

MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

NOVEMBER 2000

ITEMS OF INTEREST

OPEU TEMP NEGOTIATIONS CONTINUE

In March, the Employment Relations Board ruled that certain direct-hire temporary workers could vote to determine whether or not they wished to be represented by the OPEU. In May, a majority of the direct-hire temporary workers who returned ballots voted to join the union. Since that time, starting on June 6, the State of Oregon and the OPEU have met on nine occasions to bargain over the terms and conditions of these workers' employment with the state.

The negotiations have largely focused on which articles of the OPEU Master Agreement will apply to these workers. Tentative agreements have been reached to apply thirteen of the articles and to omit ten. The next negotiating session is scheduled for November 16.

During the period of this ongoing bargaining, agencies should continue to follow existing DAS and agency policies and pay practices for the affected temporary workers. Until an agreement with the OPEU is reached and ratified, the terms and conditions of these workers' employment with the state remains as they were prior to commencement of negotiations.

NOTICE TO EMPLOYEES OF WEATHER-RELATED CLOSURES

Andrew Wyeth was said to have preferred winter, "when you feel the bone structure in the landscape" One wonders, however, whether Mr. Wyeth's fancy for the season would have survived a winter spent commuting to work in Oregon.

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

Many of the agreements, including the OPEU contract, have articles that require agencies to notify their employees of the radio or television stations which will be used to broadcast closure or curtailment decisions. Most commonly, the

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Distribution:

Executive and Management Service Employees

Editors:

Mike Halpern and Pam Murdock

agreements specify that radio or television selections should be posted on agency bulletin boards. Some also require that the employees be given a telephone number to call to verify the closure or curtailment of services.

Special rule for FLSA-exempt employees

Due to Fair Labor Standards Act regulations, the state has determined that FLSA-exempt employees will not be compelled to use leave, with or without pay, in connection with inclement weather closures which last less than a full workweek. FLSA-exempt employees who have the option of reporting to their work sites or alternate work sites and choose not to do so, or who have prior approval to be off on the affected days, are not covered by this rule. Many of the state's collective bargaining agreements have special articles which address these issues.

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

ARBITRATION SUMMARIES



*In the Matter of the Arbitration between the OSPOA and the State of Oregon, Department of State Police
(Arbitrator, Sandra Smith Gangle; February 24, 2000).*

The grievant's discharge for unauthorized personal use of his state-owned laptop computer was upheld despite testimony that the agency had never before discharged an employee for such unauthorized use, except where pornography was involved. In this case, the violation was extensive, occurred over a six-month period of time, immediately after the grievant had received a written reprimand for prior unauthorized personal use of his state computer, and after he had expressly promised that he would avoid all such unauthorized use in the future. Because of the autonomous conditions under which the grievant worked, his misconduct left the employer unable to trust that he would conform his behavior to the employer's expectations in the future.

Facts: The grievant (Employee) worked as a Communications Systems Analyst II for the Oregon State Police

(Department). The Employee was hired in July 1995, in Salem, and subsequently assigned to a work station in Bend. With his supervisor located in Salem, the Employee's position allowed for considerable autonomy. He was issued a state-owned laptop computer for use in performing his duties, and was authorized to use it while working at home or in the field. In the spring of 1998, pornographic material was discovered in the computer during its routine handling by Department personnel. The Employee admitted accessing files on the laptop for personal use, but promised in writing that he would never intentionally, "[H]ave any unauthorized use of or material on any state-owned equipment again." On June 24, 1998, a Letter of Reprimand was issued to the Employee in connection with his personal use of the laptop. The Reprimand directed the Employee to, "[R]efrain from using Department computer equipment for personal use at work or in your home. Future disregard of the Department rules and regulations may result in more severe disciplinary action." In early 1999, it was discovered that the Employee had used his state-owned laptop between July 1998 and February 1999 to operate personally-owned software and to access web sites unrelated to his official duties. The Employee was discharged on June 25, 1999.

Question presented: Was there just cause for the Employee's discharge?

