MANAGEMENT INSIGHT

ON

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Executive and Management Service Employees

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ITEMS OF INTEREST

OPEU DENIED ACCESS TO STATEWIDE E-MAIL SYSTEM

In an OPEU grievance arbitration, Arbitrator Gary Axon ruled that the state's expressed intent—that the union may not use the statewide e-mail system for union business—was incorporated into the language of the parties' collective bargaining agreement. As such, Arbitrator Axon found that the state did not violate the collective bargaining agreement when it barred union officers and stewards from using agency e-mail systems to post messages relating to union business.

Reviewing the collective bargaining agreement's language and bargaining history, the arbitrator noted that the union's expressed intent in negotiations was to gain access to the state e-mail system. The state rejected this proposal. Furthermore, the language which was ultimately agreed upon makes no reference to "e-mail." The arbitrator went on to observe that: "The key sentence agreed to was the Union would be authorized to post messages 'to an electronic bulletin board or post office box system.' The omission of the word 'e-mail' from the final language provides telling evidence that *the [state's] declared intent to prevent access to the e-mail system prevailed in the negotiations*." (Emphasis added.)

As a result of this decision, it is now clear that OPEU may only post noninteractive messages to agency electronic bulletin boards or post office box systems. It is not authorized access to the statewide e-mail system or any other agency interactive electronic communications system. Represented employees, likewise, may not use the statewide e-mail system to respond to messages from, or to otherwise communicate with, their union officers or stewards in connection with union business.

As is often the case, there is an exception to these rules—in this case, the only exception. Thus, where an agency had a long-standing, agencywide practice in existence prior to July 1, 1995, which allowed union officers or stewards to use the agency's interactive communcations system, such use may continue.]

TEMPORARY MILITARY LEAVE AND FLSA EXEMPT EMPLOYEES

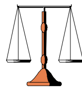
Under the Fair Labor Standards Act (FLSA), if an exempt employee works any part of the workweek and is absent for the remainder of that workweek due to temporary military leave, the employee's full weekly salary must be paid.

However, under the FLSA, no payment is owed to an exempt employee for any week in which the exempt employee performs no work. Consistent with this rule the Department of Labor, in a recent opinion letter, confirmed that when temporary military duty causes an exempt employee to miss the *entire* workweek, no payment is due that employee under the FLSA. The opinion letter also clarified the term "temporary military duty" as referring to, "[T]he usual short-term duty for reservists or members of the National Guard for two weeks or a month, but may include a period of as much as three months." In applying this rule it should be kept in mind that, irrespective of the FLSA, the employee in question may still be owed his or her salary under an applicable collective bargaining agreement (many of which authorize leave with pay status for employees on temporary military duty, limited to a certain number of days per calendar year—*see, e.g.,* OPEU Article 60, Section 6).

As always, if you have any questions regarding these issues, please feel free to contact your assigned labor relations manager.]

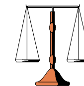
HELPFUL HINT. . .

Department of Labor (DOL) formal opinion letters provide valuable information. The courts, however, generally do not recognize such opinions as binding. A California District Court thus recently noted that, while DOL formal opinion letters are usually to be afforded deference, they "need only be considered to the extent that their reasoning is thorough, valid, and consistent with existing law."



NOTES FROM JUSTICE

by The Labor and Employment Section, Department of Justice



"TEMPORARY" SUSPENSION WITHOUT PAY—A NEW TOOL

A recent decision of the Supreme Court of the United States has given public employers a new tool when investigating potentially serious employee misconduct where criminal charges are also pending against the employee. The new tool is a suspension without pay during the agency's personnel investigation. *Gilbert v. Homar*, __ US __, 65 LW 4442 (1997). This new tool may be used only in specific circumstances and the agency must follow certain procedures. Therefore, agencies should seek legal advice from the Department of Justice, Labor & Employment Section, before using this procedure in a particular case.

Suspension without pay effective upon delivery of a predismissal notice is a process sometimes used by state agencies as part of predismissal procedures. Such suspensions are specifically mentioned in some state government collective bargaining agreements as a tool available to management. However, its use in state government has been limited and in fact, is quite rare. This is partly because of procedural requirements imposed by the constitution. Employees who have a "property interest" in their employment must be given prior notice of the charges, and an opportunity, before a decision maker, to respond to the charges before the suspension takes effect. A state agency's use of suspensions without pay as part of the predismissal process survived a constitutional challenge in *Adams, et al. v. State of Oregon, Fairview Training Center, et al.*, Civil No. 83-6527E (D Or 1985). The court approved the constitutionality of that procedure (Order, J. Leavy, August 22, 1985), in recognition of the grievance, pretermination and post termination procedures available to the plaintiffs under the collective bargaining agreement.

