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This case arose because the City in response to concerns by police sergeants that they did not want to be supervisors, discussed the eliminating the position of police sergeants or lowering their duties and reclassifying them as senior officers and creating lieutenant positions. When the Association found out about the City’s proposed action it demanded to bargain over it. The ERB conclude that as a result of the Association’s demand the City came up with a second reorganization plan that froze sergeant’s salaries, and that violated subsection 1 (a) by retaliating against the labor organization for exercising their PECBA guaranteed rights. The ERB also ruled that it was not necessary for the employer to follow through on the threat, it was the threat itself that the ERB declared would “naturally deter employees from exercising their protected rights.” However, the ERB found that the announcement of the second reorganization of the plan was not bad faith bargaining and stated:

“This Board does not conclude that this one instance of regressive bargaining is by itself substantial proof that the City engaged in unlawful surface bargaining, however instead we examined the totality of the City’s conduct to determine whether the City bargained in good faith.”

The Board concluded in the totality of the circumstances that the City did not. Finally, the Board concluded that the City violated its duty to bargain in good faith when it entered into a pre employment contract with an officer. The City argued that it had a past practice of doing so, but the ERB stated:

“A pre employment agreement that makes a salary increases a condition of employment for a newly hired worker concerns monetary benefits, a subject that is *per say* mandatory for negotiations.”

The remedy ordered: “Cease and desist from violating the statute.”

Editorial Comment: Perhaps the Association didn't request much else of a remedy. Since the reorganization was complete there wasn't much else for the ERB to order. In addition, they show this officer's wages were probably resolved.

LANE COUNTY ADMITS TO AN UNFAIR LABOR PRACTICE BY VIOLATING THE GROUND RULES DURING BARGAINING

When bargaining with AFSCME, the main courthouse union, the parties had a ground rule that said neither party would issue a press release without notifying the other party first. After three mediation sessions the county issued a press release indicating that it was going to implement its last offer. It subsequently stipulated to an unfair labor practice, admitting that it did not notify AFSCME before it did so, agreed to a fine of \$500, and reimbursed AFSCME for its filing fees.

Editorial Comment: A violation of ground rules can be enforced as an unfair labor practice.

A SCHOOL DISTRICT COMMITTED AN UNFAIR LABOR PRACTICE WHEN IT REFUSED TO RELEASE THE NAME OF STUDENT WITNESSES TO AN INCIDENT WHICH LEAD TO A GRIEVANCE

In this particular case, a bargaining unit member was issued a reprimand for misconduct. The vice principle had interviewed approximately five students in his investigation of the incident. While the district provided summaries of the interviews, it refused to provide the names of the students citing federal and state confidentiality laws for its reasons to do so. The ERB rejected the district's defense and ruled that the district had an obligation to provide names of students to the association which was attempting to evaluate the grievance.

The ERB specifically rejected the idea that releasing the interviews of students violated their federal or state laws concerning confidentiality of student records. It found that this information was not an education record under federal or state law.

INDIVIDUAL COMPLAINTS AGAINST MANAGEMENT POLICY IS NOT A PROTECTED LABOR ACTIVITY

The case of *Eugene Chapter of School Professionals (AFT) v. Ridgeline Montessori Public Charter School*, UP-34-08 (2009), arose because a teacher was upset about the school district's placing a number of teachers on a plan of assistance. The individual teacher called school board members and a superintendent and at one point threatened to

organize a strike. The district later placed the teacher on a plan of assistance and gave her a reprimand for unprofessional conduct and for problems with her communication skills.

The union filed an unfair labor practice complaint alleging that this was in retaliation for protected PECBA, collective bargaining activity. The ERB rejected that contention. The ERB adopted the school's contention:

“... the statements (the teacher) made during this phone call were a reckless and impulsive expression of her own personal opinions about school working conditions and involved no PECBA protected activity... Protected activity does not include strictly individual complaints about working conditions and other protest actions that are unrelated to the activities of the labor organization.” Page 13 of 17 (teacher's name omitted).

