



MANAGEMENT Insight

JANUARY 2005

EMPLOYEE RELATIONS NEWSLETTER
HUMAN RESOURCES SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

Highlights

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ITEMS OF INTEREST

TEST YOUR KNOWLEDGE

Think you know all about the Family and Medical Leave Act (FMLA) and its requirements? Try deciding whether the following statements are true or false.

Answers on page 8.

- T or F** Under the FMLA regulations, your employees must use their vacation time, sick leave, or any other employer provided paid time while on FMLA leave.
- T or F** A temporary employee who later becomes permanent needs FMLA leave. She can meet her 12-month and 1,250 hour eligibility requirements by combining the time she worked as a temp with the time she has worked as a permanent employee.
- T or F** One of your employees is a member of the Army National Guard and recently spent some time overseas on

military duty. Now he's asking for FMLA leave. You don't have to give it to him because the time he was away on active duty doesn't count toward the Act's eligibility requirements.

- T or F** In order to dictate the method the State uses to calculate employees' eligibility for FMLA leave (e.g., calendar year or rolling 12-month period), your FMLA policy must be in the employee handbook, not merely posted or distributed.

UPDATE FROM LRU

We Welcome Art McCurdy

Art joined the LRU as a State Labor Relations Manager in June 2004. His most recent position was ODOT's Labor Relations and Classification Manager. Art has over twenty years experience as a human resource practitioner in both the public and private sectors. His educational accomplishments include earning a Ph.D. in Political Science with a major in public administration from Washington State University, and also professional certification as a Certified Employee Benefit Specialist (CEBS) from the International Foundation of Employee Benefit Plans and the Wharton School of Business, University of Pennsylvania. Art has authored or co-authored several book chapters on human resources management topics, and also has published his research in peer reviewed journal articles in the *Review of Public Personnel Administration* and in *Health Services Research*.

We Welcome Susie Hosie

Susie joined the LRU as the Labor Relations Trainee in December 2004. Her most recent position was with the United Way of the Mid-Willamette Valley. She worked as a PSR3 in DMV's Customer Assistance from 1997-2002 and left to pursue her graduate degree. Susie holds a B.A. in Business Economics from Willamette University, a M.B.A. in Strategic Management and Labor Relations from Willamette University's Atkinson Graduate School of Management, and a Certificate in Dispute Resolution from Willamette University College of Law.

We Say Goodbye to Scott Allan

We are sad to announce the resignation of Scott Allan, LR Manager. Scott has accepted a job in Minneapolis. His planned departure is February 4, 2005. We extend a hearty congratulations. We have enjoyed working with Scott and he will be missed.

Management Tip:

Set S.M.A.R.T. Goals.

Goals you set for yourself, or others, should be:

- Specific,
- Measurable,
- Achievable,
- Realistic, and
- Time-based.

ARBITRATION & CASE SUMMARIES

SEIU vs. OREGON CASCADES WEST COUNCIL OF GOVERNMENTS

*SEIU vs. Oregon Cascades West Council of Governments
(ERB Case No. UC-16-04; 11-29-04)*

The ERB examined four positions to determine whether they should be excluded from the SEIU bargaining unit based on confidential status. The Board outlined its standards for determining confidential status and found that two of the four positions met these standards. Both of these positions provide direct and substantial assistance to employees who actually formulate, determine and effectuate management policies in the area of collective bargaining. The Board also found that it is reasonably necessary for these employees to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies.

Facts: Service Employees International Union Local 503, OPEU (SEIU) and the Oregon Cascades West Council of Governments (Council) are parties to a collective bargaining agreement (CBA), initially bargained in 1986. This action was filed by SEIU, seeking to include six additional employees in the SEIU bargaining unit. Prior to the hearing, the parties agreed to the status of two of the six positions (one excluded as confidential and one includable in the unit). The four positions in question render collective bargaining-related assistance to the Council's Human Resources Director and its Finance Director, who are both members of the Council's six-person negotiating team.

Question Presented: Are the positions in question excluded from the SEIU bargaining unit as confidential employee positions?

Discussion and Ruling: The Employment Relations Board (ERB or Board) first outlined its standards for determining whether a position is excluded from a bargaining unit due to confidential status. The Public Employee Collective Bargaining Act (PECBA) defines a confidential employee as "one who assists and acts in a confidential capacity to a person who formulates, determines and effectuates management policies in the area of collective bargaining." The Board applies a three-part test to determine confidential status:

"... (1) Does the allegedly confidential employee provide assistance to an individual who actually formulates, determines, and effectuates management policies in the area of collective bargaining?"

