

MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

MARCH 2001

ITEMS OF INTEREST

SUCCESSOR NEGOTIATIONS FOR 2001-03

The initial central table bargaining session between the State of Oregon and the Service Employees International Union Local 503, OPEU (SEIU) took place on December 6. The deadline for submitting new proposals for the SEIU central table and coalition-level negotiations was January 17.

The state's proposals include a general salary increase of 2% effective July 1, 2001. Other state proposals include issues regarding trial service, contracting out, overtime, limited duration appointments, sick leave, bereavement leave, leaves of absence without pay, personnel records, and work schedules.

The SEIU's proposals include general salary increases by the percentage increase of the Portland CPI-U, effective July 1, 2001 and July 1, 2002 (with a minimum increase of 3% and a maximum increase of 5%, but no less than \$100 per month, for each period), deleting the bottom step and adding a new top step to all salary ranges, 145 selective salary adjustments (including a restructuring of the trades classifications), a number of new pay premiums and paid insurance comparable to current HMO prototype benefit levels. The SEIU's proposals also request that the state pay for an additional holiday (the day following Thanksgiving), accelerate vacation accrual rates, increase the vacation cap to 350 hours, and limit mandated exhaustion of vacation hours before going on leave without pay to those over 80. Other SEIU proposals include issues regarding trial service, union representation, stewards, sick leave, personal leave, bereavement leave, leaves of absence without pay, e-mail, grievance and arbitration, work-out-of-class, job sharing, on-the-job illness or injury, child care, transit, parking, personnel records, and workforce development. In all, SEIU central table proposals would impact 27 existing articles

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Executive and Management Service Employees

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of the Master Agreement, incorporate six current letters of agreement into the body of the contract, and add two new articles.

SEIU coalition-level bargaining started in February, with initial meetings of the DHS Institutions, ODOT and Special Agencies Coalitions. The DHS Agencies Coalition, which is using the interest-based bargaining process, is scheduled to begin negotiations in March. Negotiations with the SEIU temp bargaining units continue. The SEIU has asked for interest arbitration for the strike-prohibited temp unit (at OYA, Forestry and OSH). The state has filed objections to the request for interest arbitration and has questioned whether the temps may properly be characterized as strike-prohibited.

A number of AFSCME and other units have also started successor negotiations. AFSCME central table negotiations will likely begin in late March or April.

ABOUT THE SUCCESSOR NEGOTIATION PROCESS

The Department of Administrative Services, acting through its Labor Relations Unit (DAS, LRU), currently negotiates and administers 31 collective bargaining agreements with 11 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 Service Employees International Union Local 503, OPEU (SEIU) and the American Federation of State, County and Municipal Employees (AFSCME)—cover nearly 27,000 state employees.

SEIU PROCESS: Two Statewide Bargaining Units—The state has a single collective bargaining agreement with the SEIU which applies to two separate statewide bargaining units covering a total of 57 boards and agencies (a “bargaining unit” is a specific group of employees represented by a single labor organization for collective bargaining with their employer). The largest SEIU bargaining unit (18,500 employees) includes employees who are eligible to strike. The second SEIU bargaining unit covers 1,900 strike-prohibited employees. Employees of the Oregon University System are not included in these two bargaining units.

Central Table—Union and management teams negotiate at a single “central” table over statewide issues. Issues handled at this table are those which affect all state agencies with SEIU-represented employees equally

(generally identified in the SEIU agreement by whole-number designations).

Coalition Tables—Due to the broad variety of work performed by agencies with SEIU-represented employees, four groups of agencies (called coalitions) negotiate with the SEIU over coalition and agency-specific issues at four separate tables. These are the Department of Human Services (DHS) Agencies Coalition, the DHS Institutions Coalition, the Oregon Department of Transportation (ODOT) Coalition, and the Special Agencies Coalition. Each of the four coalition tables handles topics which impact only their own group of agencies and employees. Articles resulting from these negotiations are identified in the SEIU contract by .1, .2, .3 and .5 extensions. Articles specific to individual agencies are identified by a coalition extension as well as a letter specific to the agency (*e.g.*, .1A for AFS). Issues having both statewide and coalition-specific aspects—such as filling of vacancies—may be dealt with at both the central and coalition tables.

