

MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

JULY 2001

ITEMS OF INTEREST

WHAT IF ...

As of July 3 (when this edition of the Management Insight was sent to the state printer), negotiations between the state and the eleven unions representing state public employees were continuing. While the negotiations have been protracted, the state remains hopeful that all outstanding issues will be resolved at the bargaining table.

However, because of the state's continuing obligation to provide services to the public, even remote possibilities which could adversely impact this obligation must be anticipated and planned for. So, how much warning would the state have if one or more state bargaining units decides to strike? Under the Public Employee Collective Bargaining Act (PECBA), strike-permitted employees are required to go through mediation, complete a cooling off period, and provide notice to the employer before they may strike in the context of successor bargaining.

Generally, under the PECBA, successor negotiations must continue for 150 days before either party may require that the negotiations go to mediation. At any time after 15 days of mediation, either party may declare an impasse. Within seven days of the declaration of impasse, each party is required to submit a written final offer to the mediator. The mediator then makes the parties' final offers public. A 30-day cooling off period follows. At the end of the cooling off period, the public employer may implement all or part of its final offer and the public employees may strike. Before a strike may occur, however, the union representing the employees in question must give 10 days notice to the Employment Relations Board and to the public employer.

As of July 3, while a number of the bargaining tables were in mediation, no declaration of impasse had been made.

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Distribution:

Executive and Management Service Employees

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MANDATORY AND PERMISSIVE SUBJECTS OF BARGAINING

Pursuant to the Public Employee Collective Bargaining Act (PECBA), the state and public employee unions are required to bargain in good faith over matters that concern “employment relations.” Subjects included in the term “employment relations” are considered “mandatory” subjects of bargaining. Subjects that are not so included are “permissive” subjects.

A subject’s bargaining status as “mandatory” or “permissive” has many practical effects. Fundamentally, mandatory subjects must be bargained—while permissive subjects need not. As such, a party may decline to bargain over a permissive subject. And, if a party so declines, the other party may not condition further bargaining on the reversal of this decision. Another consequence of permissive status is that a refusal to bargain over such a subject does not violate a party’s duty to “bargain in good faith.” Additionally, a union may not strike over a permissive subject. Finally, strike-prohibited units subject to the interest arbitration process, can only bring mandatory subjects before an interest arbitrator. In all, a subject’s status as mandatory or permissive is essential to understanding a party’s bargaining obligations.

Oregon law and Employment Relations Board (ERB) decisions determine whether a subject of bargaining is “mandatory” or “permissive.” Pre-1995, the principle guidance regarding a subject’s mandatory status was found in ORS 243.650(7)(a): “ ‘Employment relations’ includes, but is not limited to, matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment.” This statute left room for interpretation in its use of the language “*other conditions of employment.*” Pre-1995, the ERB used this language and its prior case decisions to determine whether a subject was mandatory or permissive.

In 1995, after passage of SB 750, the legislature provided additional direction. In particular, the legislature added subsections (b) through (f) to ORS 243.650(7), which help clarify which subjects are excluded from the definition of “employment relations.” In addition, the 1995 PECBA amendments codify the balancing test previously used by the ERB to determine whether subjects fell within the term “other conditions of employment.”

New subsections (7)(e)¹ and (f) list a number of subjects as “permissive.” Subsection (7)(f), applicable to all public employee bargaining units except school districts, lists as

permissive: 1) staffing levels and safety issues (except those staffing levels and safety issues which have a direct and substantial effect on the on-the-job safety of public employees); 2) scheduling of services provided to the public; 3) determination of the minimum qualifications necessary for any position; 4) criteria for evaluation or performance appraisal; 5) assignment of duties; 6) workload when the effect on duties is insubstantial; and 7) reasonable dress, grooming, and at-work personal conduct requirements respecting smoking, gum chewing, and similar matters of personal conduct at work.

New subsections (b) through (d) reaffirm the ERB’s authority to make mandatory/permissive designations. First, subsection (7)(b) provides that all subjects determined to be permissive by the ERB before June 6, 1995 remain as such. Second, subsection (7)(c) allows the ERB to find a subject to be permissive if it determines that it has a greater impact on management’s prerogative than on employee wages, hours, or other terms and conditions of employment. Third, under subsection (7)(d), subjects that have an “insubstantial” or “de minimus” effect on public employee wages, hours, and other terms and conditions of employment are excluded from the term “employment relations,” and thus are permissive.²

As a practical matter, parties rarely bring disputes before the ERB over subjects that are manifestly mandatory or permissive. Consequently, the ERB is often called upon to make status determinations through the use of subsection (7)(c). In applying the subsection (7)(c) balancing test, the ERB evaluates the general subject matter of the proposal and applies ERB precedent, if any, concerning the subject’s status as mandatory or permissive. If it finds that a subject affects management’s prerogative to a greater extent than employee working conditions, it is permissive; if the Board finds to the contrary, the subject is mandatory. For example, the ERB has found that a proposal dealing with the subject of shift bidding is mandatory because it concerns “*hours of work,*” and thus impacts employee working conditions to a greater extent than management interests. On the other hand, the ERB also found that a *post* bidding proposal was permissive since—on balance—it had a greater impact on management’s prerogative to *assign duties* rather than on employee hours of work.