(2) Does the assistance relate to collective bargaining negotiations and administration of a collective bargaining agreement?"

(3) Is it reasonably necessary for the employee to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies? ..."

The Board further explained that it also uses a "reasonable under the circumstances" touchstone to "avoid the proliferation of confidential employees." The Board clarified that "access to confidential or sensitive documents, such as personnel or disciplinary records..." or "[a]n employee's involvement in costing bargaining proposals or alternative wage schedules ..." are insufficient to render the employee confidential for purposes of the PECBA. Finally, noted the Board, employees who "back up" a confidential employee do not thereby become confidential employees.

The Board next applied these standards to the four positions in question. Personnel Executive Assistant Shepard assists the Human Resources Director, who sits at the bargaining table and actually formulates, determines and effectuates management policies in the area of collective bargaining. Shepard develops collective bargaining proposals and assists with the CBA's administration. It is "reasonably necessary for Shepard to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies."

Senior Accountant Forty assists the Finance Director, who actually formulates, determines and effectuates management policies in the area of collective bargaining. She spends “about 10 percent of her time on bargaining-related research....” This research, noted the Board, is “not confined to cost scenarios” and, in fact, she has “met with the management bargaining team to discuss and make suggestions regarding proposals related to her research.” The Board concluded that it is “reasonably necessary for Forty to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies.”

While Accounting Specialist Nofziger also provides assistance to the Finance Director, her “limited amount” of collective bargaining-related assistance has been rendered primarily by researching Council expenditure trends in three areas and utilization costs related to the Council’s cafeteria-style health plan. Finance Administrative Assistant Halvorson, also provides collective bargaining-related assistance to the Finance Director, by devoting 10 percent of her time tracking staff levels relative to one source of funding, Medicaid. While Halvorson is also aware of which funds support which staff positions (and thereby has an “early picture” of which employees might be subject to layoff), this information is public and “reflects external pressures on the Council, not the Council’s own priorities or bargaining strategies.” While Halvorson also runs computer programs to determine the cost of wage and benefit levels, this is a task which the ERB has previously found “not determinative of confidential status.” The Board concluded that, “it is not reasonably necessary for [Nofziger and Halvorson] to be designated as confidential to provide protection against the possibility of premature disclosure of management collective bargaining policies, proposals, and strategies.”

The Board thus ordered that the personnel executive assistant and senior accountant positions be excluded from the SEIU bargaining unit due to their confidential status; and that the accounting specialist and finance administrative assistant positions be included in the bargaining unit. ■

ARBITRATION BETWEEN THE STATE OF OREGON, SOCP AND AFSCME

*In the Matter of the Arbitration Between the State of Oregon, SOCP and AFSCME
(Arbitrator, Carlton J. Snow, Professor of Law; April 15, 2004)*

The Employee was discharged after multiple sleeping-on-the-job incidents. While sleeping on the job is a serious offense that sometimes warrants summary discharge, in this case a number of mitigating factors were present. These included a long and discipline-free work history, a relevant medical condition, and evidence that the sleeping episodes caused no increased risk of harm or actual harm to the Employee’s disabled client or others. The evidence also suggested that management failed to thoroughly investigate inconsistencies in the case or the mitigating circumstances. Alternative solutions, such as a fitness for duty evaluation, were available to the Employer. The Arbitrator concluded that the totality of the evidence supported a conclusion that the Employee must be reinstated.

Facts: The grievant (Employee) has worked for the state since 1990. In 2000, he transferred to Jody Place, one of 33 group homes managed by the Department of Human Services’ State-Operated Community Program (SOCP), where he worked as a primary care giver of K.L. K.L., who is autistic and suffers from bipolar disorder, requires one-on-one care due to his history of destroying property, tearing clothing and attacking others. The Employee worked well with K.L., and was able to control his destructive tendencies.

The Employee received chemotherapy and medication in 2002, for a serious kidney condition which caused him to lose nearly 100 pounds. In January 2003, the Employee was twice observed to be asleep on the job (while sitting upright on a living room couch, next to K.L.). The second incident occurred within minutes of the first one, after the Employee had been awakened and warned by his supervisor about the impropriety of dozing off. The Employee stated that he believed his medication was the cause of his “occasionally dozing off.” In February, 2003, the site manager approached the Employee to give him a written reprimand for the two earlier incidents of sleeping on the job, and again observed him to be asleep. The Employee was placed on administrative leave. In March, after receiving permission from the Employee, an SOCP Human Resource Analyst spoke with the Employee’s doctor about his medical condition. He told her that the medication which the Employee was taking did not normally cause a person to suddenly fall asleep. The Employee was discharged the following month.

