

MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

JULY 2000

ITEMS OF INTEREST

STATE POLICY ON TEMPORARY APPOINTMENTS REVISED

The Department of Administrative Services, Human Resource Services Division (DAS, HRSD) has revised State Policy 40.025.01, Temporary Appointments. These revisions were implemented to conform state policy with two recent decisions of the Employment Relations Board (ERB), *Fairbank vs. State of Oregon, EOTC*, Case No. MA-3-98, and *Reger vs. State of Oregon, EOTC*, Case No. MA-17-98. The ERB found in these cases that the Eastern Oregon Training Center (EOTC) violated ORS 240.309 by employing temporary workers for more than six months. The Board clarified that the statute limits a state temporary appointment to six months, unless the state can show that the appointment meets one of two statutory exceptions: (1) a continuing emergency situation; or (2) filling in behind a permanent employee whose leave lasts longer than six months. Violation of ORS 240.309 may result in the state's having to pay any affected employee damages for lost wages, benefits and rights.

The policy revisions revoke the authority previously delegated to agency heads to extend temporary appointments beyond six months in cases where the emergency situation justifying the original temporary appointment continues to exist. DAS, HRSD approval is now required for such an extension. The revisions also clarify that employment of a temporary worker for different workload needs may not exceed the equivalent of six months within a 12-month period. Consistent with the *Fairbank* and *Reger* decisions, the new policy deletes the old policy's reference to "1,040 hours" as equivalent to the statutory six month limit; and clarifies that the "leave" exception applies only to substituting for a single employee. To implement the new policy, the PPDB system will automatically terminate all temporary appointments after six months, except for those made for emergency needs where an extension has been approved,

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Distribution:

Executive and Management Service Employees

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and those made to fill in behind a permanent employee on leave. Appointments made to fill in behind a permanent employee on leave should be terminated by the agency upon return of the permanent employee.

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SOME BACKGROUND

ERB Decisions

The *Fairbank* and *Reger* cases concern alleged violations of ORS 240.309 by the EOTC. ORS 240.309, which governs the state's use of temporary employees, provides, in part:

- (1) Temporary employment shall be used for the purpose of meeting emergency, nonrecurring or short-term workload needs of the state.
- (2) A temporary employee may be given a nonstatus appointment without open competition and consideration only for the purposes enumerated in this section....
- (3) A temporary employee may not be employed in a permanent, seasonal, intermittent or limited duration position except to replace an employee during an approved leave period.
- (4) Employment of a temporary employee for the same workload need, other than leave, may not exceed six calendar months. The decision to extend the period of employment may be delegated by [HRSD] to other state agencies. Approval to extend shall be allowed only upon an appointing authority's finding that the original emergency continues to exist and that there is no other reasonable means to meet the emergency. Agency actions under this subsection are subject to post-audit review by [DAS]....
- (5) Employment of a temporary employee for different workload needs shall not exceed the equivalent of six calendar months in a 12-month period.

In finding that the EOTC violated ORS 240.309 by employing temporary workers for periods of time exceeding six months without meeting either of the statute's two exceptions to the six-month limitation, the Board explained:

In sum, we interpret ORS 240.309 as allowing the State to employ a temporary employee for more than six months in only two circumstances: (1) in an emergency, a temporary employee may be hired for the need created by that emergency, and may continue to be employed for more than six months, if the particular emergency continues to exist and no other reasonable way to address it exists; and (2) when an employee goes on an approved leave, a temporary employee may fill in behind that permanent employee for the entire length of that leave, even if that means the temporary employee remains employed longer than six months.

The Board rejected the agency's argument that the emergency exception was met: "We do not accept the notion that a *chronic* staffing shortage constitutes an

emergency workload need, within the meaning of ORS 240.309." (Emphasis in original.) The Board also rejected the agency's position that its use of the employees in question for more than six months was allowable under the statute's "leave" exception. Addressing the fact that the agency assigned each of the temporary employees to substitute for *a number of employees* on leave, the ERB concluded:

We interpret the "leave" exception in ORS 240.309 (4) to allow the use of a temporary employee for longer than six months, where the temporary employee is replacing *a single employee* on approved leave, and that assignment extends the temporary employee's term of employment past six months. (Emphasis added.)

Regarding the appropriate remedy for the violations, the Board found no basis on which to order that the employees in question be converted to permanent status. It did, however, order the agency to discontinue the improper practices and to meet and confer with the complainants about an appropriate remedy consistent with ORS 240.307 (4) (a), which states:

Any employer found to be in violation of ORS 240.309 by the board may be required to pay any affected employee damages for any loss of wages, benefits and rights. The board may also require the agency to discontinue the improper practices.

According to the Board,

ORS 240.307 (4) (a) grants this Board the authority to order the State to pay appropriate damages to affected employees for violations of ORS 240.309. As a type of make-whole relief, such remedies are intended to restore an injured party to the position the employee would have been in but for the other party's unlawful conduct.

