MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES JANUARY 2000

ITEMS OF INTEREST

LABOR CONTRACTS NOW ON THE WEB

The Human Resource Services Division (HRSD) web site, at **www.hr.das.state.or.us**, now includes a box devoted to Labor Relations. The state's current collective bargaining agreements and past issues of the *Management Insight* are accessible through the site. A great deal of other useful information is also accessible through the HRSD site, including the HRSD rule and policy manual, class specifications (with rates of pay, test plans and minimum qualifications), recruitment and career services information, HRSD policy and practice review program reports, HRSD training and organization development courses and services, state job listings and links to other Oregon web sites.

LAID OFF FAIRVIEW EMPLOYEES NEED PLACEMENT

In anticipation of its impending closure, the Fairview Training Center is continuing to reduce the size of its staff. As of December 1, Fairview's staff level was at 277. Thanks in part to the efforts of other state agencies in matching job opportunities with the skills of laid off Fairview workers, 503 of the 947 permanent Fairview employees who received layoff letters prior to December 1 have moved to other state jobs.

As of December 1, there were close to 300 laid off Fairview workers actively seeking reemployment with other state agencies. The goal of most of Fairview's remaining staff is likewise to remain in state service after their Fairview jobs are ended.

Please continue to use the LFE (Laid off Fairview Employee) code when filling jobs. This will help Fairview workers connect with suitable job opportunities in other state agencies. In addition, we ask that you give serious consideration to those job applicants who seek reemployment opportunities with your agency based on their experience at Fairview. Laid off Fairview employees remain a motivated and valuable recruiting source.

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Distribution:
Executive and Management Service Employees

Editors:
Mike Halpern and Pam Murdock

OPEU DENIED ACCESS TO OUS E-MAIL SYSTEM

Affirming the prior decision of Arbitrator Gary Axon–that the state's collective bargaining agreement with the OPEU allowed the state to bar union officers and stewards from using agency e-mail systems to post messages relating to union business–Arbitrator Michael H. Beck recently ruled that the Oregon University System (OUS) did not violate its collective bargaining agreement with the OPEU when it denied the union use of the OUS e-mail system to communicate with its members about union business.

The contract language construed by Arbitrator Beck is essentially identical to the corresponding language in the state's agreement with the OPEU. Recognizing this fact, and finding the Axon decision "clear and well reasoned," Arbitrator Beck rejected the union's contention that the contract should be construed to prohibit only interactive use of interactive systems. Instead, Arbitrator Beck ruled that the collective bargaining agreement allowed the OUS to bar the union from using the OUS e-mail system to post union related messages, whether or not the messages were interactive or non-interactive. Arbitrator Beck also rejected the union's contention that the collective bargaining agreement had no application to union messages sent over the internet from remote locations; finding, instead, that such communications are interactive and that receipt of such internet communications at the worksite, "[C]annot be accomplished without use of the Employer's electronic interactive communication systems, including Employer provided computers."

In the earlier Axon decision, reviewed in the Fall 1997 *Management Insight*, Arbitrator Axon noted that the expressed intent of the union in negotiations with the state was to gain access to the state's e-mail system so that union officers and stewards could communicate with union members. The state, Arbitrator Axon found, rejected this proposal and instead ultimately agreed to contract language which made no reference to "e-mail." Arbitrator Axon went on to explain 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."

The Axon ruling made it clear that the OPEU may only post noninteractive messages to agency electronic bulletin boards or post office box systems. Except 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 communications system, the union is not authorized access to the statewide e-mail system or any other agency interactive electronic communications system. OPEU 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.

BUMPING RIGHTS IN A LAYOFF– TWO WEEK ORIENTATION PERIOD FOR OPEU REPRESENTED EMPLOYEES EXTENDED TO THIRTY CALENDAR DAYS

Article 70, Section 3 (e) of the recently negotiated 1999-2001 OPEU collective bargaining agreement extends the bumping rights orientation period from two weeks to 30 calendar days. This change, however, does not affect the principles governing application of this article, which were established by Arbitrator William Dorsey in a 1982 arbitration decision (Decision). The Decision was originally reviewed in a 1982 *Management Insight on Contract Administration* article, copies of which were made available at the recent contract training sessions regarding the new OPEU agreement.

