

MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

JULY 2002

ITEMS OF INTEREST

STATE WINS INTEREST ARBITRATION

In a recently concluded interest arbitration between the Department of Administrative Services, on behalf of the Department of Corrections (State), and the Association of Oregon Corrections Employees (AOCE), Arbitrator Ronald L. Miller selected between the parties' last best offer packages. In his award, dated May 31, 2002, Arbitrator Miller found that the State's package best served the interest and welfare of the public.

The AOCE bargaining unit includes both strike-prohibited employees (correctional institution guards), and employees in non-guard classifications who would be strike permitted if not part of the mixed bargaining unit. The parties' last best offer packages included proposals regarding general salary increases, "other pay provisions," and contract language. In reaching his decision, Arbitrator Miller explained that while he gave careful consideration to the language and other-pay-provision proposals, the award was based primarily on application of the statutory criteria to the parties' general salary increase proposals. These were –

AOCE

All employees: 3% increase effective 9/1/02 and 7% increase effective 3/1/03;

State

Correctional officers: 2.5% increase effective 7/1/01 and 3% increase effective 7/01/02;

Non-correctional officers: 2% increase effective 1/1/02 and 3% increase effective 2/1/03.

Arbitrator Miller noted that AOCE's proposal would save the State money during this biennium and assist the State in the current financial crisis because of its back-loading

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feature (delaying increases until later in the biennium). However, because of the seven percent "catch-up" increase in March 2003, the resultant higher salary cost structure would have a detrimental impact on the State's

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reasonable ability to pay if the State's financial crisis continues into the next biennium, as appears likely. Arbitrator Miller also noted that during the contract's term the AOCE proposal would cause salaries paid to AOCE bargaining unit employees to fluctuate compared with salaries of other Department of Corrections employees performing the same duties but who are represented by a different union. This would, observed Arbitrator Miller, adversely affect long-standing internal compensation parity within the Department of Corrections, which is an aspect of efficient State government operations and, therefore, directly related to the interest and welfare of the public.

Addressing other statutory criteria, Arbitrator Miller found that, on balance, AOCE's package is supported by relevant intra-state labor market comparisons; but that inter-state compensation comparisons support the

State's last best offer. Arbitrator Miller found no convincing evidence of any recruitment and retention problem within the AOCE bargaining unit. He also found that AOCE bargaining unit employees have kept ahead of inflation.

Arbitrator Miller concluded by noting that selection between the two packages comes down to two key issues. AOCE's package would, on the one hand, provide short-term savings in operating expenses. It would also, on the other hand, result in long-term operational and financial problems to AOCE, the State and all Department of Corrections employees resulting from a disruption in internal compensation parity which has existed for eight years. Weighing these factors, "The interest and welfare of the public will be served through implementation of the Employer's last best offer package."

 **HELPFUL HINT . . .**

About Interest Arbitration – To avoid endangering the public, certain represented public safety employees are prohibited from striking by the Public Employee Collective Bargaining Act. These employees include police officers, firefighters, correctional institution and mental hospital guards and emergency telephone workers. In place of the strike option, these employees are entitled to use binding interest arbitration to resolve negotiation deadlocks regarding mandatory subjects of bargaining. Strike-permitted employees may also be ordered by a court to submit to binding interest arbitration if the court finds that a strike would create a "clear and present danger or threat to the health, safety or welfare of the public." As was the case with AOCE, if a bargaining unit contains both strike-permitted and strike-prohibited employees, it is limited to interest arbitration.

Each party to an interest arbitration must submit a written "last best offer" package to the arbitrator, which sets forth the party's final offer on all unresolved mandatory subjects of bargaining. A permissive subject may not be included in the last best offer if the other party objects to its inclusion. Interest arbitration hearings are usually informal, but similar to a trial.

The arbitrator is required by statute to base his or her decision on criteria set forth in ORS 243.746 (4). These are: The interest and welfare of the public; the reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due

consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body; the ability of the unit of government to attract and retain qualified employees at the wage and benefit levels provided; the overall compensation presently received by the employees; comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities (for the State, "comparable" includes comparison to other states); the CPI-All Cities Index; stipulations of the parties; and, if the arbitrator determines that the enumerated factors do not provide sufficient evidence for an award, other factors consistent with the enumerated factors as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment (in the AOCE interest arbitration, the arbitrator examined intra-state labor market comparisons and internal compensation parity as "other factors"). In reaching his or her decision, the arbitrator is to give first priority to the interest and welfare of the public, and secondary priority to the other enumerated criteria.

