

MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

NOVEMBER 2002

ITEMS OF INTEREST

DIRECT COMMUNICATIONS BETWEEN MANAGEMENT AND REPRESENTED EMPLOYEES ABOUT BARGAINING ISSUES

The state will soon be entering into successor negotiations in connection with the 32 collective bargaining agreements that cover its represented public employees. One issue which often comes up in relation to these negotiations is the propriety of direct communications between agency management and represented employees concerning bargaining issues.

During contract negotiations, the state and the unions designate teams to act as their representatives. Negotiations generally take place at meetings between the union and management teams at a chosen site (often referred to as the "bargaining table"). While there is no explicit statutory prohibition regarding communications between management and represented employees away from the bargaining table concerning bargaining-related issues, such contacts are problematic at best. At worst, they might constitute a violation of the Public Employee Collective Bargaining Act (PECBA).

The Employment Relations Board has held that it is a violation of ORS 243.672 (1) (e) for management to bypass the bargaining table and to instead bargain directly with employees, rather than with their representatives (see, *Management Insight*, December, 1996, p.4). What constitutes "bargaining," moreover, is not always easy to determine. Even seemingly innocent communications between management and represented employees regarding bargaining issues might result in unfair labor practice charges if they are perceived as an "end run" around union negotiation representatives.

Aside from a possible PECBA violation, engaging in direct management-employee discussions away from the

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Executive and Management Service Employees

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bargaining table raises the risk of inadvertent disclosure of confidential state negotiating positions. Such contacts might also send mixed signals to represented employees and the unions regarding the state's interests and positions on bargaining issues, undercut state bargaining proposals and complicate the negotiations process.

Because of these concerns, it is best to leave bargaining-issue discussions to the bargaining teams and the bargaining table. If bargaining-issue contacts are initiated by represented employees, agency management's response should be that it is inappropriate to engage in discussions regarding bargaining issues away from the bargaining table. Should you have any concerns, comments, or suggestions regarding bargaining issues or bargaining-related communications with represented employees, the best approach is to contact your agency's human resources department or the DAS labor relations manager handling your agency's negotiations.

ABOUT THE SUCCESSOR NEGOTIATIONS PROCESS

Most of the state's collective bargaining agreements have two-year terms. The renegotiation process, called "successor" bargaining, generally takes place during odd-numbered years, concurrent with the legislature's regular session. Agreements negotiated with the two largest of the 11 labor organizations the state negotiates with—the Service Employees International Union Local 503, Oregon Public Employees Union (SEIU) and the American Federation of State, County and Municipal Employees (AFSCME)—cover approximately 22,760 of the nearly 25,400 represented state employees. Here's how the SEIU and AFSCME processes usually work.

SEIU PROCESS: *Two Statewide Bargaining Units*—The state has a single collective bargaining agreement with SEIU which applies to two separate statewide bargaining units covering a total of 49 agencies, boards and institutions (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 (approximately 15,600 employees) includes employees who are eligible to strike. The second SEIU bargaining unit covers approximately 1,550 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 that 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) bargain with SEIU over coalition and agency-specific issues at four separate tables. These are the Human Services Coalition, the Institutions Coalition, the 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., .1C for the Employment Department, which is a member of the Human Services Coalition). 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 statewide votes (called "ratification") by each of the two bargaining units. 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. AFSCME currently represents state employees in 21 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 AFSCME reached agreements which called for the negotiation of certain statewide issues at a central negotiating table. These issues 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 the 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 public employee unions, 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 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 occur.



FROM THE EMPLOYEE SUGGESTION AWARDS PROGRAM

MANAGEMENT’S ROLE

The Employee Suggestion Awards Program (ESAP) encourages and rewards state employees’ creativity and ideas for improved efficiency and effectiveness. State managers play three different roles when it comes to ESAP. Each of these roles is important to ESAP’s success:

- **Management employees may nominate their eligible staff whose innovative ideas meet the criteria for eligible suggestions, have already been implemented, and have already produced results.**

This is a somewhat new option for managers, allowing them to use ESAP as an employee recognition tool. Simply complete a Management Nomination Form and send it to ESAP at 155 Cottage St NE U30, Salem OR 97301-3967, or via e-mail. Management Nomination Forms are available on ESAP’s web site.