Two recent ERB decisions concerning mandatory/permissive determinations are summarized at pages 4 through 6.

¹ Subsection (7)(e) only applies to school districts.

² This section has not been widely used, apparently because most “de minimus” subjects are adequately handled by the balancing test of subsection (7)(c).

ARBITRATION & CASE SUMMARIES



In the Matter of the Arbitration Between Oregon AFSCME Council 75, Local 3940 and the State of Oregon, Department of Corrections (SRCI)
(Arbitrator, William F. Reeves; April 3, 2001)

The grievant alleged that the agency violated the collective bargaining agreement by failing to pay him overtime for working more than five consecutive, eight-hour days. The arbitrator denied the grievance on the grounds that (1) the pay differential which the grievant received for a special work schedule was in lieu of the contract's overtime penalty pay for working more than five consecutive days, and (2) the grievant did not work more than forty hours in the workweek defined by the contract.

Facts: The grievant worked as a correctional officer at the Snake River Correctional Institution. During the time in question, he was assigned to a "Relief Factor Management" (RFM) position. RFM positions were created to provide a pool of relief correctional officers to fill in for officers on leave. Officers filling RFM positions receive a 5% pay differential. The grievant's RFM assignment resulted in several periods during which he worked more than five consecutive, eight-hour days.

Question Presented: Did the agency violate the parties' collective bargaining agreement (CBA) by failing to pay the grievant overtime?

Discussion and Ruling: The FLSA requires employers to pay overtime to covered employees who work more than 40 hours in a workweek. However, CBAs may obligate employers to pay overtime in other situations.

The CBA's shift change penalty clause calls for overtime for all hours worked in excess of forty hours within the prior "work week" where a shift change requires an employee to work more than five consecutive days ("work week" is defined in this clause as the seven-day period beginning with the employee's first scheduled work day). However, the CBA also provides that employees assigned to RFM positions receive a 5% RFM differen-

tial, "...in lieu of other penalty pay." The RFM differential clause, moreover, specifically defines "penalty pay" to include the shift differential called for by the shift change clause. As such, the shift change penalty does not apply in this instance.

The Arbitrator also "specifically reject[ed]" the Union's argument that in agreeing to the RFM clause, it did not intend to forego penalty pay for employees assigned to work more than five consecutive days. The agency's purpose in proposing the RFM provision was to reduce overtime when assigning officers to relief positions. The Union agreed to the provision with knowledge of this agency objective, which is contrary to the Union's asserted interpretation. The RFM in-lieu-of language, moreover, is clear and unambiguous.

The Union also argued that the grievant was entitled to overtime pursuant to the CBA's overtime article: "Overtime ... is time worked in excess of eight (8) hours per day or forty hours per week within the employee's basic workweek" As such, argued the Union, "... once an employee works five consecutive days (40 hours) he or she is entitled to overtime." The Arbitrator, however, found that, "... the FLSA allows an employer to establish a single workweek for an establishment 'as a whole'...." In this case, the CBA's "clear language" specified, "The workweek for the institutions shall begin at 00:00 am Sunday and end at 12:00 Midnight the following Saturday." Rejecting the Union's argument that this definition referred to the "institution's" workweek, and not the "employees' workweek"; the Arbitrator applied it to the reference in the overtime clause to, "the employee's basic workweek." The Arbitrator also noted that the CBA's shift change penalty clause would be superfluous if the Union's interpretation were correct, since under the CBA's overtime article an employee working more than five consecutive, eight-hour days would already be entitled to overtime. "[A]n arbitrator should avoid interpreting an agreement in a way which causes a provision to be superfluous." An arbitrator, furthermore, "...must assume the parties had some reason for agreeing to [the shift change penalty clause]. The most logical reason is that [the overtime article], on its own, does not provide for overtime compensation when an employee works more than five consecutive days."

Applying the CBA's defined workweek to the hours worked by the grievant, while he worked more than five consecutive days, he did not work more than forty hours in any "workweek." He was thus not entitled to overtime compensation.

