MANAGEMENT

Insight

MARCH 2006

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

Highlights

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ITEMS OF INTEREST

2005-2007 BARGAINING REFLECTION

The Labor Relations Unit received **100% ratification** of thirty-two (32) bargaining unit agreements covering state employees and one (1) collective bargaining agreement covering the non-state employees in the Homecare Workers Bargaining Unit!

The 2005-2007 biennium is the first time we have implemented all of the collective bargaining agreements without employees going on strike or strike prohibited groups (10) using interest arbitration.

For contract details please visit the Labor Relations Unit Website.
http://egov.oregon.gov/DAS/HR/CBAs.shtml

CONTRACT ADMINISTRATION & BARGAINING ASSIGNMENTS

Effective February 1, 2006, the Labor Relations Unit updated its contract administration and bargaining assignments. For an updated list see our Contract Administration document on ourwebsite.
http://egov.oregon.gov/DAS/HR/docs/lr/LRUContAdm2106.pdf

2007-2009 BARGAINING CONCEPTS

The Labor Relations Unit will distribute the BARGAINING CONCEPTS FORM to human resource managers around April 3, 2006. This form requests information about proposed agency bargaining concepts. This process provides agencies the opportunity to identify problem areas in their collective bargaining agreements (CBAs) and to propose solutions. It also allows agencies to suggest revisions and additions to their contracts. Agencies will have until May 31, 2006 to return the completed forms to the Labor Relations Unit.

Any state supervisor who has a concern with an area of bargaining should raise the concern through the appropriate management chain of command. If you do not receive a form by April 7, 2006, and would like to contribute to this process, please contact your Agency's Human Resource Department. It is not appropriate for management service to address bargaining concerns directly with public employee unions or bargaining unit members. It is also inappropriate for union members to assist with completing the Bargaining Concepts Form. These are confidential forms intended to assist management in preparing for the 2007-2009 collective bargaining negotiations.

ARBITRATION & CASE SUMMARIES

by Mike Halpern
State Labor Relations Manager

DHS vs. SEIU Local 503, OPEU

In the Matter of the Arbitration Between SEIU Local 503, OPEU and the State of Oregon, Department of Human Services (Arbitrator, Janet L. Gaunt; January 31, 2006)

DHS did not violate the DAS/SEIU collective bargaining agreement when it contracted out certain bargaining unit work since the Union's alternative proposal did not provide "quality" equal to or greater than the "quality" of the DHS proposal. The Union's proposal involved much greater risks to DHS than did the DHS proposal. It was reasonable for DHS to conclude that there was less risk utilizing experienced contractor personnel rather than in-house staff under the circumstances. The in-house staff would require extensive and complex training to perform the work in question and many might fail to attain the required level of proficiency. The work in question, moreover, was large in scope and critical to the agency's mission. There was also a risk to DHS regarding the projected staffing level if the work.

Facts: Because of the large amounts being paid to Oregon, the Department of Human Services (DHS) is required to use a Medicaid Management Information System (MMIS) to administer the federally funded Medicaid program (about two-thirds of the 9.3 billion dollar DHS budget comes from federal funding, two-thirds of which comes from the federal Medicaid program). The current MMIS was implemented in 1982 and designed for a maximum of 116,000 eligible clients. By 2002, the State's Medicaid clients numbered in excess of 400,000.

In 2000, pursuant to legislative authorization, DHS initiated a project to determine the best way to modernize the MMIS. After conducting extensive research and analysis, and receiving input from the federal government, DHS adopted an alternative which included contracting out the new system's operations and maintenance. Pursuant to Article 13 of the DAS/SEIU collective bargaining agreement, DHS provided a feasibility study to the Union which included contracting out the design, development and installation of the new MMIS, as well as its operations and maintenance. The Union chose not to object to the State's contracting out the design, development and installation work; it did, however, object to the proposal to contract out the operations and maintenance. The DHS feasibility study indicated that forty-four employees would be displaced if the new MMIS operations and maintenance were contracted out. The Union, pursuant to Article 13, submitted an alternative proposal which called for the operations and maintenance work to remain an in-house function.

