



MANAGEMENT INSIGHT

Employee Relations Newsletter

FEBRUARY 2007

DAS Human Resource
Services Division

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Comments or
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COMMUNICATIONS WITH EMPLOYEES DURING COLLECTIVE BARGAINING NEGOTIATIONS

The state began successor negotiations in November 2006 with AFSCME (American Federation of State, County, and Municipal Employees) and SEIU (Service Employees International Union) in connection with the 31 collective bargaining agreements which cover its represented public employees. One issue which often comes up in relation to these negotiations is the propriety of direct communications between agency management and represented employees concerning bargaining issues.

During contract negotiations, the state and the union designate teams to act as their representatives. Negotiations take place at bargaining sessions between the union and management teams at a chosen site (often referred to as the “bargaining table”). While there is no explicit statutory prohibition regarding communications between management and represented employees away from the bargaining table concerning bargaining-related issues, such communication is problematic at best. At worst, they might constitute a violation of the Public Employee Collective Bargaining Act (PECBA).

The Employment Relations Board has held that it is a violation of ORS 243.672 (1) (e) for management to bypass the bargaining table and to instead bargain directly with employees, rather than with their representatives (see, *Management Insight*, December, 1996, p.4). What constitutes “bargaining,” however, is not always easy to determine. Even seemingly innocent communications between management and represented employees regarding bargaining issues might result in unfair labor practice charges if they are perceived as an “end run” around union negotiation representatives.

Aside from a possible PECBA violation, engaging in direct management-employee discussions away from the bargaining table raises the risk of inadvertent disclosure of confidential state negotiating positions. Such contacts might also send mixed signals to represented employees and the union regarding the state’s interests and positions on bargaining issues, undercut state bargaining proposals and complicate the negotiations process.

Should you have any concerns, comments, or suggestions regarding bargaining issues or bargaining-related communications with represented employees, the best approach is to contact your agency’s human resources department or the DAS labor relations manager handling your agency’s negotiations.



“After the pre-dismissal hearing was concluded, the State amended its charges against the Grievant to state a new, June 3, date of misconduct... ..without a second pre-dismissal hearing.”



ARBITRATION & CASE SUMMARIES

**In the Matter of the Arbitration Between Association of Oregon Corrections Employees and the State of Oregon, Department of Corrections
(Arbitrator, Sherman B. Kellar, Esq.; October 6, 2006)**

A consistent past practice in effect for ten years supported the State’s interpretation of the Collective Bargaining Agreement that employees receiving a 5% differential for “variable relief” duty are not eligible to receive an additional 5% differential for work-out-of-class duty which is assigned while they are on variable relief. The grievance was denied since the Association failed to meet its burden of proof that there was no consistent past practice supporting the State’s contract interpretation.

Facts: The Grievant is a Correction Officer assigned to “variable relief.” Employees assigned to variable relief duty backfill posts in any of the correctional series classifications on all shifts and days off. Pursuant to the Collective Bargaining Agreement (CBA), employees assigned to variable relief receive a 5% differential. The CBA also provides that “Employees receiving [the 5% variable relief differential] shall not be eligible for shift differential or other penalty pay provisions.” (Emphasis added.) While assigned to variable relief, the Grievant was assigned the higher level duties of a Corporal position from October 10 to October 27, 2005. He was not paid the usual 5% work out-of-class (WOC) pay for this assignment

Question Presented: Did the State violate the Collective Bargaining Agreement by failing to pay the Grievant work-out-of-class pay?

Discussion and Ruling: The Arbitrator initially noted that the Association has the burden of proving that the State violated the CBA since the Association is the moving party in the grievance. The “essential question,” continued the Arbitrator, is what the term “penalty pay” in Article 13 of the CBA means; the Association asserts that “penalty pay” does not include WOC differential while the State asserts that it does. Since there is no definition of the term in the CBA and since the parties take different positions on its meaning, both of which “appear to be plausible,” Arbitrator Keller found, “that the language in question is ambiguous.”

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To interpret ambiguous contract language, explained the Arbitrator, "... the past practice of the parties is the most widely accepted process." "This is not surprising" noted the Arbitrator, "since the parties intent is most often manifested by their actions." In this case, the DAS labor negotiator who bargained the initial contract in 1995 containing the language in question, made notes during the negotiations which, "... indicate clearly that his interpretation of the provisions was that turnaround, shift differential and WOC were other penalty provisions." Consistent with this interpretation, Arbitrator Keller found that: "The uncontradicted evidence of the [State's] witnesses was that at no time during the existence of this CBA has the [State] paid WOC pay differential when an employee assigned to variable relief was subsequently assigned WOC to a higher classification." Moreover, continued the Arbitrator, "The Association did not offer any evidence that contradicted the existence of this long standing past practice."

