

MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

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Distribution:

Executive and Management Service Employees

Editors:

Mike Halpern and Pam Murdock

ITEMS OF INTEREST

SUCCESSOR NEGOTIATIONS BEGIN BETWEEN THE STATE OF OREGON AND THE OPEU

Central table successor bargaining between the State of Oregon and the OPEU began on December 3. December 17 was the deadline for submitting new proposals at these negotiations. The state's proposals include issues regarding contracting out, limited duration appointments, salaries, overtime and insurance. The OPEU's proposals include requests for cost of living adjustments on July 1, 1999 and July 1, 2000 using the Portland CPI (with guaranteed minimum annual adjustments of two percent and annual caps of five percent), a July 1, 1999 additional across-the-board salary increase to "substantially narrow the compensation gap relative to the Oregon labor market," 186 selective salary adjustments, several new pay premiums and fully paid insurance. The OPEU's proposals also call for the state to pay benefits to temporary employees after six months of service, to pay for all required employee license and certification costs, to pay time and one-half overtime to all OPEU-represented employees (including those who are FLSA exempt), to pay for two additional holidays and to increase the vacation cap to 350 hours. Other significant OPEU proposals focus on issues regarding union use of internal agency e-mail and internet systems, alternative work schedules, seniority rights in relation to transfers for the filling of vacancies, job protection for employees whose positions are transferred to other public employers and the expansion of the hardship leave article to include sick leave donations and the creation of agency hardship leave banks.

Central table negotiations began with three bargaining sessions held in December. They are continuing with five all-day sessions in January, followed by six all-day sessions in February. Four of the February sessions will be devoted to negotiations regarding the requested selective salary adjustments.

Coalition-level bargaining is scheduled to begin the first week in February. December 17 was the deadline for submitting proposals for these negotiations. Proposals exchanged between the OPEU and the state include issues concerning work schedules, filling of vacancies, uniforms and protective clothing, the rights of union stewards, overtime scheduling, the definition of geographic area, unexcused absences, vacation scheduling, consistency in the definition of seniority and penalty pay.

Agency-specific, interest-based bargaining began in November. Pursuant to agreement between the OPEU and the state, three agencies are using this approach during this round of successor bargaining—Employment, Services to Children and Families and Consumer and Business Services. The agreement between the state and the OPEU also limits the number of issues which may be presented at each of these tables to no more than four from each party. These interest-based negotiations are scheduled to conclude no later than January 31.

ABOUT THE STATE'S SUCCESSOR NEGOTIATIONS WITH THE OPEU AND THE AFSCME ...

The Department of Administrative Services, acting through its Labor Relations Unit (DAS, LRU), currently negotiates and administers 30 collective bargaining agreements with 12 different labor organizations. Most of these agreements are renegotiated every two years, generally during the same time that the legislature meets. This renegotiation process is called “successor” bargaining. Agreements negotiated with the two largest of these labor organizations—the Oregon Public Employees Union (OPEU) and the American Federation of State, County and Municipal Employees (AFSCME)—cover nearly 27,000 state employees. How are the OPEU and the AFSCME successor collective bargaining negotiations conducted? Here are some answers.

OPEU PROCESS: Two Statewide Bargaining Units—

The state has a single collective bargaining agreement with the OPEU which applies to two separate statewide bargaining units covering a total of 47 agencies (a “bargaining unit” is a specific group of employees represented by a labor organization for collective bargaining with their employer). The largest OPEU bargaining unit (18,500 employees) consists of state employees who are eligible to strike. The second OPEU bargaining unit covers 1,600 strike-prohibited employees at Forestry, Oregon Youth Authority and Oregon State Hospital.

Pursuant to statute, the Oregon University System conducts independent negotiations with the OPEU, and its employees are not part of these two bargaining units.

Central Table—A “management team” composed of representatives from agencies covered by the two OPEU bargaining units and from the DAS, LRU, negotiates at a single table over statewide issues with a “union team” composed of employee representatives from the covered agencies and from the OPEU. This is usually referred to as the OPEU central table negotiations. **Issues handled at this table affect all state agencies with OPEU-represented employees.** Examples of such statewide issues include wages, vacation and sick leave accruals, insurance and overtime.

Coalition Tables—Due to the broad variety of work performed by agencies with OPEU-represented employees, four groups of agencies (called coalitions) negotiate with the OPEU over coalition and agency-specific issues at four separate tables. These coalitions are the Special Agencies Coalition, the Department of Human Resources Agencies Coalition, the Department of Human Resources Institutions Coalition and the Oregon Department of Transportation Coalition. **Each of the four coalition tables handles topics which impact only their own group of agencies and employees.** Examples of issues handled at these tables include work schedules, safety and health, filling of vacancies, inclement conditions and the rights of union stewards. A number of issues have both statewide and coalition-specific aspects. These issues—such as filling of vacancies—are dealt with at both the central and coalition tables (often resulting in a statewide article which applies to all agencies with OPEU-represented employees, as well as related coalition and sometimes agency-specific articles).