Section 2 of Article 13 provides: "If the Union's proposal would result in providing quality and savings equal to or greater than that identified in the management plan, the Parties will agree in writing to implement the Union proposal."

In June, 2004, DHS notified the Union that it had decided to proceed with contracting out both the design, development and maintenance of the new MMIS, as well as its subsequent operations and maintenance.

Question Presented: Did DHS violate Article 13 of the DAS/SEIU collective bargaining agreement when it contracted out operations and maintenance of the replacement MMIS?

Discussion and Ruling: The Arbitrator initially addressed the State's contention that Article 13 did not apply to the work in question. Article 13 applies to "work performed by bargaining unit members." The State took the position that such work only refers to work presently and currently being performed by bargaining unit members. In this case, argued the State, since the work currently performed by the bargaining unit members is significantly different from the work envisioned in the contracting out plan, the work to be contracted out is not bargaining unit work covered by the requirements of Article 13. The Union disagreed with this characterization and, instead, argued that the work being contracted out should be considered bargaining unit work under Article 13 if it would be assigned to employees

(DHS ARBITRATION Continued from page 2)

in the Information Systems Specialist classifications (all DHS ISS positions are included within the SEIU bargaining unit).

Based on evidence presented at the hearing, the Arbitrator found that "… if the new MMIS operations and maintenance were to be done in-house, it would be performed by individuals in the ISS job classification." What will change, noted the Arbitrator, "… is the complexity of the work and the knowledge base required to perform it…." But, continued the Arbitrator, "… the broad, generic nature of the work will remain the same." On the other hand, explained the Arbitrator, "There is also no dispute that the DHS employees presently working on the [existing] MMIS are not currently capable of performing work on the new MMIS. (Citations to the record.) The change in the MMIS system is so substantial that Article 13 can plausibly be read as not becoming applicable." The Arbitrator concluded that since each side has offered a plausible way of applying the contract provision in question, an ambiguity which requires interpretation exists. In reaching her interpretation that the Union's position should prevail on this point, the Arbitrator found from the evidence presented that (1) the intended scope of the contract provision was not specifically discussed at the bargaining table and (2) that the parties' past practice supported the Union's interpretation.

The Arbitrator next turned to the question of whether contracting out the operations and maintenance of the new MMIS violated Article 13. The Union and State presented conflicting evidence on the cost savings issue. The Arbitrator, however, rather than resolving the parties' conflicting positions on this issue, chose to focus on the parties' proposed staffing levels: "I have chosen to focus on that issue because it impacts both quality and savings. For example, even if [a state witness] is incorrect and there really would be a small net savings from the Union's alternative plan, that savings would be eliminated if the staffing on which it is based were found unacceptably low."

Citing Article 9, the Management Rights article, the Arbitrator explained that the State, "… has retained the right to exercise discretion, so long as management acts in good faith for reasons that are not arbitrary or capricious." It would, concluded the Arbitrator, "… clearly be a reasonable exercise of discretion" for the State to consider "risk" in judging the merits of a proposal; "I agree with the State that risk is an element of quality that DHS managers were clearly entitled to consider."

In light of the State's position that the Union's proposed staffing level "posed an unacceptable risk," the Arbitrator examined the parties' staffing projections. DHS concluded that a minimum of 50 technical workers would be required if the operations and maintenance work were to be performed in-house. The Union's proposal projected 32 employees. Comparing the two figures, the Arbitrator noted, "If 50 in-house employees represent a minimally necessary number, then any savings in the Union's plan clearly disappears." The State's evidence on the required staffing level included DHS's own experience as well as the experience of other states which had replaced their MMIS and were maintaining the new systems in-house. Reviewing this evidence, the Arbitrator concluded: "The testimony of DHS witnesses left this Arbitrator convinced that [DHS] had a reasonable basis for assuming a staff of at least 50 employees in the ISS classification would be needed if the new MMIS were to be maintained in-house."