Now public employers have another constitutionally approved tool. In *Gilbert,* the Supreme Court upheld the temporary suspension without pay of an employee during a personnel investigation after criminal charges were filed against the employee. The employee, a university police officer, was arrested by the Pennsylvania State Police,

who then filed a criminal complaint charging him with possession of marijuana, possession with intent to deliver and criminal conspiracy to violate the controlled substance law, the last of which was a felony. The university employer, learning of this matter the same day, suspended the employee without pay summarily and without prior notice or an opportunity to meet with a decision maker before the suspension was imposed.

The employee filed a lawsuit contending that the summary suspension violated his constitutional right to procedural due process. The Supreme Court rejected the argument however, and broke new ground in doing so. The court said that the state has a significant interest in immediately suspending an employee without pay who occupies a position of public trust and high public visibility when felony charges are filed against the employee. In such circumstances, the court explained, the determination by an independent third party in the criminal justice system that probable cause exists to arrest and formally charge the employee for a serious crime provides substantial assurance that the deprivation was not baseless or unwarranted and permitted the university to immediately suspend the police officer without pay. However, the court also said that an employee cannot be held in "limbo" for too long. To be accorded procedural due process, the employee must be given an opportunity to have the suspension reviewed within a reasonable period of time. Language used by the court suggests that a review within three months would be considered "reasonable" by the court in the circumstances presented in the *Gilbert* case. Thus, these suspensions are "temporary," unless by the time of the review, the employee is discharged or disciplined at least as severely as the period of the suspension.

As a result of the court's decision in *Gilbert*, the Oregon Department of Corrections has placed several corrections officers on "temporary suspension without pay pending completion of a personnel review." The employees were placed on suspension after they were indicted by a grand jury on criminal charges relating to their official duties.

Any new process, like the suspensions approved by the Supreme Court in *Gilbert*, will be challenged on some legal basis, so one should expect. For example, the suspensions of the corrections officers by the Oregon Department of Corrections are being challenged by their labor organization as a violation of the collective bargaining agreement. It is unclear from the *Gilbert* Court's decision, whether a collective bargaining agreement applied to the university police officers who were suspended in that case.

To determine whether this new tool should be used in a particular case and to make proper use of it, an agency must obtain answers to questions of law and policy. To answer those questions, a state agency must work closely with its own personnel officers and with the DAS labor relations manager assigned to the agency, and should also seek legal advice from the Department of Justice, Labor & Employment Section.]

COMINGS AND GOINGS AT LABOR AND EMPLOYMENT

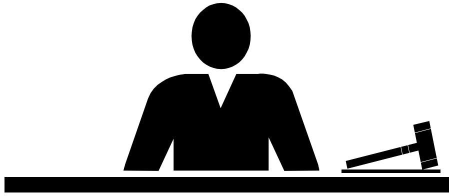
After many stellar years as a management advocate and counselor, Gary Cordy is leaving the Labor and Employment Section. His new assignment will be at the Education Section of the General Counsel Division, where he will generally advise such clients as the Education Department and the Oregon State System of Higher Education. Gary will be missed by all of us.

A departure means a new arrival on the scene. Assistant Attorney General Ann Boss has been appointed by Attorney General Hardy Myers to fill the position vacated by Gary. Ann has been with the department since July 1997. She was originally hired in a limited duration position to replace Assistant Attorney General Josephine Hawthorne who is on a two year leave of absence from the department.

Ann has 15 years of prior legal experience, all in the private sector where she represented and advised companies in employment law and other business matters. She is most recently from the law firm of Seidle & Rizzo in Portland.

The limited duration position which became vacant again with Ann Boss' permanent position appointment has been filled. Starting October 27, 1997, Lori Kraut will join the Labor and Employment Section.

Lori graduated from the University of Oregon School of Law in 1989. After graduating, she clerked for one year for Judge Butler of the Court of Appeals. She then joined the law firm of Davis Wright Tremaine handling a variety of business litigation, including employment law matters. After three years with that firm, Lori moved to the labor law firm of Bennett, Hartman, Reynolds & Wiser where she practiced labor and employment law exclusively, representing unions and individual employees. When Lori starts, the section will finally be staffed by its full complement of attorneys.]



DOC vs. OPEU
(Arbitrator, Thomas F. Levak; August 18, 1997).

Grievant's discharge was reasonably related to the seriousness of his offenses—selling contraband to a prison inmate and dishonesty during the investigation—which provided independent grounds for his termination. The fact that a key inmate witness chose to withhold his consent to the union's interviewing him prior to the hearing did not violate grievant's due process rights, since the state gave the union access to the inmate witness and allowed the inmate to himself make the determination whether he wished to be interviewed by the union or not.