The ERB went on to note that a meeting that the teacher had with the district superintendent was to complain about a principal and that was not sponsored by the labor organization. Therefore, participation at the meeting cannot be viewed as participation in activities of a labor organization. Also, in the past the ERB had concluded that an individual decision to engage in a “one-man work to rule” response to the employer's policy was not protected activity because the conduct was not sanctioned by the union. In another case, the ERB has also held that an officer's declaration that “the superintendent is an uneducated moron” was not a PECBA protected statement since it was an individual complaint and was not connected to any action by a labor organization.

Editorial Comment: If you are going to complain about an employer do it through your labor organization.

AN EMPLOYER'S REFUSAL TO CALCULATE DUES DEDUCTIONS AS REQUESTED BY THE UNION CONSTITUTES AN UNFAIR LABOR PRACTICE

The case of *AFSCME v. Hood River County*, UP-11-08 (2009), arose because *AFSCME* asked the county to deduct for all full time employees dues of 1.27% of base salary with a minimum of \$15 and a maximum of \$55 plus an additional \$3. The county's defense was the union's request was too time consuming. The ERB pointed out that statutes make mandatory dues deduction a requirement for all public employers upon request from a public labor organization. The ERB found that the county's estimation of a cost of \$1,200 per bargaining unit member to calculate the monthly dues to be “implausible.” The ERB found that other employers have implemented *AFSCME* new dues structure for far less cost. The ERB stated that the county did not have to rewrite its software but could have “hired someone for a few hours a month to make necessary calculations by

hand.” The ERB also stated that the statute makes no exception for the costs of complying with the union payroll deduction requests. The county was ordered to make the union whole by going back and calculating the correct dues deductions based on the union’s requested formula. The ERB ordered the county to make the payment from its own funds and could not deduct the additional amount from bargaining members’ paychecks or otherwise seek reimbursement.

Editorial Comment: If management would only read mandatory statutes.

A SCHOOL DISTRICT COMMITTED AN UNFAIR LABOR PRACTICE FOR NOT MAKING A GOOD FAITH EFFORT TO OBTAIN COSTS OF HEALTHCARE BENEFITS

The case of *Klamath Falls Education Association v. Klamath Falls City Schools*, UP-27-07 (2009), arose when the union requested costing information from Klamath Schools. The ERB found under the circumstances that the school district did not make a good faith effort to get the information from its various agents of record. The district defense in this matter was that the costing information for past insurance costs was the property of a company who no longer was its agent of record, and therefore it had no obligation to try to get information from this company. The ERB held that the district was required to make a good faith effort to get information that it didn’t have, but was possession of a “related” third party. Here the district had a business relationship with the company and it related directly to the administration of benefits under the collective bargaining agreement.

Editorial Comment: An employer’s duty to provide information cannot be hidden behind an agent.

ERB RULES THAT DALLAS POLICE SERGEANTS ARE SUPERVISORS

In the case of *Dallas Police Assn v. City of Dallas*, UC 007-08 (Feb ’09), the ERB found that Sgts. are supervisors: they assign work, do IAs and can effectively recommend discipline, assign shifts to employees, approve vacation and overtime.

ERB DISMISSES A DUTY OF FAIR REPRESENTATION COMPLAINT

In the case of *Melendy v. SEIU & State*, FR 003-08 (Jan ’09), the ERB dismissed a DFR complaint for the failure to represent an employee in a reclassification of her position and later in the processing of a grievance. The ERB found that the complainant never clearly told the Union that she wanted help with reclassification and the contract permitted

employees to do this on their own. As for grievance, the Union has wide discretion on whether to process one and in this case no abuse was shown.

ERB FINDS THAT LANGUAGE IN A CONTRACT ALLOWS EMPLOYER TO IMPLEMENT A NEW SICK LEAVE POLICY

The case of *AFSCME v. DOC*, UP 017-06 (Jan '09) arose because the DOC implemented a new sick leave policy, which had the potential for discipline and other management action over possible misuse of sick leave. DOC refused to negotiate over the new policy. The ERB noted that in refusal to enter into mid contract negotiation cases there are two possible employer defenses: (1) the contract gives it the right to do whatever it is proposing, or (2) the contract waives the union's right to bargain over a subject. Here the ERB found that # 1 prevails and all the policy contained were details for implementing language in the contract.

Editorial Comment: This must have been news to AFSCME. Here vague language in a contract was held to be sufficient to allow a policy of management monitoring sick leave usage with the potential for discipline being present. However, a union will still be able to grieve whether there is just cause for any discipline that is imposed, or any other punitive action by management over a perceived abuse of sick leave, such as denial of overtime requests etc.