Discussion and Ruling: The Oregon State Police Officers Association (Association) asserted that the Department failed to meet the notice and penalty tests of just cause: "Specifically, the Association contends [the Employee] had not been informed, in his 1998 Letter of Reprimand, that he could be *discharged* if he used the

laptop computer for personal reasons, particularly where the personal use did not involve accessing pornographic material; and, secondly, discharge is an excessive penalty under the principle of progressive discipline.” (Emphasis in original.) As such, Arbitrator Gangle limited her analysis to these two issues.

As to the first issue, “[O]rdinarily, to sustain a discharge, an employer must demonstrate that it has notified the grievant in advance, by either written or oral notice, that discharge is a possible or probable penalty for the type of misconduct that the grievant has committed.” However, “The principle of advance notice is not without its exceptions” For instance, “Discharges have been upheld in a variety of arbitration cases, where gross insubordination or other types of ‘major misconduct’ were proven, even though the employers in those cases had not given express prior notice to the grievants involved that discharge would be the penalty for such conduct.” Citing a rationale expressed by Arbitrator C. Allen Pool, Arbitrator Gangle noted that this is because, “[S]ome types of behavior are so unacceptable that warning and notice are presumed.”

In this case, the Employee did have, “[S]ome advance notice that discharge was a possible penalty.” The Department Manual, which the Employee acknowledged receiving in July 1995, included prohibitions on personal use of Department computer equipment and also provided that violation of the policies contained in the manual, “ ‘[M]ay result in disciplinary action, *up to and including dismissal.*’ ” (Emphasis in original.)

In response to his prior violation of the Department’s computer-use policy, the Employee wrote a letter of apology, in which he promised that, “I will never, intentionally, have any unauthorized use of or material on any state owned equipment again.” However, a “few weeks” after making this promise the Employee began again using his state-owned computer for unauthorized personal use. This use, moreover, “[W]as not minimal or incidental, but was extensive and pervasive, as compared to his work-related use of the machine. The investigation showed that he had accessed and downloaded substantial amounts of non-work-related material from the Internet, including the entire Ken Starr Report on the President Clinton/Monica Lewinski investigation”

At the hearing, the Employee testified that in making his 1998 promise he only intended it to cover accessing pornography on the Internet, and not other forms of personal use of his state-owned computer. Finding that

the Employee lacked credibility in so testifying, the Arbitrator pointed out that the promise was, “[A] commitment to avoid *all unauthorized use* of his computer.” (Emphasis in original.) Arbitrator Gangle concluded that, “[T]he [Employee] had ample notice that he was *not* to use his laptop for *any unauthorized personal use.*” (Emphasis in original.) His 1998 promise, moreover, “[W]as insincere and untruthful He began breaking it within a few weeks and then repeatedly and deliberately broke it over the following six months. Under the circumstances, the [Employee’s] violation of the order contained in his 1998 Letter of Reprimand, was a very serious form of misconduct, involving not only insubordination but also dishonesty, breach of trust and lack of personal integrity. Since the [Employee’s] job assignment was in an autonomous setting, with very little direct supervision, his untrustworthiness was especially significant because he could not be watched on a regular basis.” As such, “This case fits squarely within the principle . . . that egregious misconduct can lead to discharge, even where there has not been specific advance notice of that penalty.”

Regarding the appropriateness of the penalty in this case, the Arbitrator found that discharge was not excessive, in view of the extensive and flagrant nature of the unauthorized use. Despite the testimony of a Senior Trooper that he had never before seen a discharge resulting from the unauthorized personal use of a state computer, except where pornography was involved, the Arbitrator was not persuaded that the Employee’s discharge was inconsistent with prior practice or discriminatory. This is because, “There may never have been such an egregious case involving unauthorized use of property before.” Finally, “Because of the autonomous conditions under which the [Employee] worked, he could no longer be trusted to conform his behavior to the expectations of his Employer.” The Department had just cause for the discharge.



HELPFUL HINT . . .