Pursuant to the Board's order, the parties met and came to agreement with respect to all but two of the remedy-related issues. To address the two remaining issues, the ERB subsequently issued a Supplemental Order which held that the starting date for the ORS 240.309 damages in these cases is the day after the employees were employed more than six months, rather than after they completed 1,040 hours; and that such damages are "in most, if not all circumstances" limited to losses suffered by the injured party (and not as was alleged in the *Reger* case, by the complainant's mother, who paid health insurance costs on the employee's behalf).

Board Member Rita Thomas authored a concurring opinion to the Supplemental Order in which she clarified that her concurrence was limited to the Board's

resolution of the two remaining issues, and did not affirm the agreement made by the parties:

The employees in this case were compensated for all of the time that they worked for the State. They were not entitled to anything other than the compensation they received. Therefore the affected employees did not suffer any loss of wages, benefits or rights when they continued to be provided work beyond six months.

...

We are limited in our authority to assess *damages* by the terms of the statute. We do not have the authority to assess a *penalty* beyond actual losses. Because there is no evidence of any *loss* here, my concurrence with this order is limited to resolving the specific issues before us and in no other way affirms the agreement made by the parties. (Emphasis in original.)

OPEU Unit Clarification Petitions

The Oregon Public Employees Union (OPEU) began monitoring the state's use of temporary employees some time ago. The issue was brought up by the OPEU during 99 – 01 successor bargaining, but was left unresolved. On April 28, 1999, the union petitioned the ERB to determine by election whether state direct hire temporary employees desire to be part of the existing OPEU statewide strikable and non-strikable units. The state objected to the OPEU petitions and the ERB issued a ruling on March 17, 2000, granting the petitions and ordering a self-determination election (the *Fairbank* and *Reger* decisions were also issued by the Board on March 17, 2000). In granting the OPEU petitions and ordering a self-determination election, the Board explained:

The considerations we find particularly meaningful are that temporary employees are performing substantially the same work and filling the same classifications as existing bargaining unit employees. They are often placed in the same salary ranges as unit employees, they work together at the same locations and share common supervision.... we also are influenced by the fact that the existing units already include employees in some jobs that involve

irregular, fluctuating work, and work of limited duration. Under these circumstances, where temporary employees share a sufficient community of interest with employees in the existing units, it is appropriate to apply our preference for larger or wall-to-wall units. And, we do so here.

On May 11, 2000, a majority of the direct hire temporary employees who returned their ballots voted to join the OPEU. Collective bargaining negotiations between the state and the OPEU regarding the terms and conditions of the represented state temporary workers' employment are currently ongoing.

The state has appealed the ERB's ruling that its direct hire temporary employees should be clarified into the OPEU's existing strike-permitted and strike-prohibited bargaining units. In the appeal, the state has requested that the temporary employees instead be placed in two stand-alone bargaining units (strike-permitted and prohibited). The appeal is currently pending.

RESTRICTIONS ON POLITICAL CAMPAIGNING BY PUBLIC EMPLOYEES (ORS 260.432)

The following article is based in part on a document issued by Secretary of State Bill Bradbury in January, 2000. The full document may be accessed through the Secretary of State web page, at www.sos.state.or.us/elections/Publications/respubemp.html. This article also includes material not found in the Secretary of State's posting.

The overriding principle is that public employees cannot use their work time to support or oppose measures, candidates, or petitions.

This principle is based on ORS 260.432 (2), which provides that public employees may not be involved in promoting or opposing any political committee or any initiative, referendum or recall petition, measure or candidate "while on the job during working hours." However, the statute also states that it does not restrict the

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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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right of public employees to express personal political views. The policy of the state is thus that public employees may engage in political activity *except* to the extent prohibited by state law when on the job during working hours.

ORS 260.432 (2) does not apply to elected public officials, but does apply to all other public employees including the staff of elected public officials. Public officials who are not elected—whether paid for their service or not—such as members of appointed boards and commissions, are considered to be “public employees” for purposes of this statute.

Also important is ORS 260.432 (1), which states that a person—including public employers and elected officials—may not require a public employee to promote or oppose any political committee or any initiative, referendum or recall petition, measure or candidate. Pursuant to this statute, public employers, including elected officials, may not require or direct public employees to prepare or distribute material supporting or opposing a measure, candidate, or petition. Under ORS 260.432 (1), a supervisor who *requests* a public employee to perform any campaign activity (such as typing or mailing a campaign-related document) would be considered to have *required* the public employee to perform such tasks.