- **Management employees may submit suggestions for awards consideration.**

There was a time when management employees were ineligible to receive awards for their suggestions. Current policy, however, allows management employees to receive recognition and awards for suggestions that meet the eligible-suggestion criteria. A key criterion for determining eligibility of a manager’s suggestion is whether he or she has the authority to make the change. Managers’ suggestions must be related to services and duties outside their authority. Suggestion forms are available on ESAP’s web site.

- **Management employees are typically called upon to evaluate suggestions that require their specific expertise and/or program knowledge.**

Evaluators play a critical role in the suggestion process. This person or team reviews suggestions to determine if they will benefit their agency and whether they can and should be implemented. The ESAP Commission depends on evaluators’ technical expertise as well as their desire to see improvements to the way they do business. The Commission bases its decision to adopt or not adopt suggestions on the evaluators’ recommendation.

Many times, employees participating in ESAP base their opinions of how well the Program works on the evaluators’ timeliness and attention to their suggestion. Not all evaluations will result in a recommendation to “adopt,” but it is important that reviews are thorough and timely.

For forms and more information on eligibility criteria, process, etc., visit ESAP on-line at <http://www.hr.das.state.or.us/suggestions>. You may also contact Kathy Shepherd, Statewide Suggestion Coordinator, at (503) 378-4477 or kathy.j.shepherd@state.or.us.

FROM DAS TRAINING AND DEVELOPMENT SERVICES

NEW MANAGEMENT TRAINING AND DEVELOPMENT OPPORTUNITIES

The state, like many public employers, finds itself facing a unique staffing dilemma. An aging workforce and an uncertain future for the retirement system combine to create the potential for extensive turnover, particularly in the state's management ranks. At the same time, budget constraints are forcing managers to make difficult decisions on the best ways to use limited funds.

Helping new and current managers succeed in today's climate of scarce available resources calls for innovative approaches and creative ideas. In light of these new realities, DAS Training and Development Services has adopted a fresh approach to management training—appropriate for *all* management levels. Recognizing that times have changed, as have the needs of state managers, CORE management training will no longer be offered. In its place, DAS Training and Development Services is now offering the Management Development Series (MDS).

Over the past several months, significant research has been conducted using surveys, focus groups and meetings with agency managers—as well as benchmarking best practices throughout the public and private sectors—to help develop MDS. Based on that data, MDS will become much more than just a new training series. It will provide state managers with an extensive menu of training and development options to help them become more effective in leading Oregon government and to further their own management careers.

The other unique feature of MDS is its focus on the needs of targeted audiences. For example, a first-time manager has different needs than an experienced manager new to state government. A person transitioning to management from a peer technical/professional position faces different scenarios than a first time supervisor. It is our goal to give each group the tools it needs to succeed.

A pilot class for each area took place at the end of October. The first regularly-scheduled sessions begin in November. Online registration is available at www.statetraining.das.state.or.us. An outline of the new series areas, in the order of availability, is provided below.

Foundational: This series is designed for the first-time supervisor/manager. The focus is on key elements of managing people, problem solving and communication skills.

Transitional: This series is designed for experienced technical/professional staff who are making the transition to management. In many instances these employees are transitioning directly into middle management positions that require a higher level of skill. The focus is on the elements of people managing, transitioning from peer to manager, and an introduction to strategic skills.

New-To-State: This series is designed for experienced managers who are new to state government. The focus is on managing in state government and an outline of the policies unique to the state's operation.

Developmental: This series is designed for non-managers who are interested in entering the management field. The focus is on a basic introduction to the management environment and the role of a manager in state government.

In addition, DAS Training and Development Services will continue to work with all agencies to develop and deliver specialized modules of interest to managers. Currently available are *Coaching* and *Selection Interviewing*. Modules are also being developed on *Facilitation*, *Train the Trainer*, and other subjects of particular benefit to mid and senior level managers.

If you have questions or need more information on the programs, please call Jan Miller (503) 378-6334 or janet.l.miller@state.or.us or Sue Wilson (503) 378-2744 or susan.wilson@state.or.us.