Oregon AFSCME Council 75 vs. State of Oregon, DPSST

(ERB Case No. UP-56-99; March 5, 2001)

The Agency expanded its background check procedure to include current bargaining unit employees who had promoted or who were seeking promotion. It had previously applied only to new hires. Affected employees were required to complete a 20-page background check form which included questions regarding the employees' personal lives. The ERB found that this constituted a unilateral change in a mandatory subject of bargaining and that the Agency was thus required to bargain with the Union regarding this subject.

Facts: The Department of Public Safety Standards and Training (Agency) provides training and certification to employees of police, fire and corrections agencies. Since 1996, the Agency has required job applicants to complete a background check form. Included in the 20-page form are questions regarding personal data, traffic and arrest records, personal history, current and past residences, military service, education, references, employment history, financial information, credit history, and personal interests. In May 1999, the Agency extended this background check requirement to include existing employees who had been promoted as well as those who were seeking promotions. The Oregon AFSCME Council 75 (Union), who represented the employees covered by the new requirements, demanded to bargain this change with the Agency. The Agency refused.

Question Presented: Was the Agency's extension of its background check procedure to existing bargaining unit members who had been promoted or who were seeking promotion a mandatory subject of bargaining?

Discussion and Ruling: The Employment Relations Board (Board) began its discussion by noting that the Public Employee Collective Bargaining Act (PECBA) prohibits unilateral changes in employment relations which concern mandatory subjects of bargaining: "In order for a public employer to lawfully change an employment condition that is a mandatory subject, the public employer must first notify the exclusive representative and complete the bargaining process."

To reach a determination as to the mandatory or permissive nature of the disputed subject, the Board followed its usual approach and first ascertained whether the disputed

subject was *per se* mandatory or expressly permissive under the PECBA. Finding that the disputed subject does not fall within the matters listed as mandatory under ORS 243.650 (7)(a), the Board moved on to expressly permissive subjects listed in section (7)(f) of the statute. In response to the Agency's argument that the background check procedure is a minimum qualification (a subject listed as permissive in section (7)(f)), the Board replied that, "...minimum qualifications concern whether the employee can *do* the work—not whether the employee has engaged in off-duty, personal conduct that causes employer concern about the employee's propriety for the job." (Emphasis in original.) In this case, the Agency used the background check form (BCF) as a final screening device only after it determined that an employee met the minimum qualifications ("knowledge, skills, and abilities") for the position. The Board next addressed the Agency's argument that the new BCF procedure concerns criteria for promotions, a subject previously held to be permissive. Disagreeing with this argument, the Board observed that while the Agency would use the new BCF procedure as a screening tool in the promotion process, the content of the BCF discloses that its "essence" does not concern promotions (moreover, noted the Board, a promotion proposal may be mandatory where it addresses conditions of employment).

Finding no match with *per se* mandatory or expressly permissive subjects, the Board next determined whether the new BCF procedure is a condition of employment and therefore a mandatory subject for bargaining. The Board first found that the BCF concerns the subject of "personal life," which "...refers to matters concerning the off-the-job personal life of employees—not to be confused with personal conduct requirements *at work*." (Emphasis in the original). Language concerning an employee's personal life is generally a mandatory bargaining subject, "... in that it relates to an individual's privacy and basic constitutional rights." However, the BCF is also being used in the context of promotions, and criteria for promotions is usually a permissive bargaining subject. As such, observed the Board: "This case ... presents us with a direct tension between personal life language that is generally mandatory and promotion criteria that are generally permissive. To determine, therefore, whether the [BCF] concerns a condition of employment, we balance the interests of management and the interests of employees to determine upon which it has a greater impact."

The Agency, noted the Board, "...has a legitimate interest in ensuring that an employee is not a security risk and is trustworthy with personal and/or confidential information." Balanced against this interest is the right of employees, "... to be free from employer intrusion into

their personal, off-duty lives. Unless there is a direct nexus between the personal information sought and the work in question, an employer does not have the right to compel employee disclosures of such information.” In this case, the BCF, “... goes far beyond [the Agency’s] legitimate interests and intrudes significantly into the personal life of [the employees in question]. Much of the information sought ... is extremely personal in nature. For example, the [BCF] asks for personal characteristics, in-depth personal histories, including prior personal relationships/associations (and personal information about the other individuals involved in a relationship), and extensive financial information. The facts do not establish that the employees here hold such sensitive positions that an intrusion of this magnitude is warranted.”

The Agency has the right to decide whether to establish a background check procedure for a particular position. However, the BCF, as used by the Agency, “... has a greater impact on employee personal life than management’s right to ensure employee suitability for a position. [The Agency] is, therefore, obligated to bargain both its content and impacts.”

