor and where an employee volunteers for a shift, the employee will be assigned; subject, however, to the requirements of the Agency to have qualified employees on all shifts to provide the best service to the motoring public. When two (2) or more employees volunteer for the same shift, the shift will be assigned to the most senior employee qualified to work that shift within the classification.”

**Question Presented:** Did the Agency violate the CBA when it assigned employees to the night shift rather than the shift of their preference?

**Discussion and Ruling:** The Agency argued that an employee's right to volunteer for a preferred shift is subject to the CBA's requirement that the Agency have the *best* qualified employees to provide the "best service to the motoring public." The best service to the motoring public, argued the Agency, required that the most experienced employees be assigned to the night shift operation which, if not properly carried out, could have harmed the product applied by the day shift. The Union, on the other hand, argued that, "... unit employees, as long as they are *competent*, have a contractual right to be assigned to preferred shifts based on their seniority." (Emphasis in original.) As such, noted the Arbitrator, "This case involves a classic confrontation between labor and management concerning the manner in which qualifications may impact shift preference based on seniority."

Reviewing the CBA's language, the Arbitrator explained that she, "... is struck by the fact that there are no modifiers preceding the word 'qualified' .... While the ... language refers to the 'most senior employee' in the second sentence, the language omits any reference to the 'most qualified' or 'best qualified' employee." (Emphasis in original.) Addressing the Agency's argument, the Arbitrator ruled that "the best service to the motoring public" does not "amplify the meaning of the word 'qualified' as used in [the CBA]." Rather, the best-service language, "... may be a reflection of planning by management, appropriate equipment, weather conditions, quality of materials, and a variety of other facts which do not relate directly to the relative skills and abilities of [employees in the classification in question] assigned to a particular project." Finally, "... had the parties intended to imply that management could defeat the mandatory shift preference language ... they would have expressed what happens when two or more employees volunteer for the same shift differently. As reflected in the [language in question], when two or more employees volunteer to work the same shift, the preferred shift is assigned to the 'most senior employee qualified to work that shift' and not to the employee whose qualifications are deemed superior." The Arbitrator concluded, "... based on a straightforward interpretation of the disputed provision, a more senior employee who volunteers for a shift has the right to be assigned to a preferred shift in favor of less senior employees *as long as each employee is qualified to perform his or her assigned duties.*" (Emphasis in original.)

Assessing the evidence, the Arbitrator found "reliable and cogent evidence" that, "... crew members were required to work the night shift when there were other less senior and qualified [employees in the same classification] ... who could have been assigned to the night shift." As such, "... the Union has met its burden of establishing a contract violation."

In reaching her conclusion, the Arbitrator clarified that she is not, "... signify[ing] that management cannot determine the qualifications which are necessary to a particular assignment. Rather, the Arbitrator signifies only that where qualifications, e.g., experience in a given task, are established in derogation of the shift preference provisions of the Agreement, the State must determine not only that individuals originally selected for a project have the necessary qualifications but also that less senior individuals are lacking in the necessary qualifications. By failing to sufficiently examine whether less senior employees in the same classification were qualified to perform the night shift assignment [the shift originally assigned to the three employees in question], the State violated the letter and spirit of the Agreement."

#### ***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. Back issues and a cumulative articles index may be accessed through the HRSD website, [www.hr.das.state.or.us](http://www.hr.das.state.or.us). Material covered in this newsletter may be reproduced without special permission. Please credit the *Management Insight*, DAS, LRU.

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***Lane County Peace Officers Association vs. Lane County Sheriff's Office***

*(ERB Case No. UP-32-02; August 29, 2003)*

**An Employer's investigation into alleged bargaining unit member misconduct, at an off-duty party held by a Police Officer Association, did not constitute unlawful interference with the Association's affairs or the employees' PECBA-protected activities. An employee may be disciplined for serious misconduct that occurs during an otherwise PECBA-protected activity (such as picket-line violence). The Employer was, moreover, justified in refusing to permit two employees who were Association officers to represent bargaining unit members in investigatory interviews regarding the alleged misconduct, since the Employer planned to question the two Association officers about their observations and conduct at the party and the bargaining unit members received other Association representation at the interviews. It was, however, inappropriate for the Employer to question the Association officers about confidential Association-related conversations they had with a bargaining unit member who was not at the party or to ask questions unrelated to the alleged misconduct at the party during the investigatory interviews.**