ULPS' MUST BE FILED WITHIN 180 DAYS OF THE EVENT THAT IS THE SUBJECT OF THE COMPLAINT

In the case of *OSPOA v. OSP*, UP 30-07 (Jan '09), the ULP was filed more than 180 days after the act complained about (contracting out work to DOT), so it was dismissed as untimely.

TRI MET WARS

The case of *ATU v. Tri Met*, UP 062-05 (March '09), involved multiple allegations of ULPs by each side against the other. Ultimately the ERB ruled that it's an ULP to pay your witnesses who testify for you more than you pay those who testify for ATU. It's an ULP to refuse to bargain over the impact of a new job description (\$\$\$). It's an ULP to use documents in a disciplinary case when you've previously agreed not to do so.

YES, AN EMPLOYER HAS TO COMPLY WITH AN ERB ORDER TO REMOVE DOCUMENTS FROM A PERSONNEL FILE

Being a bad loser of a previously reported ULP, in the case of *AFSCME v. City of Portland*, UP 7-07 (Jan '09), the City claimed that being forced to remove documents from a personnel file would constitute an illegal destruction of public documents. ERB said that purge does not equal destroy.

EMPLOYMENT RELATIONS BOARD REFUSES TO RECONSIDER ITS DECISION EXCLUDING OREGON STATE POLICE SERGEANTS FROM OSPOA

In the case of *OSPOA v. State of Oregon*, 22 PECBR 717 (2008), the Employment Relations Board dismissed a unit clarification petition filed by the Association which attempted to add sergeants to its bargaining unit. The Employment Relations Board looked at sergeants' participation in the disciplinary process and concluded that their participation had not significantly changed since its previous decision in 2000, which permitted removal of the sergeants from the bargaining unit. The Board stated that:

“Any change in circumstances must be significant... allowing constant challenges to the composition of the bargaining unit would not promote labor relations stability. Further it would impose unnecessary expense on the parties and tax unlimited resources on this agency. This case for example consumed nine days of hearing. Labor peace is best achieved when time consuming litigation over trivialities does not crowd the docket and slow access to this Board for other parties who have legitimate disputes that need to be resolved.” *Id.* Page 746.

On that basis alone the unit clarification complaint was dismissed.

Editorial Comment: Even under the pre SB 750 standards for being a supervisor, OSPOA would have lost that case.

EMPLOYMENT RELATIONS BOARD RULES THAT YOU CAN'T HAVE TOO MANY SUPERVISORS

The case of *City of Union v. Labors International Union*, 22 PECBR 872 (2008). The City filed a petition to exclude the public works superintendent on the grounds that the position was supervisory. The ERB found that the City only had 7 fulltime employees. The City Manager and the Assistant City Manager was excluded from the bargaining unit. The ERB also found that the so called superintendent “performs the same tasks and works as every other public work employees.” *Id.* Page 885. Dealing with timesheet overtime and days off do not indicate supervisory status because they are routine or clerical in nature. *Id.* The Board noted that it declined to find supervisory status when an employee's roll is “primarily routine and reoccurring in nature”, citing a previous *IAFF* case at 20 PECBR 512 (2003).

MARION COUNTY'S FAILURE TO OBEY ARBITRATOR AN UNFAIR LABOR PRACTICE (ERB AGENT RECOMMENDS)

Marion County refused to reinstate a corrections deputy as ordered by an arbitrator. The Deputy was fired for alleged mistreatment of inmates at the Marion County Work Center. The MCLEA arbitrated her termination and convinced Arbitrator Michael Cavanaugh that her termination was not supported by just cause. Initially the County agreed to bring the deputy back to work (leading her to quit the two jobs she had taken to pay her bills), but then changed its mind and defied the arbitrator's order. The MCLEA filed an unfair labor practices charge with the Employment Relations Board alleging that the County's defiance of the arbitrator violated the PECBA.

After hearing on the ULP, ERB Agent Carlton Grew concluded that the County had violated the PECBA by failing to reinstate the deputy. His proposed order mandates the County to "cease and desist from refusing to comply fully" with the arbitrator's award—that is, put the deputy back to work. The County has filed objections to the Agent's Recommended Order. Anticipating the County's action, the Association also filed objections. No hearing has been set on the Objections.