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 may also print separate agreements which include only their own coalition and agency-specific clauses (as well as all of the articles which apply equally to the state as a whole).

AFSCME PROCESS: Multiple Bargaining Units—Each AFSCME bargaining unit typically represents employees in a single agency or a professional group within an agency. The AFSCME currently represents state employees in 20 separate bargaining units. In general, each of these bargaining units enters into separate negotiations with the state.

Central Table—During the last several contract periods the state and the AFSCME have reached agreements which called for the negotiation of certain statewide issues at a central negotiating table. These issues have included general salary increases, insurance and travel.

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 contract.

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 themselves determine whether they will reach agreement or not. In the state’s negotiations with the SEIU and the AFSCME, the mediator is supplied by the Employment Relations Board. Under the Public Employee Collective Bargaining Act (PECBA), good-faith successor negotiations must continue for 150 calendar days before either party may unilaterally request the assignment of a mediator. By mutual agreement, however, the parties may request a mediator prior to expiration of the 150-day period.

Finally, 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.

COURT RULES THAT NEGOTIATED SENIORITY SYSTEM PREVAILS OVER ADA ACCOMMODATION OBLIGATION

The Ninth Circuit Court of Appeals (which includes Oregon), recently ruled in the case of *Willis and Gomez v. Pacific Maritime Association, et al.*, that proposed ADA accommodations which would compel an employer to violate a collective bargaining agreement’s bona fide seniority system are per se “unreasonable.” As such, the employer was not obligated to implement the requested accommodations.

In the *Willis* case, one of the two employee/appellants requested a transfer to a clerical position and both requested placement on a priority list for light-duty assignments. The requests were made to accommodate the employees’ ADA qualifying disabilities. According to the Court, the employees were apparently relying on the ADA’s definition of a “reasonable accommodation” as including “reassignment to a vacant position.” The Court

determined, however, that the requested positions were not really “vacant” because the collective bargaining agreement in question required the positions to be assigned based on seniority. Since neither of the employees had the requisite seniority, while others did, the employer was justified in denying their proposed accommodations.

In the *Willis* case, the collective bargaining agreement was governed by the federal National Labor Relations Act (NLRA). The state’s contracts, on the other hand, are governed by state law. The *Willis* decision leaves unanswered the question whether the federal ADA would preempt a collective bargaining agreement created under state law.

In a previous case, *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), the Ninth Circuit was presented with a conflict between a proposed ADA accommodation and a seniority system where there was no collective bargaining agreement in place. The Ninth Circuit reached a different conclusion in this context, holding that since “no bargained for rights are involved,” the seniority system would be viewed as only one factor to consider when a court weighs, on a case-by-case basis, whether a proposed accommodation that would violate the seniority system is “reasonable” under the ADA.

A NEW MANAGER JOINS THE DAS LABOR RELATIONS UNIT

Kevin B. Dull recently joined the Labor Relations Unit as a Senior Labor Relations Manager. Before joining the LRU, Kevin spent 20 months with the Oregon School Boards Association where he worked as a labor relations and human resources consultant. In 1999, Kevin graduated from Willamette’s College of Law and the Atkinson Graduate School of Management. During graduate school, Kevin worked as a law clerk for the Labor and Employment Law Section of the Oregon Department of Justice and as a legislative assistant for an Oregon State Representative. Kevin is a member of the Oregon State Bar and the Society for Human Resource Management.

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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COMMENTARY FROM THE OREGONIAN

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FAIR PROCESS LETS ABLE MANAGERS OUST MISCREANTS

The public loses its trust in government when supervisors fail to fire misbehaving or incompetent public employees

A convicted serial rapist escapes from a Washington County deputy. The sheriff fires the deputy for disregarding rules for transporting prisoners. An arbitrator orders the deputy reinstated after an appeal under the union contract. The public is angry.

An Oregon Zoo keeper is fired for animal abuse—176 gashes and cuts on the elephant Rose-Tu. The worker appeals under terms of his union contract. To end any chance that an arbitrator would send the keeper back to tending elephants, Metro settles with him for \$18,000 in back wages. The Department of Agriculture fines the agency, not the worker, \$10,000 for failing to protect the animal. The public is outraged.