CASE SUMMARIES



Beaverton Police Association vs. City of Beaverton
(ERB Case No. UP-10-01; August 2, 2002)

The determination of minimum qualifications necessary for promotion to a position is permissive for bargaining. As such, the City had no obligation to bargain over its determination to change the minimum qualifications for promotion to sergeant. However, since the change impacted mandatory bargaining subjects—wages and benefits—the City had a duty to impact bargain. In reaching its decision, the Board declined to rescind the promotions made following the change or to reinstate the old minimum qualifications. Instead, the Board limited the City’s bargaining obligation to the impact which the change had on the employment relations of bargaining unit members who, as a result of the change, no longer qualified for promotion.

Facts: In January 2000, the Beaverton Police Association (Association) became the exclusive representative of a bargaining unit which includes police officers and sergeants (the unit had previously been represented by Teamsters Local 223). In January 2001, during the term of the collective bargaining agreement between the City of Beaverton (City) and the Association, the City advertised that the minimum qualifications for sergeant included an associate’s degree. In previous promotional opportunities between 1996 and 1999, the City’s minimum qualifications for promotion to sergeant had treated the college-credit requirement in various ways. In January 2001, unlike the prior promotional opportunities, the City did not permit applicants to apply life experience credit to both the years-of-service and college-credit-hour requirements. By making this change, the City revised the minimum qualifications specified in the classification description. As a result of the change, four officers did not qualify for promotion and were not considered (two of which had qualified under previous promotional opportunities).

Question Presented: Did the City violate ORS 243.672 (1) (e) by failing to give notice of its change of the

minimum qualification requirements for promotion to sergeant and refusing to bargain over the impact of the change?

Discussion and Ruling: The Employment Relations Board (Board) began its analysis by clarifying that—since the determination of minimum qualifications necessary for promotion to a position is clearly permissive for bargaining—the Association’s claim is directed solely at the City’s failure to give notice of the change and to bargain its mandatory impact. When, during the term of a labor agreement, a public employer wants to make a change in an employment relations subject which raises an obligation to bargain, the process for bargaining is governed by ORS 243.698. This statute, noted the Board, “...expressly recognizes that impact bargaining may be required” It states, in part: “ ‘ ...If a demand to bargain is not filed within 14 days of the notice [of anticipated changes], the exclusive representative waives its right to bargain over the change or *the impact of the change* identified in the notice.’ ” (Emphasis in original.) Board case law is consistent with this statutory reference: “Even when the decision to make a change is permissive, an employer may be required to bargain mandatory impacts. [Citation omitted.] Typically, the employer must exhaust its duty to bargain over such impacts before implementing its decision.”

Wages and economic benefits, “... fall squarely within the statutory definition of ‘employment relations’ and are *per se* mandatory for bargaining.” (Emphasis in original.) As a result of the City’s change in the minimum qualification requirements, certain senior officers in the Association’s bargaining unit lost the opportunity for promotion to sergeant. These bargaining unit members also lost the opportunity to receive increased wages and benefits. The City, concluded the Board, “... was obligated to bargain over such mandatory impacts on unit members.” While ORS 243.650 (7) (f) does speak of minimum qualifications as a permissive subject, “The language of (7) (f) speaks expressly to *the determination* of minimum qualifications; nothing more or less. It does not address mandatory impacts.” (Emphasis added.)

The City argued that the change in minimum qualifications was not actually a unilateral change in the status quo since it had a past practice of adjusting minimum qualifications depending on its applicant pool and needs. In response, the Board explained that regardless of whether this constitutes a “practice,” it would not be binding on the Association, since it became the exclusive

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bargaining representative in January 2000, after the City's previous recruitment efforts, but before the one in question: "A practice is not binding on a newly certified representative unless it had notice of it and agreed to it, i.e., the practice is mutual. [Citation omitted.] There is no evidence that the Association agreed to such practice." Furthermore, noted the Board, this time the City changed the minimum qualifications in a way different from prior modifications, resulting in the exclusion of bargaining unit members who had previously qualified as promotional applicants.

The City also argued that the Board should balance the interests of management and employees in reaching its determination on whether the issue in question is permissive for bargaining. The Board, however, declined to do so, explaining that it applies the balancing test, "... generally when a subject is not deemed expressly mandatory or permissive by the PECBA." In this case, the determination of minimum qualifications is expressly permissive, and the impact of the change, expressly mandatory.