Forewarning of possible discharge

One of the seven steps of just cause generally requires that employees be forewarned of the consequences which might ensue from engaging in misconduct. As such, when preparing a disciplinary letter or memo, if subsequent misconduct of a similar nature might conceivably lead to pre-dismissal proceedings, it is prudent to include a forewarning in the document that such misconduct may result in further disciplinary action, “up to and including dismissal.”

In the Matter of the Arbitration between the OSPOA and the State of Oregon, Department of State Police (Arbitrator, David Gaba; August 11, 2000).

While the weight of the evidence supported the state's position that there was just cause for the grievant's termination, the evidence was insufficient to meet the clear and convincing standard used by the Arbitrator. Since the state failed to meet its burden of proof on the just cause issue, the discharge was set aside.

Facts: On March 1, 1987, the grievant (Employee) was hired by the Oregon State Police (Department) as a Trooper. He was promoted to Senior Trooper in March 1995. Between April 1997 and January 1999, the Employee received a letter of reprimand for passing two other patrol cars during a pursuit; a six-month, one-step salary reduction for disobeying an order by having contact with witnesses in a criminal matter involving another trooper; and a six-month, one-step salary reduction for late report writing. He also repeatedly received unsatisfactory job ratings in a number of categories, including "safety" and "job knowledge/application." After reporting for duty on May 30, 1999, the Employee received a telephone call from a dispatcher which informed him that, "I'm going to be sending you probably to a 12-35 that was tagged by Tanya, but maybe not, it might be a 12-16." The designation 12-35 is code for an abandoned vehicle; 12-16, for an accident. The dispatcher also later informed the Employee, "Yeah, someone called it in as a 12-16. And of course, we err for the worst case scenario." In the process of getting to the scene, the Employee drove through a residential neighborhood in the dark, at more than 50 mph. Two neighbors of the Employee (who were also Grants Pass Police Department supervisors), reported the Employee for driving at excessive speed through a residential neighborhood. The Employee was discharged on August 20, 1999.

Question presented: Did the Department have just cause to discharge the Employee?

Discussion and Ruling: Since this arbitration involves the discharge of an employee, "[T]he burden is on the employer to sustain its allegations, and to establish that there was just cause for the termination." And, in light of the, "... harsh effect of summary discharge upon the employee in terms of future employment," the applicable burden of proof is clear and convincing evidence.

Agreeing with the Department's argument that the proper context for the termination decision included the prior

discipline since all of the misconduct involved "poor judgment," Arbitrator Gaba noted: "While the actions [the Employee] was disciplined for in the past at first appear to be dissimilar, there is a common thread of 'poor judgment' running through them. To disregard the State's theory is to allow an employee an unlimited opportunity to commit continuous acts of misconduct as long as they are of a constantly varying nature." The Department had the right to require that the Employee use good judgment in performing his job since such judgment was an explicit requirement of the Employee's patrol position. Quoting from Elkouri and Elkouri (*How Arbitration Works*), Arbitrator Gaba explained: " 'An offense may be mitigated by a good past record and it may be aggravated by a poor one. Indeed, the employee's past record often is a major factor in the determination of the proper penalty for his offense.' "

Applying this approach, the Arbitrator observed that, "[G]iven the nature and severity of [the Employee's] past conduct and its recent occurrence, almost any act warranting discipline would justify termination. Put quite simply, on May 30, 1999 [the Employee] was extremely lucky to still have his job." As such, "If the facts show that a reasonable (not good or average) trooper would have perceived the dispatch of May 30, 1999 to be a non-emergency situation, I would uphold the State's position that [the Employee] was guilty of poor judgment and the termination would stand." However, "While a preponderance of the evidence supports this view, it does not rise to clear and convincing evidence." Because of the unclear designation by the dispatcher (using both the 12-35 (abandoned vehicle) and 12-16 (accident) codes, "This contradiction alone calls into question whether there is clear and convincing proof for the argument that a reasonable trooper would have unequivocally perceived the dispatch to be of a non-emergency nature It is only by the thinnest of reeds that I have substantial doubt that [the Employee] assumed that he was proceeding to a 12-35, and it is only due to the clear and convincing evidence standard that he could be reinstated." The issue then is whether a reasonable trooper would have expected to be disciplined for driving as the Employee did to an emergency situation. And, concluded the Arbitrator, "[T]here is little compelling evidence that a reasonable trooper would have expected to be disciplined under such circumstances." Since the Department failed to prove violation of its rules by clear and convincing evidence in this instance, the incident cannot be grounds for the Employee's discharge. The Employee's history of poor judgment, "[C]annot reasonably be considered if the ultimate cause of termination is insufficient to justify an examination of [the Employee's] history." Under these circumstances, the Department did not have just cause to discharge the Employee.