Public employees may not be involved in activities such as collection of funds, receipt and distribution of advocacy materials, or preparation of correspondence on behalf of political committees, petitions, measures or candidates while on their work time. A public employee’s work time may not be used to produce or distribute political documents advocating a vote for or against a measure or candidate; or to produce or distribute news releases or letters announcing an elected official’s support or opposition to a measure, candidate, referendum, initiative or recall petition.

Some Examples of Allowable Political Activities by Public Employees

- Lunch hours and breaks—when an employee is off duty—may be used for political activity, depending on other employer lunch/break policies. Any such activity must be voluntary by the employee. Employees who elect to use this time for political activity must not feel obligated or coerced to do so by co-workers or supervisors.
- A public employee may be involved in voluntary campaign activity during the employee’s personal time in the evenings and on days off.
- The planning stage of a governing body’s proposed issue, before it is certified as a measure to the ballot, is not subject to ORS 260.432.

Provision of Information

- A public employee may provide only impartial, factual information related to an initiative, referendum or recall petition, measure or candidate as a part of the employee’s job on work time. The full Secretary of State document on ORS 260.432, at www.sos.state.or.us/elections/Publications/respubemp.html, includes a number of guidelines to consider when making a determination whether written material would be considered political advocacy under state law (at pp. 4-7).
- If any public employee makes public presentations or speeches regarding an initiative or referendum petition or ballot measure while on his or her work time, or in an employee’s “official capacity,” the employee must make sure the speech is only factual and neutral in its presentation.
- A public employer may tell employees about the possible effects of a measure, such as possible layoffs; but the public employer must not threaten employees with financial loss if they vote one way or another.
- A public employee may address election-related issues while on the job, in a factual and unbiased manner, if such activity is legitimately within the scope of the employee’s normal duties (*e.g.*, a teacher instructing a high school social studies class).
- Incoming telephone calls about measures must be answered in a strictly factual manner.

Salaried vs. Hourly Staff

Salaried employees’ work time is not as easily measured as that of hourly workers. Salaried employees must be careful during all public appearances and functions both after normal work day hours as well as during working hours. They must not advocate on behalf of, or against a petition, measure or candidate if they are considered to be in their “official capacity.” For example, if a salaried employee applies for expense reimbursement for a function, this would indicate that the employee was “on duty.” Personal note-keeping by salaried employees is suggested. Recording when the employee is on or off duty can determine whether the employee is acting in his or her “official capacity.” Also, during public appearances, the employee should specifically announce in what capacity he or she is speaking.

Use of Public Buildings and Other Facilities

If the governing body allows one political group to use public facilities, all groups (including unions) should have the same opportunity. The same building policy should be used for everyone, including charging the same fee. If unequal access is granted, a public employee who

facilitates such services may have committed an election law violation.

A number of the state's collective bargaining agreements have articles dealing with a union's right to use agency facilities (*e.g.*, OPEU, Article 10, Section 3). The content of a union meeting held pursuant to such a clause, including political advocacy, is not subject to agency regulation, so long as the state is not co-sponsoring the meeting.

Distribution of Political Material Within a Government Agency

The Secretary of State, Elections Division, routinely discourages the distribution of campaign advocacy materials to public employees through a government mail or distribution system, regardless of the source of the materials. A union may distribute such materials to its members in this manner *only* if its collective bargaining agreement with the state allows for distribution of union materials through an agency mail or distribution system.

It is not a violation for a public employee, as part of his or her regular job duties, to process incoming mail which may include political material addressed to employees. However, it is in violation of election law for a public employee to distribute political advocacy materials to other employees or constituents (such as students) while on the job during working hours.

Wearing of Political Buttons While on the Job

In general, political buttons may be worn by public employees while on the job. This rule, however, is subject to applicable employer policies. For instance, safety or other overriding considerations might justify an employer policy prohibiting the wearing of *all* buttons, of any nature. Moreover, depending on the circumstances, the wearing of political buttons on some state uniforms might cause the public to perceive that the agency has taken a position on the issue or candidate in question, or that the agency's employees might act in a biased manner due to political considerations.

Posting of Political Material in Work Areas

In general, a public employee may post political material in his or her *private* work area. However, a political posting would not be permitted in a work area which is open or visible to the public—such as a reception area—or if the public regularly goes to or passes by the work area for interviews, to fill out forms, or such. As is the case with the wearing of political buttons, the cause for concern here is that members of the public might perceive the political material to mean that the

agency has taken a position on the issue or candidate in question, or that the agency's employees might act in a biased manner due to political considerations.

Websites, Electronic Bulletin Boards and E-mail

Public employee use of an agency's website, electronic bulletin board or e-mail system is subject to the agency's policies concerning such use, as well as the terms of any applicable collective bargaining agreement. In general, if a public employee sends an e-mail or posts a message that supports or opposes a petition, candidate or measure, on the job during working hours, this would constitute a violation of election law. Any public employee who uses work time to produce a website that constitutes political advocacy would also be in violation of election law.