**Facts:** The Lane County Peace Officers Association (Association) held an off-duty Christmas party at a local hotel for bargaining unit members and invited guests, including Lane County sheriff's office management personnel, members of other law enforcement agencies and members of the community. During and after the party, some bargaining unit members allegedly engaged in conduct which certain other bargaining unit members felt was inappropriate. The alleged misconduct included public nudity, fighting, gross intoxication in public, and inappropriate sexual contact. After hearing allegations regarding this purported misconduct, the Lane County Sheriff's Office (Employer) began an internal investigation into what occurred at the party. During the investigation, the Employer refused to permit two employees who were Association officers to represent bargaining unit members in investigatory interviews regarding the alleged misconduct because the Employer intended to interview the two Association officers regarding their observations and conduct at the party.

Other Association representation was provided to each Association member interviewed by the Employer.

The Employer's department manual includes a number of articles regarding proscribed off-duty conduct. Among other things, it provides: "... All employees of this department shall conduct themselves, on or off-duty, in a manner that will not bring embarrassment, disgrace or dishonor on the department, directly or indirectly. ... Employees may be disciplined for on or off-duty conduct that tends to lessen their credibility or ability to efficiently and effectively perform their assigned duties or tends to damage the image, reputation, public confidence or support of the employee or the department."

**Questions Presented:** Did the Employer violate the Public Employee Collective Bargaining Act (PECBA) by: (1) Conducting an investigation regarding alleged bargaining unit member misconduct at the Association's off-duty party? (2) Refusing to allow two employees who were Association officers to represent bargaining unit members at investigatory interviews on the grounds that the two officers would also be questioned about the alleged misconduct? (3) Questioning the two Association officers about the contents of their Association-related conversations with a bargaining unit member who was not at the party?

**Discussion and Ruling:** Responding to the Association's argument that the off-duty party itself was a PECBA-protected activity and that the Employer's investigation therefore violated the PECBA, since any conduct that occurred during such an event would be "beyond the [Employer's] lawful reach," the Board replied: "The real question here ... is not whether the party itself is a protected activity. An employer may impose discipline for serious proven misconduct that occurs in the course of otherwise protected activity. A basic example would be picket-line violence." As such, "If an employer may discipline bargaining unit members for such conduct, even where it occurs in the context of protected activity, it follows logically that the employer may investigate allegations that such conduct occurred." In this case, the Employer "had the right" to investigate alleged public nudity, fighting, gross intoxication in public and inappropriate sexual contact, "... notwithstanding that it occurred in the context of an Association-sponsored party."

Addressing the Association's charge that the investigation constituted an unlawful interference with Association affairs, the Board found that, "... no reasonable

employee would be chilled from participating in Association business because of an investigation into alleged misconduct that occurred in a social setting.” The Association, moreover, produced no evidence that the investigation actually caused union members to forego attendance at Association meetings.

Moving to the next issue, the Board noted that, during its investigation, the Employer asked bargaining unit members to provide information that was not relevant to the alleged misconduct at the party. This went too far. Questions concerning the Association’s internal organization, such as the names of Association officers who had assisted bargaining unit members in investigatory interviews, were inappropriate and violated the PECBA. Such questions “... could reasonably be expected to interfere with or restrain employees’ willingness to participate in PECBA-protected activities, such as serving as [an Association] representative in [an investigatory] interview.... Such questions would also have a direct impact on the Association’s ability to administer the contract and fulfill its statutory responsibilities.”

The Board next reviewed the Employer’s refusal to permit two Association officers to assist Association members in the investigatory interviews because the Employer intended to interview the officers regarding their conduct and observations during the party. Under these circumstances, the Board found, “The participation of those Association officers in the interviews of other bargaining unit members reasonably could create an actual or apparent conflict of interest that could interfere with both the [Employer’s] investigation and the Association’s ability to represent its members.” The bargaining unit members’ right to representation, moreover, was honored: “Association representatives other than [the two officers] were available and assisted the bargaining unit members interviewed by the [Employer]. The Association did not show that any member received inadequate representation or that it suffered a hardship.” The Board concluded that, under these circumstances, the Employer’s refusal to permit the two officers to assist Association members in the investigatory interviews did not violate the PECBA.