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Question Presented: Was the Employee dismissed for just cause?

Discussion and Ruling: Arbitrator Carlton Snow explained that sleeping-on-the-job disputes “constitute a special genre of arbitration cases out of which a number of arbitral principles have emerged.” While sleeping on the job is a “serious offense,” “a number of factors come into play when selecting an appropriate discipline for such misconduct.” These include the nature of the workplace, an employee’s duties and the impact of illness or medication. Finally, Arbitrator Snow observed, “Arbitrators tend to make sharp distinctions between ‘sleeping on the job’ cases where an employee unintentionally dozes as a result of medication or some legitimate reason for loss of sleep as contrasted with ‘nesting’ cases where an employee deliberately and with premeditation makes advance arrangements for sleeping on the job.”

Arbitrator Snow next looked at the due process issue of adequate notice – was the Employee given adequate notice that sleeping on the job constitutes inappropriate conduct that could lead to dismissal? The evidence indicated that the Employee had signed two policies covering such conduct. Also, the SOCP Code of Conduct makes clear that, “sleeping on duty at any time for any reason is prohibited and could result in immediate commencement of pre-dismissal procedures.” Arbitrator Snow concluded that the Employee was, indeed, given adequate notice of the seriousness of the offense and that such a violation could lead to discharge.

Arbitrator Snow next addressed “another due process consideration,” the fact that “the investigation of the circumstances was incomplete.” While the Employee’s physician had stated that the medication which the Employee was taking did not normally cause a person to suddenly fall asleep, on the other hand, “the Employer had the benefit of its own objective observation of an employee who dozed off within minutes of a warning about dozing off” The “glaring inconsistency” between the doctor’s statement and the observed behavior, noted the Arbitrator, “cried out for further investigation, but management chose to ignore the contradiction.” In reaching this conclusion, the Arbitrator dismissed the Employer’s argument that the discharge was not premised on the doctor’s statement but would have resulted anyway due to the Employee’s exhibiting unsound judgment by reporting to work while knowing that he was fatigued and taking medication. To the Arbitrator, “What such testimony suggested was not only that the investigation was incomplete but also that no good faith evaluation of mitigating circumstances took place.”

Turning to his “mitigation analysis,” Arbitrator Snow noted that management viewed the Employee’s dozing off a second time, minutes after having been warned about the impropriety of such behavior, as evidence of “intentional disobedience and employee recalcitrance.” He then offered a “more reasonable” alternative explanation — that the Employee was unable to control his behavior due to the effects of his medication. Data from his employment file indicated that “the grievant espouses not a cavalier but a strong work ethic.” He “cared deeply” about his job, was recognized by management as “quite a good employee,” and was “conscientious about responding to the needs of K.L.” The Employee, moreover, “was not a lazy employee who laid out a ‘nest’ deliberately to sleep on the job.” Regarding the doctor’s statement, the Arbitrator noted that the Employee failed to describe his sleepiness problem to the doctor until after the incidents that led to his dismissal because he feared not receiving a work release from the doctor. After the Employee’s discharge, in August 2003, the doctor stated that while “it seems unlikely,” it was “not impossible” that the medication caused the Employee to doze off. Information from the drug manufacturer, noted the doctor, lists sleepiness as a “less frequently reported adverse reaction” and the fact that the Employee reported sleepiness at the onset of his medication “suggests it may be associated.” The Arbitrator concluded that a “thorough investigation” would have shown the possibility of a link between the medication and the Employee’s sleepiness, and “[w]hile the grievant’s incomplete statements to his doctor about his medical condition may have led to a faulty medical assessment, the Employer made no effort to unravel the stark inconsistency between its interpretation of the doctor’s telephonic report ... and objective manifestations by the grievant at the work site.”

Addressing the Employer’s argument that the Employee’s sleeping on the job created a safety risk to people and property, the Arbitrator noted that “This is a significant and legitimate concern.” Testimony at the hearing, however, established that, “in the grievant’s presence, K.L. controlled his destructive tendencies” and that he “never had any ‘bad incidents’ while in the grievant’s care.” On the other hand, in the month after the Employee was discharged, K.L. had to be placed in restraints 13 times. According to the Employee, if K.L. wanted to leave the room for any reason, he would have alerted him, even if he was dozing. “Arguably,” noted the Arbitrator, “the grievant’s absence has caused far more destructive behavior to surface in K.L. than the risk created by the grievant’s dozing on the job.”