Turning to the Union's evidence on this issue, the Arbitrator found that "The Union's staffing of just thirty-two … technical employees was not nearly as justifiable." She continued: "The Union had no research showing any other state that was supporting a new technology MMIS using just thirty-two people." Rather, the Union, "… simply based its staffing level on the number of DHS employees it believed had been maintaining the [old] MMIS system. The record indicates the number of positions actually supporting the [old] MMIS was greater than the Union calculated." In addition, explained the Arbitrator, the Union's assumption that the new system could be maintained by the same number of personnel assigned to maintain the old system, "… ignores the substantial differences between the two systems. The new MMIS was going to be broader in scope … [encompassing] major subsystems that had not historically been supported by DHS employees. That alone would have an impact on staffing." A private consultant who testified on behalf of the State supported the State's conclusion: "… I think that it would be a tremendous risk to the State to assume that the [same number of] people doing the current technology could now support the new system."

The Arbitrator next reviewed the evidence regarding the contractor staffing level used by the State in its projection. In arriving at its projection, the State had considered the contracting staff used by other states that had outsourced

(*DHS ARBITRATION Continued from page 3*)

their MMIS operations and maintenance and used the highest reported figure, twenty-one. DHS witnesses "persuasively" testified that, among other reasons, the lower contractor (as opposed to in-house) staffing level resulted from the greater experience of the vendor's employees in supporting the new technologies and the fact that vendor employees working for other states with similar new technologies would be available to the DHS contractors for problem solving and emergencies. The Arbitrator concluded that, "The record supports the number of contractor personnel that [the State] used in [its] feasibility study."

Other "significant risks" arising from the Union's alternative proposal were also, noted the Arbitrator, "persuasively established" by DHS witnesses. This included the need for speculation as to how many of the current DHS staff would attain an acceptable level of proficiency after training on the new technologies, which involved new hardware, new software, new system architecture, new applications, new data structures and a change from procedural to object-oriented programming. The State presented evidence that less than fifty percent of its existing programmers would succeed in making the transition. With contractor staff, noted the Arbitrator, "… the State could require minimum qualifications … that would ensure a high level of skill [on the new technologies] at the outset."

The Union argued that the risks associated with having to train existing employees are outweighed by their organizational knowledge, experience with DHS clients, commitment to public service and relationships within the agency. Moreover, it asserted, "… contracting out is not risk free." The State, however, presented evidence that it had considered the risks and had researched the experience of other states. That research indicated that there had not been significant contractual issues with outside vendors performing this work. The Arbitrator also pointed out that "With an outside vendor many risks can be guarded against by obligations written into the ultimate contract."

In the end, explained the Arbitrator, "DHS managers had to decide which presented the greater risk: (a) using workers who had no prior experience maintaining an MMIS system based on such different technology, but extensive experience delivering services to DHS clients, or (b) using programmers with no prior experience delivering services to DHS clients but extensive experience with the InterChange MMIS that would serve as the basis for the new MMIS in Oregon. This relative risk had to be judged in light of the size of the MMIS replacement project and its critical nature." As a witness for the State testified, "[The MMIS] is the heart of our Medicaid operation. … [I]f I was having heart trouble and wanted to have heart surgery, who would I want to go to? I would want to find the best heart surgeon in town that has done this a number of times. … We cannot take a chance." The Arbitrator concluded: "For a project this large and critical, it was entirely reasonable for DHS to conclude that there was less risk utilizing experienced contractor personnel over inexperienced and only recently trained in-house staff. … the Union's alternative proposal involved much greater risk than management's plan …. The quality of the alternative proposal was therefore not equal, and accordingly no obligation arose under Article 13 to implement the Union's plan." ■

HELPFUL HINT

What is "Bargaining Unit Work" for Purposes of Contracting Out?

The State's obligation to perform a feasibility study under Article 13 of the DAS/SEIU Collective Bargaining Agreement is triggered if the State is contemplating contracting out "work performed by bargaining unit members" (when the contract in question would exceed $30,000 annually or would displace bargaining unit members). In the DHS arbitration, the issue of whether the work being contracted out was "work performed by bargaining unit members" was addressed by the Arbitrator as a question of arbitrability (*i.e.*, if the work was not bargaining unit work, there was no need for an arbitration, since Article 13 did not apply). The Arbitrator found that the work in question was, indeed, bargaining unit work, and went on to address the merits of the competing proposals submitted by DHS and the Union on the contracting out issue.