After the hearing, the arbitrator issues a written decision which awards one of the last best offer packages. No split or compromise decisions are allowed; the arbitrator must award one party's entire package. While there is a limited right to appeal, the arbitrator's award is generally final and binding.

ARBITRATION AWARD REINSTATING PUBLIC EMPLOYEE FOUND UNENFORCEABLE

Under ORS 243.706 (1), an arbitration award ordering reinstatement of a public employee must “comply with public policy requirements as clearly defined in statutes or judicial decisions....” Based on this statute, the Oregon Court of Appeals concluded that Washington County was justified in refusing to comply with an arbitration award requiring reinstatement of a deputy sheriff who had failed a drug test and lied about his marijuana use.

The county hired the employee in question in 1990, as a deputy sheriff. Under Federal law his duties, which included driving a bus to move inmates from site to site, required that he be periodically tested for drug use. In January 1999 the deputy tested positive for marijuana. After first telling the medical review officer that the positive result was due to an herbal sleep medication he was taking, the deputy later admitted to his coworkers that he had, indeed, smoked marijuana while off duty, nearly every day for a month before the test. During the subsequent internal investigation, the deputy admitted marijuana use, but changed his story as to how recently he had last smoked it (first stating that the last time he had smoked marijuana was a week before the test, and later stating that his most recent use could have been as few as three or four days before the test). The internal investigator concluded that the deputy had illegally bought and consumed marijuana while off duty and that the levels of THC detected in the drug test were inconsistent with the deputy’s testimony regarding amount and recency of use. The investigator also concluded that there was no evidence that the deputy had reported to work while under the influence of marijuana.

The county proceeded to terminate the deputy despite an article in the applicable collective bargaining agreement which provided that a first positive drug test would not result in discipline as long as the employee participated in an employee assistance program or drug counseling. The union grieved the discharge and, after the matter was submitted to arbitration, the arbitrator found that the county had violated the collective bargaining agreement. The arbitrator ordered the deputy reinstated, but did not award back pay (in effect, imposing a seven-month unpaid suspension as the penalty for the alleged misconduct). The county refused to implement the arbitration award, and the union took the matter to the Employment Relations Board, which ruled in the union’s favor. The county then sought judicial review of the ERB ruling in the Court of Appeals.

The Court of Appeals explained that under ORS 243.706 (1) the public policy analysis must be directed at the arbitration award itself, not the conduct for which discipline was imposed. As such, the question is whether the *reinstatement* of a public safety officer who has admitted to repeated illegal off-duty use of marijuana complies with public policy. The statute also provides that the public policies in question are those “clearly defined in statutes or judicial decisions.”

Applying the above-described guidelines, the Court found that the relevant public policy is embodied in ORS 181.662 (3)—which at the time the deputy used the marijuana provided that a public safety officer who is convicted of unlawfully using a controlled substance shall have his or her certification denied or revoked after notice and hearing. The Court further reasoned that the fact that the statute requires a hearing and conviction before revocation of the certification does not imply that reinstatement is required in the absence of such a hearing and conviction. In this case, the facts are “undisputed” and the public policy embodied in the statute is “clear”: “officers who use controlled substances should not be certified.”

In conclusion, the Court found that, “ORS 243.706 (1) renders the reinstatement award unenforceable, despite the undisputed fact that the county violated the collective bargaining agreement It follows that, in refusing to implement the award, the county did not commit an unfair labor practice.”

**US SUPREME COURT RULES THAT
NON-NEGOTIATED SENIORITY
SYSTEM WILL USUALLY TRUMP
ADA DUTY TO ACCOMMODATE**

What happens when a proposed Americans with Disabilities Act (ADA) accommodation is a reassignment which would violate the employer's seniority system? The US Supreme Court, in *US Airways vs. Barnett*, addressed this question in the context of a seniority system unilaterally imposed by management (*i.e.*, not collectively bargained).