A Portland 9-1-1 administrator, plagued by health problems, uses up all sick leave and vacation time. Accommodations are made under the Americans with Disabilities Act to help her continue leading the emergency-call operation. Continuing absenteeism adds up to inadequate job performance, but the city, fearing a lawsuit, doesn't fire her. The public is exasperated.

Cases like these, along with tales of the contortions needed to get rid of bad teachers, have multiple effects:

- They imprint the idea that public workers own their jobs for life regardless of misconduct, incompetence, bad attitude or inability to perform.
- They shrivel trust in public administrators' ability to manage their staffs, and they reinforce the slander "good enough for government work."
- They paint public-sector unions as eager defenders of laziness, mischief and low performance expectations.

- They reinforce anger-arousing suspicions that many public-sector managers have stopped trying to fire nonperformers. In education, the doubt rises to the level of accepted truth that savvy principals don't try to counsel weak teachers out of the field or fire them, but arrange transfers to other schools, where they continue harming students.

This paints a scene in which all lose except misbehaving or underachieving workers. Voters believe they get poor value for taxes, government and unions suffer disdain or hostility, and reputations of able public workers—the huge majority—are smeared by association with the unable, the unwilling and the error-prone.

Is it hard to fire public workers? Indeed, yes.

Civil-service and collective-bargaining rules were adopted to halt unfairness. They are intended to stop bosses from punishing or rewarding unfairly and to halt spoils-system firings of workers to open jobs for campaign donors' cronies or bureaucrats' "Sad Sack brothers-in-law."

Is it *too hard* to fire public workers? The answer is more no than yes. Not if there is "just cause"—for which arbitrators and courts have developed guidelines. Not if managers follow proper procedures. Not if leaders set out clear performance expectations, monitor *all* workers fairly (not just target a few), document shortcomings, give workers fair chances to improve and apply discipline progressively and equally.

But yes, saying goodbye to public workers can be tortuously tough, because the system is highly bureaucratized. There are more chances than in private business to misstep, as arguably happened in the cases above. Also, unions sometimes defend members vigorously for reasons that aren't immediately apparent:

- Some grievances are carried to arbitration, even to the courts, to protect vital contract or due-process principles even when the union deplores the members' misconduct.
- Union leaders, despite the cases' weak merits, may feel political pressure to defend popular members or to press extra hard against unpopular supervisors' disciplinary actions.

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- Some leaders feel it is easier to fight firings than face lawsuits from members who charge the union with dereliction of duty for failure to represent.

It isn't supposed to be easy to fire public workers. Difficulties arise mostly when managers fail to prove their case or are careless about following the rules. That's not unions' fault.

The issue, then, is how to improve the public-service system. How can we advance supervisors' ability to manage? How can we insist on high performance from workers while protecting their rights in fear-free job environment?

Economic execution

Some subtle obstacles will be hard to overcome, public officials, union leaders, arbitrators and lawyers on both sides of firing disputes agree. Explaining why so many mishandled firings are fought through to the last trench of the appeals process, a labor lawyer remarked: "Union leaders and shop stewards tell me that termination is like economic capital punishment, and they would rather have a third party make the judgment."

What happens, then, when an arbitrator is tapped to be the executioner? "The law calls for a preponderance of the evidence to determine a firing," a former state official agreed. "But that's not the mentality of the arbitrator who . . . realizes this can destroy a person or family economically; consequently, an arbitrator will demand *very* strong evidence to support a termination."

If you really want a basic education in how the system works, says a public manager who has represented labor and government agencies, you have to understand two things. One is that Oregon public employee unions have a great deal of power because of the political donations they can give. Public officials depend on union money for their campaigns. This affects the language of contracts that public bodies negotiate with the unions. The second factor is how this affects appointed officials: "If I am a city bureau manager, I don't want to be a poster child for whom the unions hate. I don't want them whispering in the ear of every city councilor about what an SOB I am."

Managers find few incentives to tackle tough personnel problems. Rewards come mostly to those who keep things quiet. Besides, it takes courage—in rare supply—to look employees in the eye and tell them their behavior is inappropriate or their performance deficient. And it requires dedication to help them chin the bar.

