

MANAGEMENT *Insight*

A NEWSLETTER ON EMPLOYEE RELATIONS
FROM THE LABOR RELATIONS UNIT

HUMAN RESOURCE SERVICES DIVISION, DEPARTMENT OF ADMINISTRATIVE SERVICES

OCTOBER 2003

ITEMS OF INTEREST

MANAGEMENT INSIGHT NOW AN ONLINE PUBLICATION

Beginning with this issue, the Management Insight will be available solely as an online publication posted on our website. To facilitate distribution to state executive and management service employees, notice of the posting will be sent to all HR managers for distribution to all supervisory and management employees. We also encourage agencies to make hard copies available to those supervisors and managers who do not have Internet access.

FOCUS ON SELECTED SEIU CONTRACT CHANGES

E-mail, Contracting Out, Discipline and Discharge, Grievance and Arbitration Procedure, Limited Duration Appointments, Layoff and Reclassification

The new SEIU contract, which became effective October 1, includes revisions to 24 contract articles. Here is a brief analysis of significant changes to seven of these revised articles.

Union Rights (use of Agency e-mail systems) – Union representatives and SEIU-represented employees may now use Agency e-mail systems to communicate about Union business provided that a number of conditions are followed. These conditions include: use only during an employee's non-work time; compliance with Agency policies applicable to all users (not inconsistent with this article); use which does not incur any additional Agency costs, including printing costs; and use which does not adversely affect or hinder the performance of Agency computer systems for Agency business.

Certain uses are absolutely prohibited. These include advocating or soliciting for or against any political candidate, ballot measure, bill or law; initiating or coordinating

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strikes, walkouts, work stoppages or activities violating the contract; and use of false, unlawful, offensive or derogatory statements against any person, organization or group of persons (including profanity, sexual content, character slurs, threats, and rude or hostile references to race, marital status, age, gender, sexual orientation, religious or political beliefs, national origin, health or disability).

Generally, e-mail communications are limited to messages between SEIU-represented employees and managers, within their Agency, and messages between the Union and Agency managers or Agency represented employees. However, communications across Agencies is permitted in three instances: Union bargaining team members may communicate among themselves by Agency e-mail for purposes of contract negotiations; members of DAS-recognized, multi-agency labor/management committees may use Agency e-mail systems to communicate among themselves; and members of the Union's Board of Directors may communicate among themselves by Agency e-mail. The revised article also allows employees to access links to SEIU's website during their non-work time.

Special rules apply to group e-mails (defined as messages sent simultaneously to more than five people). Such e-mail communications are limited to plain or rich text formats and to no more than approximately one page in length. Such messages shall not include attachments or contain graphics (except for the SEIU logo). Finally, recipients of such communications shall not use the "Reply All" function.

Other provisions include clauses affirming an Agency's right to control its e-mail system and to monitor e-mail use without prior notice, a clause permitting employees to forward e-mail messages to their home computers, and a hold harmless agreement from the Union. It should be noted that, while Agencies retain the right to control their e-mail systems and to develop e-mail use policies applicable to all users, neither of these rights allow Agencies to prohibit SEIU-represented employees from using the state's e-mail system in a manner consistent with the conditions enumerated in the revised e-mail article.

The revised article also permits DAS to appeal a continuing violation of the e-mail provisions to arbitration, after providing notice of an initial violation to the SEIU Executive Director.

Contracting Out – In instances where a contractor is required to hire state employees displaced by contracting work out, eligible employees so hired will be placed on

Agency layoff lists and, at the employees' discretion, on a secondary recall list. A new Letter of Agreement, effective January 1, 2004, provides that, when a feasibility study is required, the Employer will count 80% of an affected employee's straight time wage rate when comparing the two plans if the contractor's wage rate is lower.

Discipline and Discharge – Copies of pre-dismissal and dismissal notices will now be provided to Union Headquarters in Salem within five calendar days of their issue. Violation of this provision will not void the disciplinary action in question. New language clarifies that the Union (rather than the employee) has the right to appeal dismissals and disciplinary actions within 30 days of the action's effective date.

Grievance and Arbitration Procedure – New language allows the Union to expand on the original elements and substance of a grievance during the initial 30-day filing period at Step 1 or 2 (whichever is the appropriate step for initial filing), provided that the grievance is properly filed and there has been no grievance response from Agency management. At Step 2, the Union is permitted to add other relevant articles to those previously listed as having allegedly been violated.

A new provision also mandates that the Union steward of record be granted leave with pay to attend an Employment Relations Board or arbitration hearing regarding a grievance (but no overtime, travel expenses, penalty or premium pay).

Limited Duration Appointments – Last biennium's Letter of Agreement is incorporated into the contract (with changes). New language reduces from two years to 17 months the period of employment required before new limited duration hires employed for workload needs are granted layoff rights.

Agencies are now required, in collaboration with DAS, to monitor the utilization of limited duration appointments for workload reasons. Agencies are to provide a summary report to DAS, Budget and Management and to the Union every six months. SEIU will be provided monthly lists of all limited duration appointments in SEIU-represented positions, including the reason for each such appointment.

Layoff – Employees may now prioritize their layoff options (rather than having to make a single selection). The time period for affected employees to notify Agencies of their layoff options has been increased from five to seven calendar days. The new language allows employees to identify and prioritize up to three classifications in lower salary ranges for demotion.

Reclassification – The Agency or Union can now ask for reconsideration of a Reclassification Appeals Committee decision on the grounds that the initial decision was based on incorrect or incomplete information. New language also grants the Union designee on the Reclassification Appeals Committee paid release time during his or her scheduled workday to participate in the appeals process.