IBB Tables—A limited number of agency-specific issues are handled at tables involving just the agency in question and its OPEU-represented employees, using a special negotiating procedure called interest-based bargaining (IBB). Preliminary negotiations between the DAS, LRU and the OPEU determine which agencies will use the IBB process and establish IBB issue limitations. IBB involves collaborative exploration by labor and management of their “interests.” Interests are seen as more fundamental than “positions” or “proposals.” They are, rather, the basic concerns or purposes that motivate bargaining positions or proposals. IBB negotiations often begin with joint training of the management and union negotiating teams in the IBB process. In contrast to IBB, “traditional bargaining” focuses on the exchange of proposals that set forth the positions and desired outcomes of the parties to the negotiation. This is

usually followed by mutual exchanges of information, discussions, counter-proposals and compromises (IBB also involves such exchanges and discussions, although the focus is generally more interest-based). IBB and traditional bargaining procedures are not mutually exclusive. Some negotiations actually result in a blending of the two approaches.

Tentative and Ratified Agreements—Agreements reached at the various tables are called “tentative agreements.” These tentative agreements are subject to separate votes (called “ratification”) by each of the two bargaining units on a statewide basis. If both units vote to ratify, the ratified agreements are then printed in one document referred to as the “Master Agreement.” Coalitions and agencies may also print separate agreements which include only the applicable coalition and agency-specific clauses (as well as all of the statewide articles).

AFSCME PROCESS: Multiple Bargaining Units—Although the AFSCME also represents a large number of state employees (6,700), their bargaining units are defined differently than those of the OPEU. AFSCME bargaining units typically represent employees in a single agency or a professional group within an agency. The AFSCME currently represents state employees in 19 separate bargaining units. **In general, each of these bargaining units enters into separate negotiations with the state (usually at individual agency tables).** Some of these agency negotiations utilize the IBB process, while others engage in traditional bargaining. Additionally, two groups of AFSCME bargaining units—from the Department of Corrections and the Fairview Training Center—usually enter into agreements with the state to address group issues at single bargaining tables. As is the case with the OPEU coalition tables, these AFSCME group tables only address issues which impact their own coalitions.

Central Table—During the last several contract periods, the state and the AFSCME have agreed to negotiate certain statewide issues at a single negotiating table. These negotiations are usually referred to as the AFSCME central table negotiations. **Topics discussed at this table affect all state agencies with AFSCME-represented employees.** Examples of these statewide topics include wages, insurance, travel and retirement.

Tentative and Ratified Agreements—Any tentative agreements reached at the AFSCME central table are combined with tentative agreements reached at agency tables for inclusion in each of the separate bargaining

unit contracts. Each separate collective bargaining agreement must then be ratified by the AFSCME bargaining unit in question before it is considered a final agreement. After ratification, each of the 19 different AFSCME contracts are printed and distributed to the applicable agencies and bargaining units.

MEDIATION: Mediation is often used as part of the collective bargaining process. In mediation, a neutral third party—the mediator—is brought in to facilitate the negotiation process by helping the parties define issues, recognize options and reach tentative agreements. The parties involved in the mediation process retain the right to determine whether they will reach agreement or not (unlike in arbitration, where the arbitrator—acting as a judge—generally determines the outcome). In the state’s negotiations with the OPEU and the AFSCME, the mediator is supplied by the Employment Relations Board. Under the Public Employee Collective Bargaining Act, good-faith successor negotiations must continue for 150 calendar days before either party may unilaterally request the assignment of a mediator. By agreement, however, the parties may jointly request a mediator prior to expiration of the 150-day period.

Finally, it should also be remembered that when important mandatory subjects of bargaining cannot be resolved through negotiations or mediation, strikes or binding interest arbitration (for strike-prohibited bargaining units) may also occur.

ADOPTION REMINDER—MEDIATION CONFIDENTIALITY RULE

In July, the Department of Justice and the Department of Administrative Services circulated a memorandum to state agency heads which recommended adoption of the “Combined” Mediation Confidentiality Rule. Among other things, the memo noted that by adopting the rule, an agency would ensure that it could engage in confidential mediations arising out of labor negotiations and administration of collective bargaining agreements. This would include mediations required as part of the public employee collective bargaining process, as well as mediations arising out of filed contract grievances. The Combined Rule was written by the Department of Justice in accordance with ORS 36.224. While providing for mediation confidentiality, it is nevertheless in conformance with the state’s laws and policies on open government.

All agencies, boards and commissions with represented employees face the possibility of mediation as part of the collective bargaining process. In general, ORS 36.228 would bar confidentiality in a mediation arising under the Public Employee Collective Bargaining Act unless *all* of the agencies, boards and commissions participating in the mediation have rules providing for confidentiality.