The final issue addressed by the Board was the Employer’s questioning the two Association officers about the contents of Association-related conversations they had with a bargaining unit member who was not at the party. The member in question had been making

critical comments in the workplace about the conduct which had occurred at the party. The two officers talked to the member “in their roles as Association officers,” warning him that his statements could constitute a violation of an Employer policy proscribing certain “unfounded, inflammatory or malicious criticism of [co-workers]....”

The Board began its analysis of this issue by noting that, “... as a general rule, an employer may not interrogate union officers about their contacts with bargaining unit members or about the substance of those conversations.” This is because, “In having such contacts, both the officer and the unit member are engaged in protected activities.” If employees knew that an employer could question a union officer about the subject of such a conversation, this would “... almost certainly inhibit such exchanges contrary to [the PECBA].” It would also violate the PECBA by making unit members less willing to contact union officers to discuss problems, which would impede the union’s ability to represent its members and administer the contract. Certain conversations—such as a union officer’s direction to union members to engage in picket line violence—are not absolutely privileged under the PECBA. The conversations in question, however, “... are not the sort about which an employer can freely inquire.” Rather, “These were conversations ... about subjects central to the Association’s role. [The member] was concerned about potential misconduct by Association members. The officers were concerned that [the member], who was not present at the party, might himself be violating [Employer] policy by spreading rumors about what occurred. In short, these conversations were none of the [Employer’s] business.” Questioning the officers about these conversations violated the PECBA.

The Board ordered the Employer to cease and desist (1) from compelling bargaining unit members to disclose information regarding the Association that is beyond the scope of its investigation of alleged off-duty misconduct, and (2) from compelling Association officers from disclosing the substance of their conversations with bargaining unit members, absent some evidence of misconduct. The remaining elements of the complaint were dismissed.



### WHEN IS A LAST CHANCE AGREEMENT APPROPRIATE?

Agencies have turned to last chance agreements as a tool in resolving disciplinary disputes. If used appropriately, last chance agreements can be an effective mechanism in employee disciplines. In using last chance agreements appropriately, state employers should keep the following considerations in mind.

First, last chance agreements are precisely that—agreements providing an employee a final opportunity to demonstrate that he or she can acceptably perform the duties and responsibilities of the position. State employers use last chance agreements most appropriately, therefore, at the final step in the disciplinary process—dismissal. The concept underpinning a last chance agreement is that, in exchange for forgoing a dismissal action, the employer receives an agreement from the employee that he or she will not again engage in the conduct leading to the dismissal action and, should the employee breach the agreement by repeating that conduct, the employer can dismiss the employee without further appeal to arbitration. The employer thus relinquishes the current dismissal action and retains the employee, who is to demonstrate that he or she can perform as agreed. The employee and the union relinquish the employee's appeal of a future discharge should the employee breach the last chance agreement by repeating the prohibited conduct. The value to the state employer of a last chance agreement lies, therefore, not in the dismissal action itself, but in relinquishment of the contractual procedure ending in arbitration—the ability to discharge without further litigation. The value to the state employee lies in his or her retention of employment with a final opportunity to show that he or she can perform as expected. The value to the union lies in a retained member of the bargaining unit.

An appropriate last chance agreement should not, therefore, be seen as a short cut through the requirements of progressive discipline. Obviously, if the state employer is at the final step of that process—discharge—the employer will have followed the necessary steps of progressive discipline leading up to dismissal. However, if the state employer is entertaining the idea of proposing a last chance agreement to resolve a grievance regarding a discipline with any action that is less than dismissal, such as a pay reduction or a demotion, the appropriateness of a last chance agreement at this point in the process may be open to question. Implicit in the imposition of a discipline less than dismissal is the state employer's conclusion that the conduct for which the employee was disciplined does not yet warrant dismissal and deserves, instead, further warning and opportunity to demonstrate acceptable performance. As the disciplined employee has thus not engaged in conduct warranting dismissal, what incentive do that employee and the union have to enter into an agreement with a dismissal action as the agreed next step and the relinquishment of the contractual right to grieve that dismissal to arbitration? Now, if the employee and the union propose entering into a last chance agreement at an intermediate step of the progressive discipline process, that is a different situation, as they themselves have offered, to waive further disciplinary steps and to relinquish the contractual grievance procedures. As the employee and the union are themselves offering to short cut the process of progressive discipline, the state employer may decide that entering into a last chance agreement under these circumstances offers a unique opportunity, to draw the disciplinary process to an early conclusion, which should not be passed up.