Facts: Grievant, a Correctional Officer at the Oregon State Correctional Institution (OSCI), was accused of bringing tobacco into OSCI and turning it over to an inmate in return for money, a Class-A misdemeanor. Grievant was aware that tobacco is contraband and forbidden to OSCI inmates. When subsequently interviewed about this transaction by the State Police and by an internal affairs investigator, grievant denied bringing the tobacco into OSCI and denied giving it to an OSCI inmate in return for money.

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

Discussion and Ruling: Arbitrator Levak first set forth the standard to be followed in cases such as this: "Whether an employee has been discharged for just cause commonly involves an analysis of whether three basic components of that term have been satisfied: 1) Was the employee afforded fundamental due process rights implicit in the just cause clause, e.g., did he or she have forewarning or foreknowledge that his or her conduct would lead to discipline, and was a fair investigation conducted? 2) Was the charged offense(s) proved? And 3), was the penalty imposed reasonably related to the seriousness of the offense(s), the employee's disciplinary record and any mitigation or extenuating circumstances?" In this case, there was no violation of due process even though a key inmate witness chose not to allow a pre-hearing interview by the union. By granting the union access to the witness and allowing the witness to himself make the decision regarding a pre-hearing interview by union counsel, the state did all that it had to do under the due process requirement. As to the charges themselves, the arbitrator found that they were proved by clear and convincing evidence. Finally, as to the penalty of discharge, Arbitrator Levak found that it was, "[R]easonably related to the Grievant's offenses; because of the seriousness of the offenses, his work record is irrelevant; and there are no extenuating or mitigating circumstances. The on-the-job commission of an offense that is criminal in nature by a correctional officer is grounds for summary discharge." Grievant's conduct, "[J]eopardized the safety and security of the institution, and placed himself in a position to be blackmailed into even more serious transgressions." Moreover, his "[S]ubsequent dishonesty constituted separate independent grounds for his termination."]

HELPFUL HINT . . .

Collective bargaining agreements commonly require that the principles of "progressive discipline" be followed. Generally, this calls for the employer to utilize a series of disciplinary actions, of increasing severity, to send a message to the employee that the problem in question needs to be corrected. Dismissal is only invoked if lesser disciplines fail to cause the employee to correct the problem. Nevertheless, despite "progressive discipline," if the employee's fault or deficiency is serious enough, significant discipline, up to and including dismissal, may be warranted despite the absence of previous disciplinary actions of lesser severity. In such cases, it is particularly important that the "seven steps of just cause" be adhered to (see article, *infra*, p. 9).

OPEU vs. AFS
(Arbitrator, Gary L. Axon; July 2, 1997).

Grievant was not entitled to work out-of-class pay since the union failed to establish the four elements required by the collective bargaining agreement to trigger the obligation: 1) assignment or knowing acquiescence by the employer; 2) for a limited period of time; 3) to perform the core duties of a higher level classification; 3) for more than 10 consecutive calendar days.

Facts: Grievant, employed as an Office Specialist 1 for Adult and Family Services Division (AFS), requested work out-of-class pay pursuant to Article 84 of the

collective bargaining agreement between OPEU and AFS. In support of her request, grievant asserted that she performed duties of three higher rated positions—User Support Analyst 1, Administrative Specialist 1 and Office Specialist 2. Grievant performed some of the work in question as a volunteer, without the knowledge of management. She performed the remaining work either at the request of her co-workers or pursuant to assignment by management.

Question presented: Did the employer violate the collective bargaining agreement's work out-of-class article?

Discussion and Ruling: Arbitrator Gary Axon initially noted that, "The essence of a work out-of-classification grievance is a claim the worker is performing the core tasks of a higher rated job." Pursuant to the collective bargaining agreement, four conditions must be met to trigger an obligation to pay for work out-of-class: "1) The employer must assign an employee; 2) for a limited period of time; 3) to perform the duties of a higher level classification; and 4) the assignment must be for more than 10 consecutive calendar days."

The first element, assignment by management, may be met by a verbal instruction. It may also be met if the employer is aware that the employee is performing the work in question and does not request the employee to stop. On the other hand, the employee performing work as a volunteer or at the request of co-workers—without the knowledge of management—will not result in employer liability to pay work out-of-class pay. In this case, while some of the disputed work was performed voluntarily by grievant, without management's knowledge, some of the work was assigned by management. However, on December 6, 1994, grievant's manager gave her a memo which stated that if she felt that she was performing higher level duties, "then we will discontinue them and have you focus entirely on your assigned position description duties." The arbitrator concluded that, "This letter provided clear notice to Grievant to work within her position description. From this date on Grievant acted at her peril when she voluntarily performed work which could be categorized as higher level work."