Every agency, board and commission with represented employees which has not already adopted the Combined Mediation Confidentiality Rule, is urged to do so. For more information or help in adopting this rule, please request the head (or other designated representative) of your agency, board or commission to contact your organization's assigned Department of Justice counsel.

OPEU CONTRACTING OUT CLARIFICATION

An agreement between the state and the OPEU which clarified Article 13 (Contracting Out) of the OPEU Master Agreement was the subject of an article in the Summer 1998 *Management Insight*. Among other things, the article referred to the need for OPEU-represented agencies to provide the OPEU with notice of intent to perform a feasibility study pursuant to Article 13, as well as the feasibility study itself. However, with the exception of ODOT, **all contracting out notices of intent and feasibility studies should be sent to the OPEU by the DAS Labor Relations Unit, and not by an agency acting independently.** As such, agencies should contact their assigned DAS Labor Relations Manager whenever the need to prepare a contracting out notice of intent and study may arise.

NOTICE OF BAD WEATHER CLOSURES

It's that time of year again. While it is the duty of state agencies to remain open to serve the public, sometimes the state is compelled to curtail or close operations due to extreme weather conditions. Many of the state's collective bargaining agreements include provisions regarding the need, under specified circumstances, to use the media to announce such closure or curtailment decisions.

Many of the agreements, including the OPEU contract, have articles that require agencies to notify their employees which radio and television stations will be used to broadcast closure and curtailment decisions. Most commonly, the agreements specify that radio and television selections should be posted on agency bulletin boards. Some also require that employees be given a telephone number to call to verify the closure or curtailment of services.

If you are unfamiliar with the inclement conditions article in each collective bargaining agreement covering represented employees in your agency, now would be a good time to review each such article to assure your agency's compliance. Please contact your agency's personnel department if you have any questions regarding these provisions.

HELPFUL HINT . . .

Due to Fair Labor Standards Act regulations, the state has determined that FLSA-exempt employees will not be compelled to use leave, with or without pay, in connection with inclement weather closures which last less than a full workweek. 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 rule. Many of the state's collective bargaining agreements have special articles which address these issues.

About the Management Insight...

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If you have any items of interest or other information which you would like considered for an issue of the *Management Insight*, please produce them in typewritten form and send them to Michael Halpern, Labor Relations Unit; or . . .

Call: (503)378-2705 Fax: (503)373-7530 E-mail: Michael.Halpern@State.OR.US



NOTES FROM JUSTICE

by The Labor and Employment Section, Department of Justice



ERB YEAR IN REVIEW

The Employment Relations Board (ERB) is a three-member board responsible for administration and enforcement of the Public Employee Collective Bargaining Act (PECBA), and the State Personnel Relations Law (SPRL). The PECBA, ORS 243.650-243.782, is the state law that governs labor relations between public employers, public employees, and the exclusive bargaining representatives of public employees (*i.e.*, labor organizations). Under SPRL, ORS 240.005-240.990, ERB reviews personnel action appeals and petitions filed by state employees who are not represented by labor organizations, including employees in the classified service and management service.

Some important rulings from the ERB within the last year under the PECBA include the following:

DUTY TO PROVIDE INFORMATION

It has always been clear that a public employer has a duty to provide information to the union under the PECBA, but the questions of *when* the duty arises, and *what* information must be provided are less clear. In *Eugene Police Employees Association v. City of Eugene*, Case No. UP-43-97, 17 PECBR 634 (1998), the union charged that the city unlawfully refused to provide the union with psychological data after the pretermination process but prior to actual termination. The city contended that it was not required to turn over the information until after termination occurred and that neither its settlement proposal or notice of proposed termination constituted an actual or potential contract violation. The Board found the city did act unlawfully by refusing to provide the information the union had requested. The Board focused on the contents of the data, finding that it was relevant because it virtually assured the termination of the officer. Additionally, the union's demand was timely because the information was needed to evaluate the city's pretermination settlement offer.

ALLEGATIONS OF EMPLOYER DISCRIMINATION BASED ON UNION ACTIVITY

While supervisors and managers are well-aware that it is unlawful discrimination to retaliate against an employee because he or she has filed an employment claim (such as a BOLI or SAIF claim), it is also important to remember that taking action against an individual who is active in the union could subject the agency to claims that it discriminated against the individual based on union activity.

In *Portland Association of Teachers and Denise Poole v. Multnomah School District No. 1*, UP-72-96, 17 PECBR 470 (1997), the union alleged that the school district changed a teacher's teaching assignment because of her involvement in protected union activity. The ERB held that the teacher's reassignment did not constitute an "adverse action." The teacher was not disciplined and received no loss of pay or benefits; rather, the facts supported the conclusion that the teacher simply did not receive the assignment she preferred. In order to constitute an adverse action under PECBA, a change in a work assignment must be detrimental or harmful. In addition, although management did remark on the amount of time the teacher spent on union business, it had legitimate concerns regarding the teacher's absences from the workplace, including complaints from parents and other indications that the teacher's absences were having a negative effect on her classes and co-workers.