The Board also disagreed with the City's argument that any impact from the change was insubstantial or de minimis under ORS 243.650 (7) (d). Bargaining unit members, noted the Board, were directly affected by the change since some who had previously been deemed qualified to compete for sergeant were excluded as a result of the change. There are also substantial differences between the wages and benefits received by sergeants and police officers.

The Board declined to adapt the Association's proposed remedy (rescission of the promotions and reinstatement of the procedure and minimum qualifications used before the recruitment in question). The City, noted the Board, "... had the right to change minimum qualifications. Only those individuals who met those minimum qualifications had the right to be considered for promotion." That being the case, "... rescinding promotions that occurred over a year ago ... would accomplish little, because this Board's decision does not alter the pool of applicants who were eligible for promotion. ... Instead, this Board will order the City to bargain with the Association regarding the

impacts of the minimum qualifications change on the employment relations of those bargaining unit members who, due to the change no longer qualified for promotion. That bargaining will not involve the determination of minimum qualifications necessary for promotion."

In the Matter of the Petition for Declaratory Ruling Filed by D. Grant Walter and SEIU Local 140

(ERB Case No. DR-04-02; June 7, 2002)

The School District's proposal to contract out its custodial services is neither contrary to the law cited by the Union nor does it require a violation of that law. As such, the proposal is not a prohibited bargaining subject.

Facts: The Portland School District 1J (District) employs approximately 338 custodians, assistant custodians and custodial helpers represented by Service Employees International Union Local 140 (Union). The District is covered by the provisions of the Custodians' Civil Service Law. On February 5, 2002, the District sent a letter to the Union's President, D. Grant Walter, notifying him that the District proposed to subcontract out to private custodial service providers all of the custodial services currently being performed by members of the Union. The District offered to bargain with the Union over this plan. The Union agreed to bargain with the District, subject to its objection that the proposal is a prohibited subject of bargaining. (For an article regarding prohibited subjects of bargaining, see, *Management Insight*, October 2001, p. 10.)

Question Presented: Does the Custodians' Civil Service Law (CCSL) render the District's proposal to contract out all its custodial services a prohibited subject of bargaining?

Discussion and Ruling: The Employment Relations Board (Board) explained that a prohibited subject of bargaining, "... is one that violates, or is contrary to a

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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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statute or constitutional provision.” As such, the question is, “... whether the District’s proposal to contract out its custodial services is contrary to provisions of the CCSL or requires violation of those statutes.”

In support of its position, the Union argued that the legislature, by and through the CCSL, intended to require District custodians to be employed and discharged under the specific jurisdiction of the custodial civil service board. The Union further argued that nothing in the statute, statutory context or legislative history allows the District to render the statute a “dead letter” by contracting out custodial services.

The Board addressed the Union’s argument by analyzing the “text and context” of the CCSL. In so doing, the Board concluded: “Nothing in the law states that the District cannot subcontract custodial services; rather the CCSL applies if the District decides to hire custodians as employees of the District. Thus, there is no conflict between the CCSL and the District’s proposal. The District’s proposal does not require it to violate the CCSL, because, as a threshold matter, for CCSL to apply, the custodians must be District employees.”

It is true, noted the Board, that the CCSL includes certain mandatory provisions (that the District “shall” do certain

things in connection with the employment of custodians); and that if the District employs no custodians, these provisions will “cease to have effect.” Nevertheless, “... the CCSL clearly was intended to cover only those custodians in the District’s employ. There is simply nothing in the law that extends its reach to independent contractors of the District or that prohibits the District from subcontracting custodial services. The mandatory language of the CCSL, relied upon by [the Union], takes effect only if custodians are employees of the District.”