HELPFUL HINT . . .

Progressive Discipline Tracks

The purpose of progressive discipline is to put employees on notice of inappropriate conduct in order to give them a chance to correct the behavior in question. When an employee persists in engaging in *similar* inappropriate behavior despite prior discipline, the principles of progressive discipline allow the employer to increase the severity of the discipline imposed. If the employee continues to engage in similar misconduct despite continued progressive discipline, discharge may ultimately result—even if the conduct immediately leading to the employee’s termination would not, absent the prior disciplinary record, justify such a harsh penalty. Progressive discipline for the same or similar type of misconduct is often referred to as a progressive discipline “track.” Subsequent misconduct of a *different* type is treated by many arbitrators as requiring a separate disciplinary track, starting at the least severe disciplinary level for relatively minor misconduct. Whether or not subsequent misconduct is similar enough to fall within an ongoing disciplinary track sometimes requires some thought. In the arbitration summarized above, for instance, the employer successfully argued that the prior and subsequent misconduct should be linked together as repeated instances of the use of poor judgment.

In the Matter of the Arbitration between the State of Oregon, Department of Corrections and Board of Parole and Post-Prison Supervision, and the AFSCME, Local 2376 (SRCI Nurses) (Arbitrator, Carlton J. Snow; August 14, 2000).

The Arbitrator first found that the grievance is arbitrable since it concerns issues covered by the parties’ collective bargaining agreement, which fails to exclude these issues from the scope of its general arbitration clause. The fact that the grievance alleges a possible violation of state law does not exclude it from arbitration. On the merits, the Arbitrator determined that a past practice (scheduling security officers to assist nurses during sick calls), could not overcome a standard management right expressly protected by the parties’ collective bargaining agreement (the right to determine methods of operation). As such, management retained the authority to make a unilateral change in the practice.

Facts: This matter arose out of the decision of the Department of Corrections (Agency) to reassign correctional officers who had been working with nurses in satellite clinics at the Snake River Corrections Institution (SRCI). From 1991 (when the SRCI was first opened) until May 1999, correctional officers were usually assigned to monitor activities in satellite clinics while nurses conducted inmate examinations during sick call. While the correctional officers generally were excluded from examination rooms due to the need for medical confidentiality, they remained nearby. In May 1999, the Agency reassigned the correctional officers. Thereafter, nurses performing examinations were accompanied by other nurses or by members of the administrative staff. To address concerns of the nurses that the reassignment had adversely affected their workplace security, the Agency increased the number of security cameras and mirrors in the clinics, provided the nurses with electronic body alarms and assigned a roving correctional officer to patrol the program services area. Believing that the Agency’s steps failed to compensate for the perceived lack of adequate security, the nurses filed this grievance, asserting that the reassignment violated the collective bargaining agreement between the parties as well as the Oregon Safe Employment Act, which was incorporated into the agreement.

Questions Presented: Is the grievance arbitrable? If so, did the Agency violate the collective bargaining agreement by ceasing to schedule security personnel to assist nurses during sick call at satellite clinics?