In response to the Employee’s assertion that he had been disciplined more harshly than other similarly-situated SOCP employees, the Employer argued that when a “preferred, one-on-one staff member dozes [there] is a substantially heightened risk...” which justifies a stiffer sanction. However, the record indicates that in other sleeping-on-the-job cases at SOCP which resulted in a lesser sanction than dismissal, whether or not the employee was a “preferred caregiver” was unknown to the decision-maker in more than half the cases. This, noted the Arbitrator, indicates that the “preferred caregiver” status was “not generally a weighty factor in

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meting out discipline.” The Employer has the burden of supporting its right to impose a more stringent sanction on “preferred caregivers” than other employees and, concluded the Arbitrator, it failed to do so in this case.

The Arbitrator also disagreed with the Employer’s argument that the Employee’s work history is irrelevant due to the severity of the offense. Rather, noted the Arbitrator, the Employee’s discipline-free work history of almost 15 years “ought to have received considerable weight in management’s assessment of an appropriate sanction.” The Employer also should have given some weight to the Employee’s frank admission of guilt and his remorsefulness, which support a conclusion that he is a trustworthy employee. On the other hand, the Employee showed poor judgment by not being candid with his doctor and by failing to put the Employer on notice of a potential performance problem caused by his medication.

The Arbitrator Concluded: “In sum, the grievant’s conduct warranted discipline, but discharge was too severe. Sleeping on the job is a serious offense and warrants an appropriate sanction. In some cases, that might include summary discharge. In this case, however, the grievant’s not causing a substantial risk to K.L. or others, the absence of actual harm to K.L. or others, the grievant’s medical condition, work history, and lack of prior discipline all provide substantial mitigating factors. Moreover, a thorough investigation by the Employer into inconsistencies in the case could have led to an alternative solution. For example, it was within the Employer’s authority to send the grievant for a fitness for duty evaluation.”

The Arbitrator found that “the totality of the evidence supports a conclusion that the grievant must be reinstated.” The Arbitrator also stated that since little evidence had been submitted to him about an alternative sanction, he would retain jurisdiction for 60 days to give the parties an opportunity to negotiate an appropriate remedy themselves, and that he would fashion a remedy should this process prove unsuccessful. ■

ARBITRATION BETWEEN THE STATE OF OREGON (DMV) AND AFSCME

In the Matter of the Arbitration Between the State of Oregon (DMV) and SEIU (Arbitrator, Mark S. Downing; November 23, 2004)

Thirty four employees sought upward reclassification from the Public Service Representative (PSR) 3 classification to PSR 4. To prevail, the employees had the burden of proving that the PSR 4 classification more accurately depicts the overall assigned duties, authority and responsibilities of the employees’ positions. The Arbitrator found that the employees failed to meet this burden. He also found that the positions lack two of the PSR 4 classifications’ distinguishing features (interpreting laws and problem solving that requires negotiation), and that the vast majority of the employees’ work time is spent on duties consistent with the PSR 3 class. The Arbitrator denied the grievance and thereby upheld the Agency’s decision that PSR 3 is the appropriate classification for the employees.

Facts: The grievants are 34 employees (Employees) of the Department of Transportation, Driver and Motor Vehicle Services Division (DMV or Agency). All of the Employees work as Public Service Representative (PSR) 3s in the Salem Call Center at DMV headquarters. After an update of their Position Descriptions (PDs), the Employees filed a request for reclassification under Article 81 of the SEIU/DAS contract, seeking to be reclassified to PSR 4. The request was denied by the Agency and the Union appealed the denial.

The PDs covering the 34 employees list three major duties: (1) answering telephone inquiries (65% of employees’ time), (2) field office support (20% of employees’ time), and (3) research, interpretation and miscellaneous duties (15% of employees’ time).

Question Presented: Did the Agency violate Article 81 of the SEIU/DAS collective bargaining agreement by not reclassifying 34 PSR 3s to PSR 4?

Discussion and Ruling: After first addressing an arbitrability issue raised by the state, and finding that the grievance was arbitrable, Arbitrator Mark S. Downing turned to the reclassification issue. Article 81, Section 4 (c) of the SEIU/DAS labor contract provides that the arbitrator shall allow the Agency’s decision on the requested reclass to stand, “... unless [the arbitrator] concludes that the proposed classification more accurately depicts the overall assigned duties, authority, and

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responsibilities . . .” Article 81, Section 1 (c), in turn, provides that the overall assigned duties, authority, and responsibilities are to be determined by the PD and other relevant evidence of duties assigned by the Agency. In this case, since no “other relevant evidence” was presented, the PDs control on this issue. Article 81 also requires that a reclassification be based on a finding that the purpose of the Employees’ jobs (determined by the statement of purpose and assigned duties of the Employees’ PDs) is consistent with the concept of the proposed (PSR 4) class (determined by a review of the general description and distinguishing features of the class specification).