In response to the Union’s arguments that legislative intent and legislative history of the CCSL supported its position, the Board concluded: “... the fact remains that nothing in the statute, or its legislative history, extends the CCSL’s reach to prohibit subcontracting. By the plain terms of the statute, its coverage is limited to employees of the District. If the legislature had intended to ban contracting with private firms for custodial services, or if it had intended to extend the coverage of the CCSL to private contractors of the District, it would have said so. It did not. We will not read a prohibition into the CCSL that simply is not there. ... The District’s proposal to contract out its custodial services is not a prohibited subject of bargaining under the PECBA”



NOTES FROM JUSTICE



EMPLOYEE USE OF STATE CREDIT/TRAVEL CARD

I. Overview.

State agencies are encouraged to offer state travel/credit cards (travel cards) to all personnel who regularly travel on official state business. The travel card is issued after application and execution of a Corporate Travel Card Agreement, which spells out the terms of use for the employee. The employee is granted a travel card on the merits of his or her credit history.

The travel cards can be used only for state-related travel expenses, i.e., lodging, meals, rental cars and parking. The cards are not to be used, under any circumstances, for personal purchases. To prevent abuse, certain types of merchants are blocked from use. For a complete listing of excluded merchants, go to the DAS-TPPS website at <http://tpps.das.state.or.us/purchasing/agency-info/travel-menu.html>.

Upon completion of the employee’s work-related travel, the employee is expected to promptly fill out and submit an expense sheet. The employee should complete the expense sheet early enough to allow processing of payment to the employee prior to the due date of the travel card statement. The employee is to pay the travel card balance in full every month. The travel card is issued in the employee’s name and it is the employee’s responsibility to ensure

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payments are made promptly. An employee's credit rating may be affected by delinquency or nonpayment. An employee whose payments are delinquent in excess of 60 days will have his or her travel card cancelled. Agencies are required to notify the travel card issuer and cancel the travel card should the employee transfer to another agency or separate from state service.

Employees may opt to use their personal credit card. If this option is exercised, they must adhere to ORS 244.040 (1) (a), which prohibits employees from receiving and making personal use of any special benefits—such as cash rebates, frequent flier miles, or bonus points—from the use of their card for state travel. An employee using a personal credit card will not be reimbursed for interest charged for cash advances used for state travel expenses.

II. Agency Administration.

DAS performs periodic reviews to ensure that agencies are monitoring their employees' travel card usage. DAS may implement appropriate and progressive sanctions for misuse. All travel claims are subject to a detailed audit by the Secretary of State Audits Division.

Agencies issuing travel cards are required to have a Travel Card Coordinator to ensure that applications and Corporate Travel Card Agreements are being timely submitted and signed. The coordinator is also responsible for overseeing employee travel card use. It is extremely important that the coordinator is notified upon termination or transfer of an employee. The travel card must be cancelled in order to avoid any post-termination or transfer charges that could possibly be made by the former employee. Failure to notify the travel card issuer of the employee's termination transfers the liability of any charges made on the card after termination from the cardholder to the issuing agency. The agency should destroy any cancelled travel cards.

III. Dealing with Employee Misuse of the Travel Card.

Agencies should monitor the monthly reports received from the Financial Services Branch to determine that all employee usage is proper and balances are being timely paid. It is recommended that each agency follow regular established internal procedures in handling matters arising from employee use of travel cards. It must be emphasized that a uniform approach is preferable. For example, management employees should not be treated any differently than classified employees with respect to the travel card. If agencies choose to allow individual managers to handle card-related issues, the agency should consider having a process in place to ensure that consistent practices are followed throughout the agency.

What actions should an agency take if problems are identified? The Corporate Travel Card Agreement notifies the employee that disregarding the provisions of the Agreement may result in disciplinary action, up to and including dismissal. Even though the employee is solely responsible for the charges on the travel card, balances must be paid promptly and it is not within the employee's discretion to choose to make payments over time. Finally, the Agreement states that an employee's wages may be subject to payroll deduction to pay off any outstanding balances on the employee's travel card.

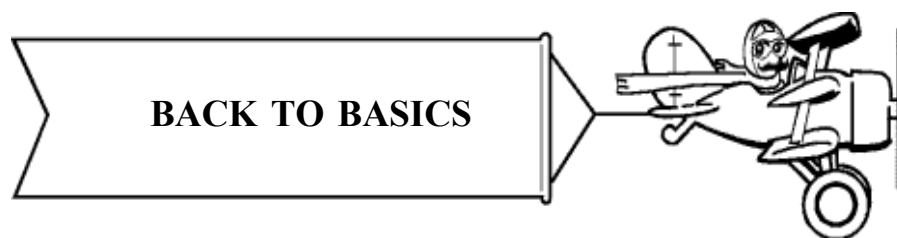
The first step an agency should take is to determine the nature and the extent of the abuse. Possibilities include failing to make a timely payment, making an incomplete payment on a small account balance, and carrying large account balances that are past due for a considerable period of time. Potentially more egregious are circumstances where an employee has made personal charges, or where an employee has submitted and obtained reimbursement from the state, but has failed to apply the travel expenses received to the account balance.