In another "adverse action" case, *Klamath County Peace Officers Association v. Klamath County and Klamath County Sheriff's Office*, UP-18-97, 17 PECBR 515 (1998), the union alleged that the sheriff improperly investigated and retaliated against executive members of the union during an internal investigation. Discipline of an employee resulted in an allegation of misconduct by a sergeant/supervisory employee, which both the association and sheriff's office investigated separately. The union alleged that the employer acted unlawfully when the sergeant ordered the association president, a subordinate, to his office to meet with him about a statement she made regarding his alleged conduct. The ERB held that the employer, through the sergeant, did act unlawfully when the sergeant ordered the association president into his office because the focus of the meeting was not related to office business. Rather, the

order to meet was issued out of the sergeant's personal frustration with the employee in her capacity as an association representative. Aside from the sergeant's conduct, another issue in the sheriff's investigation was whether members of the association's executive board failed to report possible misconduct and discussed confidential sheriff's business outside the sheriff's office, contrary to policy. The association alleged that as to that portion of the investigation—the employer's refusal to provide a transcript of the telephone conversation between the sergeant under investigation and the association president—issuance of a reprimand to an active union member and issuance of a letter of instruction to the association president were all unlawful, retaliatory actions. The Board dismissed the improper investigation and retaliation charges because the union was unable to show that simply interviewing the executive board about a source of information was an adverse employer action. The Board also found the reprimand and letter of instruction were legitimately issued.

The way a public employer treats one bargaining unit member might be unlawful if it affects the protected activities of other bargaining unit members. In *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transit District*, Case No. UP-48-97, 17 PECBR ___ (11/12/98), the union charged that the district unlawfully terminated an employee because the employee grieved a five-day suspension. The employee was initially suspended for five days for exhibiting poor customer service skills during an incident with irate passengers. Upon reviewing the evidence, as part of the grievance procedure, a higher level manager decided the suspension was too lenient and decided to terminate the employee. The Board held the district's decision to terminate was not made because the employee chose to grieve the initial suspension. However, the Board did find the decision to alter the discipline during the grievance process to be unlawful because the natural and probable effect of the decision would be to interfere with, or restrain other employees from using the grievance procedure to challenge any form of discipline for fear of similar treatment.

HARD BARGAINING NOT UNLAWFUL

In *Lincoln County Employees Association v. Lincoln County and Glode, District Attorney*, Case No. UP-42-97, 17 PECBR 683 (1998), Member Whalen concurring, the union filed numerous charges that the county and district attorney acted unlawfully during negotiations for a successor contract. The union alleged, among other charges, that the county counsel lacked authority to represent the district attorney and that the county and district attorney refused to bargain in good faith and submitted permissive or prohibited subjects of bargaining during mediation. In particular, the union objected to proposals that made the "just cause" provision inapplicable to deputy district attorneys, and substituted merit for seniority as the primary determinant for the order of layoff. The district attorney unilaterally implemented those provisions. The Board held that the county counsel did have sufficient authority to bargain for the district attorney, and also concluded that the hard line taken by the district attorney with respect to the specific articles relating to "just cause" and layoff for the deputy district attorneys was not enough to indicate bad faith bargaining.

ARBITRATION AWARD VIOLATES PUBLIC POLICY

Although ERB has the authority to overturn arbitration awards, it rarely does so because of the strong public policy in favor of binding arbitration. However, ORS 243.706(1) provides that in order to be enforceable, "any arbitration award that orders the reinstatement of a public employee or otherwise relieves the public employee of responsibility for misconduct shall comply with public policy requirements as clearly defined in statutes or judicial decisions including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work." Recently, the ERB determined that an arbitration award in favor of an employee who had been disciplined for misconduct did violate public policy, and refused to enforce it under ORS 243.706(1).

In *Deschutes County Sheriff's Association v. Deschutes County and Deschutes County Sheriff's Office*, Case No. UP-55-97, 17 PECBR ___ (11/25/98), an employee was suspended for five days and removed from his appointments as firearms instructor and participant in the deputy reserve program for allegedly using excessive force on a prisoner, including using pepper spray while the prisoner was handcuffed and compliant. The arbitrator concluded the discipline was not warranted, basing the decision primarily on the findings of the county's own internal investigation, and ordered the employee to be made whole. The county refused to implement the award. The ERB held that the arbitrator had concluded that the employee was guilty of the misconduct for which the discipline was imposed, and that the award relieved the employee of responsibility for the misconduct. In light of the clearly defined public policy protecting prisoners from excessive and abusive actions, the award was unenforceable.

ARBITRATION SUMMARIES



State of Oregon, ODOT vs. AEE
(Arbitrator, Thomas F. Levak; September 8, 1998).