Discussion and Ruling: *Arbitrability* – The Agency contended that the nurses’ grievance is not arbitrable since it is premised on assurances which were allegedly made to the nurses during their employment interviews, before they became members of the bargaining unit, and because the dispute involves the reassignment of correctional officers who are not in the nurses’ bargaining unit. The Union countered that the dispute is arbitrable since the contract has a broad arbitration clause which does not exclude the subject matter of the grievance. Assessing these arguments, Arbitrator Snow noted that the Agency, “[M]ust overcome a presumption in the law that favors arbitration.” Citing U.S. Supreme Court decisions on this issue, the Arbitrator commented on the difficulty of overcoming a general commitment to arbitrate disputes, and observed that, “[T]he Employer [had] an obligation to give positive assurance that the parties never intended the subject matter of this particular dispute to proceed to arbitration.” And, as was stated by the U.S. Supreme Court, “ ‘Apart from matters that the parties specifically exclude, all the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provision of the collective agreement.’ ” In this case, the contract

did not exclude a dispute from arbitration, "... because it implicated regulatory or statutory matters," or because it concerned the public interest. "The fact that the grievance might implicate a violation of state law failed to provide a bright line for concluding that the dispute is not substantively arbitrable." The subject matter of the grievance—"that nurses are not safe in their present working conditions"—falls within the scope of Article 29 of the parties' contract, which covers health and safety issues and which expressly incorporates into the agreement provisions of the Oregon Safe Employment Act. As such, "The totality of the record makes clear that the grievance is substantively arbitrable."

Merits – The Arbitrator first addressed the Union's assertion that removing the sick call officers violated Article 29 of the parties' agreement as well as the Oregon Safe Employment Act. Noting that while there is little doubt that the level of risk for the nurses conducting sick call was increased by the staffing reduction, Arbitrator Snow explained that, "The question is whether the level of risk crossed the line into a contractual and legal violation." And while, "A number of witnesses maintained that conditions at [SRCI] are comparably safe or even safer than conditions at similar facilities," no objective evidence contradicted this conclusion. There was, "No persuasive evidence ... that the Employer is in violation of relevant industry standards." Furthermore, "[T]he totality of the record ... failed to establish that work conditions at the satellite clinic Sick Calls are unreasonably unsafe."

The Arbitrator next addressed the Union's contention that the staff reduction constituted a violation of a past practice. While the evidence established the existence of such a past practice, it also established that the underlying conditions for the practice had changed sufficiently to justify eliminating it as inefficient and uneconomical. "It is the process management used to alter the past practice that is problematic in this case." To discontinue a past practice, a party, "[I]s expected to make known that fact during the course of negotiating a new contract A failure to give such notice ... generally means that an employer may not unilaterally revoke a practice during the duration of the agreement between the parties."

However, while the Agency did not give such notice, "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." Noting that the management rights clause in the parties' agreement protected the disputed right in this case, Arbitrator Snow concluded: "The practice is clear and meets all the indicia of a past practice, and the Employer failed to follow established methods of changing a past practice by giving notice at the bargaining table. But because the nature of the past practice involved a standard management right expressly protected by the parties' agreement, management retained the authority to make a unilateral change in the practice. In such cases, courts are clear that a past practice will not be permitted to overcome a specifically protected management right." The grievance is denied.



HELPFUL HINT . . .

Who Decides Substantive Arbitrability

Substantive arbitrability has to do with the extent of an arbitrator's contractual authority, *i.e.*, whether an arbitrator may properly rule on a particular issue. While courts are sometimes called upon to determine substantive arbitrability, the question is often left to the arbitrator, either by mutual consent of the parties or by virtue of a clause in the applicable collective bargaining agreement. Even where no clear authorization to decide substantive arbitrability is made, arbitrators often view such a determination as an inherent part of their authority. Since this is a well-established practice, and in light of the clear public policy favoring arbitration of disputes, an arbitrator's decision on substantive arbitrability is generally accepted by the parties without a courthouse challenge.

HAPPY HOLIDAYS!

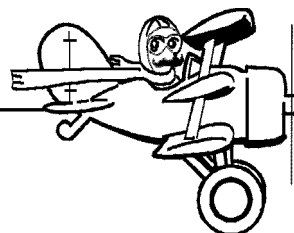
About the Management Insight...