A union may utilize an agency's electronic bulletin board or e-mail system to post messages constituting political advocacy *only* to the extent and in the manner that it is permitted to use the agency's electronic bulletin board or e-mail system by the governing labor agreement. For instance, the OPEU agreement (Article 10, Section 4), allows the union to post non-interactive messages to an agency's electronic bulletin board or post office box system. In such a situation, the only issue the agency should be concerned with is whether the union is adhering to the terms of the applicable labor agreement regarding any right it may have to use the state's e-mail or electronic bulletin board system, and not whether the message includes political content.

For questions regarding the state's election laws, the Secretary of State, Elections Division, may be contacted at — (telephone): 503-986-1518; or (FAX): 503-373-7414.

U.S. SUPREME COURT RULES ON COMPELLED USE OF COMP TIME

In the case of *Christensen vs. Harris County*, the United States Supreme Court recently ruled that nothing in the FLSA prohibits a public employer from compelling its employees to schedule time off to reduce their accumulated compensatory time. In previous rulings, federal courts of appeal in different parts of the country had issued conflicting decisions on this question. However, since the *Christensen* ruling is from the U.S. Supreme Court, it sets a nationwide standard, which applies to the State of Oregon and its employees.

Irrespective of this ruling, agencies should continue to follow provisions in existing labor contracts concerning their employees' use of accumulated comp time.



NOTES FROM JUSTICE

by The Labor and Employment Section, Department of Justice



VALUE OF THOROUGH PREPARATION AND PERFORMANCE IN ARBITRATION IS CONFIRMED BY RECENT COURT OF APPEALS DECISION

What weight will an appellate court give to an arbitrator's ruling on appeal? A recent Oregon Court of Appeals case, *Shuler v. Distribution Trucking Co.*, 164 Or. App. 615 (1999), provides an answer.

The plaintiff in *Shuler* brought an action for unlawful termination and wrongful discharge, alleging that his employer discharged him for exercising his right to appear and testify at a former co-worker's unemployment compensation hearing. In defense, the employer asserted that plaintiff was discharged for falsifying time sheets and violating company rest break policies. The parties proceeded to arbitration in accordance with the collective bargaining agreement between them.

In the collective bargaining agreement, the parties agreed to submit grievances first to a joint conference board and then to an arbitrator. The parties further agreed that the arbitrator's decision would be final and binding.

The arbitrator ruled that the employer terminated the plaintiff for violating the company's policies regarding breaks, and not for exercising legal rights as asserted by plaintiff. In the wrongful discharge lawsuit, the employer contended that the arbitration decision precluded the plaintiff from re-litigating the issue regarding the employer's motivation for plaintiff's discharge. The Court of Appeals agreed with the employer's assertion.

The Court recognized that, traditionally, issue preclusion applies only within the same judicial system; in other words, courts with the same or similar jurisdiction and rules of procedure. However, the Court went on to explain that Oregon case law has expanded the preclusion rules "to encompass prior adjudications in a different judicial system when doing so serves the dual policies of preventing unnecessary re-litigation of claims or issues and preserving the integrity of the legal inquiry to be made."

The Court of Appeals explained that arbitrator's decisions operate to preclude subsequent litigation as to an issue as long as four requirements are satisfied: 1) the issue in the two proceedings is identical; 2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; 3) the party against whom preclusion is sought has had a full and fair opportunity to be heard on that issue; and 4) the party against whom preclusion is sought was a party (or was in privity with a party) to the prior proceeding.

The Court summarized its findings by concluding that if the arbitration takes a quasi-judicial form that affords the parties an opportunity for a full and fair hearing before an impartial and qualified arbitrator, the plaintiff is adequately represented, and the ultimate fact at issue in the arbitration is identical to the issue for which a party is seeking a new trial, the arbitrator's holding will operate to bar a party from re-litigating such an issue.

The practical effects of the *Shuler* decision on parties to arbitration hearings are clear. In important discharge cases, the level of preparation must be as rigorous as preparation for trial, for the parties may not have the opportunity to re-litigate the key issues. As important, agencies should not reject out-of-hand, on grounds of "principle," reasonable settlement offers that would resolve all potential claims that many terminated employees may assert.

COMINGS AND GOINGS IN THE LABOR AND EMPLOYMENT SECTION OF THE DEPARTMENT OF JUSTICE

In March, we said goodbye to Carol Radmore, who worked in the labor and employment section for 13 years. Carol is now an office specialist/assistant to Don Arnold in the general counsel division. We will miss her and wish her well.

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Please join us in welcoming Debbie Nealy, Susan Hoeye and Shelli Marshall as office specialists for the section.

As many of you are already aware, Stephanie Harper left the labor and employment section to join the Portland City Attorney's office in February. Stephanie will be missed by all of us. We wish her good luck in her new endeavors.