The second consideration regarding last chance agreements is the conduct for which the state employer disciplines the employee. Last chance agreements were first used to address disciplines involving substance abuse. The typical situation involved the employer progressively disciplining the employee for deficient attendance, such as excessive absences or repeated tardiness, or for reporting to work impaired. At pre-dismissal, the employee would announce and acknowledge that he or she had a substance abuse problem and was undertaking a drug/alcohol treatment. The employee and union, if the employee was represented, would then request that, instead of proceeding with the dismissal, the employer give the employee one "last chance" to demonstrate that he or she could successfully treat the substance abuse and, once rehabilitated, could successfully address deficient attendance. With the passage of the Americans with Disabilities Act (ADA) and its protection of substance abusers in rehabilitation, such requests became more frequent and numerous and were formalized in last chance agreements. Last chance agreements most appropriately addressed discipline, therefore, in the context of substance abuse resulting in deficient performance at

work or unacceptable attendance. In other words, the conduct for which the state employer disciplined the employee was inextricably intertwined with the employee's substance abuse.

State employers have begun, however, to use last chance agreements to address deficient performance unrelated to substance abuse, such as repeated minor misconduct or incompetent performance of assigned tasks. Even when the state employer appropriately proposes the last chance agreement during the pre-dismissal process, rather than during the intermediate steps of progressive discipline, last chance agreements do not necessarily fit these circumstances. The reason the employer was willing to give the employee engaging in substance abuse "one last chance," other than the requirements of the ADA, was that the employee's substance abuse clouded a clear picture of his or her capabilities to perform the duties of the position or to report to work in an acceptable manner. The employee's successful completion of a drug/alcohol treatment program and substance-free return to the workplace gave the employer a clear picture, unclouded by substance abuse, of the employee's ability to perform the duties of the position or to report to work.

With the employee for whom substance abuse is not an issue, however, the state employer has already developed a clear picture of the employee's repeated minor misconduct or incompetent and inefficient performance of the duties. The employee is intentionally engaging in conduct contrary to the employer's interest or lacks the capability to perform the duties of the position competently and efficiently. There is no need for intervention to determine whether the employee can perform to the state employer's expectations, as the employee has already amply demonstrated through progressive discipline that he or she will not or cannot so perform. In such cases, the state employer may be substituting a last chance agreement for a final warning to the employee—a warning that a state employer can give unilaterally without the need for a negotiated last chance agreement. Further, when considering a last chance agreement, the state employer should appropriately be at the pre-dismissal step of progressive discipline. The state employer has unequivocally and finally warned the employee about the consequences of his or her misconduct or incompetent performance through its imposition of the pre-dismissal process itself. (If the misconduct is so egregious that a single instance warrants discharge, the state employer should not give the employee "one last opportunity" to potentially engage in such conduct yet again before discharge. The state employer should simply discharge the employee.)

State employers should propose last chance agreements in these instances only if the employee and the union commit to the employer that the employee has well and truly mended his or her ways and will never again commit the minor misconduct or the incompetent performance of duties, and that a single instance of an unauthorized absence, tardiness, rude word, snarling at co-workers, typographical error, missed route slip, erroneous filing, client complaint, inattention to duty, and so on, will result in dismissal without the right to grievance and arbitration. Remember, the state employer has adequate present grounds for dismissal because the state employer is at the dismissal step of progressive discipline. The state employer is agreeing to abandon that dismissal action and give the employee "one last chance" in exchange for relinquishment of grievance and arbitration.

State employers should, furthermore, utilize last chance agreements for repeated minor misconduct and incompetent performance of duties only in those rare instances where the employee and the union agree to give up their contractual right to grievance and arbitration. If the employee and union will not agree to forgo the contractual grievance and arbitration process, the state employer should not be signing a last chance agreement because it would, in such case, be retaining an employee with a demonstrated record of poor performance and received nothing of value in return. If, however, the employee and the union propose a last chance agreement at an intermediate step of progressive discipline, such as during the grievance of a pay reduction or a demotion, and agree to give up the grievance and arbitration process in that last chance agreement, then state employers should seriously consider such an agreement for the reasons set out above.

In the next installment the contents of a last chance agreement will be addressed.