The Arbitrator's decision on the arbitrability issue is significant, since agencies with SEIU-represented employees contemplating contracting out work need to consider this decision when making a determination whether the requirements of Article 13 apply.

(HELPFUL HINT Continued from page 4)

In the DHS case, the State took the position that the work envisioned in the contracting out plan was not bargaining unit work because it would be significantly different from the work currently performed by DHS bargaining unit members. The Union disagreed with the State's position and instead argued that the work being contracted out should be considered bargaining unit work under Article 13 if it would be assigned to employees in the Information Systems Specialist classifications if performed in-house (since all DHS ISS positions are included within the SEIU bargaining unit). The Union argued that this approach should be used even if employees in these classifications would require extensive and complex training before they could perform the work in question. The Arbitrator agreed with the Union on this issue, finding that the complexity of the work and the knowledge base required to perform it would change, but the broad generic nature of the work would remain the same. Since the work to be contracted out would be assigned to employees in ISS classifications if performed in-house, and since all ISS classifications are included within the SEIU bargaining unit at DHS, the work in question was "bargaining unit work" under Article 13. ■

Employment Department vs. SEIU Local 503, OPEU

In the Matter of the Arbitration Between the State of Oregon, Employment Department, and SEIU (Arbitrator, Timothy D. W. Williams; January 23, 2006)

The Grievant exhibited over time a repeated pattern of responding to the Employer's attempts to correct her performance problems with angry, argumentative and combative communications, including yelling, use of profanities and over-talking her supervisor. This repeated misconduct justified the Employer's loss of trust in the Grievant and constituted just cause for her discharge.

Facts: The Grievant was employed as an Administrative Specialist 2 with the Department of Employment's Office of Administrative Hearings. This position required her to review proposed orders prepared by administrative law judges for general format, case information and proper exception language.

On September 9, 2004, the Grievant spotted what she thought was a quotation error in an Order issued by an administrative law judge (ALJ). When she tried to contact the ALJ, she was told by his assistant to wait until the ALJ returned to the office the following Monday to request authorization to correct the quote. The Grievant believed this to be a suggestion rather than a mandate. The Grievant then approached another ALJ, not connected with the matter, and requested authorization to alter the Order. When the other ALJ agreed that changes might be necessary, the grievant took this to be authorization to alter the Order, which she did.

Upon his return, the ALJ who had written the Order expressed his dissatisfaction with the Grievant's failure to follow the instruction of his assistant to wait until his return. Following this communication, the Grievant forwarded the string of e-mail correspondence regarding this matter (which included the draft Order as an attachment to one of them) to her home computer. A subsequent meeting with the Grievant's supervisor to address the issue, "… was very emotional and did not go well." On September 24, a pre-dismissal letter was delivered to the Grievant. The letter pointed out three problem areas: 1) removal of confidential information from the Employment Department [which had to do with forwarding the e-mail string to her home computer], 2) modification of the body of a proposed order when her task was just to prepare it for publication, and 3), providing false and misleading statements during the dismissal process. The letter went on to charge the Grievant with having "railed against verbal and written direction" and having placed the Employer "in the untenable position" of having an employee with whom it has "irreconcilably lost trust."

Question Presented: Did the State have just cause to discharge the Grievant?

Discussion and Ruling: The Arbitrator initially noted that since this matter involves the Grievant's discharge for just cause, the employer has the burden of proof on the just cause issue. As to the charges, Arbitrator Williams explained that, "… while the letter of dismissal sets forth in some detail the charges around the violation of confidentiality, the question of dishonesty and the inappropriate modification of the substance of the proposed order, those three problems are only incidental to the primary concerns over a continuing pattern of hostility (railing) whenever the

(EMPLOYMENT ARBITRATION Continued from page 5)

Employer attempted to address performance problems." As such, the Arbitrator focused on the evidence in support of the charge that, "… the Grievant's disruptive and combative behavior had led to an irreconcilable loss of trust."