The state violated the collective bargaining agreement's just cause article when it discharged the grievant for sleeping on the job and falsification of timesheets. Sleep-related medical tests had been performed on the grievant two days before the pre-dismissal conference. At the conference, the union asked the state to hold off taking any further action on the charges until the test results would become available for the state's review, in a week to ten days. The state's failure to agree to this request was a due process violation. The state's pursuing discipline for the timesheet errors in an untimely manner, after the problem was apparently resolved, was a second due process violation. Finally, the state also failed to meet its burden of proving that the grievant knowingly falsified his timesheets or that he willfully and intentionally slept on the job.

Facts: The applicable collective bargaining agreement between the State of Oregon, Department of Transportation (Employer) and the Association of Engineering Employees of Oregon (Union), provides that employees may be terminated for just cause. The grievant, an Engineering Specialist 1 (Employee), had been employed by the Department of Transportation since 1983. On July 3, 1997, the Employee was dismissed on the basis of seven charges involving sleeping on the job, unexcused absences and related timesheet errors.

Sleeping on the Job—Over the course of a year and a half, starting in July of 1995, the Employee was counseled and progressively disciplined for repeated instances of sleeping on the job. On each occasion the Employee denied that there were any medical reasons for the repeated episodes. According to the Employer, the Employee also generally denied that he had been sleeping. After two additional sleeping-on-the-job incidents which occurred in April and May, 1997, pre-dismissal proceedings were initiated. Prior to commencing the pre-dismissal proceedings, the Employer contacted the Employee's health care provider and asked

for medical information on the Employee. Since the Employer had failed to obtain a medical release from the Employee, no information was released to it. No steps were ever taken by the Employer to obtain such a release.

In May, 1997, the Employee scheduled a medical appointment after suffering a dizzy spell. After several visits, he underwent a sleep evaluation on June 29. A report of the study was scheduled for issuance in mid-July. When issued, the report stated that the Employee suffered from "severe sleep apnea." A subsequent report provided that the sleep apnea had been successfully treated and that it should no longer impair the Employee's work performance.

At the pre-dismissal meeting on July 1, the Union advised the Employer that the Employee had been tested for sleep apnea, but that the test results would not be available for a week to ten days. The Union asked the Employer to take no further action until the study results were received. Two days later, prior to receiving the test results, the Employer terminated the Employee. At the arbitration hearing, the Employee testified that he first learned that he had sleep apnea at the time of the sleep study. He also testified that prior to that time, for the most part, he was not aware that he had been sleeping on the job.

Timesheet Errors—These charges alleged that in March, 1997, the Employee had left work early on three occasions and had been absent from work on a fourth. They also asserted that he had not accurately recorded these episodes on his timesheets. The Employee testified at the arbitration hearing that because he and his wife had separated on March 2, he was depressed during that month and did not fill out his timesheets in a timely manner. When he did fill them out at the end of the month, he inadvertently failed to accurately record his absences. He also testified that he corrected the errors after his supervisor spoke with him about them. At the July pre-dismissal meeting, when confronted with these charges, the Employee stated that he believed that they had been "taken care of" and that his attendance was no longer a problem. The Employee's supervisor, also present at the pre-dismissal meeting, responded, "That's correct."

Question presented: Whether the grievant's termination was for just cause?

Discussion and Ruling: Arbitrator Levak initially explained that, "Whether an employee has been

discharged for just cause commonly involves an analysis of whether three basic components of that term have been satisfied: 1) Was the employee afforded fundamental due process rights implicit in the just cause clause, or contained specifically in the labor agreement, *e.g.*, did he or she have forewarning or foreknowledge that his or her conduct would lead to discipline, and was a fair investigation conducted? 2) Was the charged offense(s) proved? And 3), was the penalty imposed reasonably related to the seriousness of the offenses, the employee's disciplinary record and any mitigating or extenuating circumstances?"

Addressing the due process question first, the arbitrator found that the Employer failed to comply with "either the letter or the spirit" of the contract requirement that employees be given an opportunity to refute charges and present mitigating circumstances at pre-dismissal hearings. Such an opportunity, the arbitrator noted, must be "meaningful." Under the circumstances, by failing to wait seven to ten days for the test results before reaching a decision on the discharge, the Employer deprived the Employee of the, "[O]ppportunity to present a full and complete defense." In reaching this finding, the arbitrator also observed that the Employer, "[I]nexplicably failed to follow through and obtain a medical release when it knew the Grievant was seeking medical treatment for his problem." Observing that the Employer's "rush to judgment" was "unconscionable," the arbitrator concluded that, "[F]ailure ... to honor an explicit due process requirement is grounds alone for setting aside the discharge."

Noting that, "It is well established that management must proceed in a timely manner to issue discipline for a purported offense," Arbitrator Levak found a second due process violation in connection with the Employer's handling of the timesheet errors. The Employer, "[C]annot wait an unreasonable period of time to [issue discipline], nor may it belatedly 'pile' stale charges upon a more recent offense, or resurrect issues resolved without discipline, in an attempt to bolster its overall case. In the instant case, the persuasive evidence established that the [Employer] did just that."

