

MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

OCTOBER 2001

ITEMS OF INTEREST

2001-03 SEIU CONTRACT NOW ON THE WEB

The 2001-03 SEIU collective bargaining agreement is now on the Human Resource Services Division (HRSD) web site, at www.hr.das.state.or.us. After ratification and integration of new contract language, each of the State's 2001-03 agreements will be posted on the site. The collective bargaining agreements, as well as current and past issues of the Management Insight, are accessible by clicking on "Labor Relations." In addition, the site now offers a "Search the Collective Bargaining Agreements" feature.

A great deal of other useful information is also accessible through the HRSD site, including the HRSD Rule and Policy Manual, class specifications, compensation information, statewide training and organizational development courses and services, state job listings and links to other Oregon web sites.

NEW HRSD AUDIT PROGRAM

During the 1999-01 biennium, Human Resource Services Division (HRSD) audit functions were scaled down to allow HRSD staff to meet increased service-related needs. Effective July 1, 2001, this changed.

The 2001 Legislature approved the addition of three positions that will support a renewed HRSD audit program. HRSD also redirected one position from the HR Management and Consultation Unit to the new program. With three of the four positions currently filled, the staff is beginning to work on a draft plan that identifies potential future audits. This administrative review function is part of HRSD's continuing efforts to move toward more

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Distribution:

Executive and Management Service Employees

Editors:

Mike Halpern and Pam Murdock

consistent application of state human resource management rules and policies.

Audits will fall into two categories—classification and issue-specific. Audit subjects are typically selected through risk analysis, upper-management input, HRSD staff input, and agency suggestions. Once selected, audit subjects are then prioritized to determine the sequence of audits. The prioritization methodology consists of:

- Risk analyses—which assess the extent of fiscal, legal, and/or public policy impact for each potential audit subject, with those having the highest level of risk given top priority; and
- Database analyses—which determines the quantity, magnitude, degree of aberration, and inconsistencies that exist in current application of practices.

The risk analysis format is derived from the “Risk Assessment Matrix” used by the Secretary of State Audits Division to prioritize their audits, but is tailored to human resource management issues. The database analysis uses data from the Personnel and Position Data Base (PPDB) and the Oregon State Payroll System (OSPS).

Some audits will occur as a result of leadership direction or special requests. A state human resource management practice of particular interest to the 2001 Legislature was the area of position classification and reclassification. Legislators expressed concern about the number of reclasses being requested in agencies’ 2001-03 biennial budgets and the impact inappropriate reclasses and/or misallocations might have on agency expenditures. One of the first tasks of the HR Audit Program staff was in response to those concerns. In June, agencies began allocating positions to a number of new classifications developed in phase one of the Administrative Classification Study. The Audit Team was asked to perform an audit of those agency allocations to determine whether the allocation was to the most appropriate classification. This audit is currently underway and is anticipated to be completed by the time this article is published. Results will be available on HRSD’s website at www.hr.das.state.or.us/auditprog in late October or early November 2001.

Most of the interaction between HR Audit Program staff and agencies will be with the agencies’ personnel staff. However, some audits will require interviews with employees and/or managers to gather information, review processes or procedures, or to gain feedback. If you have specific questions regarding the new program, or

suggestions for future audits, please call the HR Audit Program manager, Denise Hall, at 503-373-7320, or e-mail her at denise.l.hall@state.or.us.

EMPLOYMENT RELATIONS BOARD RECONSIDERS E-MAIL RULING

On August 28, 2001, the Employment Relations Board issued an order requiring the Oregon Public Employees Union, Local 503 (OPEU) to cease and desist from its use of the Oregon University System’s e-mail system (UP-61-98). This order was issued in response to a petition for reconsideration filed by the Oregon University System (OUS), and vacated a prior Board order (19 PECBR 205 (April 24, 2001)), which concerned the same conduct.