In reviewing this evidence, the Arbitrator chose to use a preponderance of the evidence standard: "… this Arbitrator has regularly determined in prior decisions that where discharge relates to questionable circumstances that might make it difficult for the employee to find new employment (drug abuse, sexual harassment, theft, etc.), to sustain the discharge, the employer must establish by clear and convincing evidence that it had just cause to terminate employment. The matter in the instant case involves performance related issues which generally do not fall into the category which requires the higher standard of proof. Therefore, the standard used, in this case, is a preponderance of evidence."

Reviewing specific instances involving the Grievant's responses to management when she was addressed about the appropriateness of her conduct, the Arbitrator concluded: "Having carefully reviewed the evidence, the Arbitrator is convinced that the Employer has presented a preponderance of evidence to establish that the Grievant had developed over time a pattern of responding to any attempt to correct performance problems with a highly inappropriate, usually very angry response. … the Grievant did have a pattern of 'railing' against her employer when confronted with problems and … those railings involved launching counterattacks based on the Grievant's unique and self-serving perception of the situation." Responding to the Grievant's assertion that management had "turned against her," the Arbitrator noted that, "Yelling, using profanities and over talking her supervisor, who demonstrated during his testimony to be a very mild mannered person, is simply unacceptable, whatever the reason."

The Arbitrator, moreover, found that the Employer was justified in concluding that the Grievant had demonstrated by her conduct that she would never conform her behavior to acceptable standards: "The number of prior disciplinary events and the continuing problem of a combative reaction leads the Arbitrator to conclude that there was at the time of discharge no reasonable basis to believe that she is likely to change this behavior. Thus the Employer's conclusion that trust was irreconcilably broken is supported by the evidence."

Addressing the specific charges against the Grievant, the Arbitrator found that the second (inappropriately modifying the order) was proven to the extent that she did not have authority to unilaterally make substantive changes to the order (though she did have authority to correct typos and other "obvious mistakes"). However, the charge regarding breach of confidentiality was "extreme and unreasonable" since the conduct in question was most likely inadvertent (the Order having been an attachment to an early e-mail in a string of messages). This charge was, in the Arbitrator's opinion, a case of "piling on." The Arbitrator nonetheless concluded: "While the Arbitrator found that the Employer overstated (piled on) in stating the charges against the Grievant, he additionally found that the Grievant's angry reactions to the Employer's efforts to correct her employment deficiencies were primarily her issue, not blamable to the Employer. Since these reactions had been repeated on more than one occasion and since the Grievant had multiple instances of prior discipline, the Arbitrator concluded that the just cause standard was not violated when the Grievant's employment was terminated." The grievance was thus denied. ■

ERB - Jackson-Graves vs. State of Oregon

Marilyn Jackson-Graves vs. State of Oregon, Department of Justice, Division of Child Support (ERB Case No. MA-11-05; January 23, 2006)

The Employment Relations Board found that it lacked jurisdiction to hear an appeal from an employee removed from management service since the employee was still in her trial service period when removed.

Facts: On January 4, 2005, the Appellant began working in a management service position with the Department of Justice (DOJ). Prior to that time, she had been a regular status classified employee at DOJ. Pursuant to ORS 240.570 (3) and DAS Personnel Division rules, the Appellant was required to serve a six-month trial service in the management service position. Prior to its expiration, the trial service period was extended for three months, to October 3, 2005. On September 30, 2005, DOJ removed the Appellant from the management service position and returned her to her former

(ERB SUMMARY Continued from page 6)

classified position. She then filed this appeal, alleging that her removal from management service was in violation of ORS 240.570 (3). In response, DOJ filed a motion with the Employment Relations Board (ERB) on the grounds that the ERB has no jurisdiction over the Appellant's removal since it occurred during her trial service period.

Question Presented: Does the Employment Relations Board have jurisdiction to hear this appeal?