The grievance which gave rise to the Decision involved the alleged denial of an employee's right to bump laterally during a layoff. After receiving a layoff notice, the employee notified the agency in question of his desire to bump into a position in his same classification. The agency denied the employee's request on the grounds that the employee was not capable of performing the specific requirements of the position within a reasonable period of time. The employee grieved the decision and the union appealed the matter to arbitration. Arbitrator Dorsey ruled in favor of the agency. In doing so, he referred to eight principles which he used to guide him in making his decision:

1. The employer has the duty to determine if the employee desiring to bump into a particular position *already* possesses the knowledge, skills and abilities to perform in the position in question in approximately two weeks;

2. An employee seeking to bump into another position during a layoff does not have an automatic right to a trial service period;

3. The two week [now 30 calendar day] period stated in the [OPEU collective bargaining agreement] is only

for the purpose of orienting the employee to the duties and responsibilities of the position into which he or she wishes to bump;

4. The employee desiring to bump into a particular position in the same classification must possess *all* of the minimum qualifications for the position at the time the employer is making its decision;

5. The employer must use reasonable and job related criteria to determine whether an employee possesses *all* the minimum qualifications for the position sought;

6. If the employer had a reasonable basis in fact for determining that the employee did not possess all the minimum qualifications, the arbitrator must let the employer's decision stand. The employer need only show this by a preponderance of the evidence;

7. If the union can show that the employer acted in bad faith in making the decision, the union need only prove bad faith on the part of the employer by a preponderance of the evidence; and

8. Proof of the employer's bad faith must be based on relevant and material evidence. It may not be based on conjecture, rumor, or uncorroborated evidence.

Agencies which are experiencing layoffs in OPEU bargaining units should continue to be mindful of and to follow the principles established by Arbitrator Dorsey.

HELPFUL HINT . . .

It is essential that the employer make the determination that the employee possesses all of the skills, knowledge and abilities to perform the duties of the position *before* the employee is alowed to bump into it. After the employee bumps into the position, the employee has immediate due process rights in it. Removal for failure to meet performance standards would require just cause, even if during the 30 day "orientation" period.

OPEU HARDSHIP LEAVE CLARIFICATION (Article 56, Section 8)

Scenario: An OPEU represented employee who has 15 days of accumulated leave receives a doctor's certificate indicating that the employee will be absent from work for 30 days. The employee requests hardship leave under Article 56, Section 8 to make up the difference. Subsequently, however, the employee returns to work after only 20 days.

Question: Should the agency recoup the donated leave used by the employee?

Answer: No. The employee provided the agency a legitimate doctor's certificate that satisfied the 15-days-following-exhaustion and 30-days-of-leave requirements. However, the agency should not add donations to the employee's sick leave bank which would cause the bank to have more hours than actually used by the employee. This result is mandated by new language in Article 56, Section 8 of the 99–01 OPEU contract which recognizes the longstanding agency practice of only adding donations of accumulated vacation leave to the donee's leave bank to the extent necessary to cover the qualifying absence. Please note that the result would be different if, after returning to work, the employee continued to use sick leave on an intermittent basis for the same illness that led to the initial request for donated leave.

OPEU 1999-2001 CONTRACT CORRECTIONS

In the OPEU Master and Coalition Agreements, references to the Board of Licensed Clinical Social Workers and the Counselors and Therapists Board should be removed from the index page and Articles 1, 2 and 14. In the OPEU Master Agreement and the ODOT and DHS Institutions Coalition Agreements only, please change the Board of Radiological Technicians to the Board of Radiologic Technology on the index page and in Articles 1, 2 and 14. Also, in these agreements, under Article 1, the asterisk should be removed after Occupational Therapy Licensing Board and Board of Examiners for Speech Pathology & Audiology.

About the Management Insight...

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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 . . .

Call: (503)378-2705 Fax: (503)373-7530 E-mail: Michael.Halpern@State.OR.US

NOTES FROM JUSTICE

by The Labor and Employment Section, Department of Justice

CRIME AND PUNISHMENT IN STATE SERVICE–THE REVOLVING DOOR PROBLEM

Hiring managers generally agree that a criminal conviction, standing alone, should not necessarily bar an individual from ever working for the State of Oregon in any employment position. The pertinence of a criminal conviction to a hiring decision will depend upon many factors, including but not limited to the nature of the crime, when the crime occurred, the duties and responsibilities of the position to be filled, and the qualifications of the other candidates against whom the individual is competing.

Ignoring pertinent information about a job candidate's criminal history when making the hiring decision can expose the state to a substantial risk of liability for injuries or damage to persons and property, resulting from unlawful conduct by the person while working for the state. At the very least, ignoring pertinent information may result in the employment of a person who is unsuitable for the position being filled.

No one would reasonably question that a registered sexual predator should not be hired in a job that involves regular unsupervised contact with women or children or some other target group involved. Likewise, a prudent hiring manager may decide that a recently convicted embezzler is not suitable for a payroll officer position or for employment in any job in which a dishonest person could take advantage of real opportunities to steal public funds or expensive equipment.