The case arose out of OPEU’s use of the OUS e-mail system to communicate with its bargaining unit members about union business. In the previous ruling the Board had held, among other things, that OPEU’s conduct did not breach the parties’ collective bargaining agreement since the relevant contact provisions are silent on the issue of OPEU’s use of the OUS e-mail system and do not govern the conduct of OPEU’s paid staff.¹ On reconsideration, while the Board reaffirmed its previous conclusion that OPEU’s conduct did not breach the contract’s *express* terms, it nonetheless found that the conduct breached the union’s implied covenant of good faith and fair dealing and thus constituted an unfair labor practice.²

In reaching its decision, the Board relied on the approach used by the National Labor Relations Board (NLRB)—that unions generally do not have a statutory right to use an employer’s equipment to communicate with their members. Under Oregon’s Public Employee Collective Bargaining Act, the subject of union access to employer equipment for the purpose of communicating with union members is typically a mandatory subject for bargaining. As such, for OPEU to have a right to use OUS’s equipment to communicate with its members, this right must be found in the parties’ collective bargaining agreement. And, the Board found, no such right is present in this case.

First, the collective bargaining agreement is silent on the subject of e-mail. In addition, the parties’ conduct during contract negotiations indicates that the contract language regarding the union’s use of electronic bulletin boards was not understood to extend to interactive use, which is usually the case with e-mail. Union use of the OUS e-mail system, moreover, had been proposed by the union

during contract negotiations and rejected by OUS. Finally, two grievances which had claimed that OUS violated the electronic bulletin board contract language by denying OPEU the use of the employer's e-mail system were dismissed by arbitrators.

In assessing a party's duty of good faith and fair dealing, the "guiding principle" for consideration is the "objectively reasonable expectations of the parties." In this case, based on the reasoning set forth above, the Board concluded that the parties did not have a reasonable expectation that OPEU could use the OUS e-mail system to communicate with its members. As such, OPEU's use of the OUS e-mail system is a breach of the union's duty of good faith and fair dealing and constitutes an unfair

labor practice. The Board ordered the union to cease and desist from this practice.

¹ Board Member Rita E. Thomas wrote an opinion which dissented in part from the Board's previous decision (and which argued, among other things, that OPEU's conduct was a violation of the duty of good faith and fair dealing).

² As stated by the Board: "Oregon courts and this Board have recognized that contracts, including collective bargaining agreements, contain an implied covenant of good faith and fair dealing. . . . '[a] party's failure to fulfill its duty of good faith and fair dealing is, in effect, a breach of contract.' [Citation]"



NOTES FROM JUSTICE

by The Labor and Employment Section, Department of Justice



EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

Statutory protection of job security for uniformed service members dates as far back as World War II. While various federal statutes have existed over time, the basic premise of these statutes remains constant: "He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind."¹ The current federal statutes protecting military and other emergency personnel can be found in the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 USC §§ 4301-4333, which was enacted in 1994.

The declared purposes of USERRA are to encourage noncareer military service by minimizing employment problems that can result from such service; to minimize disruption to the lives of service members and their employers by providing prompt reemployment; and to prohibit discrimination in the hiring and employment of persons because of service duties. 38 USC § 4301(a).

In sum, USERRA affirmatively obligates employers to provide employees with leaves of absence to perform military training and service. Employees are entitled to reemployment after military service, with seniority, status, and rate of pay to accrue as if continuously employed. USERRA guarantees employees' continuation of health benefits for the first 18 months of military leave and protects an employee's pension benefits upon return. USERRA protects both potential and existing employees from discrimination because of military obligations. Finally, USERRA preempts any state law, contract, agreement, policy or practice (even collective bargaining agreements) that reduce or limit the rights and benefits provided by USERRA.

When confronted with issues involving USERRA, employers should remain mindful of the remedial nature of the Act. Because of the public policy issues involved, courts have liberally construed USERRA to the benefit of service members. Further, in most cases the burden of defending any practice in violation of USERRA will fall upon the employer.

Leaves of Absence. The Act provides employees in the uniformed services leaves of absence, whether their absence is on a voluntary or involuntary basis. National Guard duty as well as training related to serving as a reservist are all included.

... continued page 4

¹ *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 US 275 (1946).

USERRA requires that all persons leaving to perform military service give advance notice to the employer, but this may be either written or verbal. Notice may also be given by an appropriate officer of the armed services and advance notification is not required if such notice was precluded by military necessity. While an employer may ask for a copy of an employee's military orders, leave should not be conditioned upon those orders. Such leave may be for up to five years, and can be extended further.

