

# MANAGEMENT INSIGHT



## ON EMPLOYEE RELATIONS

Winter 1998

Department of Administrative Services  
Human Resource Services Division, Labor Relations Unit

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#### Distribution:

Executive and Management Service  
Employees

#### Editors:

Mike Halpern and Pam Murdock

### ITEMS OF INTEREST

#### AGENCY BARGAINING INPUT SOUGHT

It is once again time for the Labor Relations Unit to begin preparing for successor negotiations with the various state employee bargaining units. As part of this process, the LRU recently sent a form which requests information regarding proposed agency bargaining concepts to agency heads and personnel managers. Agency heads will determine how the input process is to be conducted within each agency and will designate the agency personnel authorized to complete bargaining input forms.

This process provides agencies the opportunity to identify specific problem areas of their collective bargaining agreements and to propose solutions to the problems identified. It also allows agencies to suggest revisions and additions to their contracts.

Completed concept forms must be approved by agency heads or designees prior to their return to the LRU. Relevant attachments may be included with completed forms. After the LRU receives the completed forms, it will utilize the input to develop recommended bargaining proposals.

If you have been authorized to receive a bargaining concept form but nonetheless failed to receive one, please contact your agency's personnel office to obtain a copy. In addition, the form is available from the HRSD WEB Page at <http://www.dashr.state.or.us>. Should you have any questions regarding the form or the input process, please contact your agency's personnel office. □

## EMPLOYEE ACCESS TO SUPERVISORY WORKING FILES

Supervisors, understandably, often maintain logs or files to help them keep track of various personnel issues. Notes and remarks concerning individual employees may be included in these files and logs to aid supervisors in such matters as coaching better performance, as a reference for preparing future performance reviews and for purposes of progressive discipline. Hopefully, many such notes would concern conduct that is positive or praiseworthy. However, such notes would also likely include references to blameworthy conduct or performance, including the dates and substance of counseling sessions and warnings.

Should an employee seek access to such notes or entries—what obligation, if any, does an agency have to honor such a request? For OPEU-represented employees, the answer is found in Article 19, Section 6 of the 1997-99 OPEU collective bargaining agreement; which provides that employees generally do have the right, upon reasonable notice, to review non-privileged supervisory notes and log entries about them. For represented employees in other bargaining units, a similar approach to disclosure is usually a good idea; since such disclosure may alleviate employee concerns about alleged “secret files,” and help to promote more of a team-oriented and less of an us-versus-them labor-management atmosphere. There is, furthermore, the practical consideration that if such notes and entries are not shared with a requesting employee, the union may argue that the just cause standard should be applied to prevent the employer from later relying on or referencing such documents in connection with any disciplinary action. And, on a related issue, some collective bargaining contracts have even been construed to preclude the use of *any* supervisory note or log entry of an adverse nature against an employee in connection with a disciplinary action, unless previously placed in the employee’s personnel file (*See, infra, DOC (EOCI) vs. AFSCME Council 75*).

Employee access to supervisory files is subject to a number of limitations. No notes or entries protected by the attorney-client, physician-patient or other confidentiality privilege should be disclosed. Notes or entries

reflecting confidential communications between an assistant attorney general and a state manager or supervisor should thus never be disclosed without prior approval from an agency’s assigned assistant attorney general. Employees also generally have no right to review notes which concern other employees or which otherwise do not refer to them. They also usually have no right to access references provided by their former employers. In addition, employee access to drafts of investigatory reports and related information used *during* an investigation may also be denied (although all investigatory information and report findings which are subsequently relied upon in connection with any resulting disciplinary action should be disclosed). Finally, it is always wise to consult with the agency personnel office before making any access decision.

Subject to these limitations, when responding to an employee’s request to review supervisory notes and log entries about the employee, all such notes and log entries should be disclosed—no matter where or in what file they are maintained. If significant copy costs would be incurred in making a disclosure, agency policies and practices regarding the charging of copy costs to the requesting party should be followed.

Finally, in light of their disclosure obligations, supervisors should be careful never to “guarantee” that information which they receive “in confidence” (such as a co-worker’s complaint or statement) can be maintained as such. Once such information is received or recorded by a supervisor—subject to the limitations noted above—the employee or employees concerned may have a right to access such materials, irrespective of any assurance of confidentiality. □

## TRIAL SERVICE EXTENSIONS

Under the state’s collective bargaining agreements, the time immediately following appointment to a position (whether by initial appointment or promotion) is generally referred to as “trial service.” Unless specified otherwise, the most common trial service period is up to six months for full-time employees and 1,040 hours for part-time employees. Since this period is recognized as an extension

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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

of the selection process, removals from service during it are not subject to the contractual just cause standard or grievance procedures.