The short answer provided by the Court is that "ordinarily" the ADA does not require the employer to grant such a reassignment. In other words, if the employer shows that the requested accommodation would violate the rules of the employer's seniority system, that showing is, by itself, "ordinarily" a sufficient basis to deny the requested reassignment as an unreasonable accommodation. The Court, however, created an exception to this rule, if the employee can show "special circumstances" which warrant a finding that the requested accommodation is reasonable in the employee's particular case.

What would constitute a "special circumstance"? The Court gave several examples, which it noted were not meant to be comprehensive. If the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently—reducing employee expectations that the system will be followed to the point where one more departure would not likely make a difference—then an exception might be warranted for the employee in question. Another possibility would be a showing that the seniority system already contains exceptions such that, under the circumstances in question, one further exception is unlikely to matter.

It is important to note that this decision concerned a seniority system where there was no collective bargaining agreement in place. In the Ninth Circuit, which includes Oregon, a previous decision—*Willis and Gomez vs. Pacific Maritime Association, et al.*—held that proposed ADA accommodations which would compel an employer to violate a collective bargaining agreement's bona fide seniority system are per se "unreasonable." As such, an Oregon employer would not be obligated to implement such a requested

accommodation in the context of a negotiated seniority system (for more on the *Willis* case, see, *Management Insight*, March 2001, p. 3).

**EEOC ADDRESSES EMPLOYMENT
RIGHTS OF MUSLIMS, ARABS,
SOUTH ASIANS AND SIKHS**

The Equal Employment Opportunity Commission (EEOC) has announced the availability of two new fact sheets which address frequently asked questions about the employment of Muslims, Arabs, South Asians and Sikhs. These fact sheets are available through the EEOC's web site at www.eeoc.gov. Choose, "September 11 Information," which includes the two fact sheets as well as additional September 11-related materials and resources. According to the EEOC, the fact sheets are part of the agency's ongoing efforts to prevent backlash discrimination.

The two fact sheets provide hypothetical circumstances and practical guidance on how to best handle the issues raised. One focuses on employer responsibilities, while the other deals with employee workplace rights. Topics dealt with include hiring and other employment decisions, discharge, harassment, religious accommodation, dress codes, and background investigations.

The EEOC announcement reports that between September 11, 2001 and May 7, 2002, the EEOC received 497 charges alleging discrimination on the basis of the Muslim religion. During the comparable period one year earlier, 193 charges were received. The post-September 11 discrimination charges most commonly allege harassment and unlawful discharge.

Title VII of the Civil Rights Act of 1964 prohibits workplace discrimination and harassment based on religion, country of origin, ethnicity, race and color. Such discrimination and harassment is prohibited in any aspect of employment, including recruitment, hiring, promotion, benefits, training, job duties, and termination. In addition, Title VII prohibits retaliation against an employee who complains about an alleged discriminatory practice, files a charge, or assists in an investigation of discrimination in any way. The EEOC also explains in the fact sheets that an employer must provide a reasonable accommodation for religious practices unless doing so would result in undue hardship.

FROM THE HR MANAGEMENT AND CONSULTATION SECTION

FINDING THE BEST PERSON FOR THE JOB – REFERENCE CHECKS

Capable employees, who are good matches for their positions, are the foundation on which a quality organization is built and maintained. To find and select such employees, an effective recruitment and selection process is essential. Reference checking is a vital step in this process.

When conducting a reference check, seek information beyond how well the candidate performed his or her last job. Include questions linked to the position's primary duties and the skills needed to perform those duties. To ensure that answers provide sufficient detail to effectively aid hiring decisions, employ follow-up questions to generalized responses (she's outstanding ... "how" or "why" is she outstanding?). A request for specific examples is another effective probing tool.

To get an accurate assessment of a candidate's skills and abilities, conduct reference checks with former supervisors, co-workers, peers, stakeholders and subordinates. While a former supervisor is one of the best sources of information, go beyond the former supervisor, particularly if there is a direct link with the position you are filling. Contact those individuals who can provide the most relevant information to the skill-based questions. Go beyond references which the applicant provides on his or her job application. Ask the applicant for names of individuals to contact for more position-specific (skill related) information. In addition, consider contacting individuals discovered through the interview and reference check process who have a connection with the applicant enabling them to provide information on the applicant's ability to perform the duties of the position being filled.