Firing process could be costly

The human factor permeates the system in another way. Public bosses often are timid about chopping off dead weight or firing bad actors because the firing might cost a lot in legal fees, swallow a great deal of time and stir staff discord. And if the case goes all the way to arbitration or, worse, the courts, where someone else makes the decision, the public managers could lose anyway despite honorable intentions and best efforts. So managers' instinct is to shuffle problem people off to the side and not confront them.

The result of that, says a longtime factfinder in termination cases, is that the supervisors "let problems go and go and go until they respond like a ton of bricks all at once. Then they want to use all the past incidents that haven't been documented and presented to the employee. So it's easy to understand why arbitrators often come down on the employees' side."

The 1995 Legislature recognized that managers might not do a perfect job of setting work rules, documenting problems and following seven steps that add up to due process in the public sector. But the lawmakers were outraged that firings for serious misconduct—police using state patrol cars for sexual trysts, for example—were overturned for procedural violations that they felt to be lightweight compared with the misbehavior.

They passed Senate Bill 750. In effect, the lawmakers and governor said to the Employment Relations Board and the state courts: "We are amending the law so that it is clear that a higher standard is to be met to overturn arbitrators' decisions that do not enforce public employers' disciplines for misconduct." The intention of this so-called public-policy exception was to build a moral balance that allowed punishment for serious wrongdoing to stand even where procedures were less than perfect but still amounted to fair treatment for *both* the public and the employee. But a three-judge Oregon Court of Appeals panel on Aug. 30 threw the law's application by the Employment Relations Board into confusion. In *Deschutes County Sheriffs Association vs. Deschutes County and Deschutes County Sheriff's Office*, the judges overturned a four-day suspension without pay for a jail officer who the sheriff found had used excessive force on an inmate. An arbitrator found that the jail guard had seriously misbehaved but that the sheriff had procedural problems in presenting the case, so the arbitrator felt that he could not uphold the discipline under the bargaining agreement. The Employment Relations Board, which oversees enforcement of arbitrators' awards, unanimously

disagreed that the discipline could not be enforced. Deschutes County has petitioned the Oregon Supreme Court for review. This is an important step because the appeals court's decision appears to perpetuate just the kind of knot that the Legislature and governor were trying to untie.

Steps toward improvement

Despite such difficulties, progress is possible, parties on all sides of the issues agree. Not instantaneous huge leaps, but an inch here and a half-inch there—tortoise-like steps that chew up the miles over time. Among them:

- Teach first-, second- and third-level public managers that they have duties to set out reasonable work rules, to explain them and to enforce them.
- Stress that probationary periods are not formalities; they must be taken seriously. Public managers who have doubts about new employees during probationary periods should get rid of the fledglings and seek stronger candidates.
- Require audit trails of documentation as a routine part of public personnel management. Lazy, cowardly or honey-sweet evaluations that ignore tardiness, absenteeism, sloppy work, harassing behavior or other problems make it excruciatingly hard to address those issues later on.
- Move bosses who are unwilling to confront and deal with misconduct and work-performance deficiencies back to rank-and-file jobs or terminate them.
- Hold elected officials and upper-level managers accountable—especially in print and broadcast news—for failures to train junior supervisors to jump through the corrective-discipline hoops properly, especially when cases of severe misconduct are mishandled.
- Emphasize then re-emphasize with public managers that misconduct cases fail most likely on appeal because discipline has been applied inconsistently. Standards cannot be switched on and off at the bosses' capricious preference.
- Increase the use in public-employee unions of panels of experienced coworkers to determine whether the procedural steps have been fair and, if so, how far the

bargaining group should carry a member's grievance appeal. Beyond that point, the union member would assume appeals costs. The union has the right not to take a case to arbitration.

- Add an informal appeals process within the public-worker unions to offer aggrieved members another level of review by their peers.
- Reaffirm in the 2001 Legislature the intent of the 1995 change in the law: Where discipline is otherwise deserved on the merits, it should not be thrown out for other than the most extreme procedural failures.
- Promote cooperation between union and management to build good diversion programs for problems people bring to the workplace—especially alcohol and drug abuse, anger management, mental health, gender and diversity sensitivity. Unions can also assist in coaching problem workers to help improve job performance.