As to the third of the four requirements for work out-of-class liability, "The 'core element' rule is the appropriate test to apply in determining whether work being done by the employee was in a higher classification." Reviewing the "core elements" of each of the three higher rated classifications cited by grievant and comparing these with the duties performed by her, the arbitrator concluded that while grievant may have performed "some aspects" of one of the classifications, and while there is "a degree of overlap" in the duties of the Office Specialist 1 and 2 classifications—grievant was never assigned or performed the core elements of any of the three classifications on a regular and ongoing basis.

Finally, even if it could somehow be found that grievant met the third requirement, she still must satisfy the fourth. And, concluded Arbitrator Axon, "[G]rievant was never assigned higher rated duties which invaded the core elements of any of the classifications *for more than ten consecutive days*." (Emphasis in original.)]

HELPFUL HINT . . .

Under the collective bargaining agreements, work out-of-class pay is meant to cover only *temporary* assignments to perform the duties of a position at a higher level classification. When the assignment is permanent in nature, the reclass article should be considered. It should also be noted that some of the collective bargaining agreements require that all work out-of-class assignments be made in writing. A number also have threshold periods other than 10 consecutive days.

OPEU vs. ODOT, DMV Services Branch (Arbitrator, Luella E. Nelson; June 8, 1997).

Grievant should have known that his intentionally rubbing buttocks with a co-worker would be unwelcome and, as such, discipline could be imposed despite the lack of any previous expression by the co-worker that such conduct would be unwelcome. In light of recent serious disciplinary history, the buttocks-rubbing incident, along with other disrespectful and disruptive conduct, justified grievant's dismissal.

Facts: Grievant had worked for ODOT since 1981. In 1995, he was accused of having engaged in inappropriate behavior while at work with two female co-workers. The charges concerned, among other things, allegations that grievant (1) asked to spank a female co-worker; (2) rubbed her shoulders; (3) touched her face; (4) rubbed buttocks with her and (5) gestured toward his waist while stating words to the effect, "you know you want it." He was also alleged to have repeatedly thrown paper clips and other objects at another female co-worker despite the co-worker having told him that the conduct was unwelcome. Contradictory testimony was received at the arbitration hearing regarding what each of the parties had actually said and done. Grievant had been suspended twice within the three-year period prior

to his discharge, for hostile and "somewhat violent" encounters with co-workers. He had also received two "final warning" letters in connection with these suspensions.

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

Discussion and Ruling: Observing that the issue of notice is particularly significant in this case because of the varying kinds of misconduct with which grievant had been charged over the years, Arbitrator Nelson explained: "Ordinarily, except where the misconduct is of a nature that any reasonable employee would know was improper, employees are entitled to notice that they have breached workplace standards and an opportunity to conform their behavior to those standards. However, where an employee has received discipline and counseling for a succession of behaviors, an employer is entitled to expect the employee to apply common sense and recognize that other behaviors, of similar gravity but differing details, are likely to be as unacceptable as those for which discipline has already been imposed....Thus, the fact that Grievant's prior discipline involved hostile and somewhat violent encounters did not require that the State begin at the lowest level of progressive discipline for suggestive and overly-familiar encounters."

Addressing the specific incidents in question, Arbitrator Nelson began by noting that the propriety of the alleged misconduct is dependent on context. As such, since grievant's co-worker interpreted his request to spank her as a joke, the conduct was not unwelcome and, therefore, did not constitute misconduct. Similarly, since the relationship between grievant and his co-worker was, "[A] friendly and, in her words, 'flirtatious relationship'"—when grievant rubbed her shoulders, "[I]t was incumbent on her to let Grievant know when he had been too forward. Only after such notice would continued contact demonstrate his unwillingness to comply with her wishes." Finally, as to grievant's touching of his co-worker's face, Arbitrator Nelson concluded that while the contact was, "[U]nnecessary and, perhaps, somewhat uncalled for .... [Grievant] did not persist in physical contact despite a request to desist; on the contrary, he complied with the request." As a result, the state could not sustain its burden on this allegation.

However, noted Arbitrator Nelson, "The buttocks-rubbing incident is another matter." Such conduct, "[I]s quite an intimate contact, even among close friends." In this case, moreover, the conduct was more than a mere inadvertent or incidental contact. As such, "Any employee knows, or should know, that in most workplaces, one does not expect such an intimate encounter. It is therefore unnecessary to give notice that it is unwelcome. Instead, an employee who initiates such a contact at work must show good reason to believe it would be welcome. No such evidence exists here ...."

In addition, despite contradictory testimony, it is more likely than not that grievant, "[M]ade some gesture toward his waist ... and said something along the lines of 'you know you want it' ...." While the comment alone, "[W]ent only slightly beyond the joking and flirtatious exchanges [grievant] had with [his co-worker] in the past ... when coupled with his physical gesture, it demonstrated a lack of common sense and propriety." This conduct was thus properly taken into consideration by the state in determining the appropriate level of discipline.