Yet, it is surprising how often state agency managers discover, in horror, that they have someone on staff who has a conviction record that they wished they had known about when they hired the person. In far too many cases, the agency discovers that the staff member committed the crime while employed at another state agency. In one notable case, the individual stole more than $50,000 from the other state agency by authorizing checks to be drawn on fictitious agency accounts.

Some of these individuals work for the state as temporary employees, both then and now. Others are appointed to permanent positions in an open and competitive recruitment process. After such an employee completes an applicable trial service period, we often have the task of advising the manager that he or she has acted too late, and the individual cannot be removed solely due to the criminal conviction.

Clearly the best time for a manager to act to protect an agency and the public by considering a record of a criminal conviction is before appointing the person to the position in question. There are two ways to do this. One way is to do a criminal history check as part of the screening process for some or all positions, permanent or temporary. (Please contact the Labor & Employment Law Section if your agency needs sample forms and other information for conducting criminal history checks.)

Another way to find out if a job candidate has a criminal conviction record is to ask the job candidate. It is surprising how many hiring managers do not ask this question. It is lawful, reasonable, and in some cases, it may be essential for informed decision-making in the hiring process.

Agencies may use the following form to be completed by the candidate in the screening process:

CRIMINAL HISTORY VERIFICATION

The purpose of the Criminal History Verification is to assist the [agency] to make an informed decision about candidate qualifications. In assessing the pertinence of a conviction record, the agency will consider

such factors as the nature of the crime, when and where it occurred, and the duties of the position for which the application is made.

Warning: Falsely responding to any of the questions listed below may constitute a basis for disqualification of your application or termination of your employment.

1. Have you ever been convicted of a crime in the State of Oregon?
2. If convicted in Oregon, what is the crime of which you were convicted?
3. Have you lived outside the State of Oregon any time during the five (5) years prior to today's date?
4. Have you ever been convicted of a crime in a jurisdiction other than Oregon?
5. If convicted in a jurisdiction other than Oregon, where did the conviction occur and what is the crime of which you were convicted?

Certification and Signature: I understand that any oral or written statement that is false, fraudulent or misleading that is contained in this form, or made in the course of any related employment process, whether made by me or by others at my request, will result in rejection of my application, denial of employment or dismissal if discovered after employment, and/or prosecution for a crime.

____________________________ ________________________

(Applicant's signature) (Date)

LABOR AND EMPLOYMENT LAWS - 1999 LEGISLATURE

The 1999 Legislative Assembly passed a substantial number of bills that affect labor and employment. Most of the bills made small but important changes in existing law.

I. WAGE AND HOUR

HB 3607 (ch__) Civil Penalties. HB 3607 amends the civil penalty provisions under ORS chapters 652 and 653. Before amendment, ORS 652.150 provided that an employer who failed to pay an employee all wages due on termination was subject to a civil penalty. The employee's wages continued to accrue until the employer paid the wages, subject to a 30-day limitation. HB 3609 continues the 30-day cap on the amount of the civil penalty. But, if the employer pays the full amount of the unpaid wages within 10 days after receiving notice of nonpayment, then the penalty may not exceed 100% of the unpaid wages.

II. UNEMPLOYMENT COMPENSATION

HB 2243 (ch 256) Charges to Employer Accounts. HB 2243 extends the time in which employers have to protest charges against their unemployment compensation accounts. Employers have had 10 days following issuance of notice provided for in ORS 657.265 or 657.266 to notify the Employment Department that the applicant was discharged for misconduct because of the commission of a felony or theft in connection with work. HB 2243 requires notice within 10 days of the notice under ORS 657.265 (the notice of claim filing) or 30 days after notice of the initial claim determination under ORS 657.266.

HB 2698 (ch 416) Employer's Exemption from Unemployment Benefit Charges. HB 2698 amends ORS 657.471 so that an employer will not be charged for unemployment benefits when the person failed to satisfy job prerequisites required by law or administrative rule or leaves work for a cause not attributable to the employer. HB 2698 is not retroactive.

HB 2813 (ch ___) Voluntary Election of Unemployment; Scope of Referee's Authority. HB 2813 amends ORS 657.176 to extend eligibility for unemployment to an employee who has voluntarily left work without good cause if

the employee worked under a collective bargaining agreement, elected to be laid off at the employer's offering, and is placed on a referral list.

Section 2 of HB 2813 amends ORS 657.270 to authorize the Employment Department referee and Employment Appeals Board to address any issues raised by the information before them, notwithstanding the scope of issues raised by the parties or the arguments in a party's request for hearing.