As required by Article 81, Arbitrator Downing reviewed the general description and distinguishing features sections of the PSR 3 and 4 class specifications. The Arbitrator explained that, “PSR 3s explain and apply rules and procedures, while PSR 4s research, analyze and interpret rules, procedures and laws.” The class specifications also, “. . . illustrate that PSR 3 employees solve problems by explaining rules and procedures to gain a customer’s compliance. PSR 4 employees have a higher level of problem solving, using analysis and interpretation of law in addition to rules. Problems solved by PSR 4 employees are more often of a nonroutine nature, requiring greater judgment, extensive research, and negotiation.”

The parties’ arguments to the Arbitrator focused on two “key phrases” in the PSR 4 class: (1) The PSR 4 provides research, analysis and interpretation of rules, policies, procedures and laws; and (2) The PSR 4 class has the responsibility for problem solving that requires research, analysis, and negotiation. Specifically, do the employees’ interpret laws and do they have the responsibility for problem solving that requires negotiation? The Union provided evidence, including the testimony of a number of the Employees and the Webster’s Dictionary definition of “interpret” and “negotiation,” in support of its position that the Employees do, indeed, interpret laws and problem solve through negotiations. The state also presented evidence, including the testimony of the DAS statewide classification manager, the testimony of one of the Employees’ managers and the definitions of “interpret” and “negotiate” found in the state’s DAS Classification Guide, in support of its position that the Employees do not “interpret” or “negotiate.”

Finding that the Employees do not interpret laws, the Arbitrator stated: “Established guidelines interpreting driver and vehicle laws are available to the grievants. The job of a PSR 3 does not include making judgments on how a law should be interpreted. As used by the Agency for classification decisions, the word ‘interpret’ does not have the meaning of explaining laws to the public [as the Union had asserted]. The grievants do not interpret laws.”

As to the authority to negotiate, the Arbitrator explained: “The grievants are involved in compliance work. As the regulator, they decide what will be accepted for a customer to gain compliance with DMV rules and procedures. There is no mutual agreement or give and take between DMV and a customer. Discussing options with a customer within established guidelines does not qualify as the type of compromise that is envisioned by use of the word ‘negotiate’ for classification purposes. The grievants do not have responsibility for problem solving that requires negotiation.”

The Union also contended, “. . . that if the Arbitrator concludes that employees lack one or two distinguishing features but finds that a preponderance of distinguishing features favor the PSR 4 class, he must find that the PSR 4 class more accurately describes the duties, authority, and responsibilities of the job.” Addressing this contention, the Arbitrator explained, “Under that argument, a list could be made of the distinguishing features of a proposed class. For example, a proposed class might have five features distinguishing it from another class. Under the Union’s position, if a job performed three of the five distinguishing features, the job would be reclassified to the higher classification.” However, noted the Arbitrator, “Training materials prepared by the Union [“How to Make Your Case for Upward Reclassification – A Step-By-Step Approach”] contradict its argument . . . Instead of a preponderance of distinguishing features test, the Union’s training document [which states that an employee, “normally needs to perform the duties of the target class at least 50% of the time”] adopts a percentage of time spent performing the duties of the proposed class test.”

The Arbitrator Concluded: “The Salem Call Center handles a high volume of calls [“12.3 calls per hour, or a call every five minutes”]. Sixty-five percent of a PSR 3’s work time is spent answering phone inquiries from customers. Another 20% of work time is occupied by providing support, often on the phone, to the 64 DMV field offices. While the evidence does not allow for a calculation of the total amount of time that the grievants spend on the phone, the vast majority of their work time is consumed by this task. Nearly all of their phone work is consistent with the PSR 3 class.”

Arbitrator Downing reiterated that he is, “. . . required by [A]rticle 81, [S]ection 4 (c) to allow the decision of the Agency to stand, unless he concludes that the PSR 4 class more accurately depicts the grievant’s duties, authority, and responsibilities.” The Employees, concluded the Arbitrator, “. . . do not interpret laws or solve problems through the use of negotiation. The decision of the Agency must stand.” ■



NOTES FROM JUSTICE

by The Labor and Employment Section
Department of Justice



PUBLIC RECORDS LAW

The Public Records Law explicitly encourages public agencies to “guarantee to its citizens the right to know about the activities of their government.” Requests from the public only pertain to existing documents; not information, because a public record is “any writing containing information relating to the conduct of the public’s business * * * prepared, owned, used or retained by a public body.” Generally speaking, personnel disciplinary actions are exempt from disclosure. This includes records of “materials or documents supporting that action.” However, various exceptions weaken this exemption. This article explores when records of personnel disciplinary actions must be produced under the Public Records Law.