Grievant also threw paper clips and other objects at a different co-worker. While "[S]uch conduct was minor in and of itself..."; grievant continued to engage in the conduct even after the co-worker told him that it was unwelcome. He had also previously been specifically cautioned about such conduct in the past. The arbitrator concluded that, "In this context, therefore, Grievant knew, or should have known, that he should desist from throwing objects at co-workers who protested this behavior."

Arbitrator Nelson concluded: "But for his disciplinary history, these events would have warranted some discipline, but not discharge. However, when these incidents began, Grievant had been on the job less than a year after his reinstatement with a lengthy suspension and final warning. Given this recent serious disciplinary history, discharge was within the range of reasonable responses to a resumption of disrespectful and disruptive conduct. Accordingly, just cause existed for his discharge."]

HELPFUL HINT . . .

Most of the collective bargaining agreements include provisions which allow written disciplinary actions to be retained in personnel files for only a limited period of time—usually two or three years. In light of these provisions, some arbitrators will not consider as part of the progressive discipline process, any disciplinary action which was assessed before the retention period. Nevertheless, many arbitrators *will* consider evidence of discipline imposed prior to the retention period for *notice* purposes; that is, to show that the employee was aware that the conduct now in question was unacceptable, because he or she had previously been disciplined for the same or very similar conduct.

OPEU vs. ODOT
(Arbitrator, Howell L. Lankford; February 12, 1997).

On the job comment made to a co-worker and his wife that she should "lift up her shirt and show 'em her t---," is so obviously outrageous on its face that the grievant should reasonably have known that discipline would be a possible consequence of the behavior.

Facts: While on the job, grievant, a weighmaster, was visited by a co-worker and the co-worker's wife. As grievant worked at weighing trucks, a number of the truck drivers waiting in line for the scale stared at the co-worker's wife. At the same time, grievant talked with his co-worker about his prior job as an EMT ambulance attendant. What each of the parties said was in dispute at the hearing. Grievant allegedly stated that he had encountered "naked women" at accident scenes and could easily have "Jump[ed] [their] bones." As they started to leave, the co-worker suggested that his wife "say goodbye" to the truck drivers who had been staring at her. Grievant then allegedly stated, "why doesn't she lift up her shirt and show 'em her t---?"

Question presented: Did the employer violate the just cause provision of its collective bargaining agreement with the union when it reduced grievant's pay one step for three months as a result of his having made the comments noted above?

Discussion and Ruling: The union argued that at the workplace in question the use of foul language is commonplace. It also argued that the discipline grievant received was improper since grievant was given no prior warning that discipline could result from his use of such language.

In addressing these arguments, the arbitrator noted that the just cause standard requires that, "[A]n employer must administer only a degree of discipline which the employee should reasonably have known would be a possible consequence of that sort of misbehavior...." In an attempt to show that it had met this standard, the employer cited its training sessions, the posted "ODOT values regarding diversity," and "the ODOT policy on sexual harassment...." Arbitrator Lankford, however, concluded that, "[N]one of the cited materials comes even close to covering [grievant's] actions ... The sexual harassment law, rules, and policy simply have nothing to say about an employee's churlish and contemptible treatment of a non-employee in the workplace."

Nevertheless, grievant's "show 'em your t---" comment is so outrageous under the circumstances (made in the workplace, on company time, to a co-worker's spouse, in his co-worker's presence), that any employee should understand that such a comment could have disciplinary consequences: "As long as an employer contents itself with doing no more than promulgating the EEO Title VII regs, that employer will often find itself dependent on what is sometimes known as the 'any darned fool' rule. In this case, however, that is enough: any darned fool ought to know better than to suggest, in the presence of a new co-worker and his wife, that the co-worker's wife 'show 'em your t---.'" As to the comment regarding grievant's experiences as an ambulance EMT: "That comment might not have been in good taste, but it was not so obviously offensive as to justify disciplinary action on an 'any darned fool' basis." The financial penalty assessed against grievant was upheld by the arbitrator, but the employer instructed to rewrite the discipline letter to, among other things, eliminate references to grievant's comment regarding his experience as an ambulance EMT.]

ONA vs. AFSCME Declaratory Ruling,
(ERB Case No. DR-2-97, June 25, 1997).

Basing its ruling on the unions' competing recognition clauses and community of interest factors, the ERB found that pursuant to the doctrine of accretion, registered nurses working at OSH-Portland are represented by AFSCME and not by ONA.