SB 770 (ch___) Unemployment Insurance Benefit Account. SB 770 amends ORS 657.471 to give a base-year employer the opportunity to request relief from charges to the employer's unemployment insurance benefit account when an employee has been discharged for misconduct. The Director of the Employment Department must review the information submitted and determine whether the employer is entitled to relief.

III. PUBLIC RECORDS LAW

Unauthorized Interference with Public Services. ORS 192.501(22) was amended to exempt information that, if disclosed, would allow a person to: a) gain unauthorized access to buildings or other property used or owned by a public body; b) identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a public body; or c) disrupt, interfere with or gain unauthorized access to information processing, communication or telecommunication systems, including the information contained therein, that are used or operated by a public body.

This provision was added in order to protect the delivery of the state's public services.

Security Measures. ORS 192.501(23) was amended to exempt from disclosure records or information that would reveal the security measures taken or recommended to be taken to protect: a) an officer or employee of a public body; b) buildings or other property used or owned by a public body; c) information processing, communication or telecommunication systems, including the information contained therein, that are used or operated by a public body; or d) those operations of the Oregon State Lottery the security of which are subject to study and evaluation under ORS 461.180(6).

This provision was added in order to protect employees and the delivery of the state's public services.

SB 975 Security of Public Safety Officers. SB 975 adds several new provisions. The first prohibits a law enforcement agency from disclosing information about an employee who is engaged in undercover investigations during the investigation and for a period of six months after conclusion of the duties. The prohibition does not apply to disclosures made to the DPSST or other law enforcement agencies, including a district attorney and the Department of Justice or a court. A person injured by violation of the prohibition may bring a civil action for damages against the law enforcement agency.

The second new provision prohibits disclosure by a public body of a photograph of a "public safety employee" defined as a certified reserve officer, corrections officer, parole and probation officer, police officer or youth correction officer as those terms are defined in ORS 181.610.

The third new provision prohibits a public body from disclosing information about a personnel investigation of a public safety officer of the public body if the investigation does not result in discipline of the employee. This is a direct departure from the "personnel discipline action" exemption of ORS 192.501(12), which qualifiedly exempts from disclosure the records of discipline actually taken. The new provision provides several exceptions: a) when the public interest requires disclosure; b) when disclosure is necessary for an investigation by the public body or DPSST; c) when the public body determines that nondisclosure of the information would adversely affect the confidence of the public in the public body; and d) if investigation resulted from a complaint, the public body may inform the complainant about the disposition of the complaint; and it may also provide a written summary report of the investigation.

The fourth new provision requires a public body to notify a public safety employee if the public body receives a request for a) a photograph of the employee, b) information about the employee that is exempt or prohibited from disclosure as stated above.

SB 975 also amends ORS 192.503(3) by exempting public employee dates of birth from disclosure from personnel records.

IV. PUBLIC WORKS AND CONTRACTS

HB 2574 (ch 588) Drug-Testing Programs. HB 2574 adds a condition to ORS 279.312 requiring public contractors to establish the existence of an employee drug-testing program. The amendments apply only to public improvement contracts entered into on or after October 23,1999.

V. UNLAWFUL EMPLOYMENT PRACTICES

SB 177 (ch 245) Disability Discrimination. SB 177 extends the definition of *unlawful employment practices* in ORS 659.010 to include all practices prohibited in ORS 659.400-659.494 (civil rights of disabled persons) and provides a cause of action for injunctive relief for the following violations: 1) Civil rights of disabled persons; 2) Rights of reinstatement; 3) Discrimination against disabled persons in real property transactions; 4) Discrimination against disabled persons; 5) Medical examinations and inquiries for job applicants and employees; 6) Benefits for injured workers; and 7) Family leave.

A person who alleges a violation relating to disability discrimination may file a civil suit to recover compensatory and punitive damages under ORS 659.121 (2).

Section 3 of SB 177 clarifies the procedures in ORS 659.070 to enforce orders or awards issued by BOLI. Those awards or orders constitute a judgment that may be recorded in the County Clerk Lien Record and enforced as a lien.

The amendments to ORS 659.010 and 659.121 apply to all conduct that occurred on or after October 4, 1997. SB 177 became effective on June 10, 1999.

VI. MISCELLANEOUS

HB 2870 (ch____) Employee Attendance at Juvenile Court Hearing. HB 2870 amends ORS 419C.306 to prohibit an employer from firing, threatening to fire, or intimidating an employee because of the employee's required attendance at a juvenile hearing. HB 2870 does not alter the employer's wage policies or agreements relating to an employee's appearance in juvenile court.