A departure means a new arrival. Kelliss Collins joins us with experience from the private sector where she focused on defending employers in litigation of issues including civil rights discrimination and sexual harassment as well as providing general advice regarding employment law issues. Kelliss had the opportunity to co-author the legal briefs and assist at counsel table in a U. S. Supreme Court case involving ADA issues, *Albertson's v. Kirkingburg*, in which the employer prevailed.

We also welcome Eva Shih, who joined the labor and employment section as a half-time attorney on July 1. Eva comes to us from the appellate division as part of the honors attorney program.

EMPLOYEES' CLAIMS UNDER THE FLSA ARE SUBJECT TO TORT CLAIMS NOTICE REQUIREMENTS

In *Butterfield v. State of Oregon*, plaintiffs sought review of a Marion County Circuit Court's granting summary judgment to the employer (the State of Oregon) regarding plaintiffs' claims for overtime pay under the Fair Labor Standards Act (FLSA) based on plaintiffs' failure to meet the notice requirements of the Oregon Tort Claims Act (OTCA, ORS 30.260 through 30.300). At issue was the nature of an FLSA claim: is it a tort or does an employer's duty to pay overtime arise out of the contractual relationship between an employer and an employee? The Court held that claims based on the FLSA are torts, and therefore that the plaintiffs' failure to comply with the OTCA was fatal to their claims.

The OTCA constitutes a partial waiver of sovereign immunity. Tort claims must comply with the notice requirements of the OTCA in order to bypass sovereign immunity and take advantage of the limited waiver. The plaintiffs in *Butterfield* asserted that notice under the OTCA was not required for FLSA claims brought in state court because such claims are contractual in nature, and therefore not subject to the requirements of the OTCA.

The Court explored a history of cases distinguishing between employees' rights based on the contractual

terms of the employment relationship as compared to applicable statutory terms. The Court's discussion included a reference to an Oregon Supreme Court case, *Griffin v. Tri-Met*, 318 Or 500 (1994) in which the Court rejected an argument that unlawful employment practices are not torts under the OTCA, holding that an employer's duty not to discriminate against employees with disabilities is one imposed by law, not by contract. The Court also cited *Fullerton v. Lamb*, 177 Or 655 (1946), an FLSA claim in which the Court held that the action was a liability created by statute rather than one based on express or implied contract.

The Court further explained the holding by pointing out the fundamental distinction between bargained-for employment terms which induce an employee to enter into and continue an employment relationship (contractual in nature) compared to the provisions of the FLSA, which apply to the employment relationship as required by law (wherein noncompliance provides the basis for a tort claim).

The Court concluded that the state's duty to pay overtime—the basis of plaintiffs' claims—arises out of a legal duty imposed by federal law and not out of the employment contracts themselves.¹ The effect of the ruling? Plaintiffs bringing claims of unlawful employment practices, even when based on statutory grounds, must comply with the notice requirements of the OTCA or risk dismissal of their claims.

¹ In dissent, Judge Armstrong offered an analysis in support of a conclusion that the FLSA regulates the terms of employment contracts. FLSA claims, he argued, are thus contractual and do not require notice under the OTCA as a matter of federal law.

LESSON: DON'T LOOK A GIFT HORSE IN THE MOUTH . . .

The state recently proposed a change in travel policies to the Criminal Investigators' Association (a police unit within the DOJ). The proposal advocated adoption of the 1999 DAS travel policy to replace the 1997 DAS travel policy adopted by the union and state in their existing collective bargaining agreement. The 1999 policy has higher travel allowances.

In response to the state's proposal, the union demanded to bargain over the changes. The union proposed even higher allowances under certain conditions. After the parties failed to reach an agreement regarding the improvements in the travel policy proposed by the state, the union initiated interest arbitration to resolve the impasse.

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The state then withdrew its proposal to update the travel policies, and asserted that, as a result, interest arbitration was not necessary. When the union continued to pursue interest arbitration, the state filed an unfair labor practice complaint against it. The state's complaint asserted that the union's pursuit of interest arbitration was, in effect, a repudiation of the parties' collective bargaining agreement. The state also contended that the union's actions were contrary to both the interest arbitration and mid-term expedited bargaining processes.

The ERB dismissed the state's complaint, but held that the PECBA does not prevent an employer from withdrawing a mid-term change in favor of continuing existing contract language. The ERB also stated: "Application of our interpretation leads us to conclude that, based on the facts alleged, the State has no obligation to participate in the interest arbitration process." *State of Oregon v. Criminal Investigators' Association*, UP-14-00, p. 4 (June 13, 2000).

ARBITRATION SUMMARIES



In the Matter of the Arbitration between the OSPOA and the State of Oregon, Dept. of State Police
(Arbitrator, David Gaba; March 15, 2000).