Moving to the proof component of just cause, the arbitrator found that the Employer failed to meet its burden of proving that the Employee knowingly falsified the timesheets. "Given the facts that [the Employee] was depressed over his marital situation and was then functioning in a state of chronic sleepiness, it is most understandable that he had difficulty ever remembering the actual hours worked on any day."

Regarding the sleeping charges, Arbitrator Levak explained that even if the Employer had reviewed the medical tests before making its decision, he still would have ruled in the Employee's favor. "The applicable rule must be that unintentional sleeping on the job, caused by a medical condition, does not give rise to just cause discipline, at least where the condition is made known to management in a reasonable time, and where the condition is fully treatable." The Employee's medical condition, moreover, "[C]onstitutes sufficient mitigation to merit the [Employee's] reinstatement with full back pay and benefits ... [less any outside earnings]"

 **HELPFUL HINT . . .**

Generally, discipline should never be imposed until the employee in question has been given a meaningful chance to tell his or her side of the story. Not only is this step required by due process, but it affords the employer an opportunity to determine whether there are any mitigating or exonerating circumstances which should be taken into consideration *before* discipline is imposed. This rule applies to all levels of discipline, from written reprimand to discharge. If at all possible, this process should be informational and investigatory, rather than adversarial. If the employee requests the presence of a steward at the interview, the employee's *Weingarten* rights should be honored (*See, Weingarten* article, p. 10).

AOCE vs. State of Oregon, DOC
(Arbitrator, Howell L. Lankford; October 23, 1998).

A Corporal's failure to report facts indicating that his co-workers had attacked an inmate constituted just cause for his dismissal. The Corporal's fear of retaliation from co-workers for his violating the unwritten "code of silence" at Oregon State Penitentiary did not excuse the Corporal's omission.

Facts: The grievant (Employee) worked as a Corrections Corporal at the Oregon State Penitentiary (OSP). He had been employed at OSP since 1990. In October, 1996, the Employee witnessed a number of events which raised the possibility that two officers had beaten a prisoner. While the Employee did not directly observe the beating, he did witness the two officers enter the prisoner's cell under unusual circumstances. He also observed the two officers within minutes of their having exited the cell, and noted that one of the officers had sustained an injury to his face. The injured officer then asked the Employee and the other officer to write memos stating that the injury had resulted from a slip and fall incident elsewhere. The other officer agreed to do so; the

Employee declined. Several months later, when his Lieutenant asked the Employee what had happened, the Employee told the Lieutenant that he would have to talk with the officer who was injured, because he was the one who knew.

In late April, 1997, the OSP Superintendent issued a memo dealing with the “code of silence.” Among other things, the memo stated that it is the obligation of staff to report, “Illegal acts, acts that could pose an immediate threat to the safety, security and welfare of staff and inmates, and violations of post orders, rules, regulations, policies, and procedures....” It also provided that staff who choose not to report such behavior may be subject to disciplinary action equal to that received by the person committing the act.

The Employee was formally interviewed about the incident three times, beginning about a month after the Superintendent’s memo was circulated. During the second interview, he described a meeting with the two officers just after the incident, during which one of the officers had “laughed” that the inmate “had kicked [the other officer’s] ass.” He also admitted that the three of them had discussed the slip and fall explanation and that he had agreed that he would go along with it.

The Employee was dismissed on December 2, 1997.

Question presented: Whether the employer had just cause to terminate the grievant?

Discussion and Ruling: Noting that the facts were largely uncontested, Arbitrator Lankford found that, “In light of the rules of the facility, no Corrections Officer can claim surprise if he is discharged for failing to report a co-worker’s probable physical attack on an inmate within [the Officer’s] own area of responsibility.” Moreover, “No Corrections Officer can claim surprise if he is discharged for agreeing with co-workers to participate in ... a coverup.”

Observing that, “[The Employee’s] desperation to avoid a ‘rat jacket’ was clearly the driving force behind his misbehavior....” the arbitrator turned to the “code of silence” defense presented by the Union. According to the Union, the “code of silence” must be treated as a major factor in this case since officers who reported other officers were ostracized by their co-workers, and feared that their co-workers would refrain from coming to their aid when help was needed in a dangerous situation. The arbitrator rejected this defense, citing four grounds for doing so. First, if the “code of silence” excused the sort of misbehavior present in this case—witnessing the

“serious misbehavior of a co-worker” and acting as, “a necessary party to the perpetrators’ coverup plan”—then, “it is hard to say exactly what [the “code of silence”] would *not* excuse.” (Emphasis in original.) Second, the evidence established that adherence to the “code of silence” at OSP is not universal. Third, contrary to the Union’s assertion that the Employee’s “truthfulness in the investigation improved substantially after the Superintendent’s memo was issued”—the evidence, in fact, shows that after the memo was issued the Employee acted as “an extremely reluctant witness” from whom “hidden factual information” had to be “pried.” Finally, the Employee’s attitude and testimony at the hearing failed to support his assertion that he now rejects the “code of silence.” The arbitrator concluded: “Although his record shows that he was otherwise a fine officer, I cannot avoid agreeing with the Superintendent’s conclusion: ‘[The Employee’s] participation in covering up an assault on an inmate and ... failure to report [his] knowledge of assaults on inmates goes to the heart of [his] ability to render effective service to the department.’ The termination was for just cause.”