In investigating these issues, agencies should be mindful that if discipline is a possibility they must take certain precautions depending upon the employee's status. If a represented employee is to be questioned about travel card usage they may be entitled to representation if they reasonably believe that discipline could result. If the nature of the abuse rises to the level of potential criminal liability, for example where an employee has submitted false expense statements, then additional issues may arise. In such cases, the agency's human resources department should be consulted, and possibly the Department of Justice.

The next step for the agency is to determine the appropriate course of action to take. In addition to notifying the employee, the agency Travel Card Coordinator may contact the DAS State Controllers Division to cancel and revoke the use of the travel card. If this is done, the employee will be required to use their own card, or the agency will need to make cash advances available. An agency should not threaten or unilaterally undertake any deduction of wages. Despite the inclusion of this provision in the Corporate Travel Card Agreement, such action may require legal proceedings and should not be taken without contacting the Department of Justice. This is because the employee remains personally responsible for the debt, and it should not be considered the same as an overpayment. As a result, ORS 292.170 (recovery of overpayment from employee leaving employment) is not applicable.

If discipline is considered, all of the usual factors for just cause must be addressed. In approaching this analysis, the terms of the Corporate Travel Card Agreement and the travel policies serve as clear notice and warning to employees that contrary conduct may likely result in discipline. Because the type of misuse may vary, the misuse in the context of the circumstances should be considered. Has the employee received prior warnings? Has the agency acted promptly? Was the misuse willful and intentional? Does the employee's position justify strict standards?

Finally, both individual agencies and the state as a whole have a duty to refrain from acting in an arbitrary or capricious way. Thus, not only should each agency maintain a predictable, consistent approach to credit misuse problems, but the state as a whole should strive to maintain a consistent application of the policies. Questions regarding discipline and enforcement of the Corporate Travel Card Agreement may be directed to agency human resource departments. Other sources of information and advice are the Labor and Employment Section of the Department of Justice and the DAS State Controllers Division.



PAST PRACTICE

In a broad sense, a past practice is simply a repeated, usual, or habitual way of doing things. It is a consistent course of action in relation to a given set of circumstances. For a past practice to become enforceable in the labor relations context, a number of criteria—discussed below—must be present. Once the enforceability threshold is crossed, a past practice may establish binding rights and responsibilities under a collective bargaining agreement.

The issue of past practice (also sometimes referred to as “custom and practice”), regularly arises in a number of different circumstances. When a collective bargaining agreement is silent on a subject related to working conditions, a past practice may be cited by a party in an attempt to establish enforceable rights under the agreement. A past practice issue may also arise in connection with an ambiguous contract term. In such a situation, evidence of a past practice may be cited as an interpretive aid. Where contract language is very general, sometimes a past practice is cited to prove a specific application or to fill in a gap left by the general nature of the language. Finally, in some limited circumstances, a well-established past practice may even go so far as to constitute an amendment or modification of unambiguous contract language.

How Created—Typically, a past practice will not be given effect unless it is longstanding, clear, fixed and known to the parties to the contract (which, in the state context, generally are the Department of Administrative Services and the applicable union). The Employment Relations Board (ERB) has cited five factors which it will consider in determining whether a past practice has been established: (1) clarity and consistency; (2) longevity and repetition; (3)

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acceptability; (4) origin and purpose; and (5) mutuality. See, e.g., *International Association of Fire Fighters, Local 1395 v. City of Springfield*, ERB Case No. UP-51-85, 9 PECBR 8533 at 8540 (1986).