Although an employer is not required to compensate an employee absent on active duty, an employee may request that accrued paid time off (not including sick leave) be applied to cover the leave. (One exception to the general rule that employees are not entitled to compensation from their civilian employer while serving can be found in ORS 408.290, which provides state employees on annual guard or reserve training duty 15 days of paid leave per calendar year). Employees absent for 31 or more days may elect to continue their health benefits through a process similar to COBRA for up to 18 months.

Reemployment Rights. In order to be eligible for reemployment, the employee must have given notice properly. Further, the length of absence from employment must not exceed five years, the person must be released from military service under honorable conditions, and the person must report back to his or her civilian job in a timely manner.

The requirements for reporting back to work depend on the length of service. For periods of training and service of up to 30 days, the employee must report back to work on the first regularly scheduled work day following military service, within eight hours, after allowing for a reasonable time of transportation from the place of service to the person's residence. If the period of service is more than 30 days but less than 181 days, the individual must submit an application for reemployment not later than 14 days after the completion of service. For service over 180 days, that application for reemployment must be made not later than 90 days after completion of service. In certain circumstances these application deadlines may be extended. Like the initial notice requirements, written application for reemployment is not required. The employee must merely notify the employer, either verbally or in writing, of the person's intent to return.

Regarding reemployment rights, an employee returning from training or military service of less than 90 days must be promptly reemployed "in the position of employment in which the person would have been employed if the continuous employment of such person with the employer

had not been interrupted." If the employee is not qualified, after reasonable efforts to qualify the person, then the employee must be reemployed at the original pre-service position. Where the term of service exceeds 90 days, the employer has the option of returning the employee to either the position the employee would have attained if continuously employed or a position of like seniority, status and pay. Employers should focus upon USERRA's requirement that *the employee be treated as if continuously employed*. Thus, an employee who is reemployed is entitled not only to seniority and other rights and benefits that the person had at the start of his or her military service, but also to any accrued seniority that the employee would have attained if continuously employed. This is often described as an "escalator principle." As the U.S. Supreme Court has explained, a service member "does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." Consistent with this approach, an employee also is entitled to immediately resume benefit eligibility status without a waiting period.

Protection from Discrimination and Discharge. An employer may not discriminate against an employee or applicant and shall not deny "initial employment, reemployment, retention in employment, promotion or any benefit ..." because of service obligations. 38 USC § 4311(a). In the past, this anti-discrimination policy has been broadly applied. For example, cases have held that changes in job duties and work schedules due to an employee's reserve obligations were discriminatory, even if accompanied by no loss of pay or seniority. Policies limiting the number of employees who can be reservists have also been found to be discriminatory. A collective bargaining agreement does not supercede USERRA and cannot serve to justify acts or sanction discriminatory policies. It should be emphasized that the anti-discrimination provisions also prohibit discrimination against applicants for employment, even those who are currently unavailable for employment because of military duty. That is, an applicant who is otherwise qualified may not be denied employment because of anticipated or impending military duty.

In these cases, it is not necessary for the employee to show an employer discriminated intentionally, nor must the employee show that the sole cause of the action was the employee's military service. Rather, an employee must merely show that such action was a "motivating" factor in the employer's action. The employer's sole defense is to prove that the action would have been taken regardless of such membership.

Finally, as mentioned above, the Act also provides covered employees rights greater than those of employees not in the service. Training or retraining and other accommodations may be required. A reemployed employee may not be discharged without cause for a period of one year if the length of service was 181 days or more and for a period of 180 days if the length of service was more than 31 but less than 181 days. While persons serving less than 31 days are not automatically protected, the anti-discrimination provisions still apply.

Assistance Available. A number of federal web sites serve to provide employers general advice. They include: www.dol.gov, "The USERRA Advisor"; and www.dol.gov/dol/vets providing a nontechnical resource

guide. These user guides are provided as a resource to employers and are for information purposes only.

THE LABOR AND EMPLOYMENT SECTION WELCOMES . . .

Assistant Attorney General Tim Nord (the above article's author) is a recent addition to the Labor and Employment Section of the Department of Justice. Prior to joining Labor and Employment, Mr. Nord practiced in the department's Civil Enforcement Division. Before coming to the Department of Justice, Mr. Nord was in private practice in Lane County, Oregon.