Occasionally, an agency is unable to determine suitability for a position within the trial service time frame. In such instances, designated agency personnel may contact their assigned DAS labor relations manager to request a trial service extension.

Factors to remember in making trial service extension requests:

(1) Work with the employee about his or her performance problems early on, so that the employee has adequate time to demonstrate improvement. A request for trial service extension should come as no surprise to the employee.

(2) Generally, a trial service extension requires the negotiation of a letter of agreement where it would modify an existing collective bargaining contract. Please refer to your agency's contract for possible exceptions to this general rule. When a letter of agreement is required, **it is crucial that your labor relations manager be allowed sufficient time (minimum of one month recommended) to negotiate such an agreement.** Neither the Labor Relations Unit nor the union can review or respond to agency requests on short notice.

(3) Should an agency fail to provide timely notice to an employee that he or she is being removed from trial service, such a failure would likely result in that employee being deemed to have successfully completed trial service.

(4) A request for a trial service extension must be in writing and contain the following information: (1) name of employee; (2) position held; (3) period of trial service and amount of extension necessary; (4) justification for extension; and (5) confirmation that the employee is aware of the need for the request and is in agreement with the trial service extension. Providing additional information, such as the name and phone number of the local steward, will also help to expedite the processing of an extension request.

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### **HELPFUL HINT . . .**

A represented state employee transferring from one state position to another may be required to complete an additional period of trial service in the new position if the transfer is promotional or if the new position is in a different bargaining unit. Where such a transfer is promotional in nature and the employee is removed from the new position during trial service, the employee may have return rights back to his or her former position or classification, depending on the contract provision covering the former position. Where such a transfer is lateral in nature and to a position in a different bargaining unit, if the employee is removed from the new position during trial service, the employee generally has no guaranteed right to return to his or her former position. As such, the employee would likely become unemployed, irrespective of his or her having achieved regular status in the former position. Finally, a lateral transfer to a position which is in the same bargaining unit as the former position generally does not require that the employee serve a new trial service period.

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"Sharing Human Resource Information"  
Human Resource Services Division  
By Linda Topping, HRSD Generalist

## **MANAGING AND REVIEWING EMPLOYEE WORK PERFORMANCE**

At a recent meeting of the "Quarterly Learning Network," participants shared opinions on the value of a performance management system and the various ways they can be structured. A primary benefit of such a system is that it results in communication taking place between managers and their employees so that employees get feedback regarding how they are doing in their jobs.

The group identified the following obstacles to successful performance management:

- lack of control over changes in administrative and program direction and resources;
- the natural resistance of human nature to confront or judge others;

## HRSD AUDIT PROGRAM

- lack of skill in performance management;
- the temperament of some individuals who dislike the process;
- failing to see the value of the process;
- raises are automatic and not tied into performance;
- lack of time, especially for the “working supervisor” who must choose between workforce management and “doing the job.”

DHR, AFS, and OYA reported a 95 to 99% evaluation completion rate by their managers, which they largely attribute to discontinuing the use of scores in their processes and focusing more on accountabilities and performance goals. It was generally believed that forced ranking fosters competitiveness which detracts from the agency mission and goals. The point was also made that some managers prefer to conduct their evaluations at the salary eligibility date (SED), which spreads them throughout the year rather than doing them all at once at a specified time.

HRSD policy (50.035.01 Performance Management Process) requires that the annual rating of each (unrepresented) employee be processed by December 1st of each year and by the SED for step-eligible classified unrepresented employees. (This doesn't preclude the option of conducting all evaluations in conjunction with the SED.) If agencies do plan to change to this system, they are asked to coordinate with the HR Information Systems Unit at HRSD. Agencies that wish to discontinue the three performance level ratings may request a policy exception by writing to Dan Kennedy, HRSD Administrator. Dan is also open to suggestions that you may have to improve the state's performance management system. □

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### THE QUARTERLY LEARNING NETWORK . . .

The “Quarterly Learning Network” is a forum which focuses on human resource development issues. The forum encourages agencies to share opinions, ideas and best practices to help accelerate learning and improve individual and team performance. The topic for the next meeting—scheduled for May 12, 1:30 to 3:30—is “Rewards and recognition systems: When does it pay to be good?” For information about future forums, please call Pete Schmidt at 378-2744 or Jan Miller at 378-6334.