In this contract interpretation grievance, the Association had the burden of establishing that the Employer violated the collective bargaining agreement. Since insufficient evidence was presented to establish either party's interpretation, the grievance must fail.

Facts: On December 19, 1997, the grievant (Employee) was hired by the Oregon State Police (Department) as a Telecommunicator II. Effective June 2, 1998, pursuant to a request made by the Employee for a change in employment status to Telecommunicator I, the Employee was reassigned to a Telecommunicator I position. The Employee was discharged on June 23, 1999. The applicable collective bargaining agreement grants "reclassified" employees the right to grieve discipline and discharge during their probationary period.

Question presented: Was the Employee "reclassified" from a Telecommunicator II to Telecommunicator I, and thus entitled to grieve her discharge?

Discussion and Ruling: Since this grievance presents a contract interpretation issue, the Oregon State Police Officers Association (Association) has the burden of establishing that the Department violated the collective bargaining agreement. The sole issue to be decided is the meaning of the term "reclassified." However, "The lack of precise dictionary meaning for the term in

question is matched by the lack of parol evidence as to the meaning of the parties." The issue was not discussed at the bargaining table. Since the record fails to indicate who drafted the language in question, the Arbitrator cannot construe the contractual ambiguity against the drafter, like he "normally" would. As such, "This leaves the past practice of the parties as the only remaining aid in construing the contract.... Unfortunately, the record contains no examples of an analogous situation arising between the parties." At the hearing, "[W]hile the Association produced substantial evidence to support its position, the State also produced substantial evidence." As a result, concluded the Arbitrator, "... I cannot determine from the testimony whether the Association is correct in its position or the State is correct in its position.... and absent the evidence necessary to utilize the rules of contractual construction, the grievance must fail."

✓ HELPFUL HINT . . .

Burden of Proof — In general, the party having the burden of proof on an issue at an arbitration hearing has the duty to prove the facts necessary to establish the party's position on the issue. The "burden" (also called the "burden of persuasion") is to convince the arbitrator that the facts in question do or do not exist, or that they are or are not true. If the arbitrator is not so persuaded after the party having the burden of proof has presented his or her evidence, the arbitrator will generally rule against that party on the issue. In so ruling, the arbitrator will often say that the party has not "sustained" their burden of proof.

In discipline and discharge arbitrations, the burden of proof is generally on the employer to prove just cause for the action taken. In contract interpretation cases, the party asserting the interpretation in question (usually the grievant) generally has the burden of proof on that issue. In cases involving past practices, generally the party

asserting the existence of a practice has the burden of proving it.

During a hearing, the “burden of producing evidence” on an issue may shift from party to party. For instance, if the party with the initial burden of proof on an issue introduces sufficient evidence to prove the points essential to prevail on the issue, the burden of producing evidence then shifts to the opposing party. Unless the opposing party presents sufficient evidence to rebut the evidence presented by the party who had the initial burden of proof, the opposing party will lose on the issue. However, if the opposing party, in turn, presents sufficient evidence to rebut the evidence presented by the first party, then the burden of producing evidence would shift back to the first party, and so forth.

The *amount* of proof required for a party to prevail on an issue at an arbitration hearing is determined by the arbitrator. Often it is either a “preponderance of the evidence” or “clear and convincing evidence.” A preponderance of the evidence means the greater weight of the evidence, or “more likely than not” (e.g., 50.1 percent). Clear and convincing evidence is somewhat ill defined, but usually requires more than a preponderance of the evidence but less than “beyond a reasonable doubt” (the standard used in criminal cases).

In the Matter of the Arbitration Between the State of Oregon, OYA and the OPEU
(Arbitrator, Sylvia Skratek; April 24, 2000).

The grievant’s discharge for physically “taking down” an incarcerated youth who was not acting in a physically aggressive manner was upheld by the Arbitrator. The grievant’s conduct, including his failure to seek assistance from co-workers who were readily available, violated agency rules and constituted egregious behavior which warranted discharge despite the fact that the District Attorney chose not to prosecute due to insufficient evidence of criminal conduct.

Facts: The grievant (Employee) began working as a Group Life Coordinator at a youth correctional facility run by the Oregon Youth Authority (Agency) in January, 1998. In February, 1999, a facility teacher asked the Employee to remove a committed juvenile from his classroom. The Employee did so, placing the juvenile in a day room adjacent to the classroom. Subsequently, the juvenile began cursing at the Employee, who decided to put the juvenile into a time-out cell. To do so, he directed the youth to stand up. The youth cursed again and

failed to move. When the Employee repeated the directive, the youth grabbed onto the chair and clamped himself down. The Employee then advised the juvenile that he would give him to the count of three to comply. When the youth still refused to stand up, the Employee moved forward and physically forced him out of the chair. Aside from having the wind knocked out of him, the youth was not injured in the incident. When questioned later about the juvenile’s behavior, the Employee acknowledged that the youth had not acted in a physically aggressive manner toward him. The Employee was subsequently dismissed by the Agency.