NEW SECONDARY RECALL RIGHTS FOR AFSCME-REPRESENTED EMPLOYEES

With signing of the 2003-05 labor agreements, AFSCME-represented employees will have a new benefit available to them in the event they are laid off. The state has, for the first time, agreed to a statewide procedure granting secondary recall rights to AFSCME-represented employees. When employees are laid off, they will not only have recall rights to their classification in their own agency, but they may also have a right to be called for vacancies in their class in other AFSCME-represented bargaining units.

The Secondary Recall List is an inter-agency layoff list. It consists of regular status employees in good standing who (1) have been separated by layoff from AFSCME-represented positions in AFSCME Central Table Agencies and/or the Department of Corrections, and (2) have elected to be placed on lists for specific geographic locations. After exhaustion of the Agency Layoff List for a specific classification within a geographic area, the Secondary Recall List will be used to fill positions within a specific classification and geographic area until the secondary list is exhausted. The term of eligibility for the Secondary Recall List is two years from the date of layoff. Employees appointed to positions from a Secondary Recall List will serve a trial service period which, in most instances, will not exceed three full months.

Look for detailed procedures in the new AFSCME collective bargaining agreements, which will become effective upon signing.

NEW LABOR CONTRACTS WILL BE POSTED TO LRU'S WEBSITE

Copies of all the state's 2003-2005 labor contracts will be accessible through the DAS-HRSD website. To access the new contracts, go to <http://www.hr.das.state.or.us/lru/lr.htm> and click on Collective Bargaining Agreements. Each of the new contracts will be posted as they become available after union ratification and signing.

FATE OF PROPOSED OVERTIME REGULATIONS UNCLEAR

The U.S. Department of Labor (DOL) has proposed significant revisions to the Fair Labor Standards Act (FLSA) regulations concerning overtime pay exemptions. These revisions are aimed at simplifying, clarifying and streamlining the so-called "white-collar" exemptions, which have become badly outdated since they were originally established in 1938. The duties tests were last modified in 1949, while the salary basis test has remained essentially unchanged since 1954.

The proposed regulations were published in the *Federal Register* on March 31. In July, the House narrowly defeated (213 – 210) an amendment to an appropriations bill which would have effectively killed the proposed regulations. A similar amendment came up for a vote in the Senate on September 10 and, unlike the House, the Senate passed the amendment (54 – 45) as part of the appropriations bill. Now the two chambers will attempt to work out their differences in a joint conference committee. President Bush has threatened to veto the appropriations bill unless the amendment regarding the proposed regulations is eliminated. Prior to the Senate vote, the DOL stated that it hoped to issue final regulations by the end of this year or early in 2004.

So... what's the debate all about? The FLSA's overtime provisions require, in general, that covered employees receive additional pay for working in excess of 40 hours in a workweek. This overtime compensation is calculated at a rate of not less than one and one-half times the "regular rate" of pay and is based on hours actually worked—not including sick or vacation days.¹ In general, employees who qualify for one of the white collar

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¹ The FLSA sets a nationwide minimum standard for overtime (and minimum wage rate) which employers are free to exceed. Negotiations with public employee unions have resulted in a number of provisions in many of the state's collective bargaining agreements which exceed FLSA-mandated minimums. For instance, many of the state's collective bargaining agreements use hours *paid* (which generally would include sick and vacation leave) as opposed to hours *worked* for calculating contract mandated overtime pay. Many also call for overtime for employees working more than a specified number of hours in a day (the FLSA has no daily overtime rate).

exemptions are not owed overtime for working more than 40 hours in a workweek.²

Among other changes, the proposed regulations would make all employees earning less than \$22,100 per year (or \$425 per week) eligible for overtime pay, regardless of job duties. The DOL estimates that this change alone would increase the number of workers eligible for overtime nationwide by 1.3 million. Conversely, the proposed regulations would establish, for the first time, a special exception for “highly compensated” employees. This streamlined exemption would apply to employees paid at least \$65,000 annually. It also would require that they perform office or nonmanual work and one or more of the job duties required for the executive, administrative or professional exemptions.

Under the proposed regulations, an employee would still have to meet both the duties and salary basis tests to qualify for an executive, professional or administrative exemption. For the duties tests, the proposed regulations would eliminate the current long and short tests and substitute a single “standard duties” test with a single minimum salary level of \$425 per week. As a result of this change, current limitations on the amount of nonexempt work which an exempt employee may perform would be removed. The duties tests for all three of the white collar categories would also be modified by dropping the current requirement that an exempt employee exercise “discretion and independent judgment.”

One of the proposed changes to the professional exemption would likely affect a number of state employees. Currently, FLSA regulations require that a “learned” professional employee possess knowledge of an advanced type in a field of science or learning “customarily acquired by a prolonged course of specialized intellectual instruction and study...” The new regulations, however, provide that such knowledge or learning may be acquired by advanced academic studies *or* through an “equivalent combination” of academics and work experience. This change would likely result in an increase in the number of state employees qualifying for this overtime exemption.

Another change that would likely affect a number of state employees concerns the administrative exemption. This

proposed change would substitute the requirement that an administrative employee hold a “position of responsibility” in place of the eliminated exercise of discretion and independent judgment requirement. A “position of responsibility” is defined by the proposed regulations as either (1) performing work of substantial importance or (2) performing work requiring a high level of skill or training. Duties of substantial importance would include formulating, interpreting or implementing management policies; providing consultation or expert advice to management; making or recommending decisions; and analyzing and recommending changes to operating practices.

One of the proposed changes to the executive exemption might also impact state employees. The “long” executive exemption duties test requires that executive employees have authority to hire or fire (or have particular weight given to their recommendations regarding hiring or firing). Currently, however, most state managers qualify for the “short” duties test, which does not include this requirement. The proposed regulations would eliminate the short and long tests and substitute one streamlined test which would include the current short-test requirements plus the hiring-firing requirement from the current long test. As a result of this change, currently exempt managers who do not have hiring or firing authority (or have particular weight given to their recommendations regarding hiring or firing) would no longer qualify for the executive exemption.