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The audit group is gearing up for the next classification audit which will be a review of the newly implemented Information Systems Specialist Series. From this point forward each newly implemented class series will be audited when allocations of positions are complete. The audit group recently finished the first agency specific classification review. The Fish and Wildlife Technicians were reviewed and a final report was issued to the Department of Fish and Wildlife. Agencies interested in receiving a copy of the report may call Nancie Helvie, 373-7062. □

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### ABOUT HRSD AND HR SHARE . . .

The Human Resource Services Division is the state's central personnel unit. It provides advice and services concerning recruitment, compensation, classification, labor relations and personnel records. It also provides training and audit services and develops human resource systems and policies. HRSD Generalists Linda Topping (373-7689) and Paul Koch (378-4309) are available to assist agencies with their HR needs.

*HR Share* has been developed as a medium for HR staff in all agencies to share items of special interest. It is posted on the HRSD WEB page at <http://www.dashr.state.or.us>. For information about *HR Share*, or to submit an article for inclusion in an upcoming issue, please contact Linda Topping at HRSD. Agencies are also invited to share how they resolved issues of their own.

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## JOB ANNOUNCEMENT WIZARD

HRSD has created a helpful and user-friendly application for agencies to use when preparing job announcements. Among other beneficial features, the “Wizard” will correctly format announcements for electronic distribution. It will also allow agencies to develop announcements on-line and to send them directly to the Internet and State Job Public Display (SJPD). This new approach should be a significant improvement over the old system. Please contact Rebecca Gray, at 378-3006, for more information. □

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## ARBITRATIONS



*DOC (EOCI) vs. AFSCME Council 75*  
(Arbitrator, Marvin L. Schurke; November 12, 1997).

**The grievant was dismissed for violating EOCI's rules requiring employees to report all contacts they have with parolees. The Arbitrator found that the dismissal was for just cause, even though the grievant had failed to read the rules, since the grievant had been given ample training and opportunities to learn and understand them. As part of the decision, the Arbitrator ruled against the employer's use of a memorandum as evidence against the grievant, because the document had never been placed in the grievant's personnel file.**

**Facts:** The Department of Corrections, Eastern Oregon Correctional Institution (EOCI), maintains a number of rules which require its employees to inform it of any relationships or encounters they might have with inmates or parolees. In the Summer of 1996, when hired by EOCI as a registered nurse, the grievant informed her new employer that the father of her twin daughters, Gary Torgeson, was an inmate in another Oregon correctional institution. At the outset of her employment, the grievant attended training sessions which included EOCI's rules regarding disclosure of contacts with inmates or parolees, as well as its code of ethics. Key rules were displayed by means of overhead projectors and were the subject of discussion.

On March 17, 1997, Torgeson was released on parole. After his release, Torgeson had a number of contacts with the grievant, including telephone calls, outings together with the children and visits to her home. Between April 18 and April 28, Torgeson stayed at the grievant's home. The grievant failed to report any of these contacts to her employer until April 28, when she advised her supervisors only that Torgeson had visited her home to see the twins. She also submitted a memo that day which stated that Torgeson was living with his father.

On April 30, another employee advised the grievant's supervisors that Torgeson had been living at the grievant's home. When confronted with this accusation, the grievant confirmed that it was true. After she was suspended, the grievant acknowledged that she had received copies of the disclosure rules, but indicated that she had not read them.

**Questions Presented:** Was the grievant dismissed for just cause? Is Exhibit 16 excluded from evidence because it was never placed in the grievant's personnel file?

**Discussion and Ruling:** *Dismissal.* Arbitrator Schurke determined that under EOCI's disclosure rules and the training which the grievant received regarding them, "It was clear that any and all contacts are to be reported, no matter how inconsequential." Moreover, by failing to disclose her contacts with Torgeson, she also violated the "honesty" and "diligent reporting" precepts found in EOCI's "Code of Ethics." Arbitrator Schurke found unpersuasive the grievant's arguments that she did not understand that the disclosure rules applied to situations involving "immediate family," and that Torgeson had a right to visit his children. Moreover, "Had she been forthcoming with the information, the disclosure might have forced the employer to deal with potentially difficult parent-rights issues...." In conclusion, the arbitrator stated: "The employer has promulgated rules which appear to be reasonably related to its mission, and are not challenged by the union. The employer provided this grievant with ample opportunities for her to know and understand its rules, and is not responsible for the grievant's failure to read the rules which were clearly applicable to her family situation.... The employer had just cause to dismiss the grievant."