State of Oregon, SCF vs. OPEU
(Arbitrator, Thomas F. Levak; May 31, 1998).

The state did not discriminate against the grievant, a union steward, when it chose to fill two positions with candidates other than the grievant.

Facts: The grievant (Employee) has been employed as a Human Services Assistant II for the State Office for Services to Children and Families (Employer) since 1994. Her career goal is promotion to Social Service Specialist 1 (SS 1). During a 1995 strike, the Employee participated in various “aggressive” union activities. She also acted as a union steward from June 1995 through June 1997. In July, 1996, the Employee interviewed for two SS 1 positions. According to the Employee, after other employees were selected for the positions, her primary supervisor told her that she had “burned her bridges” with her supervisors, and that if she would stop her union activities she might have a chance to regain her supervisors’ trust. At the arbitration hearing, the Employee’s primary supervisor testified that she did not make any such statements to the Employee.

Question presented: Whether the Employer violated a contract provision prohibiting reprisal or discrimination against union stewards?

Discussion and Ruling: The arbitrator first noted that the Union’s position is that this is a “mixed motive” case [one which asserts that an employer may have a mixture

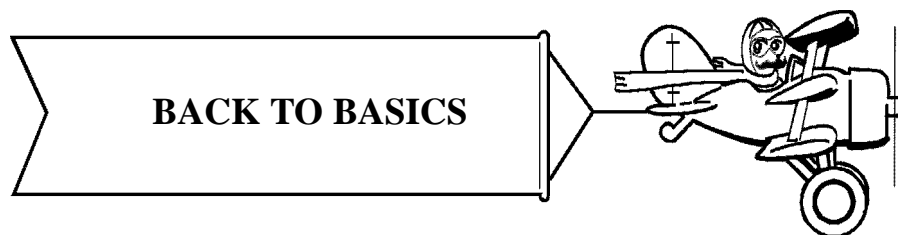
of both legitimate and illegitimate reasons for the challenged action]. In such a case, “[I]n order to establish a claim of union discrimination, a union must first prove a *prima facie* case, and by direct evidence, the existence of an unlawful motive, after which the burden shifts to the employer.” To prove the *prima facie* case, “[A] union must prove that a relationship existed between the employee’s union activities and the employer’s employment decision.” In this case, “[T]he Union failed to make such a *prima facie* showing.” In fact, explained Arbitrator Levak, the “persuasive evidence” established that the Employee’s union activities, “[P]layed no role whatsoever in management’s hiring decisions . . . the persuasive evidence clearly established that the [Employee] was not selected to fill any of the vacancies simply because she presented herself as an average candidate; she lacked the experience and general ability of other candidates.”

Arbitrator Levak also found that there was no violation of a contract provision which grants an employee not selected for a promotion or transfer, “[T]he opportunity to discuss with the hiring supervisor why he/she was not

selected for the position.” In this case, the Employee’s dissatisfaction with the explanation provided by one of the hiring supervisors did not amount to a contract violation. The Employee, moreover, was responsible for failing to follow up with the other hiring supervisor after that supervisor had left her a voice mail message offering to give her feedback.

✓ **HELPFUL HINT . . .**

When acting in their official capacity, stewards are considered to be equals with management, and should be treated accordingly. Generally, this would include grievance investigation, requests for information, presenting grievances and otherwise acting as an employee representative. Retaliation against stewards in any form is prohibited by all of the state’s collective bargaining agreements. However, stewards are not immune from the disciplinary process. In general, when not acting in their official capacity, stewards should be treated just like other employees—no better and no worse. If work-related discipline is warranted, it may be imposed.



UNION REPRESENTATION AT INVESTIGATORY INTERVIEWS (Weingarten Rights)

Does a represented employee have any right to have a union representative present at an investigatory interview? It’s not surprising, this being a labor relations issue, that the short answer is—it depends. *If* the interview truly is investigatory, and *if* the employee reasonably believes that the interview may lead to discipline, and *if* the employee expressly requests the presence of a union representative—then, in general, the employer may not go forward with the interview in the absence of such representation. The representative’s role at such an interview, however, is quite limited. For instance, during employer questioning, the representative may not question, coach or counsel the employee. Instead, the representative’s participation during employer questioning is limited to seeking clarification of employer questions.