All of these steps would help the system work better. With adequate documentation in their personnel records, more workers could be counseled out instead of fired. Cases would be resolved faster. Fewer firings would be carried all the way through arbitration. Arbitration, as intended, would remain final and binding, with few appeals to the Employment Relations Board and the courts. Fewer workers fired for gross misconduct would be reinstated for managers' procedural blunders.

We don't want to excuse misbehavior. We do want to cherish due process. Incompetent and misbehaving public workers can be disciplined or fired in almost all cases. Even so, miscreants will stroll free in some cases, preferably rare. That's a regrettable but necessary price for a system grounded in fairness.

But when ordinary Oregonians hear elected officials, agency heads and school principals whimper that they can't fire anyone anymore, it is an act of good citizenship to reply:

“Baloney! You just don't manage them right. Stop your moaning and do your job. The impossible is mostly the untried.”

ARBITRATION AND CASE SUMMARIES



In the Matter of the Arbitration Between the Oregon AFSCME Council 75 Local 3940 and the Oregon Department of Administrative Services on behalf of the Department of Corrections (SRCI) (Arbitrator, Norman L. Lindstedt; November 20, 2000)

The grievant alleged that the agency violated the collective bargaining agreement by failing to provide employee rest breaks. The arbitrator denied the grievance on the grounds that (1) the union failed to comply with the contractual grievance procedure by passing over Step One of the process, and (2) the agency did, in fact, comply with the contract's rest break provisions.

Facts: The grievant (Employee) worked as a correctional officer at the Snake River Correctional Institution (SRCI). During the time in question, he worked as the only officer assigned to the third shift in one of SRCI's housing units. In March 1999, he kept a log of all of his rest break periods, including rest breaks taken and not taken. On April 14, 1999, he filed a Step 2 grievance on behalf of himself and all affected staff. The grievance alleged that SRCI had violated the collective bargaining agreement (CBA) by failing to provide two rest breaks per working day on a normal basis.

Questions Presented: Does the CBA require the Employee to present his grievance to his immediate supervisor before filing a formal written grievance? Did SRCI violate the CBA by failing to regularly provide appropriate rest breaks?

Discussion and Ruling: *Compliance with the contractual grievance procedure*—In his testimony, the Employee asserted that he raised the rest break issue with his supervisors. The agency, however, presented testimony that the Employee had not. The relevant contract language provides: "Employees shall meet with the immediate supervisor informally. If such problems cannot be resolved, the employees may avail themselves of the following procedure. ... Step 1. Employee, with or

without union representation will contact their immediate supervisor to meet and discuss alleged contract violation prior to filing a written grievance at Step 2."

Construing the contract's "grievance and arbitration" article, Arbitrator Lindstedt determined that before a grievance can be moved to Step 2, the informal Step 1 process must occur. Since the Union has the burden of proof on this contract interpretation issue, it must show that the Employee made a "real good faith effort to meet and discuss the alleged contract violation." The Arbitrator determined that this burden was not met: "The collective bargaining agreement required that the employee must address issues directly with first line supervisors under Step 1 of the grievance process. It was not done in this case." This requirement, moreover, was a "condition precedent to advancing an alleged contract violation to Step 2 under the grievance procedure."

Allowance of rest breaks—Notwithstanding the Employee's procedural error, the Arbitrator went on to address the substance of the grievance. The contract specifically deals with rest periods: "Rest periods will normally consist of two (2), fifteen minute breaks. . . . However, it is understood that breaks are not guaranteed at regular and recurring intervals. Management agrees to make reasonable effort to allow rest breaks where possible, but does not guarantee that rest breaks will be granted on every work shift or that they will occur at regular and recurring intervals." (Emphasis added).

The Union contended that, "[A]lthough the contract language provides for leeway in order to meet reasonable operational needs, the union . . . does not believe it was the intent of the parties to allow management to not give breaks on a routine basis." The Arbitrator, however, determined that the Union failed to present enough substantive evidence to establish its position. Rather, as evidenced by the parties' CBA, they understood that breaks were not guaranteed at regular and recurring intervals, and that the agency only agreed to make a reasonable effort to allow rest breaks where possible. And, based on the evidence presented at the arbitration hearing, the Arbitrator found that the agency was making reasonable efforts to provide rest periods. In contrast, the Employee's unilaterally prepared log was insufficient to support a conclusion that the agency acted unreasonably.