OAR 416-490-0010 provides, in part, that, “Physical force...shall be used...only when no other means are deemed...to be practical...to prevent the youth from inflicting immediate and serious harm upon him or herself or others or property.... [S]taff shall not use physical force...except: As necessary in self-defense or to prevent imminent injury...or when a youth refuses to obey a direct order...and refuses to move to another area and it is desirable or necessary to move the youth to another area.... Whenever possible, the use of physical force by staff shall be delayed until a third party is able to intervene and aid in controlling the situation....” These rules were incorporated into the Employee’s position description.

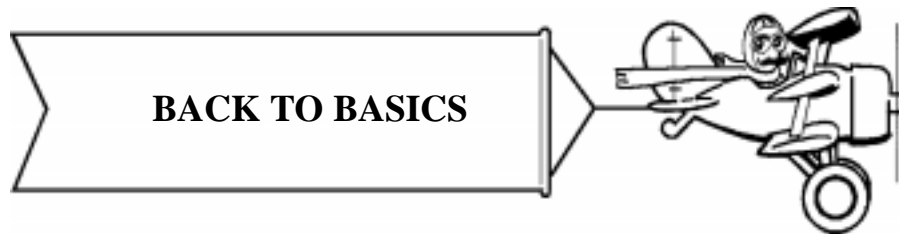
Question presented: Was the Employee discharged for just cause?

Discussion and Ruling: Since this is a discharge case, the Arbitrator addressed two “areas of proof” in her analysis: proof of wrongdoing and whether the penalty assessed should be upheld or modified. Looking first at proof of wrongdoing, Arbitrator Skratek initially found that while the juvenile did refuse to obey a direct order by a staff person, the Employee, “[D]id not exercise good judgment when he moved to take the youth out of the chair and down to the floor.” Rather, “[C]onsistent with the regulation that provides for a third party intervention whenever possible,” there were at least two other individuals “within easy distance of the incident” who could have helped the Employee. Noting the testimony of an OYA Coordinator that “[O]ne person takedowns should only be done if there is nobody else around,” the Arbitrator found that, “[A] delay of a minute or two *prior* to any takedown to allow for direct third party intervention would have been appropriate.” (Emphasis in original.) The fact that the juvenile was “verbally aggressive” was, according to the testimony, not unusual behavior at the correctional facility. The juvenile, moreover, “[D]id not make any physically aggressive moves. There was no imminent danger nor was there any need for self defense on the part of the [Employee]. While the [Employee]

may have believed it was desirable to move [the youth], there is no evidence that he could not wait for third party intervention to assist with the move.” Finally, addressing the Union’s contention that other takedowns had occurred at the facility without any resulting discipline, the Arbitrator found that, “[T]here is no evidence that there were any individual takedowns of a youth who was not an immediate threat. There is also no evidence that other takedowns were not in accordance with policy.” As such, “[T]he Employer has met its burden of proof of wrongdoing.”

Regarding the appropriateness of the penalty, the Employee, “[W]as not a long-term employee with a good work history that would mitigate his behavior in this case.” Evidence of counseling sessions and a reprimand during his thirteen months of employment with the

Agency, “[I]llustrate that the [Employee] was having difficulty in his interactions with the youths at the facility. The individual takedown of [the juvenile] was the latest in a series of related problems.” There are no mitigating circumstances which would warrant overturning the discharge. While progressive discipline must be applied in most cases, “[I]n this case the Arbitrator finds that the [Employee’s] behavior of physically moving a youth who posed no imminent danger was egregious misconduct that could have had serious ramifications.” Even if the Employee was convinced that the juvenile needed to be physically moved, the move should have occurred within the established policy and rules of the institution. The fact that the District Attorney chose not to prosecute due to insufficient evidence of criminal conduct, “[D]oes not remove an Employer’s ability to administer discipline for inappropriate behavior.” The Agency had just cause for the Employee’s discharge.



SOME FREQUENTLY ASKED FMLA QUESTIONS

If a holiday occurs while an employee is on FMLA leave, does the day count toward the employee’s 12-week entitlement?

The general answer is yes. If a holiday falls during a week of FMLA leave, the week is usually counted as five days of FMLA leave. However, if an employee is on *intermittent* FMLA leave, a holiday falling on a leave day would generally not be counted toward the employee’s FMLA leave entitlement. Finally, if the employer’s business suffers a temporary closure, such time would also not count as FMLA leave.

May an unmarried employee take FMLA leave for the care of his or her newly born or adopted child?

Parental leave is for “parents,” whether married or not. Both male and female parents are eligible for 12 weeks of parental leave for the care of their newborn or newly adopted child (restrictions apply when both work for the same employer). In the case of an unmarried male

parent, some form of verification of parentage (such as the child’s birth certificate) may be requested.