In addition to changes to the duties tests, the proposed regulations would also modify a number of the salary basis provisions. A significant change for state employees in this area is one which would permit exempt employees to receive disciplinary suspensions without pay for one or more full workdays. Current regulations limit exempt employee disciplinary suspensions without pay to one or more full workweeks. The proposed regulations would also reduce the possible impact of an isolated salary basis violation stemming from an improper salary deduction.

² Many of the state’s collective bargaining agreements also contain provisions exceeding this FLSA provision by mandating that FLSA-exempt employees receive hour-for-hour time off for working overtime.

About the Management Insight...

The *Management Insight* is produced periodically by the Labor Relations Unit, Human Resource Services Division, Department of Administrative Services, and is distributed to Executive and Management Service employees of the State of Oregon. Back issues and a cumulative articles index may be accessed through the HRSD website, www.hr.das.state.or.us. Material covered in this newsletter may be reproduced without special permission. Please credit the *Management Insight*, DAS, LRU.

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

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FROM THE HR MANAGEMENT AND CONSULTATION SECTION

STATEWIDE OUTPLACEMENT SERVICES AND RESOURCES

Nancie Young has been named to succeed Mary Jo Sikorra as HRSD's Statewide Layoff Coordinator. Nancie will continue the program's mission, which is to provide outplacement services to laid off state employees and to coordinate layoff resources on a statewide basis. Services are also provided for employees demoted in lieu of layoff.

An important aspect of this program is linking agencies needing to place laid off employees with agencies having positions to fill. Agency HR departments have been doing an excellent job notifying the HRSD Outplacement Services Program of vacancies available for laid off workers.

Future outplacement services will be tailored to fit the nature and extent of any prospective reductions in the state's workforce. During the last round of layoffs, services included an outplacement assistance referral process; presentations by professionals from various areas which proffered information to laid off employees on available resources and possible options; monthly agency layoff coordinator meetings; and the utilization of a labor/management steering committee to disseminate information to employees and to assist in placement efforts.

The Layoff Resource Information website may be accessed at www.hr.das.state.or.us for information about outplacement services and resources available through the HRSD Program, as well as links to other websites offering layoff-related resources and information. In addition, you may contact Nancie Young by phone at (503) 373-7062, or by e-mail at nancie.j.young@state.or.us. Finally, if you know of any state employees who were laid off or demoted in lieu of layoff who have not yet enrolled in the program, please encourage them to contact Nancie or to visit the program's website.

ARBITRATION AND CASE SUMMARIES



In the Matter of the Arbitration between the State of Oregon, Dept. of Transportation, and SEIU, Local 503, OPEU

(Arbitrator, Sylvia Skratek, Phd.; January 14, 2003)

The grievant was demoted to a position which requires greater accountability and involves less autonomy than his previous position. The Arbitrator found this demotion to be an appropriate employer response to legitimate concerns it had regarding the grievant's "excessive independence." The conduct which gave rise to these concerns included failure to follow a lead worker's directive and using a state vehicle and identification to gain a personal advantage from an ODOT contractor.

Facts: The grievant (Employee) began working for ODOT in September 1996. At the time of the incidents in question, he was an Incident Response Specialist and a member of a COMET Responder Crew. His duties included regular direct dealings with private towing companies in connection with the removal of disabled and abandoned vehicles. His position gave him the authority to indicate a preference for a towing company in a situation that required the towing of a vehicle.

On January 8, 2001, the Employee engaged in a conversation with a co-worker during which he questioned the legality of his personal car having been towed two days before. His lead worker, who overheard the conversation, directed the Employee not to go to the towing company in a state vehicle on state time. Later that same day, the Employee (dressed in his ODOT COMET shirt) drove his ODOT vehicle to the towing company during a break in his work schedule. After parking his vehicle on a side street, he spoke with the towing company's owner, who recognized him as a COMET driver. During the conversation, the Employee questioned the legality of his personal car's having been towed. At the conversation's conclusion, the owner gave the Employee a refund check

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for fifty dollars. The Employee later told a co-worker about the refund, and the co-worker reported this fact to the lead worker.

After an investigation by ODOT, the Employee was notified that he was demoted from his COMET position.

Question presented: Was the Employee disciplined for just cause?

Discussion and Ruling: The Arbitrator began her discussion by noting that she would first examine the question of proof of wrongdoing, which is the employer's burden of proof. Since the union disputed ODOT's assertion that the Employee had been advised by the lead worker to refrain from going to the towing company, the Arbitrator analyzed the evidence regarding this issue. In finding that the Employee had been so advised, the Arbitrator found the lead worker's testimony—that the Employee "... looked directly at him and it was clear to him that [the Employee] had heard the directive"—highly credible. The lead worker's testimony, moreover, was consistent with an e-mail he had sent to an ODOT HR analyst shortly after the incident, consistent with ODOT investigatory interview notes, and corroborated by the testimony of one of the Employee's co-workers. There was also, observed the Arbitrator, "... no evidence or testimony presented at the hearing that indicated that [the lead worker] had any bias, motive or interest in the outcome of this matter." Contrasting with the lead worker's testimony, the Arbitrator found that the Employee's statements, "... have evolved from being preoccupied and '[the lead worker] may have said that' to 'I don't remember' to outright denial that [the lead worker] ever advised him not to go to the tow company using a state vehicle on state time. His representations have evolved in a manner that is more favorable to him the further he is removed from the incident." As such, the Arbitrator found that she, "... has no choice but to find [the Employee's] testimony at the hearing to be less than credible."