If possible, check with at least two past employers to find consistent trends in the applicant's performance. Look for a past employer who employed the candidate in a position similar or related to the one you are filling. Other sources to contact are:

- Co-workers – they are in a position to offer insight into the applicant's interpersonal skills, ability to work in a team environment or independently;
- Peers – they are a likely source of information on the individual's work ethics, organization skills and relationships with supervisors, subordinates and co-workers;
- Stakeholders – their vested interest in the work may have resulted in their possessing information related to knowledge base, accessibility, and working relationships;
- Subordinates – they may have insight concerning how the staff felt about the candidate as a supervisor or lead worker. Areas may include management style, leadership skills, and communication effectiveness.

The timing of reference checks will depend on the circumstances of each hiring situation or the hiring supervisor's preference. They may be conducted on all applicants for the position, prior to or after the interviews; or they may be conducted after the field of candidates is narrowed to the top finalists. At a minimum, complete reference checks on all finalists for the position.

Consider asking the applicant to sign a reference release. Such a release reduces the legal exposure of former employers to potential defamation claims from the applicant and thus encourages them to provide frank and thorough information in response to a reference check. (See, *Drafting Reference Releases, Management Insight*, April 2002, Page 5.) Also, be cognizant of Oregon's public records law. An Oregon public employer may be unable to represent to a candidate's former employer that reference check information will be absolutely confidential.

Reference checking is a frequently overlooked and underestimated step in the selection process. Review of work history, answers to test questions, educational background and the interview process provide basic information on a candidate's skills, abilities, and suitability for the position; an in-depth reference check verifies and validates the information gathered, and provides a more complete profile for final assessment. A thorough reference check will help ensure that the best candidate is hired.

CASE SUMMARIES

John Wynn vs. State of Oregon, Water Resources Department
(ERB Case No. UP-2-01; May 20, 2002)

A State employee filed an ERB action after his union, SEIU, declined to file a grievance or unfair labor practice complaint on his behalf. The employee's action asserted that the State violated its labor contract with SEIU by refusing to permit an SEIU representative to attend meetings between the State and the employee involving his ADA request for reasonable accommodations. It also asserted that the State violated the contract by refusing to bargain directly with him regarding working conditions as they related to his reasonable accommodations request. SEIU took the position that it did not have the right under the contract to represent the employee at the reasonable accommodations meetings. It also declined to request bargaining with the State regarding the accommodations issue. The ERB dismissed the action, finding that only SEIU, and not the employee, had standing to assert the alleged labor contract violations through an ERB action.

Facts: The complainant (Employee) was employed by the Water Resources Department (Agency) as a Natural Resource Specialist 3. He was a member of the bargaining unit of public employees at the Agency represented by the Service Employees International Union Local 503, OPEU (Union). The Employee, who has a learning disability, sought work accommodations from the Agency. He met a number of times with the Agency to discuss possible reasonable accommodations under the ADA. The Agency declined requests by the Employee and a steward for Union representation at these meetings. After the Employee and the Agency disagreed on the appropriateness of some of the accommodations adopted by the Agency, the Agency declined requests by the Employee and the steward to negotiate with the Agency over the accommodations.

The Employee asked the Union to file a grievance on his behalf regarding the issues he had raised. The Union declined to do so. The Union also refused his requests for Union assistance in further accommodations meetings with the Agency.

Question Presented: Does the Employee have standing to file a complaint with the ERB alleging violations of the State's collective bargaining agreement with the Union?

Discussion and Ruling: In response to the State's contention that the Employee is not the proper party to file and prosecute this unfair labor practice complaint, the Employment Relations Board stated that it will consider the question of whether a complainant has standing to pursue a complaint before it considers the complaint's merits. ORS 243.672 (3) provides that an "injured party" may file an unfair labor practice complaint with the Board. The determination of who is an "injured party" depends on the unfair labor practice alleged.

The parties to a collective bargaining agreement enforceable under the Public Employee Collective Bargaining Act are the public employer and the labor organization that is the exclusive representative of the bargaining unit of public employees—in this case, the State and the Union. An exclusive representative, noted the Board, "... is, literally, the *exclusive* representative of bargaining unit employees." (Emphasis in original.) Typically, only the exclusive representative can pursue an unfair labor practice complaint alleging a contract violation under ORS 243.672 (1) (g). Except in "limited situations," such as a union's violation of its duty of fair representation, a bargaining unit member is bound by the union's labor relations decisions. However, under appropriate circumstances and depending on applicable language in the collective bargaining agreement, an individual grievant may have standing to adjust contractual grievances and then pursue an unfair labor practice complaint. In this case, "Allowing [the Employee] to pursue this (1) (g) complaint would be inconsistent with the terms of the contract which gives only SEIU the right to proceed with grievances after the first step of the grievance procedure."