ARBITRATION AND CASE SUMMARIES



In the Matter of the Arbitration Between the State of Oregon, Department of Public Safety Standards and Training (Employer) and Oregon AFSCME, Local 3995 (Arbitrator, Sylvia Skratek; June 25, 2001)

The grievant was dismissed as a result of a number of performance deficiencies and a past history of repeated misconduct. The arbitrator found that the cumulative effect of the incidents justifies the discharge despite the fact that none of the incidents would, by themselves, warrant that penalty. It is well established that a minor infraction will be viewed differently when it is repeated in the face of corrective measures.

Facts: The grievant (Employee) was hired in August 1995 as a Program Technician 1 at the Department of Public Safety, Standards and Training (Employer). The primary purpose of his position was to develop, deliver and present a wide range of fire service-related training programs to small rural and volunteer fire departments. The Employee received written reprimands in August and December 1997, a performance improvement plan in

Summer 1998, a one-day suspension in October 1998 and a salary reduction for two months in April 1999. As a result of six alleged performance deficiencies which occurred in November 1999, the Employee was dismissed as of January 5, 2000. The alleged deficiencies were: (1) an unfulfilled training request; (2) failure to attend a town hall meeting; (3) violating a directive to keep his office door unlocked; (4) failure to attend regional training meetings; (5) providing work product of unsatisfactory quality; and (6) failure to maintain his pager in working condition.

Question Presented: Was the Employee dismissed for just cause?

Discussion and Ruling: The Arbitrator began her analysis by noting that there are two areas of proof in discharge and discipline arbitrations: "The first such area concerns proof of wrongdoing; a responsibility that is allocated to the employer. The second such area of proof concerns the issue of whether the penalty assessed by management should be upheld or modified."

Looking first at the proof-of-wrongdoing issue, Arbitrator Skratek addressed each of the six charges. She concluded that the evidence and testimony provided at the hearing supported all but one of the six charges: "... the Employer has sustained its burden of proof of wrongdoing on all of the charges except for the charge regarding the locked office door." In so finding, she observed that: "The [Employee] held a position that required a 'high standard of agency professionalism' and 'the ability to

coordinate multiple and diverse functions and assignments with a high degree of accuracy and efficiency.’ ... [The Employee’s supervisor] should not have to micro-manage the [Employee’s] behavior and daily schedule.”

Turning to the penalty question, Arbitrator Skratek reiterated the purpose of progressive discipline: “The principle of progressive discipline requires that the discipline be administered in a manner that is intended to correct the employee’s behavior. It is the goal of progressive discipline to stop the behavior. In all progressive discipline matters, there is an understanding that employees will be allowed to rehabilitate themselves.” In this case, the implementation of progressive discipline began in August 1997, when the Employee received a written reprimand for failing to follow state traffic laws and vehicle use policies while driving on agency business, and for being untruthful to agency managers in connection with the incident. In December 1997, he received a second written reprimand for failure to follow direction and policy, and inability to perform his job without constant supervision. In the Summer of 1998, the Employee received a performance improvement plan that addressed performance deficiencies. In October 1998 he received a one-day suspension for failure to follow direction and his performance improvement plan. He was informed in writing at that time that further inappropriate behavior would result in discipline up to and including dismissal. Finally, in April 1999, he received a two-month salary reduction for further performance deficiencies. He was advised at that time that, “ ‘ ... if you fail to meet your supervisor’s expectations and improve your work performance, you will very likely be dismissed from state service.’ ”

Arbitrator Skratek found that “inability to follow directions” and “inability to perform his job without constant supervision” was a “common theme” underlying all of these prior disciplinary actions. Moreover, “The behaviors that resulted in his discharge are of a similar nature.” While, “[n]one of these incidents standing alone warrant his discharge ... the cumulative effect of these behaviors is sufficient to justify the Employer’s decision to terminate

the [Employee]. ... Each incident viewed separately may appear to be minor but the [Employee’s] overall misconduct amounts to a serious matter and constitutes a burden that the Employer should not be expected to sustain any longer. ... For two years, the Employer attempted to correct the [Employee’s] behavior without success. The [Employee] continued his misconduct and when offered the opportunity to correct his behaviors he failed to accept the offer. ... [the Employer] has properly concluded that any further use of progressive discipline would be futile.”