The Arbitrator next turned to the question of the propriety of the Employee's actions. In response to ODOT's proof that the Employee was informed of its policies regarding public service ethics and conflicts of interest on June 30, 1999, the Employee cited a note from his physician dated March 20, 2001, which stated: "It would not be reasonable to expect him to recall rules given to him in June 99, especially considering his state of mind after his wife's sudden death." The Arbitrator, however, replied that she, "... might have given [the Employee] some leeway on the rules and policies if the incident in this matter had not occurred a year and a half after his wife's death." The

physician's note, moreover, "... does not alleviate him of his responsibility to his Employer." It was, furthermore, a reprimand which the Employee had received from ODOT for his personal use of a state vehicle which had prompted the June 1999 review of ODOT's ethics and conflicts of interest policies and rules. The Employee also received an ODOT memo on October 8, 1999, which prohibited personal use of state vehicles.

The Arbitrator found that the Employee had an obligation to adhere to the key elements of ODOT's ethics and conflicts of interest policies. These include avoiding actions that create even the appearance of a conflict of interest; avoiding personal use of department resources for personal or private purposes; not accepting gifts, other than "token" gifts, in the course of employment; and avoiding actions that create even the appearance of using a position for personal gain or private benefit.

Despite these obligations the Employee, noted the Arbitrator, "... was fully aware that the [towing] company was an ODOT vendor yet he visited the company on state time using a state vehicle and wearing a portion of the clothing that identified him as a Responder ... Although [the Employee] may never have asked [the towing company's owner] directly for a refund on his towing bill, it was clear from [the owner's] testimony that the refund was based in part on the fact that [the Employee] was an ODOT Responder." The Arbitrator concluded that the Employee's behavior was inappropriate and that ODOT has therefore met its burden of proof on the issue of wrongdoing.

Turning to the penalty issue, the Arbitrator next addressed the appropriateness of the level of discipline administered. In doing so, she noted, an Arbitrator, "... should not substitute his/her judgment for that of an employer unless the employer has acted unfairly given the circumstances of the case." In this case, the circumstances of the case support ODOT's conclusion that, "... it could no longer depend on [the Employee] to adhere to ODOT's established standards." The Employee, in this case, "... had ignored a prior discipline on the personal use of a state vehicle and had ignored a directive from a lead worker not to use the state vehicle on state time for personal business. He parlayed the ODOT uniform into his private affairs for personal financial gain. The Employer shaped its disciplinary action to address its legitimate concerns of [the Employee's] excessive independence causing problems for the Employer. By moving him out of the COMET position, the Employer alleviated its concerns regarding his activities. The move has placed [the Employee] into a position with more accountability and less autonomy without a reduction in salary. Although the

Union argues that the top of [the Employee's] current pay range is lower than the range he was on thereby affecting future earnings and benefits on those earnings, the leniency shown by the Employer through demotion rather than termination is appropriate given the circumstances of this case. The Arbitrator will not substitute her judgment for that of the Employer."

Concluding that the Employee was disciplined for just cause, the Arbitrator dismissed the grievance.

In the Matter of the Arbitration between the State of Oregon, Parks and Recreation Department, and SEIU Local 503, OPEU

(Arbitrator, Catherine Harris; May 11, 2003)

The grievant, a seasonal park ranger, was dismissed for repeatedly making obscene and sexually explicit gestures, using profane language, making derogatory and demeaning comments to and about her co-workers and ignoring multiple requests from her co-workers to stop this behavior. The Arbitrator found the misconduct to be of such a serious nature that dismissal was appropriate despite the absence of progressive discipline. The inappropriate behavior constituted a breach of trust by an employee in a largely unsupervised position of authority. The grievant's refusal to admit wrongdoing and lack of judgment (which included use of profane language and making sexually explicit gestures in front of a co-worker's fourteen-year-old daughter), establish that she could no longer be trusted to responsibly perform the duties of a park ranger.

Facts: The grievant (Employee) began working for the Oregon Parks and Recreation Department (OPRD) in 1991, as a Conservation Aide. From 1997 through 2001, she worked as a Seasonal Park Ranger 1. After unsuccessfully competing for two full-time OPRD positions, the Employee allegedly became disappointed and angry with her co-workers and what she perceived as a sexually discriminatory "good ole boy" system which had prevented her from advancing. During the 2000 season, a number of the Employee's co-workers complained to management that she was threatening to kill herself and other employees, and that they were afraid to be around her. She was placed on administrative leave and referred to an EAP counselor for a fitness for duty assessment. The counselor found that she appeared to be at low risk for harm toward herself or others and released her to return to work. The counselor also recommended

mediation and training for her and her co-workers, but the recommendations were never implemented. The Employee was, instead, continued on administrative leave for the remainder of her season and given two "letters of concern" regarding her, "...intense and aggressive behavior, which made other staff feel uncomfortable and threatened which, in turn, created low morale in the work environment." The Employee was also advised that the letters of concern were not disciplinary and would not be placed in her personnel file. After being rehired for the 2001 season, "[t]he record amply reflects that [the Employee] was dissatisfied with ... management ... and still angry about what had happened to her during the previous season." At the arbitration hearing, the testimony of seven of the Employee's co-workers included the allegations that she repeatedly made negative, derogatory and vulgar comments about male employees while mimicking male masturbation (on one occasion, purportedly, in front of a co-worker's fourteen-year-old daughter); repeatedly used extreme profanity; voiced "a continuous stream" of negative comments to co-workers about other co-workers; ignored repeated requests by her co-workers that she stop her negative and profane comments and vulgar gestures; and repeatedly demeaned and humiliated her co-workers. According to the testimony of a park volunteer, the Employee used vulgar language and simulated male masturbation on six or eight occasions, while explaining why she could not get promoted.

The agency initiated an investigation after receiving written complaints about the Employee's conduct from three of her co-workers, the teenage daughter of a co-worker and a park volunteer. After pre-dismissal proceedings, the Employee's position was terminated.

Question presented: Was there just cause for the Employee's dismissal?