Regarding the Employee's claim that the Agency violated the contract's recognition clause by refusing to permit a Union representative to attend the ADA accommodations meetings, the Board noted that the Union could have asserted that the Agency's action violated its rights as the exclusive representative and that it was an "injured party" under ORS 243.672 (3). The Union, however, "... took the position that it did not have the contractual right to provide assistance to [the Employee] (its bargaining unit member); did not assert a right to represent him; and did

not grieve or file an unfair labor practice complaint.” The recognition clause of the labor contract protects the Union’s status as the exclusive representative. Assuming for the sake of argument that the Agency violated that clause, the party injured would be the Union; and the Union would be the only party with standing to pursue such a claimed violation.

The Employee likewise lacks standing to pursue his claim that the Agency violated the contract’s past practices clause by barring the Union from participating in the accommodations meetings. As the exclusive representative, the Union, “... had the opportunity to demand bargaining over ‘any proposed changes in “working conditions” or their impact which are mandatory subjects of bargaining.’” The Union did not do so. The Union, not the Employee, “... has the right to make that decision and to litigate or not litigate that claim.”

Finally, regarding the Employee’s claim that the Agency violated the contract by failing to bargain directly with him regarding ADA accommodations after the Union refused to do so—the contract, noted the Board, indicates that the Union, as the exclusive representative, is the only party entitled to negotiate with the State over any proposed changes in working conditions which are mandatory subjects of bargaining. The contract also provides that “the Union” may file an unfair labor practice complaint with the Board if the Agency refuses to bargain. The Employee is thus not an “injured party” who can assert this claim.

Since the Employee lacks standing to assert the claims in question, the Board dismissed his action.

 **HELPFUL HINT . . .**

Who Owns the Grievance? ORS 243.666(2) provides that “... an individual employee or group of employees at any time may present grievances to their employer and have such grievances adjusted, without the intervention of the labor organization, if: (a) The adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect; and (b) The labor organization has been given opportunity to be present at the adjustment.”

So, the answer to the question, who owns the grievance, is—it depends on applicable contract language (or the lack thereof). The SEIU agreement permits a grievant, “... with or without Union representation...,” to file a grievance at the *first* step of the grievance procedure. The contract goes on, however, to state regarding the second and third grievance procedure steps that, “... the grievance must be filed by the Union...” The SEIU agreement also provides that it is the Union that has the right to appeal a grievance to arbitration.

Many, but not all, of the State’s other labor contracts contain provisions similar to those in the SEIU agreement. A few agreements, for instance, allow employees to pursue grievances on their own at steps one and two, but reserve to the union the right to appeal to step 3 and to arbitration. A few others allow employees the option of proceeding through the last step of the grievance procedure without union representation, but reserve to the union the right to submit a grievance to arbitration.

About the Management Insight...

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For questions, or if you have an item of interest which you would like considered for an issue of the *Management Insight*, please contact Michael Halpern, Labor Relations Unit . . .

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Misty Frost, James Brown and Maureen Angela Hazelton vs. State of Oregon, Parks and Recreation Department

(ERB Case Nos. MA-13-00 and MA-3-01; June 4, 2002)

Three state seasonal employees represented by SEIU filed a group grievance asserting that they should have been offered certain post-season work which was offered, instead, to three other individuals as temporary employees. SEIU and the State reached a settlement which purported to “fully resolve” any and all issues surrounding the group grievance. The settlement called for the State to hire the three employees, subject to funding and availability of work, to perform post-season work. After the employees began performing the post-season work in question and receiving compensation for it, they filed these two ERB actions which sought additional benefits beyond that called for by the grievance settlement. In doing so, they argued that their post-season work was not for the purpose of meeting emergency, nonrecurring or short-term workload needs—as required for temporary employees under ORS 240.309—and that the State thus improperly hired them as temporary employees when it honored its part of the settlement agreement. The ERB found that the employees were equitably estopped from bringing these actions, and dismissed them. SEIU misled the State into believing that the settlement would resolve the dispute, and the State reasonably believed that the dispute was so resolved.