Responding to the Association's argument that it should not be bound by the past practice since it was not aware of it, the Arbitrator reasoned: "Over the past ten years the Association should have come forward and objected to the practice. If they were not aware of it, they should have been, since it affected many people over the time span it has been in effect." In this respect, the current Association leadership is charged with "the neglect of past Association leaders."

The grievance was denied.

HELPFUL HINT:

Past Practice Versus Clear Contract Language

In this case, the Arbitrator found the contract language to be ambiguous and used past practice to interpret the ambiguous provision. If a contract provision is clear and unambiguous, past practice evidence generally may not be used to prove a different meaning. While it is possible for a past practice to amend or modify (as opposed to interpret) clear contract language, this usually requires "very strong proof." (Elkouri and Elkouri, *How Arbitration Works*, 6th Ed., p. 629) In an arbitration between the Oregon Nurses Association and the State (In the Matter of the Arbitration Between Oregon Nurses Association and the State of Oregon Executive Department, October 30, 1984), Arbitrator Timothy D.W. Williams thus stated: "Since the parties intentionally wrote the specific provision into the labor agreement; to raise a past practice to the level of amending that provision, it too must be shown to be intentional."

Reminder:

*In general,
when
reviewing
grievances,
management
may find the
contract
language
to be
ambiguous.
In these
instances,
review your
agency's
past
practice(s)
and consult
with your
Labor
Relations
Manager on
the contract
intent and
interpreta-
tion.*

Labor Relations 2007-2009 Interim Contract Administration Assignments

EVA CORBIN, 378-8321

Deputy Administrator LRU
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- **SEIU:**
 - Central Table (w/ Craig Cowan)
 - Home Care Commission (HCC) (w/ Art McCurdy)

ART McCURDY, 378-3138

State Labor Relations Manager
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- **AFSCME:**
 - Building Codes Division (BCD)
 - Construction Contractors Board (CCB)
 - Dept of Environmental Quality (DEQ)
 - Nurses at Oregon State Hospital (OSH)
- **SEIU:**
 - DHS Non-Institutions
 - Home Care Commission (HCC) (w/Eva Corbin)
 - Public Employees Retirement System (PERS)

CRAIG COWAN, 378-5611

State Labor Relations Manager
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- **AEE:**
 - Department of Forestry (DOF)
 - Department of Transportation (ODOT)
 - Parks and Recreation Dept (OPRD)
- **AFSCME**
 - Dept of Corrections (DOC) Non-Security (w/ Jan Weeks)
 - Dept of Corrections (DOC) Security (w/ Jan Weeks)
 - Adult Parole & Probation Officers
 - Department of Justice (DOJ-OAJA)
- **CIA**
 - Department of Justice (DOJ)
- **SEIU:**
 - Central Table (w/ Eva Corbin)
 - Department of Justice (DOJ)
 - ODOT Coalition:
 - Department of Fish & Wildlife (ODFW)
 - Special Agencies Coalition:
 - Consumer & Business Svcs (DCBS) including Workers' Comp Board (WCB)
 - Dept of Justice (DOJ)

GLENN WEST, 378-3967

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- **AFSCME:**
 - Homeland Security (OEM)
 - Oregon Military Department (OMD)
 - Oregon Youth Authority (OYA-JPPO)
 - Dept of Public Safety Standards & Training (DPSST)
- **IAFF/PANG:**
 - Oregon Military Department (OMD)
- **KFAFFA:**
 - Oregon Military Department (OMD)
- **SEIU:**
 - Human Services Coalition:
 - Employment Department (EMPL)
 - Institutions Coalition:
 - Oregon Youth Authority (OYA)
 - Oregon State Hospital (OSH)
 - Eastern OR Train/Psych Center
 - Special Agencies Coalition:
 - Bureau of Labor & Industries (BOLI)
 - Oregon State Library (OSL)

LABOR RELATIONS 378-3141

- **AFSCME:**
 - State Operated Community Program (SOCP)
 - Physicians at Oregon State Hospital (OSH) and Eastern Oregon Train & Psych Centers (EOTC/PC)
 - Dentists at Dept of Corrections (DOC)
 - DOC Security and Non-Security (w/Craig Cowan)
- **AOCE:**
 - DOC-Strike Prohibited (OSP,MCCI,SFFC,OSCI)
- **ONA:**
 - State Operated Community Program (SOCP) & E. Oregon Train & Psych Ctrs (EOTC/PC)

MIKE HALPERN, 378-2705

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- **AFSCME:**
 - Employment Department (EMPL)
 - OR State Fire Marshal (OSFM)

Mike Halpern Continued...