Discussion and Ruling: The Arbitrator began her discussion by noting that "Few discipline cases present such a clear choice between conflicting interpretations of the same events. On the one hand, if the [Employee] is to be believed, there was an elaborate conspiracy by co-workers, visitor/volunteers, and even a correctional staff (from another department) to destroy her once promising career. On the other hand, if the State's witnesses are to be believed, the [Employee], still angry about her failure to advance and her referral for a fitness for duty examination, persisted in a pattern of inappropriate conduct which dated back to the 2000 season." To determine which of these characterizations is correct, the Arbitrator evaluated the credibility of the witnesses presented by the State and the Employee.

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While three of the State's witnesses had reason to harbor possible bias against the Employee, the remaining five State witnesses had no apparent basis for potential bias. In fact, one of these latter witnesses was "friendly" with the Employee outside of work. His testimony was "particularly damaging" to the Employee's case, "...i.e., when he testified that her foul language and obscene gestures were confined to the work place and did not occur during the time they spent off-duty." Neither he, nor the correctional officer who also testified against the Employee, "... had any ascertainable motives for fabricating testimony detrimental to the [Employee's] interests." As to the Employee's testimony, "... her perfunctory denials were not convincing. The mechanical paragraph by paragraph denials of the charged conduct lacked substance and detail." For instance, while the Employee admitted making mock masturbation gestures during 2000, she denied subsequently engaging in such conduct without offering any explanation for her alleged change in behavior (such as anger management class, a change in feelings towards the agency, "or that she had some sort of epiphany regarding the inappropriateness of her actions"). The Employee, moreover, presented "[n]o explanation ... as to how so many witnesses could consistently report hearing the same statements and witnessing the same sexual gestures..." Finally, the Employee's misconduct went beyond "shop talk" profanity. Rather, "the use of profanity herein by the Employee was directed toward specific individuals in order to diminish and demean and as an outlet for the [Employee's] anger. As such, this type of profanity has no place in any civilized work place, much less in a parks system, where the professional image of a park ranger sets the tone for employees and visitors."

Turning to the appropriateness of the level of discipline assessed, the Arbitrator addressed the Union's argument that as a long-term employee with no history of prior discipline, the Employee should have received progressive discipline rather than dismissal: "The Union's argument erroneously assumes that irrespective of the type and severity of the offense, an employee is entitled to progressive discipline under [the collective bargaining agreement]. To the contrary, the Agreement provides only that, '[T]he principles of progressive discipline shall be used when appropriate....' " (Emphasis in original.) It is, moreover, "... well settled that certain offenses are of such a serious nature that progressive discipline is neither required nor appropriate." A common thread in such serious offenses is that they are, "... so damaging to the employment relationship that the employer can no longer rely on the employee to serve its interests." Furthermore, "... the offenses herein were also a breach of trust by an employee in a largely unsupervised authority position....

Having lacked the judgment to refrain from obscene language and gestures in front of a fourteen-year-old child, the [Employee] can no longer be trusted to responsibly perform the duties of a park ranger." Reinstatement, moreover, is not a viable option, since the Employee demonstrated no willingness to modify her conduct at the hearing. Instead, she "... was still refusing to take responsibility for her conduct, or to acknowledge any wrongdoing."

Accordingly, the Arbitrator found just cause for the dismissal and denied the grievance.



HELPFUL HINT...

Going straight to dismissal

When may an agency dismiss a represented employee for inappropriate conduct without first going through the progressive discipline process? In general, the misconduct must be serious enough that immediate dismissal is a reasonable and foreseeable response to the offense (*i.e.*, "the punishment fits the crime"). The level of discipline utilized by the agency for similar offenses in the past should generally support the invocation of immediate dismissal for the conduct in question. The Public Employee Collective Bargaining Act, however, provides an exception to this general rule by noting that, "Some misconduct is so egregious that no employee can reasonably rely on past treatment for similar offenses as a justification or defense to discharge or other discipline" (ORS 243.706 (1) (a)). While each case will depend on the facts presented, the following are some examples of conduct which might justify immediate dismissal: Conviction of a job-related crime; conviction for off-duty conduct which is connected to a job-related activity (*e.g.*, assault by a caregiver; theft or forgery by an employee who occupies a position requiring trustworthiness); serious threats to the safety of co-workers or supervisors; bringing a loaded firearm to work; serious harassment or assaultive behavior; insubordination so serious that the agency cannot allow the employee to remain on the premises; abuse of a client; stealing from the employer; falsifying important employer documents; intentional destruction of valuable employer property; release of statutorily confidential information; serious mistreatment of a member of the public; and lying about matters that go to the heart of the employee's job or the agency's mission. If you have a question about the appropriate level of discipline to utilize in a given circumstance, your agency's personnel department is the place to seek advice.

Washington County Police Officers' Association and Paul Cuff vs. Washington County
(Oregon Supreme Court, 335 Or 198, 63 P3d 1167 (2003).)

An arbitrator's award which ordered the reinstatement of a public employee, who admitted to possessing and using marijuana while off duty, was found to be unenforceable by the Oregon Court of Appeals, on the grounds that it failed to comply with a statute's public policy requirements. The Oregon Supreme Court reversed the Court of Appeals decision, finding that the statute relied on by the Court of Appeals does not clearly define a public policy requirement.

Facts: The employee in question was hired by Washington County in 1990, as a deputy sheriff. Because of his duties, which included driving a bus to move inmates from site to site, he was required by federal law to submit to periodic drug testing. In January 1999 the deputy tested positive for marijuana. After first telling the medical review officer that the positive result was due to an herbal sleep medication he was taking, the deputy later admitted to his co-workers that he had, indeed, smoked marijuana while off duty, nearly every day for a month before the test. The matter was referred to an internal investigator who came to the conclusion that the deputy had illegally bought and consumed marijuana while off duty, but that there was no evidence that the deputy had reported to work while under the influence of marijuana. The investigator's report also concluded that the deputy had lied about the reason for the positive test results and he had made statements about his marijuana use to the investigator inconsistent with the drug test results.