Must a medical certificate verifying a serious health condition under the FMLA be signed by a medical doctor?

The answer is no. The FMLA defines the term “health care provider” to include podiatrists, dentists, clinical psychologists, optometrists and chiropractors (the latter limited to treatment consisting of manual manipulation of the spine to correct a subluxation). The term also includes nurse practitioners, nurse-midwives, clinical social workers and Christian Science practitioners.

Is “needed to care for” a family member limited to physical care?

Again, the answer is no. The FMLA provides that caring for a family member includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care. It also includes making arrangements for changes in care, such as a family member’s transfer to a nursing home.

May an employer ask an employee who requests FMLA leave for planned medical treatment to schedule the treatment to suit operational needs?

Depending on the circumstances, the answer is generally yes. FMLA regulations provide that employees are ordinarily expected to consult with their employers prior to the scheduling of medical treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. Subject to the health care provider's approval, the employee must make a reasonable effort to schedule the leave so as not to unduly disrupt the employer's operations.

May an employee on FMLA leave be laid off?

An employee on FMLA leave has no greater right to reinstatement or to other benefits or conditions of employment than would have been the case had the employee been continuously employed rather than on FMLA leave. As such, an employee on FMLA leave may be laid off if the employee would have been laid off had he or she not been on FMLA leave at the time of the layoff. Nevertheless, obligations owed to any such employee under an applicable collective bargaining agreement, such as bumping rights, must be honored.

LEAVE FOR NATIONAL GUARD AND RESERVE DUTY

USERRA

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), employees who choose to be members of national guard and reserve units may generally expect return rights to their jobs and may not be discriminated against because of their service obligations.¹ These rights also carry certain responsibilities regarding reasonable notice.

Notice

Employees must notify their employer of their training schedules as soon as possible, to facilitate coverage for duty-required absences. The notice may be written or verbal. The only time notice is not required is when military necessity prevents such notice, but these instances are very rare. Guard and reserve units generally set their training schedules and notify reservists in the fall of each year. Guard and reserve members should notify their employers immediately upon receipt of their schedules. In the event that training schedules are changed, guard and reserve members should notify their employers as soon as the changes are made known to them.

Training

Annual Active Duty Training is the two-week training period that typically occurs in the summer, although it may occur at other times of the year. ORS 408.290 provides for full pay and benefits for state employees during this time, provided they have served at least six months with the state. The same statute provides for a period of leave not to exceed 15 days per calendar year for such training.

Unit Training Assemblies (UTA's) are inactive duty training periods, including weekend drills. For employees who must miss regularly scheduled work to meet such training obligations, issues may arise concerning pay, benefits and seniority.

Employees who have UTA's during regularly scheduled work shifts may take appropriate paid leave, such as vacation leave, accrued comp time, or personal leave. They may also elect to take leave without pay (LWOP). The choice is theirs, since employers cannot force employees to use paid leave for guard or reserve duty.

Employees who elect to take LWOP will have paid leave accruals calculated according to their collective bargaining agreements if they are represented; DAS policy if they are not represented. For example, under one collective bargaining agreement for corrections officers, LWOP of 16 hours in a month with 160 regularly scheduled work hours would result in a sick leave accrual of 7.2 hours, rather than 8.0. A proportionate adjustment would also be made to vacation leave accrual.

No Loss of Seniority

Employers should be especially careful when computing the vacation accrual rates for guard and reserve members who have taken LWOP to meet their service obligations. The USERRA prevents employers from reducing seniority because of a duty-required absence.

For Questions About the Act. . .

This article is not meant to be a thorough explanation of the USERRA. If you have questions about the act, please contact your agency's personnel office. Additional sources of information are the DOJ, Labor and Employment Section; and Tom Perry, Labor Relations Unit. The U.S. Department of Labor maintains an "elaw advisor" on the USERRA at <http://www.dol.gov/elaws/userrra0.htm>. The DOL's Veterans' Employment and Training Service also publishes a "Non-Technical Resource Guide" to the USERRA.

¹ The USERRA covers individuals who serve or have served in the "uniformed services," including the Armed Forces, Army National Guard and Air National Guard.

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

About the Labor Relations Unit . . .

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

Eva Corbin, Deputy Administrator, LRU	378-8321
Craig Cowan, Sr. Labor Relations Manager	378-5611
Michael Halpern, Sr. Labor Relations Manager	378-2705
Lois Harrup, Administrative Assistant	378-3141
Mark Hunt, Sr. Labor Relations Manager	378-3967
Pam Murdock, Office Manager	378-2616
Tom Perry, Sr. Labor Relations Manager	378-4201
Cathy Schuh, Sr. Labor Relations Manager	373-7608
Jan Weeks, Sr. Labor Relations Manager	378-6483