In a lawsuit seeking the production of personnel disciplinary action records a court first presumes that exemptions to the Public Records Law do not apply. In making this presumption, courts balance the public need to know the information against the employee’s right to privacy. Four significant factors can influence the balancing test; (1) the *status of the disciplinary investigation*, (2) the *status of the employee*, (3) the *nature of the conduct*, and, (4) *whether parallel legal proceedings* are in play. Courts are more likely to defer to a public agency’s refusal to produce the requested documents if the employee is *still being investigated*. If no decision has been made about disciplinary action courts recognize that compelling production may unduly interfere with the investigation and skew the findings. To a degree, even if the employer has completed the investigation, courts will permit the public agency time to consult with legal counsel as to whether and to what extent the requested documents must be produced.

In the past, Oregon courts held that a public agency must produce documented investigatory information. If the most critical investigatory information is undocumented a request for production that is granted by the court may be fruitless since the agency need not document everything in an investigation.

If an investigation is completed and disciplinary action was imposed against an employee, the balancing test is more favorable toward the employer. One reason Oregon courts defer to a public agency’s refusal to produce *after* discipline is imposed is because the existence of the discipline may be deemed sufficiently embarrassing to impact the disciplined employee’s privacy interests. But, if a public agency decides against discipline after an investigation is complete, the balancing test weighs more in favor of the public’s need to know because, arguably, there is no embarrassment for the employee.

The *status of an employee* may also affect the balancing test. Employees of high rank, within supervisory or leadership positions, enjoy less of an expectation of privacy. Oregon case law indicates that when high ranking public officials engage in even illegal off-duty conduct, courts are less likely to recognize such officials as having a sufficient privacy interest.

Employees who are promoted as a public image of model behavior also have less of a privacy interest. For instance, if a public employee trains others regarding proper workplace behavior, that employee has a diminished privacy interest in disciplinary records for behavior contrary to his or her promoted behavior. Sometimes the *nature of the conduct* from which a personnel disciplinary action or related investigation is based may tilt the balance in one direction or the other. As stated by the Oregon Supreme Court, if “the conduct involved directly bears on the possible compromise of a public official’s integrity in the context of his public employment” then the invasion of the official’s privacy is not unreasonable. The most salient example of the compromise of integrity occurs when a public employee commits a crime. However, the public agency should be wary of quickly producing personnel records related to charged crimes. Before production, criminal proceedings must be completed and must have been public. Moreover, the criminal action must be related to the disciplinary action and the employee must enjoy a high profile position. Without all of these reasons, Oregon courts will tend to weigh more favorably for the privacy interests of the employee against the public’s need to know.

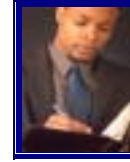
The existence of *parallel legal proceedings* is also a factor in whether disciplinary records are exempt from production. Different production rules are triggered in a civil or criminal case. If the proceeding is a union initiated grievance, the union will tend to encapsulate all requests under the umbrella of the Public Employee Collective Bargaining Act (PECBA). Public Records in criminal and civil cases are frequently produced through subpoena power, or if challenged, through court orders to compel production. Thus, when multiple levels of litigation are in play, exemptions to the Public Records law rarely apply.

A public records request is not always a simple matter therefore public agencies may find their interests best served by seeking legal counsel when such requested are received. ■



BACK TO BASICS

Human Resource
Information for Managers



EMPLOYEE REFUSAL TO PROVIDE FMLA/OFLA MEDICAL CERTIFICATION

An employer—under both the Oregon Family Leave Act (OFLA) and the federal Family Medical Leave Act (FMLA)—may require an employee to provide medical certification when the employee takes leave which may qualify under one or both of the acts. Once an employer makes such a request, the employee has 15 calendar days to return the completed medical certification. If the leave in question is for a relative's medical condition, certification regarding the family member's condition may also be required.

Extenuating circumstances may permit an employee to take longer than 15 days to provide a requested certification if he or she cannot provide it within the 15-day period despite diligent efforts to do so. But what if the employee simply refuses or fails to comply with the request? When this occurs, the leave is not protected under either of the acts. As such, if the leave would constitute an unexcused absence under an applicable collective bargaining agreement and/or employer policy, it may be treated as such and the employee may be disciplined.

To enforce the unexcused absence rule, the employer's request for medical certification (1) must be made in writing, and (2) must advise the employee of the anticipated consequences of failure to provide adequate medical certification.