The county terminated the deputy despite an article in the applicable collective bargaining agreement which provided that a first positive drug test would not result in discipline as long as the employee participated in an employee assistance program or drug counseling. The Washington County Police Officers' Association grieved the discharge and the matter was submitted to arbitration. The arbitrator found for the association and determined that the county had violated the collective bargaining agreement. The arbitrator ordered the deputy reinstated, but did not award back pay (in effect, reducing the penalty for the deputy's misconduct from termination to a seven-month suspension without pay). The county refused to implement the arbitration award, asserting that it violated ORS 243.706 (which provides that an arbitration award ordering reinstatement of a public employee must comply with

public policy requirements as clearly defined in statutes or judicial decisions). The association then took the matter to the Employment Relations Board (ERB), asserting that the county's refusal to implement the arbitration award was an unfair labor practice. The ERB found in favor of the association and the county sought judicial review. The Oregon Court of Appeals ruled in the county's favor, finding that the arbitration award was contrary to public policy enunciated in ORS 181.662 (3) and therefore unenforceable. The association appealed the Court of Appeals decision and the Oregon Supreme Court allowed review.

Question presented: Whether an arbitration award that ordered the reinstatement of a public safety employee who admitted to possessing and using marijuana while off duty complies with "public policy requirements as clearly defined in statutes or judicial decisions?"

Discussion and Ruling: The Oregon Supreme Court began its analysis by agreeing with the Court of Appeals that ORS 243.706(1) requires that the public policy analysis be directed at the arbitration award itself, not the conduct for which discipline was imposed. As such, the question is whether an award ordering reinstatement of an employee who has purchased and used marijuana and then been dishonest about it fails to comply with some public policy requirements that are clearly defined in statutes or judicial decisions. Failure to comply with such public policy requirements would render the award unenforceable.

Under ORS 243.706 (1), statutes and judicial decisions are the only sources of relevant public policy requirements. ORS 243.706 (1) also provides that such public policy requirements be "clearly defined." Citing the Webster's Third New Int'l Dictionary definitions of "clearly" and "defined," the Court determined that, "... to be pertinent to our analysis, a statute or judicial decision must outline, characterize, or delimit a public policy in such a way as to leave no serious doubt or question respecting the content or import of that policy."

The statute which the Court of Appeals relied on as containing a clear definition of public policy, ORS 181.662 (3), mandates denial or revocation of a public safety officer's certification, after notice and a hearing, upon a finding that he or she had been convicted of violating, among other things, any law involving the unlawful use or possession of a controlled substance. The Court of Appeals, "... concluded that that statute constituted a 'clear statement of public policy against the continued certification of public safety officers who use controlled substances'" However, neither the county nor the

... continued page 10

state ever provided the deputy with notice or a hearing respecting his certification, nor was the deputy convicted of any offense. The question is not, noted the Court, whether or not the employee should continue to be certified. The arbitrator's award, instead, "... addresses the employee's *reinstatement*. But ORS 181.662 (3) (1999) is not a statute about employment or reinstatement. Moreover, and even if the employee's certification were at issue in this case, it does not appear that the employee's certification as a public safety officer has been or could be revoked on the basis of his marijuana use, unless and until he had been convicted of such use. Therefore ... we do not agree that [ORS 181.662 (3)] defined a clear public policy respecting the continued certification of a public safety officer who has *not* been convicted of any offense. *A fortiori*, the statute does not define a clear public policy respecting the separate question of such an officer's reinstatement." (Emphasis in Original.) The statute's scope of application—conviction rather than use—demonstrates that it cannot be relied on as the source of a public policy respecting the facts in this case: "If the legislature meant to express a policy against *use*, rather than *conviction*, it would have been easy to do so. Because it did not do so, we cannot say that the public policy requirement on which the Court of Appeals relied exists at all, much less is 'clearly' defined" (Emphasis in Original.)

Addressing the county's alternative argument that the employee's conduct constituted, "serious criminal misconduct, related to work," (which ORS 243.706 (1) specifically enumerates as an example of a clearly defined public policy that precludes reinstatement) the Court noted that, according to the ERB, the quantity of marijuana involved, "... amounted only to a violation, punishable solely by a fine." Moreover, "... there was evidence at the arbitration hearing that no one in Oregon had been or would likely be prosecuted for a similar offense. Thus, there is no basis in the record for requiring ERB to hold that the employee had engaged in 'serious criminal misconduct, related to work....' "

The Court concluded that the Court of Appeals erred in holding that the arbitration award of reinstatement was unenforceable. As such, it reversed the decision of the Court of Appeals and remanded the case to the Court of Appeals for resolution of the county's other arguments.

On remand, the Court of Appeals, in an opinion filed on May 15, 2003, affirmed the ERB's decision that it was an unfair labor practice for the county to refuse to implement the arbitrator's award.



NOTES FROM JUSTICE



OREGON COURT OF APPEALS OFFERS BROADER DISABILITY INTERPRETATION

In November 2002, the Oregon Court of Appeals, construing Oregon disability statutes as compared to the Americans with Disabilities Act, interpreted Oregon's protections more broadly than rights offered under the ADA. *Evans v. Multnomah County Sheriff's Office* marks a moment of pause for Oregon employers, particularly considering the US Supreme Court's recent willingness to narrow the scope of the federal ADA.

Facts: Scott Evans was a corrections officer in Multnomah County when he required heart valve replacement surgery. As a part of his recovery, Evans's doctor prescribed anticoagulant medication and indicated because of the medication, there was "an increased risk of serious internal or external bleeding or hemorrhage if [Evans was] physically injured." As such, the doctor requested Evans be assigned to work without inmate contact, as inmate contact would substantially increase his chances of being injured.