***Oregon AFSCME Council 75
vs. SAIF Corporation
(ERB Case No. RC-6-01; August 20, 2001)***

In connection with a representation election, the union challenged one ballot on the grounds that the employee/voter should be excluded from the proposed bargaining unit as a confidential or managerial employee. The ERB found that the employee’s duties failed to justify either of these exclusions. As such, the challenged ballot was counted (in favor of no representation), the election ended in a tie vote, and the unit remained unrepresented.

Facts: SAIF (Agency) is a quasi-State agency which provides workers’ compensation benefits for the State and many private Oregon employers. On February 23, 2001, Oregon AFSCME Council 75 (Union) filed a representation petition, accompanied by an adequate showing of interest, seeking to represent certain attorneys employed by the Agency. The Employment Relations Board (Board) conducted an election on May 1. The results were 13 votes in favor of Union representation, 12 votes for no representation, and one challenged ballot (in favor of no representation). Since the challenged ballot affected the election’s outcome, the case was assigned for a hearing. The employee who cast the ballot is a

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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claims issue analyst. He is also coverage counsel for “Coverage B claims”¹ and, at times, a trial counsel. He reports directly to the vice president of the legal division (formally meeting with him twice a month), and is “used as a resource” by the legal management team (LMT) which is responsible for day-to-day management of the legal division. He is not an LMT member.

Question Presented: Is the employee in question a confidential or managerial employee?

Discussion and Ruling: The Board began its discussion by noting that normally it is the employer who tries to exclude an employee from the bargaining unit because of his or her status as a confidential or managerial employee.² In this case, however, the Union seeks to exclude the employee and the employer argues that the employee should be included. As the challenging party, the Union bears the burden of proving that the employee in question (Employee) is either a managerial or confidential employee.

Confidential Exclusion – ORS 243.650 (6) defines confidential employee as, “ ‘one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining.’ ” To determine whether an employee is a confidential employee under the PECBA, the Board applies a three-part test: “Does the allegedly confidential employee provide assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining? If so, does the assistance relate to collective bargaining negotiations and administration of a collective bargaining agreement? If it does, is it reasonably necessary for the employee to be designated as confidential to provide protection against the possibility of premature disclosure of management, collective bargaining policies, proposals and strategies?” In this case, the Board determined that while the Employee met the first test (since he reports directly to a vice president who would be involved in the formulation, determination and effectuation of management policies in the area of collective bargaining), he failed to meet the other two elements: “He neither

provides assistance in collective bargaining matters nor is such assistance a necessary component of his position – there is no reasonable necessity that [the Employee] be designated as confidential.” The fact that the Employee compiles hearing statistics for management is not controlling since this could be done by someone other than the Employee.

In response to arguments by the Union that the Employee is a confidential employee because he has access to “confidential” Coverage B files and purportedly acts in a “confidential” capacity to the vice president to whom he reports (though not in the area of collective bargaining), the Board replied: “[The Employee’s] position, while perhaps confidential in the everyday sense, does not satisfy the tests necessary for exclusion. The fact that an employee performs work that is ‘confidential’ in the sense that it involves personnel matters or sensitive employee records, or is done ‘in confidence,’ does not establish confidential employee status in the labor relations sense as required by ORS 243.650(6).”

Managerial Exclusion – ORS 243 .650 (16) provides that a managerial employee is: “ ‘... an employee of the State of Oregon who possesses authority to formulate and carry out management decisions or who represents management’s interest by taking or effectively recommending discretionary actions that control or implement employer policy, and who has discretion in the performance of these management responsibilities beyond the routine discharge of duties. A ‘managerial employee’ need not act in a supervisory capacity in relation to other employees....’ ”

While the Employee is a lawyer and thus “... a professional employee who exercises professional discretion in carrying out his duties ... his continued exercise of professional judgment is routine.” And, “[the] Board has not considered the exercise of professional judgment in this capacity as meeting the test for management employee status.” Furthermore, while he may provide legal advice in connection with contract negotiations, he has no authority to negotiate contracts on his own. Exercising professional judgment in connection with the provision of

¹ Coverage B is a policy sold and administered by SAIF which provides that SAIF may, in certain limited circumstances, defend or indemnify the employer if it is sued by an employee for negligence. SAIF attorneys refer such claims to outside counsel after initial acceptance or denial of coverage. The employee in question was assigned the duty of recommending to a SAIF vice president that SAIF either accept or deny coverage. The vice president would then make the decision.