Facts: A group grievance (“Grievance”) was filed on behalf of three seasonal employees (“Complainants”) who were members of the SEIU bargaining unit at Oregon Parks and Recreation Department (Agency). The Grievance was filed after the Agency employed three individuals other than Complainants as temporary employees after the Complainants’ seasons had ended. SEIU proposed a monetary settlement pursuant to which Complainants would be paid an amount equal to the money earned by the post-season temporary employees, minus any money earned by Complainants during that same time period. In response, the State offered to hire Complainants, subject to availability of work and funding, to work the number of hours needed for them to earn the amount of money proposed by SEIU. SEIU responded

by requesting that Complainants be hired as seasonal rather than temporary employees (seasonal employees are entitled to certain rights and benefits that temporary employees do not receive). The State replied with a letter which explained the State’s position that the work offered as the grievance settlement would be by temporary appointment, because conversion of “temporary dollars” to “seasonal dollars” would require legislative or Emergency Board approval. The State also explained that if the Agency had employed Complainants after their seasons (as opposed to the three other workers), they would have been hired as temporary employees.

The following month a settlement agreement was signed by SEIU and the State. It provided, among other things: “The purpose of this agreement is to fully resolve any and all issues surrounding the [Grievance]” The agreement also characterized the post-season work to be offered as work, “... that [Complainants] are assigned during the season”

To effect the settlement agreement, the Agency offered Complainants post-season work as temporary employees, of the same type that they performed during the season. Complainants accepted the assignments, completed the work and were paid the agreed amounts by the Agency. After they were hired for the post-season work, Complainants filed these actions with the Employment Relations Board. The actions asserted that the Agency violated ORS 240.309 by hiring them as temporary employees since the work they performed was seasonal in nature and not for the purpose of meeting emergency, short term or nonrecurring workload needs. In response, the State contended that the work provided was based solely on the settlement agreement and that both SEIU and Complainants understood that Complainants would be hired as temporary employees to perform it.

Question Presented: Did the State employ the grievants as temporary employees, in violation of ORS 240.309?

Discussion and Ruling: Complainants were, according to the Board, “... hired ... to perform available post-season work so that Complainants could earn the dollar amount that they did not earn when other employees were given temporary work Complainants were hired as temporary employees so that they would not just receive a dollar settlement without performing any work for [the Agency].” The settlement agreement, observed the Board, was the sole reason the Agency offered the post-season work to Complainants.

To analyze the State’s argument—that since Complainants accepted the settlement’s benefits they are estopped from asserting that the State violated ORS 240.309 in complying with its terms and from repudiating it to seek benefits not agreed to—the Board turned to the elements of equitable estoppel. As explained by Oregon courts, the evidence must establish “... that (1) a false representation (albeit an innocent one) was made (2) by someone having knowledge of the facts to (3) one who was ignorant of the truth, (4) that the statement was made with the intention that it be acted upon by [the other party] and (5) that [the other party] acted upon it.”

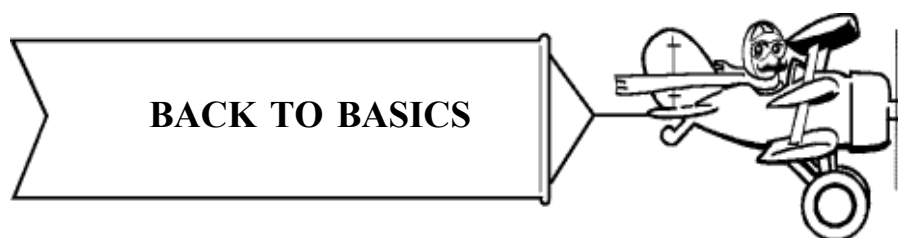
The first element was established when SEIU, “[w]hether intentionally or not, ... misled the State into believing that the settlement agreement would resolve the dispute.” SEIU did this, “...by agreeing to language stating that the settlement agreement fully resolved ‘any and all issues’ concerning Complainants’ grievance” Complainants are bound by SEIU’s actions since, “... Complainants were represented by SEIU, the exclusive representative of their bargaining unit and party to the collective bargaining agreement under which the grievance had been filed.”