AFSCME

- Oregon Liquor Ctrl Comm (OLCC)
- OSP Support Unit
- **OSPOA:**
 - Oregon State Police (OSP)
- **SEIU:**
 - Special Agencies Coalition:
 - Commission for the Blind
 - Community College & Workforce Development (DCCWD)
 - Dept of Admin Svcs (DAS)
 - Dept of Agriculture (Ag)
 - Dept of Education (ODE)
 - Dept of Veterans Affairs (DVA)
 - Housing & Com Svcs (OHCS)
 - Oregon State Treasury (OST)
 - OR Student Assistance Commission (OSAC)
 - Special Schools (OSB & OSD)
- **STEA:**
 - Dept of Education (ODE)
 - Special Schools (OSB & OSD)

SUSIE HOSIE, 378-2616

State Labor Relations Manager
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- **AFSCME:**
 - Division of State Lands (DSL)
- **SEIU:**
 - Health Related Licensing Boards
 - Health Licensing Office (HLO)
 - Water Resources Dept (WRD)
 - Watershed Enhancement Board (OWEB)

TOM PERRY, 378-4201

State Labor Relations Manager
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- **AFSCME:**
 - Real Estate Agency (REA)
 - Dept of Land Conservation & Dev (DLCD)
- **SEIU:**
 - ODOT Coalition:
 - Department of Transportation (ODOT)
 - Department of Aviation (ODOA)
 - Department of Forestry (DOF)
 - Parks and Recreation Dept (OPRD)
 - Oregon State Fair (OSF)
 - Special Agencies
 - Department of Revenue (DOR)

Labor Relations Update:

Jan Weeks, State Labor

Relations Manager, will be retiring March 1, 2007.

She has worked for LRU for nearly 26 years.

UPCOMING THIS SUMMER:

The Labor Relations website will post all arbitration case decisions to its website.



ABOUT HRSD'S SECTIONS:

Human Resource Management & Consultation

The HR Management and Consultation (HRMC) Section develops and implements the state's workforce management plan; develops and administers HRSD rules and policies; and provides consulting services and technical assistance to agency HR offices.

HR Systems, Services and Audits

HRSD established the HR Audit Program in July 2001 under the authority of State Policy 10.025.01 (pdf), "Audit of Human Resource Management Practices." The purpose of the program is to fulfill statutory obligations under ORS 240.215(2); 240.309(4); and 240.311(1) and legislative direction received during the 2001-03 budget approval process. The HR Audit Program is designed to improve the state's human resource management practices by: 1) identifying areas of noncompliance and providing state agencies with direction on required corrective actions; and 2) identifying best practices and sharing those practices with all state agencies.

Statewide Training & Development Services

Statewide Training and Development Services is committed to increasing the effectiveness of Oregon state government by providing state and local government employees with high quality training that is accessible, affordable, and relevant. Our staff and instructors are dedicated to making your education experiences the best they can be.

Statewide Recruitment Services

Our purpose is to provide statewide leadership in recruiting a skilled, diverse workforce for the state of Oregon. We focus on providing innovative solutions for improving the state's recruitment process, creating and implementing a viable and sustainable succession planning process to provide workforce bench strength, and increasing representation of minority candidates in recruitment pools at all levels.

Labor Relations Unit

The Labor Relations Unit represents the Governor on behalf of all executive branch agencies in collective bargaining. Currently the Labor Relations Unit administers 31 collective bargaining agreements. These cover approximately 27,000 employees in 62 different agencies, boards, and commissions. These employees are represented by 10 different labor organizations and one SEIU bargaining unit of approximately 12,000 home care workers.

Classification and Compensation

Classification and Compensation is responsible for maintaining the State's compensation plan for approximately 40,000 employees in classified, unclassified and management service positions, and is responsible for development and maintenance of the classification system.