Discussion and Ruling: ORS 240.570 (3) provides:

> *"A management service employee is subject to a trial service period established pursuant to rules of the Personal Division under ORS 240.250. Thereafter, management service employee may be disciplined by reprimand, salary reduction, suspension or demotion or removed from the management service if the employee is unable or unwilling to fully and faithfully perform the duties of the position satisfactorily."*

After this statute was enacted, the ERB issued a declaratory ruling regarding its jurisdiction over management service removals which take place during the trial service period (*In the Matter of the Petition of the Executive Department, State of Oregon, for a Declaratory Ruling*, Case No. DR-8-85, 8 PECBR 8271 (1985)). In that case, the ERB found that the statute, "… did not provide for an appeal of a removal from management service except for those employees who had completed trial service." This decision was subsequently upheld by the ERB in *Taylor v. State of Oregon, Department of Corrections*, Case No. MA-4-00 (May 2000).

In response to the Appellant's argument that state policies 70.000.01 and 70.005.05 (pertaining to management service discipline, dismissal and removal) overrule the *Executive Department* decision, the ERB cited state policy 40.065.01 – which pertains to trial service periods for management service and classified unrepresented employees. This policy, explained the Board, specifically provides for appeal rights only for classified unrepresented employees, but does not include those same rights for management service employees.

Since the Appellant was still in her trial service period when she was removed from management service, the Board has no jurisdiction over her appeal. The appeal was therefore dismissed. ■

NOTES FROM JUSTICE

by The Labor and Employment Section
Department of Justice

EMPLOYEE UNION-RELATED COMMUNICATIONS

In 2005, the Employment Relations Board ("Board" or "ERB") issued a trio of cases concerning the scope of a public employer's rights to restrict employees' communications on union-related topics. Although the cases arose out of SEIU's unsuccessful attempt to organize employees at the Oregon Judicial Department ("OJD"), the principles apply to public workplaces in general.

The first case, issued in March, involved the efforts of an OJD employee in the Coos County courthouse to encourage other unrepresented employees to participate in the organizing effort.[1] The employee's job duties took him to both floors of the courthouse, and he often engaged in social conversations during his travels. When he expanded his conversations to include urging other employees to attend union meetings, some employees complained to management. One afternoon, the employee was in a section that was not his own, speaking to others individually and in groups about a union meeting that evening. After he tried to persuade a woman who said she was unable to come to change her mind, she stood up and left her desk. In an exchange that led to a finding of an unfair labor practice ("ULP") against the OJD, a nearby supervisor walked over to the employee and told him that he couldn't "talk about that [the union] in the office."

[1] *SEUI v. State of Oregon, Judicial Department*, Case No. UP-3-04, 20 PECBR 864 (March 2005).

(NOTES FROM JUSTICE Continued from page 7)

The supervisor later reported the exchange to the county trial court administrator, who had a discussion the next day with the employee. This discussion led to a second finding of a ULP against the OJD. The administrator told the employee he had received two complaints about harassment by union organizers and spoke to him about the interaction of the day before. He did not discipline the employee or tell him he could not discuss the union on work time. However, he did tell him he should not engage in planned conversations about the union, going desk to desk making planned stops to talk to people.

SEIU filed an ULP complaint alleging the OJD had violated ORS 243.672(1) in these incidents by forbidding employees to talk about union-related issues during work time but allowing them to discuss other nonwork-related topics during work time. In finding for SEIU, the Board reviewed and re-affirmed prior statements of its concerning employer restrictions on employee communications. When a public employer limits its employees' communications about union or labor relations issues, the limitations must be "narrowly tailored" and cannot unduly infringe on employees' protected rights to engage in union activities. **In particular**, **a rule that prohibits union-related speech or distribution of union-related materials in nonwork areas or on nonwork time is presumed to be invalid.** The presumption can be rebutted if, for instance, special circumstances exist that necessitate the rule in order to maintain production or discipline and the employer's interest in light of the special circumstances is greater than the employees' interest in participating in union-related speech. **On the other hand, a rule that prohibits union-related speech and distribution of materials in working areas or during work time is presumed to be valid. The presumption can be rebutted by showing the rule either was discriminatorily promulgated or enforced.** Thus, essentially, if and only if an employer prohibits its employees from discussing all nonwork-related or personal matters on work time, then it can prohibit discussion of all union-related topics as a subset of nonwork-related matters.