² The supervisory exclusion was not considered by the Board since the parties stipulated that the employee in question is not a supervisor.

advice and assistance does not qualify the Employee as managerial. Likewise, “... *technical expertise in administrative functions* which may involve the exercise of judgment and discretion does not confer executive-type status on the performer. A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself, would not make him managerial.” (Emphasis in Original; citing *General Dynamics Corp.* 231 NLRB 851 (1974).) While the Employee provides important advice in his professional capacity, “[i]t is clear, however, that the legal opinions of his supervisor or the managing attorneys prevail.”

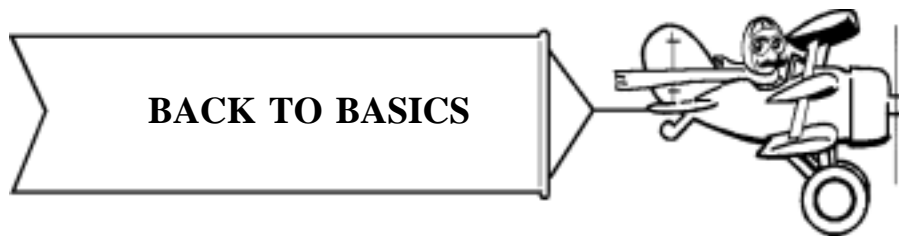
The Board thus concluded that the Employee is not managerial, and the challenge to his ballot was dismissed.

✓ **HELPFUL HINTS . . .**

Representation Elections – A representation petition may be filed by a labor organization when 30% of the employees in a proposed bargaining unit identified in the petition desire to be represented for collective bargaining by the petitioning labor organization (ORS 243.682 (2) (a)). The “showing of interest” may be proven by

authorization cards or petitions that have been signed and dated by the employees in question no more than 90 days before the petition is filed (OAR 115-25-010 (1) (h)). The petitions or cards must clearly indicate that the employees desire to be represented by the petitioning labor organization for purposes of collective bargaining. The Employment Relations Board determines whether or not the “showing of interest” is adequate (OAR 115-25-020). Pursuant to ORS 243.686(4), a labor organization must receive a majority of the votes *cast* in a representation election to be certified by the Board as the exclusive bargaining representative. A runoff election is held when there are *more than* two choices on the ballot and no choice receives a majority of the votes cast (ORS 243.686 (5)). A representation election acts as a bar to another election for the same group of employees for a year from the date of the election (ORS 243.692 (1)).

Confidential Bargaining Unit Exclusion – As the Board pointed out in the SAIF opinion, “confidential” for purposes of the bargaining unit exclusion, carries a different meaning than the word’s everyday understanding. The exclusion, instead, requires that the employee’s duties involve a necessary connection with collective bargaining. “Confidential” (in the everyday sense of the word) personnel, sensitive-record or budget-related duties are generally insufficient to satisfy the requirements of the confidential bargaining unit exclusion.



THE BUDGET PROCESS AND COLLECTIVE BARGAINING—AN OVERVIEW

How does the state plan and pay for compensation increases which are agreed to in the collective bargaining process? Here are some answers.

Budget Cycle – Generally, agencies prepare and submit budget requests to the DAS Budget and Management Division (BAM) in August or September of even-numbered years. Prior to the legislative session, which begins in early January of odd-numbered years, the Governor reviews the agency requests and develops a proposed budget for the next biennium, known as the Governor’s Recommended Budget (GRB). After submission of the GRB to the Legislature, the legislative process ultimately results in the approval of the Legislatively Adopted Budget.

Among other legal requirements, the GRB must balance to revenue projections for the next biennium. It must also identify the “current service level” for each agency for the next two years—*i.e.*, the costs of existing service levels,

assuming no change in program services. The “current service level” does not include increases for negotiated wages and benefits. Instead, it includes only existing compensation levels and expected merit increases. As such, agency operating expenses contained in the GRB for the 2001-03 biennium did not include any cost of living or special selective increases in wages or benefits over the amounts in effect for the 1999-01 biennium.

Funds for Anticipated Wage and Benefit Increases – In general, the state utilizes three funding sources for its spending, including these increases. The General Fund, stemming mainly from corporate and income taxes, is the most flexible of the three. It may be used for any lawful purpose which the Legislature authorizes. The two other funding sources, Other Funds and Federal Funds, are generally limited to specific spending purposes. Other Funds are typically derived from fees and assessments, together with lottery funds. Federal Funds, as one would expect, come from the federal government.