The evidence also established the second element since, “SEIU knew that the settlement agreement would not resolve the dispute if the State hired Complainants as temporary employees.” This is because in response to SEIU’s contention during the settlement negotiations that the State should hire Complainants as seasonal employees, the State maintained that they would be hired as temporary employees (and again informed the union

shortly before the agreement was signed that this would be the basis on which Complainants would be offered the post-season work).

The third element was established since: “While the State was certainly aware of SEIU’s desire that Complainants be hired as seasonal workers, the State could not have known that hiring Complainants as temporary employees would result in additional litigation. The State reasonably believed that this particular dispute concerning Complainants was resolved by signing and effectuating the settlement agreement.” While a provision in the settlement agreement indicated, “...that the parties continued to disagree about the correct interpretation of the parties’ collective bargaining agreement as it applied to the *subject* of the dispute—i.e., the State’s use of temporary employees for post-season work—that provision would not have given the State notice that hiring Complainants as temporary employees to fulfill the agreement would in fact prolong the dispute.” (Emphasis in original.)

The Board explained that the last two elements of equitable estoppel were established when SEIU entered into the settlement agreement intending that the State offer Complainants the post-season work, and when the State hired Complainants in accordance with the agreement. The Board concluded: “It offends equitable principles for Complainants to bargain a grievance settlement, accept the benefits of that settlement, and then initiate litigation to seek additional benefits that they failed to obtain in bargaining. The complaint is barred by estoppel and will be dismissed.”



UNILATERAL CHANGES DURING A LABOR CONTRACT’S TERM

During the term of a collective bargaining agreement, the contract’s provisions may not be changed unless both parties agree to such a change. However, suppose that during an agreement’s term the employer wishes to implement or change a practice or policy which may *impact* employees but which is not governed by the contract’s provisions—may an employer unilaterally do so without first bargaining with the union? The answer is—it depends.

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If the new or changed policy or practice would involve a mandatory subject of bargaining, the employer is generally obligated to give the union written notice of its intention to implement the new or changed approach (see, *Management Insight*, July 2001, p. 2—for a discussion of permissive and mandatory subjects of bargaining). This rule applies whether or not the proposal would benefit employees. The union then has 14 calendar days to file a demand to bargain. If a demand to bargain is not filed within 14 calendar days of the employer's notice, the union waives its right to bargain over the proposal or its impact. If the union files a timely demand to bargain, the parties are generally required to follow the PECBA's expedited bargaining process (which involves a 90-day period).

Even if the new or changed policy or practice involves a permissive subject, the employer may nonetheless have a duty to bargain the *impact* of the change on employee working conditions. For example, an employer's decision to implement a policy calling for drug and alcohol testing has been held by the ERB to be a permissive subject in the context of public safety employees (see, e.g., *International Association of Firefighters, Local 890 v. Klamath County Fire District # 1*, ERB Case No. UP-16-00, 19 PECBR 533 (2001); [citing *FOPPO v. State of Oregon, Department of Corrections*, ERB Case No. UP-117-89, 14 PECBR 693 (1993)]). The ERB has also held, however, that the methods and procedural aspects of the drug testing program—the program's impact on working conditions—must be bargained (*Ibid.*). If the employer has a duty to bargain impact, the employer is obligated to provide notice of the proposed change to the union prior to its implementation, and the union must be given a 14-day opportunity to file a demand to bargain. As with mandatory subjects, if the union files a timely demand to bargain, the parties would generally follow the PECBA's expedited 90-day bargaining process.

Occasionally, even permissive issues which do not require impact bargaining must nonetheless be bargained rather than unilaterally implemented. For instance, if a labor contract's provisions include an agreement to maintain past practices, the employer may have an obligation to bargain with the union over a change in such a practice, even if the practice involves a permissive subject. The duty to bargain, in this case, would depend on the breadth of the maintenance of past practices clause. Many such provisions are

expressly limited to maintenance of past practices regarding mandatory subjects, and thus would not create a duty to bargain permissive past practices. The State's contract with SEIU contains such a limited past practices clause: "The Employer may change or issue new work practices or rules covering permissive subjects of bargaining, including issuing administrative rules over issues which are nonnegotiable and are not in conflict with or otherwise addressed in a specific provision of this Agreement. The Employer agrees to bargain over any proposed changes in 'working conditions' or their impact *which are mandatory subjects of bargaining.*" (Article 5, Section 2 (b) (1); Emphasis added.)