Where collective bargaining agreements have grievance procedures ending in arbitration (which is the case with all of the state's contracts), past practice disputes are often decided by arbitrators. An arbitrator may choose to follow the ERB's past practice test, but generally would not be bound to do so. Instead, an arbitrator may decide to follow the precedents established by other arbitrators in similar cases. Regarding past practice, a well-known text regularly used and cited by labor arbitrators states: "Examination of many reported decisions suggests that there are no unanimously accepted standards for determining precisely under what circumstances unwritten practices and custom will be held binding by arbitrators . . ." (*Elkouri and Elkouri, How Arbitration Works*, M. Volz and E. Goggin, eds., BNA 5th ed., 1997, at 632). However, the text goes on to state: "One commonly used formulation of the elements constituting a past practice requires 'clarity, consistency, and acceptability.' The term 'clarity' embraces the element of uniformity. The term 'consistency' involves the element of repetition, and 'acceptability' speaks to 'mutuality' in the custom and practice. . . . that the practice must be 'unequivocal, clearly enumerated and acted upon, and readily ascertainable over a reasonable period of time' is also frequently cited. A number of arbitrators recognize that a past practice rises to the level of an agreement between management and labor if it is 'clear, detailed, undisputed and binding.'" (*Id.*, 1999 Supplement, at 99-100).

Underlying Circumstances and Scope—A past practice does not arise in a vacuum. Rather, it is the parties' consistent response to a specific set of circumstances. (See, *International Association of Fire Fighters, Local 1395 vs. City of Springfield, supra*, 9 PECBR 8533 at 8541 [the ERB's "origin and purpose" consideration refers to "... a repeated response to a given set of underlying circumstances."].) Since a practice is, in effect, a product of circumstances, arbitrators construing the practice generally limit its scope to the circumstances which gave rise to it. For instance, a work assignment past practice which applies to a midnight shift might not automatically apply to the day shift. The circumstances of each situation must be taken into consideration. Furthermore, if circumstances change, the practice may lose its binding effect.

Ambiguous Contract Language—If a contract provision is clear and unambiguous, past practice evidence generally may not be used to prove a different meaning. In situations involving unclear or ambiguous contract language, however, past practice evidence may be cited to establish the parties' intent as to meaning. For instance, if a contract refers to a "day"—does this period cover midnight to midnight, or a 24-hour period, beginning with an employee's shift? If both parties to the contract knowingly and consistently acted as if the term meant midnight to midnight, this might constitute evidence as to what the term means. On the other hand, evidence of a unilateral interpretation by one of the parties probably would not carry great weight (unless there was a knowing and continued failure of one party to object to the other party's interpretation).

Past Practice Versus Clear Contract Language—While it is possible for a past practice to constitute an amendment or modification of clear contract language, such an instance requires "very strong proof." (*Elkouri and Elkouri, supra*, at 652 - 653: "... the conduct relied upon to show such modification must be unequivocal and the terms of modification must be definite, certain, and intentional.")

A key issue which often arises in connection with this subject is the concept of mutual agreement by the parties. In certain contexts, some arbitrators are willing to impute knowledge of a past practice to an employer where supervisors were aware of it. In the case of clear contract language, however, knowledge by implication is generally regarded as inadequate to establish mutuality. Instead, explicit acknowledgement is typically required.

This issue was addressed by Arbitrator Timothy D.W. Williams in an arbitration involving Oregon Health Sciences University (*In the Matter of the Arbitration Between Oregon Nurses Association and the State of Oregon Executive Department*, October 30, 1984). Arbitrator Williams noted in his Opinion that, "... arbitrators are much more reluctant to rely on a claim of past practice where the language of the agreement is clear and unambiguous and where the practice contradicts the clear meaning of the language [as opposed to ambiguous language or the absence of any relevant language]." According to Arbitrator Williams, to meet the requirement of "mutual agreement" in the context of clear and unambiguous contract language, a past practice must be shown to have been *intentionally* agreed to by both of the parties: "Since the parties intentionally wrote the specific provision into the labor agreement; to raise

a past practice to the level of amending that provision, it too must be shown to be intentional.” In the *Oregon Nurses Association* arbitration, there was a longstanding practice of paying certain nurses a shift differential which was not required by the contract. However, since there was no evidence that the employer intentionally set out to pay shift differential where it was not required to do so by the contract, Arbitrator Williams held that, “. . . the practice with regards to the payment of shift differential did not rise to the level where it could amend the clear provisions of [the contract].”