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## BACK TO BASICS



### DRESS AND GROOMING CODES

Under the Public Employee Collective Bargaining Act (PECBA), the subjects of reasonable dress and grooming requirements are permissive for bargaining<sup>1</sup> (ORS 243.650 (7) (f)). As such, with some exceptions noted below, the state generally may decline to bargain with public employee unions regarding these subjects and public employees may not strike over these issues or take them to interest arbitration. This also means that, in most cases, a state agency may establish or modify a reasonable dress or grooming code without having to first negotiate with a public employee union regarding the code's contents.

The first exception to this rule is a situation where the dress or grooming code would have an *impact* on a mandatory subject of bargaining. When this is the case, the state would generally be obligated to provide notice of the proposed code to the applicable union prior to its implementation. Assuming that this occurs during the term of an existing collective bargaining agreement, the union would then have a 14-day opportunity to file a demand to bargain.

A second exception is a situation where the employer has voluntarily bargained over this subject with a public employee union and, as a result, the applicable collective bargaining agreement includes a provision regarding dress or grooming requirements. In such a circumstance, the employer may not unilaterally change the dress or grooming requirements which were bargained over during the contract's term.

Another exception is a situation where a labor contract's provisions include an agreement to maintain all past practices, including permissive ones.<sup>2</sup> Where such a clause applies, a change in an established dress or grooming code may give rise to a duty to bargain prior to implementation.

How broad is an employer's right to set reasonable employee grooming and dress standards? The answer is, very broad. According to Dan Grinfas, an attorney with the Technical Assistance for Employers Unit of the Oregon Bureau of Labor and Industries (BOLI), employers can establish any kind of dress or grooming standard, so long as they have a legitimate business reason and apply their policies in a nondiscriminatory manner. Mr. Grinfas also states: "It is . . . wise, from the perspective of preventing workplace harassment, to require that employees dress and act professionally and refrain from wearing excessively revealing or provocative clothing."<sup>3</sup>

A dress and grooming code issue that often comes up is whether an employer may establish different standards for male and female employees. In general, the answer is yes. While Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate based on an individual's sex (or race, color, religion, or national origin), the federal courts have held that grooming and dress codes that distinguish between male and female employees are permissible and do not violate Title VII. The Ninth Circuit Court of Appeals, the Circuit that includes Oregon, has stated that Title VII does not apply to "hair styles or modes of dress over which the job applicant has complete control," but rather to immutable characteristics that the applicant has "no power to alter." Following this reasoning, the Ninth Circuit has held that employers may impose different hair length requirements for men and women and that they may require men to wear neckties.

One limitation on an employers' right to enforce a dress or grooming code may arise when an employee has a sincerely held religious belief which precludes his or her compliance with the code. Depending on the circumstances, if the employee requests an exception to the code as a reasonable accommodation, the employer may be required to grant the employee's request, if the employer could do so without suffering an undue hardship. Should this issue come up, consultation with the Labor and Employment Section of the Department of Justice is recommended.

<sup>1</sup> For more on permissive and mandatory subjects of bargaining, see, *Management Insight*, July 2001, p. 2.

<sup>2</sup> The state's contract with SEIU, and most of its other labor contracts, limit maintenance of past practice clauses to mandatory subjects.

<sup>3</sup> From Mr. Grinfas' column, "In the Workplace," which appears every Saturday in the *Statesman Journal*.

## LABOR RELATIONS CONTRACT ADMINISTRATION ASSIGNMENTS

**EVA CORBIN, Deputy Administrator 378-8321**

AFSCME:  
 Oregon State Fire Marshal (OSFM)  
 Oregon State Police (OSP Support Unit)  
 OSPOA:  
 Oregon State Police (OSP)  
 SEIU:  
 Home Care Commission (HCC) (w/Cathy Schuh)

**CRAIG COWAN, State Labor Relations Manager 378-5611**

AEE:  
 Department of Forestry (DOF)  
 Department of Transportation (ODOT)  
 Parks and Recreation Dept (OPRD)

AFSCME:  
 Oregon Military Dept (OMD)

IAFF/PANG:  
 Oregon Military Department (OMD)

KFAFFA:  
 Oregon Military Department (OMD)

SEIU:  
 Human Services Coalition:  
 Employment Department (EMPL)  
 DHS Non-Institutions (w/Cathy Schuh)

ODOT Coalition:  
 Department of Transportation (ODOT)  
 Department of Fish & Wildlife (ODFW)