HB 2986 (ch 230) Employment Driving Records. ORS 802.200 requires the Oregon Department of Transportation to maintain a two-part driving record consisting of an employment driving record and a non-employment driving record. The employment driving record includes accidents, suspensions, and convictions that occur, generally speaking, while a person is driving in the course of his or her employment. HB 2986 amends ORS 802.200 to include accidents, suspensions, and convictions that occur while the person is driving a motor vehicle in the course of the person's employment with a federal, state, or local government in a public works project involving repair or maintenance of water, sewer, or road systems.

SB 1086 (ch 401) Disclosure of Wage Information to Consumer-Reporting Agency. SB 1086 requires the Employment Department to disclose an employee's wage information to consumer-reporting agencies that are verifying specific credit transactions. The employee must have given prior written and voluntary consent for the disclosure to occur. Refusal to consent alone cannot result in a denial of credit. The consumer credit agency must comply with the requirements established by the Employment Department to ensure confidentiality, and may be charged a fee to cover costs. The Employment Department will not be held liable for the improper release of the wage information by the consumer-reporting agency, or for the inaccuracy of the records reported by employers.

ARBITRATION SUMMARIES

AOCE vs. State of Oregon, DOC
(Arbitrator, Catherine Harris; July 14, 1999).

A contract clause committed the state to provide "proper" safety devices to employees engaged in work, "where such devices are necessary." The state violated this clause by providing radios, some of which were nonfunctional or under-powered, to food service staff who worked in isolated areas of the Oregon State Prison where they were greatly outnumbered by inmate workers.

Facts: This arbitration arose out of a class action grievance filed by the Association of Oregon Corrections Employees (Association) on behalf of Food Service Coordinators (Employees) employed at the Oregon State Prison (OSP). The focus of the grievance was an incident which occurred in July, 1998, during which one of the Employees was trapped inside the OSP Bake Shop when a fight broke out between two inmates. The Employee apparently made several attempts to radio for staff assistance without success. Before any back-up arrived, the Employee physically restrained one of the inmates after neither complied with a verbal order he gave them to stop fighting. While struggling with the inmate, the Employee sustained an injury to his rib area and his glasses were broken. He was later told at a staff meeting that he should not get physically involved in such an

incident, but should give a verbal command to the inmates to stop fighting and call security for back-up. He received no discipline or reprimand. The collective bargaining agreement between the State of Oregon, Department of Corrections (Employer), and the Association includes a clause in the Safety and Health Article which provides that, "Proper safety devices and clothing shall be provided by the Employer for all employees engaged in work where such devices are necessary."

The Employees work side by side with inmate workers who assist them with meal preparation. While performing their duties, the inmate workers have access to kitchen tools, including cutting and slicing devices. At times, the Employees find themselves alone with as many as 20 to 25 inmate workers. The Employees do not carry handcuffs and are not given weaponless defense training. The Employees' position descriptions provide that they supervise inmate work crews of 15 to 40 inmates, and that 25% of the Employees' time is devoted to, "[M]aintaining order and enforcing security, handling inmate incidents, being alert for escape attempts or devices, conducting searches of inmates and work areas on a daily basis for contraband and to prevent pilferage, and maintaining key control."

A Food Service Manager testified at the arbitration hearing that new employees were told to use their radios to call for back-up in the event of physical confrontations between inmates. He also testified that, "[S]ome of the radios do not transmit and that garbled transmissions occur on a frequent basis. However, employees are instructed to turn in non-functioning radios and exchange them for radios in good working order." Several other staff also testified that they had problems with nonfunctioning radios or radios which could not successfully transmit from certain "dead spots" in the OSP Culinary and Bake Shop. A report prepared at the request of the prison's chief of security disclosed that from January 1997 through January 1999, of the 192 reported incidents involving staff assaults, only 15 involved non-security staff, and only three of these involved Food Service Coordinators. None of the 15 non-security assaults resulted in injuries.

In response to the grievance, the prison took steps to ensure that all food service staff would carry radios, would check their radios at the start of their shifts, and that the radios would successfully transmit from all food service areas. The Employees were also directed not to become physically involved in inmate fights.

Questions presented: Do the Food Service Coordinators work in areas where safety devices are necessary? If so, did the state violate the contract by failing to provide proper safety devices to the Coordinators?

Discussion and Ruling: Answering the first issue in the affirmative, Arbitrator Harris found that the Employees work in areas where safety devices are necessary. They frequently work in isolated areas where they are greatly outnumbered by inmate workers. The inmate workers have access to kitchen tools which may be used as weapons. Typically there are no telephones available in these work areas, and the only way for the Employees to call for emergency help is by radio.