In this March case, the Board found that the OJD's employees in Coos County were entitled to engage in union-related conversations so long as such conversations did not interfere with their work, since that was the standard the OJD applied to other nonwork-related or personal conversations. Also, the Board found that, since the OJD did not have any "rule barring planned and systemic contact between its employees," it could not bar any such contact in the context of union-related discussions. The Board noted that employees' organizing activities in the workplace are subject to reasonable employer control, stating that an employee who "spends excessive time talking with fellow employees on any nonwork-related subject on work time" or "causes significant disruption in the workplace" may be instructed to stop doing so. The Board also observed that "[p]ublic employees, not public employers, are responsible for telling union supporters that they do not wish to be approached." Thus, an employer should not try to "shield" its employees from protected union activity, even if some employees find such activity unwelcome. The employer may intervene only to prevent disruption of work or actual harassment of employees, such as if someone makes a pro-union statement that involves a threat of physical harm against fellow employees.

In the second OJD case, issued in September 2005, the Board found that it was not a ULP when the state court administrator sent an e-mail to all employees instructing them not to use the "reply all" option when responding to mass e-mails.[2] The administrator noted that using the option was generally inefficient because it tied up the electronic communication system and caused staff to waste time on unnecessary messages. SEIU filed a ULP complaint alleging that the e-mail violated ORS 243.672(1).

In analyzing the situation, the Board reiterated the presumptions discussed in the March case about the validity or invalidity of employer rules on employee communication, because e-mail differs from speech in that it involves the use of equipment to communicate. However, as with other methods of communication, if the employer has a rule regulating union-related e-mail, the rule must be applied in a non-discriminatory fashion.

Looking at the facts of the September case, the Board found that the OJD applied its rule forbidding the use of the "reply all" function to both work and non-work times. The Board held the rule was valid with respect to both work and non-work times because it was not promulgated in response to actual or anticipated union activities, it was not discriminatorily enforced, and regular use of the "reply all" function within the OJD would be inefficient. Further, the Board responded to SEIU's argument that the OJD's using its own e-mail system to inform employees about the union

[2] *SEUI v. State of Oregon, Judicial Department*, Case Nos. UP-11- 04, 21 PECBR (September 2005).

(NOTES FROM JUSTICE Continued from page 8)

was discriminatory unless the union was also allowed to use the system. The Board stated that it does not compare union activities to “legitimate employer business-related activities” in determining whether or not a policy is discriminatory. Instead, the proper inquiry is “whether the policy (a) places more or different restrictions on union activities than it does on other personal, nonwork-related activities, or (b) was adopted for the purpose of restricting union activity.” The Board also noted that the union did not contend it lacked other means of communicating with the employees. The Board dismissed the union’s complaint.

The third OJD case, issued in October 2005, involved two separate ULP allegations.[3] ERB dismissed both allegations, finding that the OJD had not violated ORS 243.672(1) either by (1) telling an employee she could not use the OJD e-mail system in connection with union organizing efforts, or by (2) directing employees not to discuss union issues at paid staff meetings. SEIU has appealed the finding concerning the e-mail issue.

In looking at the e-mail issue, the Board carefully examined the evidence concerning the types of e-mail messages that were or were not allowed by the OJD. The OJD’s general equipment policy, which included e-mail, was that e-mail should be used for business purposes only. The policy specified two narrow exceptions, one allowing some personal use during nonwork time and the other, a narrower exception, allowing some personal use during work time. In no situation did the policy allow using e-mail for economic benefit or for “personal lobbying, soliciting, recruiting, selling or persuading, for or against, commercial ventures, products, religions, or political causes or organizations.” In the particular message at issue, an employee in Multnomah County invited another employee to a meeting on the unionization effort. The second employee read the e-mail during the workday and reported it to the Multnomah County trial court administrator. The administrator believed that the e-mail violated the OJD’s provisions against seeking a financial benefit or soliciting for outside organizations, and he told the employee who sent the e-mail not to do so again.