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EMPLOYMENT RELATIONS BOARD ONCE AGAIN RULES THAT EMPLOYEES CAN NOT BE PUNISHED FOR EXERCISING THEIR RIGHT TO TALK TO ASSOCIATION REPRESENTATIVES ABOUT A POTENTIAL GRIEVANCE

In a case of *Grants Pass Association of Classified Employees v. Grants Pass School District*, (UP-5-07, 2008) an employee began complaining about the District violating its own policy of posting a vacancy for at least 5 days before the vacancy is filled. In this case, the District pre-selected who to transfer to the vacancy. The employee went to the Association with her complaints.

In response the Districts' supervisors got quite upset, transferred the employee and changed the job description of the employee's duties.

The Employment Relations Board (ERB) found that the District's actions taken were a direct result of the employee exercising her statutory rights to talk to her Association

Representative about a potential grievance. In this case, the supervisor had threatened to discipline the employee for going to the Association before talking to the supervisor. For a remedy, the ERB ordered the employee to be reassigned back to her old position, her job duties to be restored to what they were before the District changed the job, and ordered that related documents critical to the employee be removed from her personnel file.

EMPLOYMENT RELATIONS BOARD FINALLY FINDS AN ASSOCIATION REPRESENTATIVE PRIVILEGE

Probably 15 years ago *in dicta*, which means the decision was not relevant to the outcome of the case, the ERB had ruled that there was no Association Rep privilege. Finally, the ERB has ruled otherwise. In the case of *AFSCME Local 189 v. City of Portland*, (UP-7-07, 2008), the ERB ruled that an Association Representative cannot be questioned or disciplined about what a member told it concerning a grievance, which had information relating to it, that the City found to be inflammatory or offensive. The ERB found that the City disciplined the employee because the employee was engaging in protected activity in sending information about potential grievance to the City's Human Resources section of the police department. The City attempted to legitimize its action because the policy manual said that members cannot spread rumors regarding other members. The ERB found that did not "permit the PPB to take adverse action against the (Association) representative because of her protected activity." Page 38.

The ERB also found that the City violated statutory protections when it placed the employee on administrative leave and denied her access to police bureau facilities because she exercised protected rights. The ERB found that the City violated those protections when it ordered the representative to answer questions in an IA about her confidential communications with a bargaining unit member. However, it found that the City did not violate the PECBA when it ordered the representative to answer questions about her communications with a non employee (a former employee who provided information).

Editorial Comment: With the ERB's ruling, it is still important to recognize when interviewing witnesses for a potential grievance that Association members are acting as agents of this law firm. Therefore, attorney-client investigatory privilege and work product privilege will apply to those interviews. AFSCME could not make such a claim and the ERB failed to extend the privilege to interviews of other persons who are not bargaining unit members.

BOARD RULES THAT MULTNOMAH COUNTY COMMITTED AN UNFAIR LABOR PRACTICE WHEN IT VIOLATED THE PUBLIC RECORD'S LAW BY DISCLOSING DISCIPLINE ABOUT EMPLOYEES

The case of *AFSCME v. Multnomah County*, 22 PECBR 444 (2008), arose when a radio station published the names of bargaining unit members of AFSCME who had used

significant amounts of sick leave. The County had released the names and some disciplinary records regarding bargaining unit members.

The ERB stated because the public records law would mandate the release of names of employees and their amount of sick leave use as well as overtime pay that there was no violation of the duty to bargain for the County to comply with the public records law. However, the ERB ruled:

“The County violates this rule (status quo) and changes the status quo if it provides information to a member of the public that the law does not require it to disclose.” *Id.* p. 446.

Looking at another specific case the ERB noted that:

“Discipline regarding the alleged misuse of theft of public property by public employees has by virtue of case decisions become public records due to the public interest in such information.” *Id.* p. 448.

However, when there is no request for employees’ home addresses the ERB did find a violation of the status quo when the County gave the employer’s home address to a reporter. The Board found that when a subject has a “significant impact on an employee’s privacy rights” that an employer is required to bargain about changes in its past practices and policies.