At the Governor’s direction, the GRB may also include a proposed separate General Fund amount to be used for wage and benefit increases that might be agreed to in collective bargaining negotiations. This proposal is subject to legislative authorization. The Legislature may also reduce or increase the original amount proposed. For the 2001-03 biennium, the Governor’s proposal of \$100 million for wage and benefit increases was authorized without change by the Legislature. This amount was set aside in the Emergency Fund as a separate sum, pending conclusion of collective bargaining for the 2001-03 biennium.

Bargaining – The state’s collective bargaining agreements typically have two-year terms, ending June 30 of odd-numbered years. Negotiations for successor collective bargaining agreements between the state and public employee unions generally begin four to six months before the end-of-term date—which is usually shortly after the GRB is released. During negotiations, the fiscal impact of each of the various proposals on agency budgets is calculated and assessed by DAS negotiators—usually with the assistance of the DAS Compensation Unit, BAM, and the affected agencies—in light of the General Fund amount allocated to the Emergency Fund.

DAS E-Board Report – At the conclusion of bargaining, DAS is required to report to the E-Board on changes affecting salaries and benefits that have been agreed to by the parties to each contract. The DAS report also includes planned compensation changes for classified unrepresented, unclassified and management service employees. For the current 2001-03 biennium, most of the compensation increases were reported to the E-Board at its September 2001 meeting. Since all collective bargaining negotiations have yet to be concluded, other compensation changes will be reported at future E-Board meetings (the next, currently scheduled for November). The E-Board *does not authorize or approve* any compensation changes, but it must receive the report prepared by DAS. When the report is received, increases may be paid to employees on the date they become effective.

Release of Funds – In a separate action from the report described above, DAS, on behalf of state agencies, requests the E-Board to authorize the distribution of General Fund dollars set aside for compensation changes, as well as increases of Other and Federal Fund limitations. Because the distribution is based on actual positions approved by the previous Legislature, this request cannot be made until all agencies’ Legislatively Adopted Budgets have been audited and entered into the state’s central budget system (the “Automated Budget Information System”, or “ABIS”). Typically, the request for distribution takes place at the E-Board’s January meeting following the close of session.

Negotiated compensation increases are implemented whether or not money is actually appropriated to pay for them. If the amount of money set aside is insufficient to cover these increases, DAS works with agencies to accommodate the increases within the agencies’ approved budgets. In such cases, DAS also reports to the Governor and the E-Board on the impact which the lack of full funding has on agency budgets.

If you have any questions about this process, please contact Tom Perry, DAS Labor Relations, at 378-4201, or your agency’s BAM analyst.

WORKING ON A HOLIDAY

If a state employee is required to work on a holiday, must that employee receive some sort of premium pay? The short answer is, generally yes. The complete answer is more complicated.

The Fair Labor Standards Act—the federal law which sets minimum requirements for the payment of overtime—does not require any extra pay for employees who work on holidays. Oregon state wage and hour laws also fail to require premium pay for holiday work. However, under both of these laws, if working on a holiday causes an employee to work more than 40 hours in a workweek, then such an employee would receive time-and-one-half pay for all hours worked over 40.

For represented state employees, virtually all of the state’s collective bargaining agreements include special provisions applicable to employees who work on holidays. Article 58, Sections 3 and 4 of the SEIU contract, for example, provides that employees required to work on holidays which fall within their regular work schedules shall be entitled to time and one-half of their straight time rate for such holiday work (in cash or comp time). In addition, such employees are entitled to receive eight hours of holiday pay, or a proration thereof (*i.e.*, the amount which they would have received had they not been required to work on the holiday). Cash or comp choices for SEIU-represented employees are covered in Articles 32.1 – 32.5 of the contract. Most of the AFSCME and other agreements include holiday premium pay provisions similar to those of the SEIU contract.

Virtually all of the state’s collective bargaining agreements also provide that the rate at which an employee is compensated for working on a holiday shall not exceed the rate of time and one-half. An employee who is required to work on a holiday and who would be owed overtime for some or all of the work, would thus receive no more than time and one-half for the holiday hours actually worked.