In the Matter of the Petition for Declaratory Ruling filed jointly by Oregon AFSCME Council 75, Local 3351, OAJA and the State of Oregon, DOJ.
(ERB Case No. DR-3-00; February 22, 2001)

The association sought to bargain with DOJ concerning revisions the agency planned to make to its employee policy manual. DOJ declined to bargain. The policy changes included: drug and alcohol prohibition while away from the workplace; reporting of arrests or charges of any misdemeanor, felony or criminal drug statute violation; and notice to employees that the commission of any crime, regardless of arrest or conviction, may result in discipline. The ERB found that because the drug and alcohol prohibition policy extends to off-duty conduct, bargaining was required. The Board also found, however, that DOJ did not have to bargain over the policy requiring employees to report arrests or charges because the agency’s interest in this information outweighed the employee interest in non-disclosure. Finally, because the commission-of-any-crime notice concerns the mandatory subject of discipline, the parties had to bargain over it.

Facts: The Department of Justice (DOJ) sought to revise and update its policy manual applicable to Assistant

Attorneys General represented by AFSCME Council 75, Local 3351, Association of Oregon Justice Attorneys (Association). After reviewing a draft of the manual, the Association requested that DOJ bargain over some of the changes, because it determined that they concerned mandatory subjects of bargaining. The changes in question included: drug and alcohol prohibition while away from the workplace; reporting of any arrest or charge of a misdemeanor, felony or criminal drug statute violation; and notice that commission of any crime—regardless of arrest or conviction—may result in discipline. DOJ declined to bargain over the disputed policy changes.

Question Presented: Are the challenged policy changes mandatory subjects of bargaining?

Discussion and Ruling: Before analyzing the challenged policies, the Employment Relations Board (ERB) explained how it determines whether disputed language is a “mandatory” or “permissive” subject of bargaining. First, it examines the disputed language and decides whether the subject is one of those specifically enumerated as mandatory under ORS 243.650 (7)(a). If the disputed subject does not fall within subsection 7(a), the ERB next determines whether it concerns a subject that is listed as permissive under ORS 243.650(7)(e) or (f); or which was previously held to be permissive by the Board. Lastly, if the ERB determines that the disputed language is neither a listed mandatory subject, an expressly permissive subject, nor one previously held to be permissive by the ERB, the Board will apply the balancing test set forth in ORS 243.650(7)(c).

The first issue addressed by the Board was the change in the agency’s drug and alcohol prohibition policy. The former policy generally limited the prohibition to the workplace and to controlled substances. The proposed change added restrictions on alcohol use and extended the prohibition to “work time,” defined to include lunch, rest breaks, and any time that an employee represents DOJ. Addressing the specifically enumerated subjects of subsection (7)(a), the ERB explained: “The policy may have relationships to subjects that are enumerated in subsection (7)(a), but those relationships are indirect, and its central concern is not one which makes it *per se* mandatory. We conclude that the subject of this policy is not one of the enumerated mandatory subjects.” (Emphasis in original.) Focusing on the policy’s indirect relationship to discipline—a mandatory subject—the Board noted that the potential for discipline for failure to comply would exist. As such, the *impact* of the policy on discipline would ordinarily have to be bargained. However, as is more fully explained below, since the parties have already bargained the subject of discipline to completion, this would not be necessary in this instance.

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The Board next found that the subject of the drug and alcohol prohibition policy is not expressly permissive under subsection 7(f), and then proceeded to its balancing test under subsection (7)(c). The Board noted that the policy change implicated two general subjects: at-work personal conduct, generally a permissive subject, if reasonable; and off-duty personal conduct, typically mandatory. Off-duty personal conduct may, however, be permissive, "... depending on whether there is a direct nexus between the workplace and the restriction on off-duty conduct." And, in this instance, the extension to off-duty personal conduct does make the language mandatory: "While no employee has a valid interest in working under the influence of drugs or alcohol, employees do have a fundamental interest in the unrestricted use of their personal time. Contrary to the position taken by DOJ in its argument, lunch breaks are the employees' time. The fact that those breaks occur during the work day does not give the employer the unilateral right to dictate what activities employees may or may not engage in during that time. In addition, the phrase 'any time an employee represents the department' is too vague to inform employees with certainty when they may fall under its proscriptions ... the employees' fundamental interests in being free from employer intrusion into their private lives is more significant than DOJ's interests in regulating off-duty conduct."