Special Agencies Coalition:  
 Consumer & Business Svcs (DCBS)

**SCOTT ALLAN, State Labor Relations Manager 378-3967**

AFSCME:  
 Dept of Corrections (DOC-Strike Permitted)  
 Board of Parole (BOP)  
 Corrections Central  
 Dept of Corrections (DOC-Strike Prohibited)  
 Corrections Institutions  
 Dept of Environmental Quality (DEQ)  
 Nurses at Oregon State Hospital (OSH)

ONA:  
 State Operated Community Program (SOCP)  
 & E. Oregon Train & Psych Centers (EOTC, EOPC)

SEIU:  
 Special Agencies Coalition:  
 Bureau of Labor & Industries (BOLI)  
 Pub Employees Retirement System (PERS)  
 Oregon State Library (OSL)

**TOMPERRY, State Labor Relations Manager 378-4201**

AFSCME:  
 Construction Contractors Board (CCB)  
 Dept of Pub Sfty Stndrds & Trng (DPSST)  
 Real Estate Agency (REA)

SEIU:  
 ODOT Coalition:  
 Department of Aviation (ODOA)  
 Department of Forestry (DOF)  
 Parks and Recreation Dept (OPRD)

**CATHY SCHUH, State Labor Relations Manager 373-7608**

AFSCME:  
 Department of Justice (DOJ-OAJA)  
 CIA:  
 Department of Justice (DOJ)  
 GCU:  
 Dept of Administrative Services (DAS)  
 SEIU:  
 Human Services Coalition:  
 DHS Non-Institutions (w/Craig Cowan)  
 Special Agencies Coalition:  
 Department of Justice (DOJ)  
 Oregon Student Assistance Com (OSAC)  
 Home Care Commission (HCC) (w/Eva Corbin)

**MIKE HALPERN, State Labor Relations Manager 378-2705**

AFSCME:  
 Building Codes Division (BCD)  
 Division of State Lands (DSL)  
 Employment Department (EMPL)  
 Oregon Liquor Control Commission (OLCC)  
 State Operated Community Prog (SOCP)

SEIU:  
 Special Agencies Coalition:  
 Dept of Administrative Svcs (DAS)  
 Department of Agriculture  
 Department of Education (ODE)  
 Special Schools (OSSB & OSSD)  
 Commission for the Blind  
 Com College & Workforce Dev (DCCWD)  
 Health Related Licensing Boards  
 Health Licensing Office (HLO)  
 Housing & Community Services (OHCS)  
 Oregon State Fair (OSF)  
 Department of Revenue (DOR)  
 Oregon State Treasury (OST)  
 Dept of Veterans Affairs (DVA)  
 Water Resources Dept (WRD)  
 Watershed Enhancement Board (OWEB)

STEA:  
 Dept of Education (ODE)

**JAN WEEKS, State Labor Relations Manager 378-6483**

AFSCME:  
 Dept of Land Conservation & Develop (DLCD)  
 Physicians at Oregon State Hospital (OSH) and  
 Eastern Oregon Train & Psych Centers  
 (EOTC, EOPC)  
 Dentists at Dept of Corrections (DOC)  
 Oregon Youth Authority (OYA-JPPOs)

AOCE:  
 DOC-Strike Prohibited (OSP, MCCI, SFFC, OSCI)

SEIU:  
 Institutions Coalition:  
 Oregon Youth Authority (OYA)  
 Oregon State Hospital (OSH)  
 Eastern OR Train/Psych Center (EOTC, EOPC)

Department of Administrative Services  
Human Resource Services Division  
**Labor Relations Unit**  
155 Cottage Street NE, U80  
Salem OR 97301-3971

***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 Sue Wilson. Currently, the LRU negotiates and administers 32 collective bargaining agreements with 11 different labor organizations, covering over 27,000 employees in the Executive Branch of Oregon State Government. The LRU also negotiates an agreement with SEIU covering a bargaining unit of approximately 13,000 Homecare Workers. 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.

Scott Allan, State Labor Relations Manager .....	503-378-3967
Eva Corbin, Deputy Administrator, LRU .....	503-378-8321
Craig Cowan, State Labor Relations Manager .....	503-378-5611
Michael Halpern, State Labor Relations Manager .....	503-378-2705
Lois Harrup, Administrative Assistant .....	503-378-3141
Pamela Murdock, Labor Relations Analyst .....	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