Facts: Prior to October 1, 1994, Dammasch State Hospital in Wilsonville and Oregon State Hospital (OSH) in Salem were operated as separate facilities. Effective October 1, 1994, Dammasch and OSH were merged into a single organization. From that date until it closed on July 26, 1995, Dammasch was a part of OSH. Meanwhile, on July 1, 1995, the state opened a new hospital in Portland, OSH-Portland; which it operated as one of two work sites (the other being OSH-Salem) of a single psychiatric care organization.

Prior to its closure, the registered nurses employed at Dammasch were members of ONA. Those at OSH were members of AFSCME. Approximately a year before the closure, all but 12 of the Dammasch registered nurses were transferred to OSH-Salem (and became AFSCME members). The remaining 12 Dammasch registered nurses were transferred to OSH-Portland at the time of the closure. Subsequently, 10 registered nurses who had previously worked at Dammasch and

been transferred to OSH-Salem, were transferred to OSH-Portland. As a result of the transfers, a majority of the 28 registered nurse positions at OSH-Portland were occupied by nurses who had initially been hired at Dammasch.

The applicable collective bargaining agreement between the state and AFSCME contains the following recognition language: "The Employer recognizes the Union as the exclusive bargaining agent and representative for all employees at the Oregon State Hospital working in classifications for which a RN license is required ...." The recognition language in the 1993-95 collective bargaining agreement between the state and ONA provides: "The Employer recognizes the Association as the exclusive bargaining agent and representative for all employees in separate bargaining units at (1) Dammasch State Hospital, (2) Eastern Oregon Training and Psychiatric Centers, (3) Fairview Training Center, and (4) State Operated Community Programs (Group Homes) working in classifications for which a Registered Nurse license is required ...." Subsequent to 1995, the ONA recognition language was modified to delete the reference to Dammasch.

Question presented: Whether ONA or AFSCME is the exclusive representative for collective bargaining of the nurses working at OSH-Portland, based on the respective recognition agreements?

Discussion and Ruling: Defining "accretion" as, "[T]he addition of a group of employees to an already existing bargaining unit where a significant community of interest exists among the employees in both groups" —the Employment Relations Board (ERB) noted that: "In deciding whether a proposed accretion is appropriate, this Board's practice, pursuant to OAR 115-25-005(3), is to focus mainly on whether the positions at issue are reasonably comprehended by the existing unit's recognition clause or certification description." Examining these clauses, the Board observed that, "[O]n the basis of the contract language, AFSCME has a superior claim to represent the nurses at OSH-Portland. Its recognition clause is written broadly enough to cover OSH in general, including new facilities, such as OSH-Portland. ONA's recognition clause is limited to specific facilities, and Dammasch no longer exists." Furthermore, noted the Board, community of interest factors also support the conclusion that accretion to AFSCME is appropriate in this case. Thus, while the two OSH facilities are separated by 50 miles (which tends to favor a separate unit), they nonetheless require similar skills and functions from the nurses, there is an interchange of nurses from one facility to the other based on staffing requirements, the administrative operations are centralized, the nurses work under the same supervisory structure and there is no history of a separate bargaining unit at OSH-Portland.

Not surprisingly, ONA contended that OSH-Portland is a successor employer to Dammasch, and that the dispute as to representation should be resolved by application of the successor employer doctrine, and not accretion. However, since a significant percentage of the OSH-Portland nurses were employed at OSH-Salem before transferring to the Portland facility (irrespective of where they had initially been hired), the Board determined that it could not find that there was a continuity in the workforce between Dammasch and OSH-Portland. The Board also declined to find sufficient continuity in the employing industry (asking whether the alleged successor was, "[U]sing the same physical facilities and the same workforce doing the same jobs with the same tools to deliver the same services to the same clientele."). Finally, there was no appropriate bargaining unit continuity (since the nurses at OSH-Portland included only "a handful" from Dammasch which themselves did not constitute an appropriate unit, together with those from the AFSCME bargaining unit at OSH-Salem and those newly hired).

The Board concluded: "In sum, on the facts presented, OSH-Portland is not a successor employer to Dammasch .... Based on the competing recognition clauses and giving due consideration to community of interest questions, it is appropriate to accrete the OSH-Portland nurses to the AFSCME bargaining unit."]

BACK TO BASICS

PERFORMANCE APPRAISALS

Honesty is the best policy, especially when it comes to performance appraisals. Supervisors, understandably, are often hesitant to give an employee a poor performance review. Unfortunately, if the supervisor instead gives a poor performer a satisfactory review out of compassion, the stage has been set for either a long-term acceptance of chronic under-performance, or a later grievance.