The second policy change at issue concerned DOJ's arrest/conviction reporting policy. The old policy required employees to notify DOJ management after conviction of a criminal drug statute; the proposed change required notice to the employer after any *arrest, charge or conviction*. It also expands reporting requirements to "any misdemeanor or felony." While the subject of the changed policy is not one of those enumerated as mandatory, it does "or at least could" concern discipline. However, "The relationship here between the potential of discipline and the topic of the policy—notification—is too indirect to establish that the subject of the policy is discipline." Again, as was the case with the drug/alcohol policy, while the disciplinary *impact* of the policy change would normally be mandatory for bargaining, the parties have already completed bargaining on this subject (see discussion below). Turning to subsection (7)(f), "... the topic of arrest or conviction notification is ... not specifically listed. While related to the listed subject of at-work personal conduct requirements, that is not its central purpose. ... That means we must apply the balancing test." Applying the balancing test of subsection (7)(c), the ERB concluded, "... that DOJ's interest in knowing about arrests or convictions of these employees outweighs the employees' interests in failing to disclose an arrest or conviction." In this instance, the changed policy

is job-related: "The law is their business and so violations of the law are inherently related to what they do. The employees' ability to perform their duties effectively may be compromised by an arrest or conviction." Consequently, "[a]s their employer, DOJ has a fundamental interest in knowing whether one of these employees has been arrested or convicted." And, "[o]n the other side of the scale, the employees have no PECBA-protected interest in concealing the fact of an arrest or conviction. As a general rule, such information is a matter of public record." "On balance," concluded the Board, "... the proposed policy is permissive."

The third change added a new policy which warned employees that the commission of any crime might result in discipline or discharge. The ERB determined that the subject of the policy was discipline, and therefore mandatory: "This Board has previously held that discipline is a subject of like character to those enumerated in subsection (7)(a), and that issues concerning the subject of discipline are therefore mandatory for bargaining." The DOJ agreed with this determination, but argued that it should not have to bargain over the change because the "... adoption of the policy was not a substantive change ..." and, secondly, "... that [the policy] merely states the obvious, that any employer has the inherent authority to discipline an employee for violating the law."

The ERB disagreed, noting that, "[a]n employer ordinarily cannot, during the term of an agreement, make changes concerning a mandatory subject of bargaining." However, an exception to this rule exists in cases where the ERB concludes that the parties have bargained the subject in question to completion. In this instance, "[t]he contract contains a provision concerning the subject of discipline. Article 39 grants to the Attorney General the discretion to discipline and remove assistant attorneys general. The restriction on that discretion is that employees are entitled to due process in discipline and discharge." The contract also makes the Attorney General the "final arbiter" of whether sufficient grounds exist for removal or discharge, and provides that discipline and discharge matters are not grievable. In light of these provisions, the Board concluded that there was, "... sufficient specifically relevant language on the subject of discipline to establish that the parties bargained the subject to completion."

Board Member Thomas Concurred in part and Dissented in part.



REASONABLE ACCOMMODATION IS A CONTINUING DUTY FOR EMPLOYERS

If one reasonable accommodation does not work, you must try another. This is the message to employers from our Ninth Circuit: first in *McAlindin v. County of San Diego* (192 F3d 1226, 9th Cir., 2000); next in *Barnett v. US Air* (228 F3d 1105, 9th Cir., 2000); and most recently in *Humphrey v. Memorial Hospitals Association* (#98-15404, 9th Cir., Feb. 13, 2001). As described by the *Humphrey* Court, the employer's duty to reasonably accommodate an employee with a disability is a *continuing duty*—seemingly without restrictions on the number of accommodations an employer must attempt.

The facts in the *Humphrey* case further demonstrate that the Court holds employers to this duty regardless of their good faith efforts. If an employer leaves a reasonable accommodation untried or untested, the employer will be liable for a failure to accommodate. The only clear limitation on the duty to reasonably accommodate is an employer's ability to demonstrate that the accommodation poses an undue hardship.

Humphrey had been an employee with the defendant hospital for several years as a medical transcriptionist. Though her transcription performance was "excellent," and consistently exceeded the employer's standards, Humphrey began to experience tardiness and attendance problems. The hospital provided her with a disciplinary warning. Humphrey's attendance failed to improve, and she received two subsequent disciplinary warnings.

Humphrey's excuse for the attendance problems was that she felt compelled to perform a ritualized routine while dressing for work each day. It was, in fact, not unusual for her to take several hours to get ready for work. Humphrey was eventually diagnosed with obsessive-compulsive disorder (OCD). (The Court described the disorder, and noted that Jack Nicholson portrayed a man with OCD in the 1998 movie "As Good As It Gets.") Notably, Humphrey's diagnosis occurred after the hospital's disciplinary actions.