The *Management Insight* is produced periodically by the Labor Relations Unit, Human Resource Services Division, Department of Administrative Services, and is distributed to Executive and Management Service employees of the State of Oregon. Back issues may be accessed through the HRSD website, www.hr.das.state.or.us. Material covered in this newsletter may be reproduced without special permission. Please credit the *Management Insight*, DAS, LRU.

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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BACK TO BASICS



EFFECTIVE DOCUMENTATION

THE PEN CAN BE A TWO-EDGED SWORD

Supervisors and other human resources personnel are constantly told to document their personnel actions. However, as is the case with personnel evaluations, a weak or lazy set of notes of disciplinary actions can be worse than no notes at all. Notes should be like ideal newspaper reports: who, what, when, and where—just the facts. They should be unlike newspaper editorials; they should contain no legal conclusions, opinions, generalities, or admissions.

Avoid legal conclusions

Consider the following note made by an assistant plant manager:

I reviewed the list of employees whose jobs have been targeted for elimination at this plant. It is clear that we are in violation of the discrimination laws. If the [Equal Employment Opportunity Commission] learns of this list, we could face a class action lawsuit.

This manager meant well, but his written words unnecessarily exposed his company to a claim that it *willfully* violated discrimination laws in its force reduction. What's wrong?

First, the note makes the classic mistake of *rendering a legal opinion that was not subject to the attorney-client privilege*. Many words are in effect unintentional legal conclusions, such as “unauthorized action,” “violation,” “negligent,” or “wrongful.” If the note taker thinks so, the judge and jury will think so, too.

Second, the author drew a legal conclusion without having all the facts. Notice that the note talks about “targeted” reductions. Apparently there was not yet any actual layoff, but the note says it is “clear” we “*are*” in violation. If the eventual actual list of layoffs overlaps, but is not the same as, the projected list, the manager will be left explaining orally what the context of his written note was. Oral explanations are never as strong as the written word.

Third, the legal conclusion is itself vague. He meant, presumably, age discrimination, but does not say so.

The document could just as well be taken as an admission of racial, religious, or sex discrimination.

Avoid generalizations

When the author of a document uses words such as “typically,” “usually,” or “generally” to describe a company's practices, he or she is making a broad generalization that could not possibly be true in every situation. Consider the following:

The company has typically promoted people based on seniority. Our general practice has been to promote from the ranks. We never hire managers from outside the company.

Avoid commentary and admissions

If a discharge is challenged in court, you will not want to read the following editorial in the record of the disciplinary investigation: “Our policy on theft may be too strict. A clerical employee who uses company pens by the dozen shouldn't be terminated for taking a package of pens home. However, since our policy has no exceptions, I terminated the employee.”

Nor is an honorable supervisor doing any good by making an admission: “I admit I sexually harassed her when I asked her for a date, and I apologize.” Well, that amorous inquiry may or may not be sexual harassment—the admission may make the supervisor feel honorable or cleansed, but it could form the basis for a lawsuit where none in fact existed.

Avoid labels

A classic is the claim that some female employee is “too aggressive.” That label will always be taken by a jury as proof that the speaker thinks women should be meek and, therefore, that there must have been sex discrimination. The facts, if the time and trouble were taken to write them all, might have been otherwise. This female employee “interrupted other employees during the weekly department meetings on October 7 and 14, raised her voice when speaking to the support staff about the problem with the computer, and threw items from her desk to the floor when she was attempting to locate the missing quarterly report.”

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Do the following

- Technicalities
 - Date the document.
 - Identify the writer.
 - Identify by name and title each person present at the meeting.
 - Identify the time of the meeting.
 - Identify the time the notes were written (should be the same as, or very shortly after, the meeting).
- Substance
 - State what was said and by whom. Take the time to slow everyone down, and get verbatim statements whenever possible. Not “Joe was rude and insubordinate to his supervisor,” but “Joe said that his supervisor, John Doe, was a bag of _____ [your notes should contain the word] and Jo said he would finish the job when and if he felt like it.”

(The foregoing article originally appeared in the August 2000 edition of the Oregon Employment Law Letter. It is reprinted with the Oregon Employment Law Letter’s permission.)

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.

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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