In addition, to enforce the unexcused absence rule, a valid medical certification request needs to be made in accordance with applicable collective bargaining provisions. Many collective bargaining agreements include provisions authorizing medical certification requests only after a specified period of absence, e.g., SEIU is seven days, even though OFLA and FMLA permit requesting medical certification immediately in most circumstances. Under OFLA and FMLA a more beneficial provision (to the employee) in a collective bargaining agreement would prevail over the OFLA and FMLA provisions. Refer to your collective bargaining agreement for the specific time frame for requesting medical certifications—usually contained in the sick leave article.

The 15-day period for the employee to provide medical certification begins with a valid written request as outlined in the above paragraphs. If a request for medical certification does not meet the validity criteria, then the leave may be protected under OFLA and FMLA and discipline under an unexcused absence rule may not be enforceable.

It should be noted that even though a medical certification may not be available immediately, OFLA and FMLA require an employee to explain the reasons for the needed leave to determine if the leave qualifies under the acts. Additionally, leave requests must be approved by the employee's supervisor and the employer may ask an employee for the general reason(s) a leave request is made. The reason(s) given may help the employer to determine if a leave provisionally qualifies for OFLA or FMLA prior to receipt of a medical certification. If an employee fails or refuses to provide a reason for a leave request, then the result may be denial of the request until sufficient information is provided.

Management Tip:

Don't DO Everything. Your job as a manager is to "plan, organize, control and direct." Don't waste valuable time by falling back on what you did before you became a manager. We know you enjoy it and you are good at it. That's why you were promoted. You need to concentrate your efforts on managing and not on "doing".

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Do you have an HR or Management problem and a recent insight that worked? Or do you have a dilemma and need some advice? Please describe in 250 words or less and send your note to Managing Editor @ Susie.J.Hosie@state.or.us and don't forget to include title and agency.

ANSWERS TO TEST YOUR KNOWLEDGE

So... how did you do? Here are the answers:

- (1) **False.** The FMLA regulations state that it's up to the employer to decide whether to require that employees use vacation time, sick leave, or other employer-provided paid time off while on FMLA leave.
- (2) **True.**
- (3) **False.** According to the U.S. Department of Labor, the time an employee spends on military service will be added to the time spent working for the employer for the purposes of determining the eligibility for FMLA leave.
- (4) **False.** The FMLA Policy Poster must be posted; FMLA policy does not need to be distributed or printed in an employee handbook. Regardless if it was printed in a handbook, agencies are dictated by the FMLA poster.



LABOR RELATIONS CONTRACT ADMINISTRATION ASSIGNMENTS

Effective July 15, 2004

ART McCURDY,

State Labor Relations Manager
378-3138

AFSCME:

Dept of Land Conserv & Dev (DLCD)
Building Codes Division (BCD)
Construction Contractors Board (CCB)
Dept of Environmental Quality (DEQ)

SEIU:

DHS Non-Institutions (w/Cathy Schuh)
Pub Empl Retirement System (PERS)

CATHY SCHUH,

State Labor Relations Manager
373-7608

AFSCME:

Department of Justice (DOJ-OAJA)
Oregon State Police (OSP) Support Unit

CIA:

Department of Justice (DOJ)

SEIU:

Human Services Coalition:
DHS Non-Inst -(w/Art McCurdy)
Special Agencies Coalition:
Department of Justice (DOJ)
OR Student Assist Com (OSAC)
Home Care Commission (HCC) -
(w/Eva Corbin)

CRAIG COWAN,

State Labor Relations Manager
378-5611

AEE:

Department of Forestry (DOF)
Department of Transportation (ODOT)
Parks and Recreation Dept (OPRD)

AFSCME:

Oregon Military Dept (OMD)

IAFF/PANG:

Oregon Military Department (OMD)

KFAFFA:

Oregon Military Department (OMD)

SEIU:

Central Table (with Eva Corbin)
Human Services Coalition:
Employment Department (EMPL)
ODOT Coalition:
Dept of Fish & Wildlife (ODFW)
Special Agencies Coalition:
Consumer & Business Svcs (DCBS)-
incl' Workers' Comp Board (WCB)

EVA CORBIN,

Deputy Administrator LRU
378-8321

AFSCME:

Homeland Security
(includes OSFM & OEM)

OSPOA:

Oregon State Police (OSP)

SEIU:

Central Table (with Craig Cowan)
Home Care Commission (HCC) -
(w/Cathy Schuh)

JAN WEEKS,

State Labor Relations Manager
378-6483

AFSCME:

State Operated Community Program (SOCP)
Physicians at Oregon State Hospital (OSH) and Eastern Oregon Train & Psych Centers-(EOTC & EOPC)
Dentists at Dept of Corrections (DOC)
Oregon Youth Authority (OYA-JPPOs)