Humphrey provided her employer with medical information from at least two physicians who recommended that she continue working; however, they indicated she would need a flexible schedule to accommodate her unpredictable personal grooming routine. One of the physicians acknowledged that a flexible schedule might be difficult for the employer to provide, and suggested, alternatively, that Humphrey be allowed to take time off for treatment. The hospital worked with Humphrey to arrange a flexible work schedule. After attempting to work the flexible schedule for four months, Humphrey requested to work at home as an alternative accommodation of her OCD disability.

The hospital employed a number of transcriptionists who worked from their homes. Nevertheless, the hospital refused Humphrey's request, reasoning that company policy disqualified her from working at home due to the disciplinary warnings she had received (related to her attendance problems).

After her request to work from home, Humphrey continued to have attendance problems. Less than a month after her request, the hospital terminated her due to absenteeism. Humphrey sued the hospital for failing to provide a reasonable accommodation pursuant to the ADA. She also filed claims for wrongful discharge and for violations of California's state disability laws.

In analyzing whether the hospital failed to reasonably accommodate Humphrey, the Court found it significant that the hospital relied on the prior disciplinary warnings to disqualify Humphrey from working at home—*without* considering that Humphrey's medical condition had been the *reason* for the attendance problems. The Court recognized the hospital's "good faith" efforts, demonstrated by its allowing Humphrey to work a flexible schedule. The Court nevertheless characterized the hospital's rejection of Humphrey's request to work from home as "summarily denied," since the hospital failed to consider other possible accommodations. The Court reiterated its reasoning (echoing *Barnett*)

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that the hospital, once it realized the flexible start time arrangement was not having a positive effect on Humphrey's attendance, had an obligation to re-engage in an interactive process with Humphrey to identify additional accommodations that would be effective.

Any uncertainty after *McAlindin* and *Barnett* is resolved by the Court in *Humphrey*. In our jurisdiction, accordingly, agencies should practice an ADA accommodation process that evaluates accommodations on an ongoing basis. Agencies can ensure the continuing nature of the process by:

- monitoring the effectiveness of any modifications provided; and
- in the event a modification is not effective—that is, it does not enable a disabled individual to perform the essential functions of his or her job—to work with the employee to evaluate alternative modifications.

ALSO ON THE ADA FRONT . . .

The U.S. Supreme Court continued its trend of protecting state immunity from claims under federal employment laws. First came *Alden v. Maine* (the Fair Labor Standards Act cannot be the basis for a suit against nonconsenting states); then *Kimel v. Florida Board of Regents* (the statutory right, under the Age Discrimination in Employment Act, for a private cause of action against the states is unconstitutional); and, most recently, *Board of Trustees of the University of Alabama v. Garrett*. In *Garrett*, the Court held that Congress acted without sufficient constitutional authority when it permitted states to be sued in federal court for monetary damages under the ADA.

The Court's holding did not impact suits against states for injunctive relief pursuant to the ADA. This means that state employers may (still) be ordered to discontinue discriminatory practices that violate the Act.

While this is a significant development in the practice area of employment discrimination, the effect on state agencies is minimized by the Oregon Disability Act's provision that it "shall be construed to the extent possible in a manner that is consistent with any similar provisions of [the ADA]" (ORS 659.449). In other words, developments in ADA case law will continue to be the primary resource of interpretive guidance to Oregon public employers.

COMINGS AND GOINGS

A familiar face at the Labor and Employment Section has a new role, and a new face is welcomed. The familiar face is Ann Boss, who recently became our Attorney-in-Charge. Ann has been an attorney in the Labor and Employment Section for four years. She also has over 17 years of experience practicing labor and employment law.

The new face is Tom Cowan, who comes to the section from the Business Activities Section of the Department of Justice. Tom brings 10 years of experience to our section. He is a Senior Assistant Attorney General.

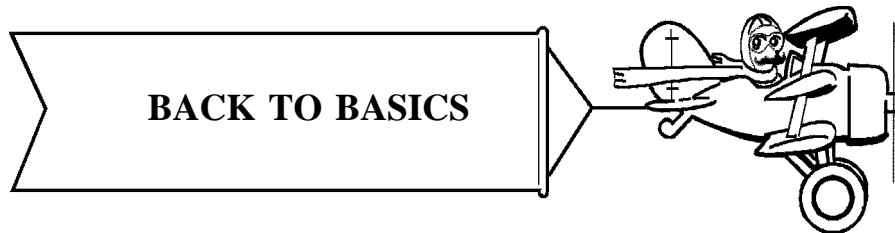
The section also said goodbye to Rudy Westerband, who served as Attorney-in-Charge for over four years. Rudy now works for the City of Portland, where he continues to specialize in labor and employment issues.