In general, employees required to work on a holiday are entitled to their premium pay for all time worked, in addition to their holiday pay. For example, suppose that an SEIU-represented employee who regularly works four days a week, Monday through Thursday, 10 hours a day, is required to work his or her regular 10-hour shift on a Monday holiday. How much pay is due for Monday? The answer is 10 hours of time and one-half cash or comp time for working on the holiday, in addition to eight hours of straight-time holiday pay.

For classified unrepresented, management service, unclassified and executive service employees, DAS Policy 60.010.01 provides, in general, that such employees must be compensated at the time and one-half rate for all holiday hours they are required to work, in addition to their holiday pay (eight hours at the straight-time rate or a proration thereof). The policy also grants the appointing authority the option of paying for the holiday work in cash or compensatory time. DAS Policy 60.010.01 includes many other provisions regarding holidays and holiday pay. It may be accessed at the HRSD web site: www.hr.das.state.or.us.

PROHIBITED SUBJECTS OF BARGAINING

The last edition of the *Management Insight* included an article which highlighted the differences between “mandatory” and “permissive” subjects of collective bargaining. A related topic is “prohibited” subjects of bargaining.

A “prohibited” subject is one which would require a party to collective bargaining negotiations to perform an illegal act or an act which is contrary to a statutory or constitutional provision. Predictably, during the negotiation of a contract it is improper to offer a contract proposal that contains a prohibited subject.

In general, to properly object to a bargaining subject as “prohibited,” a party must specifically identify the allegedly prohibited content of the proposal and cite the statute or constitutional provision that would be violated if the parties agreed to it. The non-objecting party may then either change or delete the prohibited content of the proposal in an attempt to eliminate the prohibited subject matter or may seek a ruling from the Employment Relations Board on the subject’s status.

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ERB rulings concerning this issue typically occur in two ways. Parties involved in a dispute regarding an allegedly “prohibited” subject may voluntarily submit the issue to the ERB for a declaratory ruling. Alternatively, a party may file an unfair labor practice charge against the party who is proposing to bargain over the allegedly “prohibited” subject.

**MONETARY SANCTIONS FOR
FLSA-EXEMPT EMPLOYEES**

Longstanding State policy requires that FLSA-exempt state employees subject to discipline receive neither suspensions without pay nor salary reductions—except for (1) suspensions without pay in full-workweek increments or (2) suspensions without pay or salary reductions for major safety violations. A recent decision of the Ninth Circuit Court of Appeals (the federal appeals court having jurisdiction over Oregon) validates this policy.

The case, *Block vs. City of Los Angeles*, involved a claim by certain City of Los Angeles FLSA-exempt employees that they were subject to improper salary deductions for non-safety violations in partial-week increments.

In general, the FLSA requires that exempt employees be “salaried.” The pay for such employees must remain the same, regardless of the quality or quantity of their work. Among other things, this means that the pay for an exempt employee generally may not be reduced if his or her work is substandard or if he or she works less than a

full workweek. However, if such an employee fails to work at all during a workweek, than he or she is owed no salary. Furthermore, the FLSA also includes an exception to the general rule which allows salary reductions of less than a full workweek if the sanction stems from the violation of a safety rule of “major significance.” If an employer violates the no-salary-deduction rule, the employee in question may no longer be considered “salaried” and would be entitled to overtime pay.

In the *Block* case, the City of Los Angeles argued that a number of the suspensions in question should not be counted as FLSA violations since the employees had been suspended without pay for more than a workweek. In other words, the City argued that the FLSA regulations only bar suspensions without pay of *less than* a workweek. The Ninth Circuit, however, was not persuaded.

Rejecting the City’s argument, the Ninth Circuit found that the City violated the FLSA since despite the fact that it had assessed suspensions of more than a full workweek, the suspensions were not in full-workweek increments. According to the Court, it is the *partial-week* aspect of the suspensions that creates a problem under the FLSA regulations. The fact that the suspensions were for more than a full workweek, is not determinative, if they also involved a partial-week increment (*e.g.*, an eight-day suspension of Monday through Wednesday of the following week, for employees on Monday through Friday five-day workweeks).

The bottom line: do not suspend or reduce the salary of an exempt employee for a non-safety violation except for a suspension involving full workweek increments.

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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