Turning to the second issue, Arbitrator Harris explained that while the state retained its right under the contract language to determine which technical devices are most suitable for protecting its employees, it nonetheless agreed that, "[W]hen it chooses to provide a particular type of safety device, the device will be 'proper' within the meaning of the Agreement." The weight of the evidence establishes that the Employee involved in the July 1998 incident called for assistance over his radio, and that the radio failed to work. By the time help arrived, the disturbance was over and the Employee had already been injured. The evidence also indicates that there were other instances where Employees had been unable to establish radio contact with OSP Master Control, depending on their location and the particular radio assigned to them. As such, "[W]here the State has chosen to provide radios as the first and only line of defense for non-correctional staff in potentially life-threatening situations, the State violates its contractual obligation by providing nonfunctional radio equipment, or radio equipment lacking the power to transmit from isolated work areas. In reaching this conclusion, the arbitrator is mindful of the State's good faith response to the filing of the grievance. However, these remedial steps, taken after the fact, do not alter the arbitrator's conclusion, i.e., that the State violated its contractual obligation to provide *proper* safety devices for all employees engaged in work where such devices are necessary." (Emphasis in original.) This is particularly the case with the Food Service Coordinators, since their position descriptions provide that 25% of their duties are devoted to security-related responsibilities.

An order from the arbitrator specifying that any specific safety device be provided to employees would add a new term to the collective bargaining agreement. The arbitrator is thus without authority to order such a remedy since her authority is derived solely from the agreement's language. As such, Arbitrator Harris ordered the state, "[T]o cease and desist from failing to provide proper safety devices for all Food Service Coordinators who work with inmates in locked areas at OSP."

HELPFUL HINT . . .

The arbitrator's function in grievance arbitrations is limited to interpretation of the contract to effectuate the intent of the parties. In such cases, an arbitrator generally may not add to, subtract from or modify any provision of the agreement.

State of Oregon, OSP vs. OSPOA
(Arbitrator, Timothy D.W. Williams; July 29, 1999).

The lifting of a budgetary constraint on overtime which allowed a patrol office of the state police to better serve the public by increasing minimum patrol coverage, met the contractual reasonable-operational-need standard, and justified the implementation of employee schedule changes prior to the end of the existing shift bid cycle.

Facts: Under the work schedule adopted by the Central Point Patrol Office of the Oregon Department of State Police (Employer), all employees worked Wednesdays to reduce overtime expenditures for mandatory training. Pursuant to the applicable collective bargaining agreement (Agreement), the employees bid their days off after the Employer posted the schedule. After the schedule was bid and implemented, the Employer obtained additional funds for overtime expenditures. This allowed the Employer to revise its order of priorities from minimizing overtime, conducting mandatory training and assuring minimum patrol coverage; to patrol coverage, training and minimizing overtime. As a result, the Employer changed the work schedule prior to the end of the bid cycle, eliminating Wednesday as a mandatory workday. It then invited the employees to bid for days off under the new schedule. The Agreement provides that the Employer has the right to, "[C]hange…the schedule…at any time provided the Employer has a reasonable operational need for making the change." In response to the schedule change, the Oregon State Police Officers Association (Association) filed a group grievance which asserted that management had not identified any operational need to justify the mid-cycle schedule change.

Question presented: Did the Employer violate the collective bargaining agreement by changing the grievants' work schedule prior to the end of the bid cycle?

Discussion and Ruling: The grievance centered on the meaning of the contract term, "reasonable operational need." The Association asserted that the language requires " 'some form of exigency, some requirement that compels management's action.' " The Employer, on the other hand, contended that the term requires only that the Employer, "[H]ave a reason for its actions that is related to legitimate operational needs." Arbitrator Williams, finding the parties' interpretations to be "plausible but conflicting," deemed the language ambiguous and turned to extrinsic aids to determine the parties' intent in negotiating the language. "These aids typically include factors such as bargaining history, past practice, normal and technical usage of the terms in question and review of arbitration awards considering the same or similar contract language."