The grievance was denied.

AFSCME Local 328 vs. Oregon Health Sciences University
(ERB Case No. UP-47-99; October 17, 2000)

The ERB found that OHSU violated its statutory duty to provide the Union information that is of probable or potential relevance to a contractual matter. At the time of the Union's information request, no disciplinary action had been taken against the employee in question and no grievance filed; OHSU had, however, ordered the employee to undergo a psychological fitness-for-duty examination because of alleged communication difficulties and work errors. The Union's request asked OHSU to identify the employee's specific work errors and the dates and times of the alleged communication difficulties.

Facts: In November 1998, the employee was given verbal and written non-disciplinary counseling for work-related errors. The following month, the employee was placed on paid administrative leave, pending the results of a fitness-for-duty evaluation to be conducted by a clinical psychologist. When asked by the Union why the evaluation was being administered, OHSU replied that the employee had made three work errors in lab results.

In February and March 1999, after the exam, the Union addressed a number of requests to OHSU asking for "specific reasons" why the employee was compelled to submit to the exam. OHSU replied that the employee had, "[R]epeated difficulties communicating with her supervisors and accepting responsibility for her actions," and that she had, "[C]ommitted a number of fundamental performance errors which demonstrated she was not fit to perform the important elements of her job." In response to this explanation, the Union requested additional information: "[T]he specific dates and times of [the employee's] inability to communicate with her supervisors and a detailed listing of the fundamental performance errors which demonstrated she was not fit to perform the essential functions of her job." OHSU replied that, "We are not obligated to produce subjective information for an action taken. An explanation of our reasoning for the examination is a request for subjective information and need not be provided. ..."

Questions Presented: Did OHSU fail to provide information to AFSCME, in violation of ORS 243.672(1)(e)?

Discussion and Ruling: Pursuant to ORS 243.672 (1)(e), a public employer is required to provide information to a union that is of "[P]robable or potential

relevance to a grievance or other contractual matter.' " While the duty to provide information is, "[N]ot limited to information requested to evaluate a potential discipline grievance," it extends only to "objective," and not "subjective" information: "There is no obligation to produce purely subjective, as opposed to objective, information; that is, an explanation of a party's reasoning [which is subjective and not subject to disclosure] versus a description of the action the party took and the reason then expressed for the action [which is objective and subject to disclosure].'" The duty to provide information, moreover, may be satisfied by an oral response.

When the Union asked for specific examples of the communication difficulties which OHSU had referred to as one of the reasons for requiring the fitness-for-duty examination, the Union, "[D]id not request OHSU to explain its *subjective reason* for choosing a psychological examination ...". Rather, the Union, "[S]ought information about the *objective facts* (details of [the employee's] conduct with her supervisor) that OHSU reviewed when evaluating its options." When making the request, the Union informed OHSU that the information was needed to assist the employee in processing a grievance. As such, the information was of, "[P]robable or potential relevance to an AFSCME inquiry into whether OHSU was properly administering the parties' collective bargaining agreement," and whether the agency complied with EEOC regulations regarding ADA medical examinations. OHSU, moreover, could have obtained the information, "[S]imply by conferring with [the employee's] supervisors"; and obtaining their description of the episodes of alleged communication difficulties. As such, OHSU's failure to respond to the Union's request violated its ORS 243.672 (1)(e) duty to provide information to the Union.

As to the request for information regarding the alleged work performance errors, OHSU argued that the Union already had such information since the employee had written a rebuttal to a counseling memo which addressed the work errors (and the employee therefore must have been in possession of the memo itself). The Board, however, replied that OHSU had a duty to respond to the information request, and could have satisfied that duty by either providing the Union another copy of the memo or by stating that it was aware that the Union had a copy of the memo and explaining that the work errors discussed in the memo were the basis for the decision to require the exam. In doing neither, OHSU violated its ORS 243.672 (1)(e) duty.

The Board ordered OHSU to cease and desist from refusing to provide the requested information to the Union.



RESPONDING TO PECBA INFORMATION REQUESTS

Duty to Provide Information

The Public Employee Collective Bargaining Act (PECBA) requires that public employers and representatives of their employees “bargain in good faith” with respect to employment relations. This duty is found in ORS 243.672(1)(e) for the employer and, correspondingly, in ORS 243.672(2)(b) for the union. Included among the reciprocal obligations established by these statutes is the duty to provide information. This duty arises in connection with both the negotiation process and contract administration.