Some contracts contain provisions which require that the union be given advance notice of certain proposed rule or policy changes. Depending on their language, such provisions may also grant the union a right to comment or meet and confer with management on the proposed changes before implementation.

Even if the employer would otherwise have a duty to bargain a change prior to unilateral implementation, there are circumstances which might negate that obligation. For instance, an employer may not be required to bargain with the union prior to implementation if the employer can prove the existence of a business necessity or a bona fide emergency. Such an exception, however, would only permit an employer to unilaterally implement prior to completing the bargaining process—it would not eliminate the employer's obligation to bargain. Other circumstances—including a union's waiver of its right to bargain over the subject in question—might entirely excuse the employer's duty to bargain. Such a waiver may be established by express contract language, bargaining history, past practice, or a combination of such evidence. (For a recent ERB decision dealing with waiver issues, see, *Oregon School Employees Association v. Bandon School District #54*, ERB Case No. UP-26/44-00, 19 PECBR 609 (2002).)

Finally, assuming the new or changed policy or practice concerns a permissive subject not expressly included in the labor contract, no ERB-determined duty to bargain its impact and no applicable contract clause regarding maintenance of past permissive practices or advance notice to the union—then the employer generally may implement the new or changed practice or policy without first notifying or bargaining with the union.

**YET ANOTHER REASON TO ENSURE THAT
POSITION DESCRIPTIONS ACCURATELY
REFLECT A POSITION'S DUTIES — LAYOFF**

There are numerous reasons to regularly update position descriptions (PDs) to accurately reflect current duties. Issues involving FLSA exempt/non-exempt status, ADA essential job functions, bargaining unit exclusions and the State classification system itself, immediately come to mind. And then there is layoff.

The SEIU agreement and many of the State's other collective bargaining agreements provide that an employee desiring to bump into a position as a layoff option, must meet not only the minimum qualifications for the position's classification, but also be capable of performing the specific requirements of the position. Typically, contracts provide that an employee must be able to perform the specific requirements of the position in a given time period—for SEIU, it is now 30 calendar days. For SEIU (see, *Management Insight*, January 2000, p. 2), and for many of the State's other labor agreements, this period is for purposes of orienting the employee to the duties and responsibilities of the position—it is not for purposes of training or trial service. It is thus essential that the employer make the determination that an employee possesses all of the skills, knowledge and abilities to perform the position's specific requirements *before* the employee is allowed to bump into it. After an employee bumps into a position, he or she typically has immediate due process rights in it. Removal for failure to meet performance standards would generally require just cause, even during the 30-day "orientation" period.

So... how does management determine which duties an employee must be capable of performing to meet a position's specific requirements? The PD. Some of the State's contracts expressly refer to, "...the specific requirements of the position as stated in the position description." The SEIU agreement, which does not expressly refer to PDs in this context, has nonetheless been construed by an arbitrator to require that the position's specific requirements be stated in the PD if they are to be used in connection with bumping (*OPEU, Local 503 vs. Department of Revenue, State of Oregon* (Arbitrator, Gary L. Axon; April 20, 1985)).

Whether or not your agency's labor contract expressly refers to PDs in connection with bumping rights, keeping PDs current and complete is a prudent practice. This is especially the case since a PD has the potential of becoming "Exhibit A" at a grievance arbitration concerning such rights.

About the Labor Relations Unit . . .

The Labor Relations Unit is a part of the Human Resource Services Division in the Department of Administrative Services. The Administrator of the Division is Dan Kennedy. Currently, the LRU negotiates and administers 32 collective bargaining agreements with 11 different labor organizations, covering over 30,000 employees in the Executive Branch of Oregon State Government. The following is a list of the LRU staff and contact phone numbers for your convenience. The LRU's fax number is 503-373-7530.

Eva Corbin, Deputy Administrator, LRU	503-378-8321
Craig Cowan, State Labor Relations Manager	503-378-5611
Kevin B. Dull, State Labor Relations Manager	503-378-3138
Michael Halpern, State Labor Relations Manager	503-378-2705
Lois Harrup, Administrative Assistant	503-378-3141
Pamela Murdock, Office Manager	503-378-2616
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