*Admissibility of Exhibit 16.* The collective bargaining agreement between the parties provides that: "No report, correspondence or document of an adverse nature shall be entered into the employee's personnel file unless a copy of the completed report, correspondence, or document is furnished simultaneously to the employee.... No material of an adverse nature may be used against an employee unless introduced into the employee's personnel file as described in this Article."

At the hearing, the union objected to the employer's Exhibit 16, a memo written by one of the grievant's supervisors. The grievant had not been given a copy of

the memo, and it had not been placed in the grievant's personnel file. The arbitrator described Exhibit 16 as, "[A] memorandum written by one management official to another, setting forth the results of the author's investigation.... In particular, it (1) Recites what the author and addressee were told by another bargaining unit employee, some or all of which may have been unknown to the grievant; (2) recites what was found on the statewide computer system, which may also have been unknown to the grievant; and (3) summarizes a telephone conversation between the author and the grievant in terms which might later be asserted as admissions against interest by the grievant." Basing his ruling on the collective bargaining agreement's language, as well as a previous arbitration decision construing the language, Arbitrator Schurke concluded, "If the employer wanted to use the document against the grievant at some later time, it should have placed it in her personnel file in accordance with Article 49. In the absence of compliance with Article 49, the document was inadmissible in this proceeding." While the arbitrator found the document itself inadmissible, he nonetheless allowed the supervisor who had authored it to testify at the hearing regarding most of the matters contained in it. □

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### **HELPFUL HINT . . .**

Prior to an arbitrator's assumption of jurisdiction over a grievance, the Employment Relations Board, in response to the filing of a complaint, may issue an order regarding disclosure of information relevant to a grievance. After the arbitrator's assumption of jurisdiction, however, the arbitrator, not the ERB, rules upon any request-for-information issues.

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#### ***AEE vs. OPRD***

*(Arbitrator, Allen M. Hein; August 29, 1997).*

**In interpreting a collective bargaining agreement's order-of-layoff provision, the arbitrator declined to strictly apply the "plain meaning rule," and instead considered the customary meaning and purpose of such provisions. Finding the general purpose to be the protection of bargaining unit members from layoff while non-members are being employed to perform bargaining unit work, the arbitrator ruled that the employer did not violate the agreement when it laid off two bargaining unit members while retaining non-member temporary employees, since the temporary employees were not performing bargaining unit work.**

**Facts:** A collective bargaining agreement between the State of Oregon's Parks and Recreation Department

(Employer) and the Association of Engineering Employees (Union) included a provision regarding "Reduction in Force" which stated: "Temporary and provisional employees must be terminated prior to the layoff of trial service or regular employees." In 1996, two bargaining unit members were laid off from their positions with the Employer due to revenue shortfalls and because of a lack of work for them. When the bargaining unit layoffs took place, the Employer was also employing more than 70 temporary employees throughout the state. None of these temporary employees were bargaining unit members. Their duties were not customarily performed by the Union's members.

**Question presented:** Did the Employer violate the collective bargaining agreement when it laid off two bargaining unit members and retained non-member temporary employees who were not performing bargaining unit work?

**Discussion and Ruling:** The Union argued that the language in question is clear and unambiguous, and plainly requires the termination of all temporary employees prior to any layoff of Union members. As such, it further argued, "[I]t is not necessary—or perhaps even appropriate—for the arbitrator to resort to any further rules of interpretation in deciding the meaning of the provision." In response to this argument, Arbitrator Hein initially noted that, "[A] strict application of the plain meaning rule is seldom appropriate when it is a collective bargaining agreement that is being interpreted. Because the primary purpose of interpretation is to discern and enforce the intention of the contracting parties, any evidence or expertise that helps the interpreter achieve that purpose should be considered. When it is a term of a collective bargaining agreement that is at issue, it must be examined in light of the common law of labor relations—that is, by considering what, in general practice, is the meaning and purpose of analogous provisions. Adjudicators usually will infer that parties intend common contractual clauses to have their customary meaning and purpose, unless there is presented persuasive evidence to the contrary."

And, "The common understanding of the purpose of order-of-layoff provisions such as [the clause in question] is to protect bargaining unit members from being laid off so long as there is work to be done which they are qualified to perform; in other words, while non-members of the unit are being employed to do such work."