About the Management Insight...

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

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USE OF COMP TIME WHILE ON LEAVE FOR AN FMLA-QUALIFYING REASON

Virtually all of the state's collective bargaining agreements allow employees to accumulate compensatory time off for overtime hours. Most of the state's labor agreements also provide that employees who take leave which qualifies under the Family and Medical Leave Act (FMLA), must first exhaust their accrued paid leave before going on leave without pay. But what about accrued compensatory time? Must an employee exhaust his or her accrued comp time before going on unpaid FMLA leave? In general, the answer is no.

According to U.S. Department of Labor regulations, comp time is not a form of accrued paid leave that an employer may require employees to exhaust before going on unpaid FMLA leave (29 C.F.R., Section 825.207(i)). While the Oregon Family Leave Act (OFLA) is silent on this issue, following the FMLA rule would be mandatory for leave which qualifies under both OFLA and FMLA, and prudent in OFLA-only leave situations.

What if an employee requests to use his or her accrued comp time for an FMLA-qualifying reason? May an employee do this? The answer is yes. Such leave, however, would not count against the employee's 12-week FMLA entitlement (29 C.F.R., Section 825.207 (i)). Suppose that the employee's request to use comp time for an FMLA-qualifying reason may properly be denied under the Fair Labor Standards Act and the applicable collective bargaining agreement — may the employee still take the requested time off as FMLA leave? The answer, again, is yes. A request for FMLA leave generally must be granted if it is FMLA-qualifying and the employee has not used up his or her yearly FMLA entitlement. In such a case, however, most of the state's collective bargaining agreements usually require that the employee, while on FMLA leave, first exhaust his or her accrued paid leave other than comp time, and then go on leave without pay.

ADA CONFIDENTIALITY REQUIREMENTS

Suppose you are supervising an employee with an Americans with Disabilities Act (ADA) disability. Suppose further that you believe disclosing information regarding the employee's disability to one of the employee's co-workers would in some manner benefit the employee with a disability. May you do so? According to the ADA, the answer is no.

Under the ADA, all medical information obtained about an employee – including medical information voluntarily disclosed to the employer by the employee – must be kept confidential. The ADA further requires that such information be kept in confidential files, separate from regular personnel files.

What if an employee asks management why a co-worker with a disability is receiving "special" treatment? Under these circumstances, may the employer tell the employee that the co-worker with a disability is receiving an ADA-mandated reasonable accommodation? Again, the answer is no. According to EEOC Enforcement Guidelines, doing so usually amounts to a disclosure that the employee has a disability. Such a disclosure would violate the requirement that ADA medical information remain confidential.

Are there exceptions to the ADA confidentiality rules? Not surprisingly, the answer is yes. Permissible disclosures include: informing supervisors and managers of an employee's necessary duty-restrictions and accommodations on a need-to-know basis; informing first-aid and safety personnel of a disability if it might require emergency treatment; disclosing ADA medical information to state workers' compensation offices in accordance with state workers' compensation laws; and providing relevant ADA information to government officials investigating ADA compliance.

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Finally, as long as there is no employer coercion involved, an employee with a disability may voluntarily choose to disclose to co-workers or others that he or she has an ADA disability or is receiving an ADA reasonable accommodation.



HELPFUL HINT . . .

If an employee questions why a co-worker with a disability is receiving “special” treatment, a supervisor may respond that many workplace issues are personal and, in such circumstances, the supervisor will respect the employee’s privacy. The supervisor may also inform the inquiring employee that the employer is simply complying with the law. In addition, the supervisor may inform the worker with a disability of the special-treatment inquiry, and inform the individual that there will be no disclosure of ADA information to the inquiring employee unless the worker with a disability voluntarily chooses to disclose such information.

NOT EVERY PHYSICAL IMPAIRMENT IS A DISABILITY

The U.S. District Court for the District of Oregon reminds employers that not every physical impairment constitutes a disability. A Salem police officer could not show that he was disabled under the law after he underwent surgery on his left finger, resulting in a reduction in his grip strength.

Facts

A Salem police officer sustained a work-related injury to his left hand. Following surgery, his doctor released him to permanent light duty. While the officer was physically capable of performing most of his job functions, his reduced grip strength in his left hand meant that he would have difficulty handling forcible arrest situations.

The officer sought another position within the police department but rejected the department’s offer of a sworn civilian position. The police department then terminated him. The officer filed suit, claiming that the department failed to reasonably accommodate his disability and that it terminated him because of his disability.