Changing or Discontinuing a Past Practice—Under the Public Employee Collective Bargaining Act (PECBA), if a past practice concerns a permissive subject of bargaining, management may generally discontinue or modify it on a unilateral basis. (For a discussion of permissive and mandatory subjects of bargaining, see *Management Insight*, July 2001, p. 2.) However, as was the situation in the *Beaverton Police Association* ERB case (summarized at p. 5 of this newsletter), if a change or discontinuance of a permissive past practice impacts a mandatory bargaining subject, a unilateral change would typically not be allowed. In such cases, and with past practices directly involving mandatory bargaining subjects, bargaining is generally required before implementation of a change or discontinuance.¹ If the issue comes up during the term of a collective bargaining agreement (as was the situation in the *Beaverton Police Association* case), absent controlling contract language or mutual agreement, the PECBA’s mid-term bargaining provision—ORS 243.698—would generally govern. If an employer wishes to change or discontinue a past practice regarding or impacting a mandatory subject during successor contract bargaining, the employer may notify the other party of its intent to do so during the negotiations. The burden then shifts to the other party to have the practice added to the terms of the contract. If it fails to do so, the benefit of the practice would likely be lost to it.

Discontinuing a past practice sometimes involves a conflict between the past practice and a management right. A recent arbitration decision (summarized in the November 2000 *Management Insight*, p. 5) dealt with just such an issue. In this case—*In the Matter of the Arbitration between DAS (on behalf of the Department of Corrections and the Board of Parole and Post-Prison Supervision) and AFSCME, Local 2376 (SRCI Nurses)*, August 14, 2000, Carlton J. Snow, Arbitrator—the past practice concerned scheduling security officers to assist nurses during sick calls (which provided an increased security level for the nurses). The management right was the right to determine methods of operation, which in this instance involved reassigning the security officers. Presented with this conflict between management rights and an established past practice, Arbitrator Snow concluded: “To uphold the past practice in this case would contravene an inherent managerial right to control its operation. When there is a clash between a past practice and an undisputed managerial right, an employer has no obligation to give notice at the bargaining table of its intent to change the practice and may do so at its discretion. . . . In such cases, courts are clear that a past practice will not be permitted to overcome a specifically protected management right.”

Negotiated Contract Clauses Regarding Past Practice—A number of the state’s collective bargaining agreements include clauses regarding past practice. To the extent that such contract language modifies the case-developed rules noted above, the contract language generally would take precedence. One example of such a clause is Article 5, Section 2 of the SEIU agreement. Among other things, this clause permits the state to change or issue new work practices or rules covering permissive subjects of bargaining—even though subject to a past practice—so long as they are not in conflict with or otherwise addressed in a specific provision of the agreement. The clause also obligates the state to “. . . bargain over any proposed changes in working conditions or their impact which are mandatory subjects of bargaining.”

¹ Some arbitrators follow a slightly different approach developed by arbitrators outside the scope of the PECBA. Under this alternative approach, if a past practice involves management rights, unilateral change or discontinuance by management during the contract’s term is generally allowed. (See, *Elkouri and Elkouri, supra*, at 635 – 541.) However, absent contract language to the contrary, when an established past practice involves “a ‘benefit’ of peculiar personal value to the employees,” these arbitrators would find that an employer may not unilaterally change it during the term of a collective bargaining agreement. (*Id.*, at 639.) Some arbitrators limit the scope of binding past practices to employee “working conditions” as opposed to methods of operation or control of the workforce (which fall within the scope of management rights). (*Id.*) Other arbitrators limit binding past practices to those which provide, “a major benefit to a substantial number of employees.” (*Id.*, 1999 Supplement, at 101.)

Department of Administrative Services
Human Resource Services Division
Labor Relations Unit
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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 32 collective bargaining agreements with 11 different labor organizations, covering over 25,000 employees in the Executive Branch of Oregon State Government. The LRU also negotiates an agreement with SEIU covering a bargaining unit of approximately 13,000 Homecare Workers. The following is a list of the LRU staff and contact phone numbers for your convenience. The LRU's fax number is 503-373-7530.

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