Contract Negotiations—In connection with negotiations, the duty arises if “the information sought is reasonably necessary to allow meaningful bargaining on a contract proposal.” If there is no duty to bargain over a subject, there is no PECBA duty to provide information regarding the topic.

Contract Administration—In the context of contract administration, the duty exists if the “information sought is of probable or potential relevance to a grievance or other contractual matters.” In an appropriate situation, this duty would exist whether or not a formal grievance has been filed.

The Employment Relations Board (ERB) uses a four-part analysis to determine whether a party may properly refuse to produce information requested under the PECBA:

- What was the reason given for the request.

In cases where the information’s relevance is questioned, the requesting party must state explicitly the reasons for needing the information sought.

- The ease or difficulty of producing the data.

This is a question of practical application. Where the information is readily available, a prompt response is generally expected. Where the information must be gathered or compiled, the responding party has a reasonable amount of time to provide the information. Further, if the responding party would incur expenses in providing the information that it would not otherwise incur, it may ask for reimbursement of its reasonable costs. If the request for reimbursement is refused, the party may decline to provide the information. In cases where a party is asked to produce information it does not currently possess, it may be required to make a reasonable, good-faith effort to acquire the information for production. In cases where the requested information is more easily available from another source, a party may respond by referring the other party to that source.

- The kind of information requested.

There is no obligation to produce purely “subjective,” as opposed to “objective,” information. “Subjective” information is an explanation of a party’s reasoning. A description of action actually taken by the party or the reason then *expressed* for the action would generally be “objective.” There is also no obligation to produce “confidential information.” For this purpose, “confidential information” may include such documents as personal observations and notes prepared in connection with hiring and promotional interviews, negotiations, and grievance investigations. It may also include documents made confidential by statute, such as youth

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offender information or the identity of a child abuse reporter. Additionally, the employer is not required to provide access to personnel information when a valid policy would require a waiver from the employee. In situations where the employer chooses to provide confidential information, the employer generally should require the union to sign a non-disclosure agreement before providing the information.

- The history of the parties' labor-management relations.

This element often comes into play if there has been a pattern of numerous requests, or unreasonable delays in responding to requests. In these instances, the time allowed to provide information may be lengthened, or the obligation to provide information may be excused.

Duty to Provide Information During an Internal Investigation

Must an employer provide information stemming from an investigation of employee misconduct in response to a union request? The answer is, it depends. Subject to the considerations set forth above, an employer must provide information stemming from an internal investigation of employee misconduct if it *results* in an employee being disciplined. Generally, unless and until the employer imposes discipline, no duty to disclose would arise.

Further Information

Application of the broad standards described above occurs on a case-by-case basis. *Agency responses to union information requests should be made only after consultation with your agency's Human Resources Department and the DAS, Labor Relations Unit.* Depending on the circumstances, consultation with the Department of Justice, Labor and Employment Section, may also be desirable.

EMPLOYEE RIGHT TO CONDUCT AN INDEPENDENT DISCIPLINARY- RELATED INVESTIGATION

The PECBA provides that employees engage in protected conduct when they participate with their labor union in defending themselves or other bargaining unit members against allegations of wrong-doing that could result in

discipline or discharge. As such, an employee has a PECBA right to assist his or her union in preparing a response to such charges, even during the pendency of a management disciplinary investigation. This includes the right to speak with co-workers about the allegations.

The employee's right to conduct his or her own investigation, however, is not unlimited. Management, for instance, may require that employees restrict their interviews of other employees to the non-working hours of both the employee conducting the investigation and the employee being interviewed. Furthermore, it is the independent choice of the contacted employee whether or not to participate in the investigation or to discuss the allegations with the subject employee or the union.

BEREAVEMENT LEAVE

Virtually all of the state's collective bargaining agreements allow employees to take some form of leave to attend to the customary obligations stemming from the death of an immediate family member. Some of these agreements have separate "bereavement leave" clauses (e.g., SEIU, Article 57). Others define "sick leave" to include absences necessitated by the death of an immediate family member. Some of the state's contracts allow employees to use a variety of different types of leave to cover such absences. The SEIU agreement, for instance, allows use of accrued sick leave, leave without pay or, with prior authorization, accrued vacation leave or comp time. Some of the state's other agreements limit the type of leave which may be used for this purpose. Some also place limitations on the number of bereavement leave days that may be used, or that may be used without taking operating requirements of the agency into consideration.