. . . cont. pg. 9

The message sent by a satisfactory performance review is that the employee may continue performing his or her job in the same manner. While improvement is certainly desirable, no change in performance is required or necessary. Thus, when the supervisor (or successor supervisor) later determines that he or she will no longer accept the employee's under-performance, and disciplines the employee for the same level of performance, the employee will likely be genuinely shocked and more inclined to file a grievance. Since the employee was disciplined for performance that previously had been rated as "satisfactory"—it is understandable that the employee might truly believe that the disciplinary action lacks just cause, or that it must be a discriminatory motive that caused the supervisor to now discipline the employee for the same level of performance (however misguided those beliefs might actually be).

Even more important, the prior satisfactory appraisal, by sending a message to the employee that his or her performance level was acceptable, failed to alert the employee to the fact that improvement *was* required and necessary. While, from the supervisor's point of view, the employee always had the opportunity to improve his or her level of performance and simply failed to do so; from the employee's point of view, since the message had been sent that his or her performance level was acceptable, the feeling might arise that he or she was never given an opportunity to improve, before disciplinary action was invoked. Again, increasing the likelihood that a grievance will result.

To avoid these problems, just remember what your mother always told you—honesty is the best policy.]

CONFIDENTIAL EMPLOYEES

The Public Employee Collective Bargaining Act (PECBA) defines the term "public employee" to include all employees of a public employer *with the exception of*, "[P]ersons who are confidential employees, supervisory employees or managerial employees." (ORS 243.650 (19).) A "confidential employee" may thus be excluded from a public employee collective bargaining unit. But what makes one a confidential employee?

The title of this exclusion is somewhat misleading. For purposes of the PECBA confidential exclusion, the term "confidential" does *not* have the same meaning as the dictionary definition of that term. Rather, for the PECBA exclusion, "confidential" is limited to a public employee, "[W]ho assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies *in the area of collective bargaining*." (ORS 243.650 (6), Emphasis added.) The purpose of the confidential exclusion is to, "[P]rotect employers from the possibility that their collective bargaining policies and strategies will be prematurely disclosed by employees who are necessarily involved in collective bargaining negotiations." (*OPEU vs. DOJ*, UC-120-87, 10 PECBR 942 at 947 (1988).)

To qualify for this exclusion, there *must* be a meaningful and necessary nexus with collective bargaining. As such, employees who perform "confidential" duties in the areas of budgeting or human resources, or who are given access to "sensitive" records, would *not*, by virtue of these duties alone, qualify for the PECBA confidential exclusion. Similarly, clerical processing and monitoring of grievances and disciplinary actions will generally not alone provide a basis for this exclusion. Noting the "built-in potential for abuse," the Employment Relations Board has also observed that, "A public employer could achieve rather extensive exclusions of members of its work force from the protection of the PECBA, simply by dispersing the clerical assistance needed for collective bargaining among many members of its work force." (*OPEU vs. DOJ, supra, 10 PECBR at 947*.) To prevent such a result, the Board further stated that even though such dispersion of work is usually done in good faith for managerial convenience, the Board will nonetheless, "[A]pply the statutory definition in a way which, while providing the requisite protection, will preclude the unnecessary diffusion of confidential employee status." (*Ibid.*)]

HELPFUL HINT . . .

The basis for each of the three bargaining unit exclusions—confidential, supervisory and managerial—should be found in actual, current duties. The fact that an employee will be assuming additional duties at a later date will generally not constitute sufficient grounds for exclusion.

SEVEN STEPS OF JUST CAUSE

Virtually all of the state's collective bargaining agreements require that discipline be imposed only for "just cause." Labor arbitrators, interpreting this requirement, have developed a set of questions to be addressed by them when making a determination whether the just cause standard was followed in a particular instance. These questions are often referred to as the "seven steps of just cause."

. . . . cont. pg. 10

Whenever imposing discipline, it is important that the manager or supervisor involved can answer each of these questions in the affirmative:

1) Did the agency give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

2) Was the agency's rule or directive reasonably related to the safe, orderly, or efficient operation of the agency's business or mission?

3) Before administering discipline to an employee, did the agency make an effort to decide whether the employee did in fact do what he or she is accused of doing?

4) Was the agency's investigation conducted fairly and objectively?

5) During the investigation, did the agency obtain sufficient evidence that the employee engaged in alleged bad conduct or poor performance?

6) Has the agency applied its rules, orders and penalties evenhandedly and without discrimination to its employees?

7) Was the discipline administered by the agency in the particular case reasonably related to the seriousness of the employee's offense and the employee's record of service with the agency?]

EXCERPTS OF SELECTED NEW LABOR AND EMPLOYMENT-RELATED LAWS

SB 24 Authorizes direct appointments to state positions under certain circumstances.

SB 43 Extends application of employment-related civil rights laws to public employers.

SB 44 Prohibits employment discrimination against disabled persons (intended to parallel the Federal Americans With Disabilities Act).