During recovery, Evans was in a temporary investigator position that had no inmate contact. Eventually, he requested assignment to this position on a permanent basis as an accommodation of his new medical situation. Maintaining that corrections officers needed to rotate through all positions with all duties in order to be qualified, the sheriff refused to make the investigator position permanent. Because Evans was unable to rotate into positions with inmate contact, the sheriff terminated his employment.

Evans sued, alleging a violation of ORS 659A.112, which outlines Oregon’s prohibition against disability discrimination by an employer. The sheriff responded with two arguments in its motion for summary judgment, arguing Evans (1) was not disabled, and thereby not entitled to the ORS 659A.112 protections and (2) even if he was, he was not “otherwise qualified” because he was unable to perform the essential functions of his job, relieving the sheriff from the responsibility of offering an accommodation. The trial court held Evans was unable to perform the essential functions of his job, and granted the sheriff’s motion for summary judgment. Evans appealed to the Oregon Court of Appeals.

Analysis: In evaluating Evans’s appeal of the summary judgment motion, the Oregon Court of Appeals started with the initial question of whether Evans was disabled. Reviewing terminology similar to that of the federal ADA, the court evaluated the definitions of “disabled,” “substantially limits,” and the “major life activity” of “employment.” In determining that Evans presented evidence that he was “substantially limited” in the “major life activity” of “employment,” the court determined, at the summary judgment level, a reasonable factfinder could find that Evans was disabled. Importantly, the definition of employment indicated that an employee would be disabled if he was substantially limited in performing a broad class of jobs. In response, the sheriff argued that Oregon courts were required to follow narrow US Supreme Court precedent in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*. Because ORS 659A.139, known as the “lockstep” statute, requires that federal and state disability protections be construed consistently to the extent possible, the sheriff maintained that the Oregon Court of Appeals needed to turn to *Williams* in this case. The court disagreed, noting that *Williams* was concerned with the “major life activity” of “performing manual tasks.” Even noting the lockstep statute, the cases concerned different major life activities. For purposes of the case, Evans was disabled.

At this juncture, the court turned to the second threshold question: was Evans “otherwise qualified” for his job? The sheriff maintained that the “essential functions” of the job of corrections officer included all duties to which a corrections officer could rotate. In other words, even if Evans’s current assignment did not involve inmate contact, there were positions that required such contact. This, in essence, is what it means to be a corrections officer. Evans, on the other hand, argued that there were a group of jobs within the category of corrections officer that did not require inmate contact. He argued it is from this specific group that the “otherwise qualified” analysis needed to take place. He prevailed.

The court determined that the question had been resolved in *Anglin v. Oregon Department of Corrections*. Noting the public policy statement in ORS 659A.103—to provide for the fullest participation possible of disabled individuals—the *Anglin* court had stated that it would not construe disability analysis to effectively prohibit employees from being “otherwise qualified” to fill their positions. In response, however, the sheriff argued the subsequent passage of the lockstep statute required reference to *Williams* and a narrow interpretation of that public policy statement. The court disagreed. It explained that even considering the lockstep statute, it only required consistency between the federal ADA and Oregon’s protections “to the extent possible.” Because of *Anglin*, the inapplicability of *Williams*, and Oregon’s broad public policy statements favoring disabled employees, the Oregon Court of Appeals held Oregon’s state protections may be broader than those provided by the ADA.

Lessons: In focusing on the positions necessary to determine whether a disabled employee is “otherwise qualified,” Oregon’s broader state protections may require employers to consider the jobs requested by the employee. Even if an employee is unable to perform certain duties, an employer should exercise caution in preventing or prohibiting the employee from filling all other positions in the job classification. As in the above case, there may be jobs within the classification that the employee is “otherwise qualified” to perform.

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LABOR AND EMPLOYMENT SECTION BIOGRAPHIES

Ann Boss, Attorney-in-Charge. Ms. Boss was licensed to practice law in Texas in 1984. Prior to joining the Department she practiced in the areas of employment and business litigation in Texas and Oregon. She has been licensed in Oregon since 1992, and joined the Labor & Employment Section in 1997. In 2002 she was appointed the Attorney-in-Charge of the section. Ms. Boss is past Chair of the Business Litigation Section Executive Committee of the Oregon State Bar, and she served on the Civil Rights Executive Committee of the Oregon State Bar. She was just appointed to the Labor and Employment Section Executive Committee of the Oregon State Bar.

Donna Sandoval Bennett, Assistant Attorney General. Ms. Bennett holds a B.A. and M.A. in Counseling from San Diego State University and received her J.D. in 1990. She is licensed to practice law in Oregon and the District of Columbia. Prior to joining the DOJ's Labor & Employment Section, Donna practiced privately in Portland and was a senior partner in a large Pacific Coast firm specializing in Labor & Employment law.

Jonathan Groux, Assistant Attorney General. Mr. Groux holds a B.A. from Goddard College in Vermont and a Masters from Boston University. He holds his J.D. from Willamette University. For approximately the last four years, he was a criminal prosecutor in Coos County and Klamath County. Prior to that he worked in the private sector doing general practice and personal injury law. He joined the Labor and Employment Section in July of 2003.

Ryan Hagemann, Assistant Attorney General. Mr. Hagemann holds a B.A. in Politics from Whitman College and a J.D. from the University of Oregon School of Law. While at the UO, he served on the *Oregon Law Review*. He joined DOJ in 2001 in the Oregon DOJ Honors Program, dividing his appointment between the Education and Labor & Employment Sections. In September 2003, he joined the Labor & Employment Section full-time.