Court’s decision

The district court found that the officer’s hand injury was not a “disability” within the meaning of the Americans with Disabilities Act (ADA) and dismissed the claim

without trial. To prevail on his ADA claim, the officer had to establish that:

- (1) he is disabled;
- (2) he is qualified and able to perform, with or without reasonable accommodation, the essential functions of his job; and
- (3) the department’s decision to terminate him was based on his disability.

The ADA defines “disability” as (1) a physical or mental impairment that substantially limits one or more of the individual’s major life activities; (2) a record of such impairment; or (3) being regarded as having such impairment. Major life activities are defined as functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. They are those activities that the average person in the general population can perform with little or no difficulty.

In determining whether a major life function was substantially impaired the court considered the following factors: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact resulting from the impairment. While the court agreed that the officer’s permanent injury constituted an impairment, it did not find that a major life activity had been substantially limited. The officer could not successfully show that the nature, severity, and long-term impact of his impairment constituted a substantial limitation to any major life activity. *Fultz v. City of Salem*, CV 99-399-AA (Opinion, March, 2001).

Bottom line

When faced with an employee or applicant with a physical or mental impairment, an employer’s first response should not be “must I accommodate this impairment?” Rather, you must first determine whether the impairment rises to the level of a disability under the law. Not all impairments, even if permanent, are disabling. The inability to perform a single, particular job does not generally constitute a substantial limitation to a major life activity.

This article originally appeared in the May 2001 edition of the *Oregon Employment Law Letter*, written by Perkins Coie LLP. It is reprinted with the permission of Perkins Coie LLP.

LEADERSHIP: CRITICISM

The ability to give criticism naturally and constructively is a skill. To many, criticism is the most important managerial skill because it is the way we learn and teach. Poorly done, criticism can cause employee performance to deteriorate. Properly done, it will help shape positive responses from employees. Here are a few pointers to improve your skill:

Don't Attack.

Criticize the work, not the worker. Avoid putting the employee on the defensive with such verbal blows as, "how could you be so stupid?" Imagine that someone else is criticizing you, and see how you would take it.

Don't Threaten.

Threats convey little or no confidence in the employee's willingness to change and will destroy any positive attitude you are trying to develop.

Offer An Opportunity.

An opportunity to do better at something convinces the employee you are trying to be helpful. What you offer should genuinely benefit the employee.

Appeal To Pride.

Tell the employee you are sure he/she is capable of doing even better. Most people want to improve.

Do Not Dwell On the Past.

Harping on past mistakes tells someone you think they are stupid. Focus instead on what you expect in the future. This shifts the emphasis from negative to positive.

Stick With Facts.

Get your facts straight, and document them. Forget rumor, guesswork, and personal preconceptions

about the employee. This can color your judgment.

Listen.

Criticism is most effective as a dialogue with both parties contributing.

Be Direct.

Avoid the silent treatment or snide comments. Indirect criticism will not produce good results.

Keep It Private.

Criticism heard by others is embarrassing and destroys morale. Delivering criticism in the employee's own office is less intimidating than doing it in your office.

Follow Through.

Ask the employee to sum up the understanding you have of what needs to be done. Check up on progress, offering help where needed.

Management Appraisal.

Management should reappraise itself if supervisors are constantly criticizing employees. Goals may not have been communicated effectively. Training may be inadequate. The organization may be hiring the wrong kind of employees/supervisors.

Rehearse.

Supervisors should carefully play out the criticism before delivering it. This helps you see yourself and how the employee is responding. Practice will head off reverting to old, unproductive styles in the heat of the moment.

This article originally appeared in the April 2001 edition of the *LGPI Newsletter*, written by the Local Government Personnel Institute 503-588-2251. It is reprinted with the Local Government Personnel Institute's permission.

Department of Administrative Services
Human Resource Services Division
Labor Relations Unit
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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 Dan Kennedy. Currently, the LRU negotiates and administers 31 collective bargaining agreements with 11 different labor organizations, covering over 30,000 employees in the Executive Branch of Oregon State Government. The following is a list of the LRU staff and contact phone numbers for your convenience. The LRU's fax number is 503-373-7530.

Eva Corbin, Deputy Administrator, LRU	503-378-8321
Craig Cowan, Sr. Labor Relations Manager	503-378-5611
Kevin Dull, Sr. Labor Relations Manager	503-378-3138
Michael Halpern, Sr. Labor Relations Manager	503-378-2705
Lois Harrup, Administrative Assistant	503-378-3141
Mark Hunt, Sr. Labor Relations Manager	503-378-3967
Pam Murdock, Office Manager	503-378-2616
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