These rights—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 Employment Relations Board (ERB) in 1988, in *AFSCME, Local 328 vs. Oregon Health Sciences University*, 10 PECBR 922, 927-928. Subsequently, in a 1991 case—*Washington County Police Officers Association vs. Washington County*, 12 PECBR 693, *adhered to on reconsideration*, 12 PECBR 727 (1991)—the ERB delineated their limited scope.

For *Weingarten* rights to apply, there must be an investigatory interview. *Weingarten* rights do not apply where the employer merely informs the employee of a disciplinary decision already made, or conveys a warning about possible future discipline which might result if certain conduct occurs or continues to occur. These rights also do not apply to routine workstation conversations, such as the giving of instructions or needed corrections. Instead, *Weingarten*

rights apply only to investigatory meetings, defined by the ERB as meetings in which the employer, “[S]eeks to elicit ‘damaging facts’ to support a disciplinary action or to hear the employee’s side of the story with a view toward withholding discipline.”

For *Weingarten* rights to apply, it is also necessary that the employee requesting union representation reasonably believes that the interview might lead to discipline. In making a determination whether this is the case, the ERB will ask if, “[A]n employee reasonably believes that a purpose of an interview is to obtain information from the employee which could provide a basis for imposing discipline upon the employee or for justifying already-determined discipline.” If not, the employee has no *Weingarten* rights.

Finally, for *Weingarten* rights to apply, the employee must first actually ask that a union representative be allowed to attend the interview. Absent such a request, no *Weingarten* rights accrue. The ERB has made it clear, moreover, that the employer has absolutely no obligation to inform an employee about his or her *Weingarten* rights before initiating an investigatory interview, or to alert the employee to the need to request representation. The employer also has no obligation to delay an interview because a particular representative is unavailable, so long as another representative is available.

What may an employer do if all of the factors noted above have been met? According to the ERB, “If an employee appropriately requests representation, an employer lawfully may (1) accede to the request and defer the interview until a representative is present, (2) decline to interview the employee with a representative present and continue its investigation without the interview, or (3) give the employee the choice of having the interview without representation or having no interview at all.” Where *Weingarten* rights apply, an employer may not refuse an employee’s request and then continue to question him or her. It is also unlawful for an employer to discipline an employee because of a good faith request for representation.

During an investigatory interview, the union representative’s role is quite limited. The ERB has provided guidelines regarding this limited role:

“1. The representative may inquire, at the outset of the interview, regarding its purpose, including inquiring about the general subject matter of the questioning to follow.

2. During the questioning of the employee by the employer, the representative may participate only to the extent of seeking clarification of questions.
3. After the employer has completed the questioning of the employee, the representative may ask the employee questions designed to clarify previous answers or to elicit further relevant information.
4. Before the end of the meeting, the representative may suggest to the employer other witnesses to interview and may describe relevant practices, prior situations, or mitigating factors that could have some bearing on the employer’s deliberations concerning discipline.”

The ERB has cautioned that, “Because such interviews should not be turned into quasi-hearings, they are not occasions for ‘closing arguments’ or disputations concerning facts. In addition, the employer has no duty to bargain with the representative concerning disciplinary measures at such a meeting.” Finally, the ERB has also made it clear that the employer has the right to hear the employee’s own response to employer questions. To achieve this purpose and to help avoid adversarial exchanges during investigatory interviews, the ERB has ruled that an employee may not, during employer questioning, consult with their union representative about how or whether to answer an employer question: “[T]he representative does not have the right ... to ‘counsel’ the employee during the questioning. We believe such counseling would tend to interfere too much with the employer’s right to hear initially the employee’s own account of the matter under investigation. We also believe that such counseling would tend to transform pre-grievance, investigatory interviews into adversarial proceedings.”

 **HELPFUL HINT . . .**

The *Weingarten* case establishes a mandatory minimum level of employee rights to union representation at investigatory interviews. An employer may, however, agree in a collective bargaining agreement to provide broader rights to union representation than those required by *Weingarten*. As such, when a represented employee requests union representation at an investigatory interview, the applicable collective bargaining agreement should be reviewed to confirm that it does not grant broader rights than those established by the *Weingarten* case.

Department of Administrative Services
Human Resource Services Division
Labor Relations Unit
155 Cottage Street NE
Salem OR 97310

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 30 collective bargaining agreements with 12 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 373-7530.

Eva Corbin, Sr. Lead Labor Relations Manager	378-8321
Craig Cowan, Sr. Labor Relations Manager	378-5611
Michael Halpern, Labor Relations Manager	378-2705
Lois Harrup, Administrative Assistant	378-3141
Mark Hunt, Sr. Labor Relations Manager	378-3967
Pam Murdock, Office Manager	378-2616
Tom Perry, Labor Relations Manager	378-4201
Cathy Schuh, Sr. Labor Relations Manager	373-7608
Jan Weeks, Sr. Labor Relations Manager	378-6483