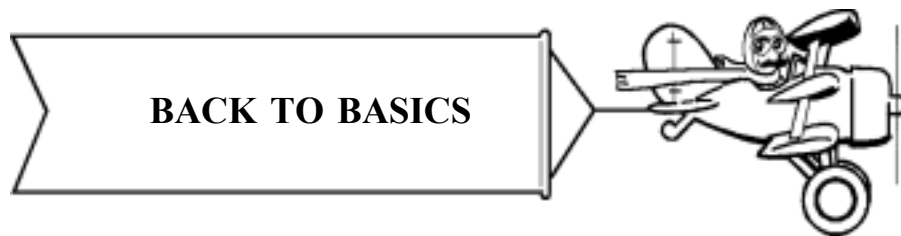
Herbert Harry, Assistant Attorney General. Mr. Harry holds a B.A. in Political Science from University of Hawaii in 1982, a J.D. from the University of Oregon School of Law in 1985 and an L.L.M. in Military Law from The Judge Advocate General's School in 1994. In May 2003 he joined DOJ and the Labor & Employment Section following his retirement as a Lieutenant Colonel from the United States Army Judge Advocate General's Corps where he served in federal labor and employment law assignments.

Josephine Hawthorne, Assistant Attorney General (Ret.). Mrs. Hawthorne graduated from Northwestern School of Law, Lewis and Clark College, in 1976. She joined the Department of Justice in November 1979 and retired June 30, 2003. She is back with the Labor and Employment Section serving as a temporary AAG through December, 2003.

Linda J. Kessel, Assistant Attorney General. Ms. Kessel holds a B.A. in Public Policy, Planning and Management from the University of Oregon, and graduated from the University of Oregon School of Law in 1990. She served two years as a judicial law clerk for Honorable Judge Riggs at the Oregon Court of Appeals, and then developed her labor and employment skills as an associate and shareholder of the law firm of Harrang Long Gary Rudnick in Eugene, Oregon. She joined the Labor and Employment Section of DOJ at the end of March 2003.

Helle Rode, Assistant Attorney General. Ms. Rode joined our section in September 2003. She has worked in private practice and in the public sector. Most recently she was a shareholder in the Portland labor and employment law firm, Bullard Smith Jernstedt Wilson. She is a graduate of the University of Oregon School of Law where she served as Staff Editor of the *Oregon Law Review*.

Tessa Sugahara, Assistant Attorney General. Ms. Sugahara has a B.A. in Anthropology from Dartmouth College and a J.D. from the University of Oregon School of Law. She joined the Department of Justice in July 2000 as an Assistant Attorney General in the Human Services Section. She joined the Labor and Employment Section in November 2001. Prior to her appointment as an Assistant Attorney General, Ms. Sugahara was in private practice in Portland.



FAIR SHARE

In general, *union security* refers to a labor organization's right to require that represented employees pay union dues or other amounts in return for services rendered by the organization. One such arrangement permitted by the Public Employee Collective Bargaining Act (PECBA) is a "fair share agreement," which requires that members of a bargaining unit who choose not to join the union pay an amount to the union for representing them in negotiations and contract administration. (ORS 243.650 (10), (18).)

A fair share agreement is subject to negotiation as part of collective bargaining. The typical fair share provision in a collective bargaining agreement provides that bargaining unit members must either join the union or make fair share payments. ORS 292.055 (5) authorizes a public employer to deduct fair share payments from employee wages and to pay the amounts directly to the union. While the amount of the fair share payment is subject to negotiation between the employer and union, under ORS 243.650 (18) it may equal the amount charged to union members for regular dues and assessments.

Bargaining unit members making fair share payments may object to making such payments to the union on religious grounds. Pursuant to statute, however, an employee making such an objection must pay an amount equal to regular union dues, initiation fees and assessments to a non-religious charity or to another charitable organization which the employee and union mutually agree upon. (ORS 243.666 (1).)

Labor organizations are required to notify all fair share payers that they have the right to object to the union's using their fair share payments for nonchargeable purposes. (*Chicago Teachers Union vs. Hudson*, 475 US 292 (1986).) This right is based on First Amendment guarantees of free expression and association which protect fair share payers from having to contribute to union political or ideological activities which are not germane to or supportive of collective bargaining or contract administration issues.

A fair share agreement may be "deauthorized" pursuant to an election held in response to a petition filed with the Employment Relations Board. (ORS 243.650 (10).) Such a petition must be filed within 90 days of the execution of a collective bargaining agreement containing a fair share provision. It must be accompanied by a statement signed by 30% or more of the bargaining unit employees declaring that they desire to rescind the fair share agreement. If a majority of the votes cast in the election favor deauthorization, the Employment Relations Board will certify the agreement's deauthorization.

Since a fair share agreement is considered to be a "purely contractual right," it is an exception to the general rule that the parties to a collective bargaining agreement must maintain the status quo after the contract's expiration and until exhaustion of the PECBA's dispute resolution process. A public employer is thus not obligated to continue deducting fair share amounts from bargaining unit employee wages after the contract in question expires.

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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 Sue Wilson. Currently, the LRU negotiates and administers 32 collective bargaining agreements with 11 different labor organizations, covering over 25,000 employees in the Executive Branch of Oregon State Government. The LRU also negotiates an agreement with SEIU covering a bargaining unit of approximately 13,000 Homecare Workers. The following is a list of the LRU staff and contact phone numbers for your convenience. The LRU's fax number is 503-373-7530.

Scott Allan, State Labor Relations Manager	503-378-3967
Eva Corbin, Deputy Administrator, LRU	503-378-8321
Craig Cowan, State Labor Relations Manager	503-378-5611
Kevin B. Dull, State Labor Relations Manager	503-378-3138
Michael Halpern, State Labor Relations Manager	503-378-2705
Lois Harrup, Administrative Assistant	503-378-3141
Pamela Murdock, Labor Relations Analyst	503-378-2616
Tom Perry, State Labor Relations Manager	503-378-4201
Cathy Schuh, State Labor Relations Manager	503-373-7608
Jan Weeks, State Labor Relations Manager	503-378-6483