In conclusion, the arbitrator determined that, "An extension of [the clause in question] to apply to employees who do work that is totally unrelated to bargaining

unit tasks, as advocated by [the Union], would far exceed the customary reach of such layoff clauses. Without compelling evidence, not present here, that the parties intended such a radical departure from normal practice when they agreed to the language in 1981, it would be erroneous for the arbitrator to interpret [the clause in question] in that manner.” □

*OPEU vs. ODOT*

(Arbitrator, Gary L. Axon; December 9, 1997).

**The balancing test often used for resolving contracting out cases is not relevant to a situation where the parties have negotiated specific contract language covering the contracting out of bargaining unit work. In this case, the collective bargaining agreement between the parties requires that the employer conduct a feasibility study prior to making a decision to contract out bargaining unit work, and to provide notice to the union of the decision to perform the study—even where the contracting out would result in no displacement of bargaining unit members.**

**Facts:** Article 13 of the relevant collective bargaining agreement provides that ODOT’s decision to contract out work performed by bargaining unit members, “[S]hall... be made only after the affected Agency has conducted a formal feasibility study determining the potential costs and other benefits which would result from contracting out the work in question. The Employer agrees to notify the Union within one (1) week of its decision to conduct a formal feasibility study.... The Employer shall provide the Union with no less than thirty (30) days notice that it intends to issue bids to contract out bargaining unit work where the decision would result in displacement of bargaining unit members....”

In 1996, ODOT (“Employer”) made the decision to contract out certain work which had been performed “for decades” by OPEU (“Union”) members. The Employer neither gave the Union any notice of its decision nor conducted any feasibility study.

**Question presented:** Did the Employer violate the collective bargaining agreement when it contracted out bargaining unit work without first performing a feasibility study and without providing the Union with notice of the decision to conduct such a study?

**Discussion and Ruling:** The Employer argued that (1) a 1989 arbitration decision, (2) the practice of the parties after that decision, and (3) the fourth sentence of Article 13, Section 1, all establish that the Article 13 language requiring a feasibility study and notice was intended to

come into play only where contracting out of bargaining unit work would result in the displacement of bargaining unit members. As such, the Employer further argued, since no bargaining unit members would be displaced as a result of the contracting out in this case, no feasibility study or notice was required.

Responding to these arguments, Arbitrator Axon found that the prior arbitration decision was not controlling since the issues and facts presented in the previous case were different from those presented by the present controversy, and since, “[T]he scope of Article 13 was not fully litigated.”

Examining the language of Article 13, Arbitrator Axon further found that, “Even though the Employer retains the exclusive prerogative to decide whether to contract out work performed by bargaining unit members.... The Employer’s prerogative to contract out work is conditioned on the performance of a feasibility study without regard to whether bargaining unit members will be displaced.” Thus, “The first requirement placed on the Employer by Article 13, Section 1, is that it ‘shall’ only make a ‘decision’ on whether to contract out work performed by bargaining unit members ‘after’ the affected agency has conducted a formal feasibility study ....” And, “In the third sentence of Section 1, the ‘Employer agrees to notify the Union within one (1) week of its decision to conduct a formal feasibility study.’ ” (Emphasis in Original.) Absent from both of these obligations is any reference to a requirement that bargaining unit members must first be displaced before they would come into effect. While the fourth sentence of Section 1 does include such a reference, “[This sentence’s] thirty day notice of a decision to contract out work which would displace bargaining unit members is clearly a separate and distinct notice requirement, from the seven day notice to do a ‘feasibility study’ before making a decision to contract out work.”

Despite finding that the Employer violated Article 13 when it failed to give the Union the required notice or to perform a feasibility study, the arbitrator rejected the Union’s request for back pay totaling 418 eight-hour days, and instead ruled that the decision should be prospective in application. Arbitrator Axon’s reasons for so ruling included the lack of bargaining unit member displacement or financial harm, as well as the fact that, “[T]he parties have operated in good faith since 1989 pursuant to the [prior arbitration] decision. Given the 1989 [arbitration] award and contract language dating back to 1983, the Arbitrator concludes the stability of labor relations would not be advanced with a large monetary award.” □

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

***About the Labor Relations Unit . . .***

The Labor Relations Unit is a part of the Human Resource Services Division in the Department of Administrative Services. The Administrator of the Division is Dan Kennedy. Currently, the LRU negotiates and administers 32 collective bargaining agreements with 10 different labor organizations, which represent over 27,000 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, Lead Labor Relations Manager .....	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