Looking first at bargaining history, the evidence disclosed that prior contract language had provided that the Employer could change the schedule so long as the action was not "arbitrary and capricious." This language was changed during the 1989-91 contract negotiations, to require that management have a reasonable operational need for a schedule change. "Taking all of the evidence regarding bargaining history into account,…"; Arbitrator Williams found that, "[B]y changing the standard from arbitrary and capricious to reasonable operational need, the parties intended that the Employer would be held to a somewhat stricter standard than under prior contracts." However, "The testimony and evidence do not establish that the parties discussed the precise meaning of the term 'reasonable operational need….' "

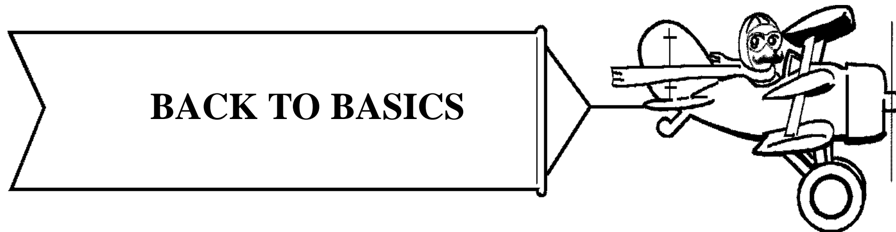
The Arbitrator made no findings regarding past practice since the parties presented no evidence concerning the issue. As to the question of normal and technical usage, Arbitrator Williams noted that, "[I]n the absence of evidence that the parties intended some special meaning, arbitrators will give words their ordinary and popularly accepted meaning, often relying on the definition of terms given in a reliable dictionary." After reviewing a number of dictionary definitions of the words in question, the Arbitrator found that, "[T]hese dictionary definitions would indicate that the term 'reasonable' as used here, means 'sensible, just, not extreme.' 'Operational' means related to the agency's actions or work. 'Need' means something of a necessity or something useful, required or desired, but is lacking." Finally, while the parties cited a number of other arbitration awards in support of their positions, the Arbitrator did not find any of these cases controlling in the present dispute.

Based on his analysis of the evidence and arguments presented by the parties, Arbitrator Williams cited the following "guidelines" for interpreting the phrase "reasonable operational need": "1. The Employer must have a reason for its actions that is related to a legitimate operational need. 2. The operational need may be based on either an internal or an external change in circumstances.

3. The changed circumstance must be something that a reasonable person, applying objective criteria, would find sufficient to overcome the presumption of the existing schedule. The reason for change cannot be merely a subjective desire on the part of management to do things differently. 4. The Employer does not have to show that the schedule change is the only means of satisfying the operational need, but it must be able to establish a reason with sufficient weight to justify making the change mid-cycle, rather than waiting until the next bid period."

In this case, management's reason for changing the schedule resulted from the availability of overtime funds for the remainder of the budget period. The overtime funding allowed mandatory training to take place during regular work hours, freeing the Central Point Patrol Office from having to schedule all of its employees to work on Wednesdays. This, in turn, allowed the patrol office to make minimum patrol coverage its first priority. While the availability of overtime funds is "clearly…an internal rather than external factor"; the guidelines noted above allow a change in an internal factor to constitute the basis of an operational need.

Finding that the reordering of station priorities to make minimal patrol coverage the number one priority is clearly a "legitimate operational need," Arbitrator Williams noted that such patrol coverage likely could not have been achieved without the disputed schedule change. In response to the Association's position that the schedule change could have waited until the next bid cycle, the Employer presented testimony that serving the public is the Employer's number one priority and that the change in circumstances gave the Employer an opportunity to achieve full patrol coverage on the road. Finding this testimony "persuasive," Arbitrator Williams concluded that, "The lifting of a budget constraint allowing the employer to provide better service to the public is sufficient to meet the definition of a 'reasonable operational need.' " As such, the Arbitrator found "[N]o basis on which to sustain the grievance."



WORKERS' COMPENSATION AND FAMILY LEAVE

Generally, the federal Family and Medical Leave Act (FMLA) and its Oregon counterpart, the Oregon Family Leave Act (OFLA), entitle eligible employees to take a limited amount of leave for certain qualifying reasons, including the employee's own serious health condition. But suppose that an employee is out on a workers' compensation absence due to an on-the-job injury. May such an absence also be counted against an employee's family leave entitlement? The answer is yes, so long as the injury meets the FMLA's definition of "serious health condition," and proper family leave notice and designation are made by the employer.

May an employer require an employee to exhaust accrued paid leave while out on a workers' compensation absence? Under the FMLA, the answer is generally no. This is because the FMLA does not consider an employee to be on *unpaid* leave while receiving workers' compensation. As such, FMLA provisions which allow the employer to require the employee to substitute accrued *paid* leave for *unpaid* leave do not apply. In these circumstances, however, some of the state's collective bargaining agreements allow the employee to make limited use of his or her accrued paid leave. The OPEU agreement, for instance, allows an employee receiving workers' compensation to elect to use accrued sick leave to the extent that it would equal the difference between the workers' compensation received for lost time and the employee's regular salary rate. If such an employee has exhausted his or her earned sick leave, then other accrued leave may be used to cover the difference between the workers' compensation received for lost time and the employee's regular salary rate (*See*, Article 56, Section 6 of the 1999-2001 agreement). Many of the state's other contracts, including a number of the AFSCME agreements, contain similar provisions.