AOCE:

DOC-Strike Prohibited
(OSP,MCCI,SFFC,OSCI)

SEIU:

Institutions Coalition:
Oregon Youth Authority (OYA)
Oregon State Hospital (OSH)
East. OR Train/Psych Center
(EOTC/PC)

TOM PERRY,

State Labor Relations Manager
378-4201

AFSCME:

Dept of Pub Sfty Stndrds & Trng (DPSST)
Real Estate Agency (REA)
DOC Security & Non-Security -
(w/Scott Allan)

SEIU:

ODOT Coalition:
Dept of Transportation (ODOT)
Department of Aviation (ODOA)
Department of Forestry (DOF)
Parks and Recreation Dept (OPRD)

MIKE HALPERN,

State Labor Relations Manager
378-2705

AFSCME:

Division of State Lands (DSL)
Employment Department (EMPL)
OR Liquor Control Commission (OLCC)

GCU:

Dept of Administrative Services (DAS)

SEIU:

Special Agencies Coalition:
Dept of Administrative Svcs (DAS)
Department of Agriculture
Department of Education (ODE)
Special Schools (OSSB & OSSD)
Commission for the Blind
Com College & Workforce Dev (DCCWD)
Health Related Licensing Boards
Health Licensing Office (HLO)
Housing & Comm Svcs (OHCS)
Oregon State Fair (OSF)
Department of Revenue (DOR)
Oregon State Treasury (OST)
Dept of Veterans Affairs (DVA)
Water Resources Dept (WRD)
Watershed Enhancement Board (OWEB)

STEA:

Dept of Education (ODE)

SCOTT ALLAN,

State Labor Relations Manager
378-3967

AFSCME:

Dept of Corrections
(DOC-Non-Security)
Board of Parole (BOP)
Corrections Central
Dept of Corrections (DOC-Security)
Corrections Institutions
Nurses at OR State Hospital (OSH)

ONA:

State Operated Community Program (SOCP) & E. Oregon Train & Psych Ctrs (EOTC/PC)

SEIU:

Special Agencies Coalition:
Bureau of Labor & Ind (BOLI)
Oregon State Library (OSL)

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Interim Bargaining for New/Revised Classes-
Jan Weeks
SEIU Reclass Appeals-
Jan Weeks

BU Exclusions, FLSA Exemptions-
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FLSA, FMLA, ADA-
Mike Halpern
Interest Arbitration Coordinator-
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Training-
Cathy Schuh and Art McCurdy
Management Insight-
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Management Insight is produced periodically by the Labor Relations, Classification, and Compensation Unit, Human Resource Services Division, Department of Administrative Services. It is distributed to Executive and Management Service employees of the State of Oregon. Material covered in this newsletter may be reproduced without special permission. Back issues and a cumulative articles index may be accessed through the HRSD website, <http://egov.oregon.gov/DAS/HR/>. Please credit the *Management Insight*, DAS, Labor Relations, Classification and Compensation Unit. For questions, or if you have an *Item of Interest* which you would like considered for an issue of *Management Insight*, please contact Susie Hosie, Labor Relations Section .

About the Labor Relations, Classification, & Compensation Unit

The Labor Relations, Classification, and Compensation Unit is a part of the Human Resource Services Division in the Department of Administrative Services. The Administrator of the Division is Sue Wilson. Currently, the Labor Relations Section negotiates and administers 32 collective bargaining agreements with 11 different labor organizations, covering over 26,000 employees in the Executive Branch of Oregon State Government, excluding Higher Education. The Labor Relations Section also negotiates an agreement with SEIU covering a bargaining unit of approximately 13,000 Homecare Workers. The Classification Section maintains the State’s classification plan and provides consultative advice in all areas of job classification development. The Compensation Section maintains the statewide compensation system; recommends compensation changes to existing, new, and revised classifications; assesses statewide market competitiveness; and gathers and analyzes market comparators data relative to the State. The following is a list of the Labor Relations, Classification, and Compensation Unit staff and contact phone numbers for your convenience.

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Tom Perry, State Labor Relations Manager	503-378-4201
Cathy Schuh, State Labor Relations Manager	503-373-7608
Lisa Snively, Classification Analyst (<i>Job Rotation at DPSST</i>)	503-373-2100
Erin Tokos, Sr. Compensation Analyst	503-378-5582
Jan Weeks, State Labor Relations Manager	503-378-6483
Vacant, Classification Analyst	503-373-7676
Vacant, Compensation and Classification Coordinator	503-378-6620