SB 141 Abolishes the State Employees' Benefit Board (SEBB) and the Bargaining Unit Benefits Board (BUBB). Creates a new board, the Public Employees' Benefit Board (PEBB), to administer the combined functions of SEBB and BUBB. Provides that PEBB will co-exist with SEBB and BUBB until January 1, 1998.

SB 143 Brings the state overtime exemption laws into conformity with the Federal Fair Labor Standards Act. Includes overtime exemption for members of the organized militia while on state active duty. Modifies notice and overtime pay requirements for public service contracts entered into on or after the Bill's effective date.

SB 283 Disqualifies an individual from receiving unemployment compensation benefits if the individual has been suspended or discharged for being absent or tardy in reporting for work as result of use of alcohol or unlawful use of controlled substances. Provides exceptions for persons participating in a recognized alcohol or drug rehabilitation program at the time of the absence or tardiness, or who are participating in such a program within 10 days of discharge or suspension. Disqualification for alcohol use requires two or more incidents in a 12-month period.

SB 484 Revises provisions regarding the administration of workers' compensation claims.

SB 528 Prohibits a defamation action against an employer by a former employee based on a claim that in seeking subsequent employment, the former employee will be forced to reveal reasons given by the employer for the former employee's termination (compelled self-publication).

SB 775 Declares that it is the policy of the state to encourage state agencies to allow telecommuting when there are opportunities for improved employee performance, reduced commuting miles or agency savings. Directs agencies to adopt written policies that define criteria and procedures for telecommuting.

SB 979 Requires SEBB and BUBB to make long term care insurance available for purchase by eligible employees, retirees and family members.

HB 2028 Allows the Bureau of Labor and Industries to assess civil penalties for willful violation of minimum wage law provisions, including those concerning subminimum wages, record-keeping, posting, discrimination prohibitions and minimum employment conditions.

HB 2187 Revises laws relating to State of Oregon deferred compensation programs. Establishes the Deferred Compensation Fund at the State Treasury in the form required by recent federal legislation (as a trust fund, the assets of which belong to the plan participants).

HB 2444 Requires certain public employee collective bargaining negotiations to be conducted in open meetings unless both sides to the negotiations request executive sessions.

HB 2491 Exempts from disclosure the addresses and telephone numbers contained in personnel records maintained by public bodies, of certain public employees and volunteers. The numbers and addresses may be disclosed if clear and convincing evidence shows that the public interest requires disclosure. Nothing in the legislation relieves a public employer from any duty owed under the Public Employee Collective Bargaining Act.

HB 3098 Authorizes on-site drug testing of employees with on-site drug screening tests, if the test results are not used for diagnosing or preventing disease, and are not used by physicians, dentists or other licensed health care professionals. Requires that positive test results be confirmed by a licensed clinical laboratory before release of on-site test results if adverse employment action will result. Requires certification that the tests are being administered under certain criteria set forth in the legislation.]

CORRECTIONS FOR THE OPEU 1997-99 MASTER CONTRACT

Page 1, Article 2--Recogntion: Remove Oregon State Correctional Institution from Section 1, Subsections (a) and (b).

Page 29, Article 32--Overtime, Section 1: Delete the word “standby/” from 1st sentence.

Page 117 (top of page--Letter of Agreement for Article 27, Section 8--OSCI Compensation Plan for Stationary Boiler Operators): Change Salary Range from 26 to 16.

Page 136: Class number for State Library Specialist 1 should be 0251; State Library Specialist 2 should be 0252.

Page 146: Reclassification Downward, Step 3 - LRU, change 15 calendar days to 30 calendar days; Reclassification Upward, Step 3 - LRU, change 15 calendar days to 30 calendar days.

Subject Index-Inside Front Cover: Under Leadwork Differential change 83, 83.1B, 83.1C, 83.1J,K to 26.

Subject Index-Inside Back Cover: Under Reclassification Downward change 82 to 81; Under Work Out-Of-Classification change 84, 84.3A to 26.

About the Management Insight...

The *Management Insight* is produced periodically by the Labor Relations Unit, Human Resource Services Division, Department of Administrative Services, and is distributed to Executive and Management Service employees of the State of Oregon. Material covered in this newsletter may be reproduced without special permission. Please credit the *Management Insight*, DAS - LRU.

If you have any items of interest or other information which you would like considered for an issue of the *Management Insight*, please produce them in typewritten form and send them to Michael Halpern, Labor Relations Unit; or . . .

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About the Labor Relations Unit . . .

The Labor Relations Unit is a part of the Human Resource Services Division in the Department of Administrative Services. The Administrator of the Division is Dan Kennedy. Currently, the LRU negotiates and administers 32 collective bargaining agreements with 10 different labor organizations, representing approximately 27,600 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.

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