May an employee lose the right to receive workers' compensation payments, but remain on family leave? The answer is yes. For example, should an employee on workers' compensation decline an employer's offer of a "suitable" job, the employee may lose the right to receive further workers' compensation payments. Such an employee, however, may be entitled to remain on family leave, until the 12-week entitlement is exhausted, as long as the serious health

condition continues to meet the family leave law requirements. And, as soon as workers' compensation benefits cease, the family leave rules regarding the employee's right to elect and the employer's right to require the employee to use accrued paid leave while on unpaid family leave become applicable. Collective bargaining agreement provisions bearing on these issues should also be consulted.

Finally, when reinstatement rights are in issue, it is important that the employer consider reinstatement rights under both the workers' compensation and family leave laws, as well as any applicable collective bargaining agreement. Generally, the provision most generous to the employee should be followed. If the employee has a disability which may require reasonable accommodation under the Americans with Disabilities Act or Oregon's disability law, the reasonable accommodation obligation may also impact reinstatement rights.

OPEU/AFSCME RECLASSIFICATION APPEALS

Article 81 of the state's collective bargaining agreement with the OPEU provides an appeals process for the denial of reclassification requests and grievances regarding proposed downward reclassifications. This process, added to the OPEU contract in 1995, establishes a joint labor-management committee whose purpose is to review reclassification appeals in a step short of grievance arbitration. In 1997, the AFSCME central table and the state adopted a similar procedure for AFSCME bargaining units, limited to disputes concerning the implementation of new or revised classifications. Each of the joint committees consists of one representative from management service and one from the bargaining unit. The standing committee members for the OPEU contract are Dee Emmerson, DAS HRSD classification specialist, and Dawn Morgan, OPEU member from VRD. The AFSCME committee has no currently assigned members since there are no pending AFSCME appeals.

During the 1999 calendar year, 17 appeals were filed for the OPEU committee's consideration. These appeals resulted in 13 decisions which supported the agency's allocation and three which supported the employee's requested allocation (one appeal was withdrawn).

Committee decisions are based on information submitted by both the union and the agency; no hearing-type presentations are made. As such, the perceived success or failure of the appeals process often turns on the quality and thoroughness of the information provided. Information submitted to the committee should include a signed, readable and accurate Position Description; job audit notes; the reclass analysis; and relevant communications from the employee, such as the original reclass request and any response to the agency denial which the employee may have made. Incomplete information may lead to an incorrect, but nonetheless binding decision.

The committee has also seen several instances where an employee submitted a reclass request to his or her own supervisor, rather than to the agency personnel department as required by Article 81. When the supervisor then approached the personnel department to complete a position allocation review, personnel understandably treated the request as coming from the supervisor rather than from the employee. As a result, the agency review required by Article 81 was delayed. To avoid such a delay, when an agency personnel department receives a reclass request from a supervisor regarding a represented position, the department should clarify what role, if any, the employee had in making the request. This will ensure that the employee's original request will be reviewed pursuant to contract terms and timelines.

SELECTIVE SALARY ADJUSTMENTS AND PROMOTIONAL TRIAL SERVICE

Suppose that an employee on promotional trial service is working in a classification which receives a selective salary adjustment prior to the employee's completion of the promotional trial service period. Does the employee still receive a salary increase on completion of trial service?

The answer is yes. Employees on promotional trial service remain eligible to receive the end-of-trial-service salary increase despite the fact that their classification receives a selective salary adjustment. Most of the state's collective bargaining agreements, including the OPEU contract (Article 29, Section 3(b)), provide that employees are eligible for a performance increase following, "The first six (6) months after promotion…." Therefore, agencies will need to manually process the six-month salary increase on the employee's completion of promotional trial service, and establish a new 12-month salary eligibility date (negating the SED which resulted from the selective increase). After completing trial service and receiving the promotional salary increase, the employee will not be eligible to receive another increase for 12 months. Reclassifications which occur during promotional trial service are treated similarly.

Department of Administrative Services
Human Resource Services Division
Labor Relations Unit
155 Cottage Street NE
Salem OR 97310

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 30 collective bargaining agreements with 12 different labor organizations, covering over 30,000 employees in the Executive Branch of Oregon State Government. The following is a list of the LRU staff and contact phone numbers for your convenience. The LRU's fax number is 373-7530.

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