Bereavement leave clauses often include a definition of what is meant by "immediate family member." Article 57 of the SEIU agreement, for instance, defines this term to include the employee's parent, wife, husband, child, brother, sister, grandmother, grandfather, son-in-law, daughter-in-law, or another member of the immediate household.

Finally, is a bereavement-related absence FMLA or OFLA qualifying? The answer is no. Death is not a "serious health condition" under these family leave laws, and neither provides separate coverage for bereavement purposes.

LABOR RELATIONS BARGAINING ASSIGNMENTS FOR 2001-03

Eva Corbin, Deputy Administrator 378-8321

AFSCME:
 Oregon State Fire Marshal (OSFM)
 Oregon State Police (OSP Support Unit)
 OSPOA:
 Oregon State Police (OSP)
 SEIU:
 Central Table (with Craig Cowan)

Craig Cowan, Sr Labor Relations Mgr 378-5611

AEE:
 Department of Forestry (DOF), Department of
 Transportation (ODOT), and Parks and
 Recreation Dept (OPRD)
 AFSCME:
 Building Codes Division (BCD)
 Employment Department (EMPL)
 SEIU:
 Central Table (with Eva Corbin)
 ODOT Coalition
 STEA:
 Department of Education (ODE)

Jan Weeks, Sr Labor Relations Mgr 378-6483

AFSCME:
 Central Table (with Cathy Schuh)
 Physicians at Mental Health Div (MHDDSD)
 Nurses at Oregon State Hospital (OSH)
 State Operated Community Prog (SOCP)
 Fairview Training Center (FTC)
 Oregon Youth Authority (OYA)
 ONA:
 Mental Health Division (MHDDSD)
 SEIU:
 DHS Institutions Coalition (with Kevin Dull)

Tom Perry, Sr Labor Relations Mgr 378-4201

AFSCME:
 Dept of Public Safety Standards &
 Training (DPSST)
 Dept of Corrections (with Mark Hunt)
 Real Estate Agency (REA) (with Kevin Dull)
 AOCE:
 Dept of Corrections (with Mark Hunt)

Mike Halpern, Sr Labor Relations Mgr 378-2705

AFSCME:
 Dept of Environmental Quality (DEQ)
 Construction Contractors Board (CCB)
 Oregon Liquor Control Commission (OLCC)
 IAFF/PANG:
 Oregon Military Department (OMD)
 SEIU:
 Special Agencies Coalition

Cathy Schuh, Sr Labor Relations Mgr 373-7608

AFSCME:
 Central Table (with Jan Weeks)
 Dept of Land Conservation & Dev (DLCD)
 Department of Justice (DOJ-OAJA)
 CIA:
 Department of Justice (DOJ)
 GCU:
 Dept of Administrative Services (DAS)
 SEIU:
 DHS Agencies Coalition (IBB)

Mark Hunt, Sr Labor Relations Mgr 378-3967

AFSCME:
 Dept of Corrections Security (DOC)
 Dept of Corrections Non-Security (DOC)
 Dentists at Dept of Corrections (DOC)
 Oregon Military Department (OMD)
 AOCE:
 Dept of Corrections (DOC) (with Tom Perry)
 KFAFFA:
 Oregon Military Department (OMD)

Kevin Dull, Sr Labor Relations Mgr 378-3138

AFSCME:
 Real Estate Agency (REA) (with Tom Perry)
 Dept of Land Conservation & Dev (DLCD)
 SEIU:
 DHS Institutions Coalition (with Jan Weeks)

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

About the Labor Relations Unit . . .

The Labor Relations Unit is a part of the Human Resource Services Division in the Department of Administrative Services. The Administrator of the Division is 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
Tom Perry, Sr. Labor Relations Manager	503-378-4201
Cathy Schuh, Sr. Labor Relations Manager	503-373-7608
Jan Weeks, Sr. Labor Relations Manager	503-378-6483