From the evidence presented, the Board found that the administrator had not been applying the OJD’s policy in a discriminatory fashion. The Board stated that its ruling looked not at the OJD’s policy per se, but only at the administrator’s interpretation of the policy in the one particular incident. In evaluating the administrator’s interpretation, the Board apparently regarded the e-mail incident as falling within the parameters for work-time communications. Here, it phrased the rule for such policies as being that if an employer allows personal use of equipment, such as computers for e-mail, then “it may not restrict uses related solely to union activities.” The Board found implicitly that the administrator allowed some personal use of e-mail but not personal use that involved seeking a financial benefit or soliciting for outside organizations, whether in the context of the union or of charity drives or of selling cookware. The OJD did allow e-mail to be used for Governor and Department-approved charity drives, as well as for “team building” activities, and treated these uses as work-related, a characterization the Board accepted.

In the second issue, concerning communications at staff meetings, the Board was unanimous in concluding that the Department did not commit a ULP when it directed employees not to discuss union issues at the meetings. The OJD’s rule regulated union-related speech during work time, and as such was presumptively reasonable unless discriminatorily enforced. The Board found that any discussion of nonwork-related topics at the staff meetings was infrequent. Thus, there was no showing that union-related speech was being discriminated against. As in the e-mail portion of the case, the Board regarded discussion such as the planning for nonmandatory social gatherings outside the workplace as “team building,” and hence related to work.

In sum, in these three OJD cases, ERB re-affirmed and developed its prior caselaw concerning when a public employer can place restrictions on employees’ union-related communications. **Thus, a rule prohibiting union-related use of employer equipment, distribution of union-related materials, or union-related speech in work areas or during work time is presumptively valid, BUT this presumption can be rebutted by showing that the rule was discriminatorily promulgated or enforced. Similarly, a rule prohibiting union-related use of employer equipment, distribution of union-related materials, or union-related speech in nonwork areas or during nonwork time is presumptively invalid,** but this presumption may be rebutted in certain circumstances. It is therefore the best practice to treat union-related communications among employees in the same manner that you treat other, similar types of personal communications. For instance, if your agency’s policies prohibit using e-mail for

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financial benefit or for soliciting or recruiting for causes or organizations, you should enforce the policy evenhandedly. If you admonish employees for sending e-mails on union activities, you should also do so if they are sending e-mails, say, inviting others to parties where goods will be sold.

If your agency is considering a change to its rules on employees' union-related communications, please contact the Labor and Employment Section for advice on how to construct rules that are in accord with the applicable statutes and caselaw.

Contract Application Question:

SEIU Article51 - Limited Duration

Scenario:

An employee in a permanent regular status Office Specialist 2 (OS2) position in Coos Bay accepts a Limited Duration (LD) appointment in Eugene. The LD appointment ends in 20 months. At the end of the 20 months there are no vacancies in Coos Bay or Eugene in the OS2 classification.

Question:

Does the employee...

(a) get return rights to Coos Bay, double-filled in an OS2 (prior class) position, then a layff ensues, or

(b) get returned to an OS2 position in Eugene and then a layoff ensues.

Answer:

B - They would get returned to an OS2 position in Eugene and then a layoff would ensue.

Article 51 - Limited Duration, Section 4(d), states in part, "...employees are entitled to rights under the layoff procedure starting from the prior class within the 'NEW Agency' (Emphasis added). We interpret this to mean the employee's layoff rights are where the limited duration is located, regardless of whether it is in a "NEW" Agency or old (prior) Agency.

EXAMPLE: If this scenario happened in the Employment Department, the employee would have return rights to an OS2 position in the Employment Department's Eugene geographic area (Article 70.K, Section 2). The Eugene geographic area includes Albany, Eugene and Springfield. Therefore, Employment could first place this person in a vacancy that mangement intends to fill in that geographic area. If no vacancy exists, management may choose to doublefill a position. Lastly, management may initiate a layoff after placing the person into their prior OS2 classification.

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