Editorial Comment: It would be appropriate for every client to see whether the employer has a written policy regarding release of public records. If it does so, then a copy of that policy should be sent to us for review. If an employer does not, than general concepts of public records law will apply to a request for information. If an employer attempts to implement a policy regarding public records a client should immediately get a copy of that policy for review to determine whether a demand to bargain should be made over an employer’s action.

A DIVIDED BOARD REINSTATES AN EMPLOYEE BECAUSE OF DUE PROCESS VIOLATIONS

The Employment Relations Board rarely gets involved in disciplinary matters as those are left to the grievance procedure of the contract. However, the *Oregon Education Association v. Willamette Education School District*, 22 PECBR 585 (2008) arose because the contract had expired and did not have an evergreen clause, which would have provided that the contract continued until a new one was negotiated. While the contract was expired, the District terminated a Teacher’s Assistant. Even though the contract had no provision in it dealing with discipline (just cause), it did have due process provisions in it. Two members of the Board ruled that the due process provisions were violated when the District could not prove the employee received actual notice and training on the policy on how to handle out of control autistic students.

Editorial Comment: This is a two to one decision that is likely to be appealed. However, the precedential value for now is significant as the Employment Relations Board has made it clear that not only is it a substantive requirement of the just cause standard for the employer to show the employee understands the rules expected of the employee, but it can also be a due process violation of the standard.

BOARD DECIDES PRACTICAL JOKE DOES NOT JUSTIFY DEMOTION

In the case of *Belcher v. State of Oregon, MA 7-07 (2008)*, a management level employee set up and participated in a joke which ended up humiliating a coworker. However, the employee's supervisor was aware that the joke was going to be performed and approved of it.

Given these facts, it is not a surprise that the Employment Relations Board concluded that there was no justification for removing the employee from management service. The Board also considered other discipline for similar acts of misconduct. The Board reduced the discipline to a one week's suspension without pay.

Editorial Comment: If you are going to go over the line, it certainly helps to have your boss' concurrence in advance.

BOARD CONTINUES ITS POLICY PROHIBITING FRAGMENTED BARGAINING UNITS

The case of *Teamsters Local Union 223 v. Yamhill County and Yamhill County Employees Association, 22 PECBR 459 (2008)* is significant only because the two of three members of the Board are fairly new. In this case, the Board followed previously established anti-fragmentation policies to prohibit the Teamsters from carving the public works employees out of a county wide association.

Editorial Comment: The continuation of this policy will mean that employees who are unhappy that are in large union will continue to be unsuccessful if they attempt to walk out of that union and form a smaller bargaining unit.

BOARD DISMISSES DUTY OF FAIR REPRESENTATION CASE

The complainant resigned his position as a Multnomah County corrections deputy during an IA when there were allegations that the employee had inappropriate relationships with inmates. Later, facts substantiated the employee in fact had become romantically involved with an inmate.

The employee sued both the County and the Association arguing that the Association did not fairly represent him.

In *Wiese v. MCCDA & Multnomah Co.*, 22 PECBR 555, (2008), the ERB noted that the employee insisted on having a personal friend represent him during the IA and spurned the help of an Association Representative. It also noted that the Association told the employee not to take any rash actions, such as quitting.

In the footnote, the ERB also commented that it was virtually impossible for an Association to represent an employee who is not candid with the Association Representatives about the alleged misconduct.

Editorial Comment: This case also reaffirms all the Boards' prior holdings on DFR cases: They are extremely difficult to prove. An Association that acts in good faith will have a very strong defense to these lawsuits.

BOARD RULES THAT CONFIDENTIALLY IS REQUIRED REGARDING INTERNAL INVESTIGATION REPORTS

In this case, *PSU Chapter of the AAofUP v. PSU*, 22 PECBR 302, 503, and 619 (2008), a professor was dismissed by the University, and the Association asked for a copy of the internal affairs investigative report. The ERB had previously ruled that it must be given to the Association and the University appealed to the Court of Appeals. It also requested a stay of the ruling arguing that it would suffer irreparable harm if it had to give up the internal affairs investigation report.

The ERB found no proof of irreparable harm. It ordered the University to give the report to the Association, but ordered the parties to negotiate a confidentiality agreement in good faith that if there were certain individuals that the University could show a valid reason why they should not be given access to the report, that the Association would agree to do so.

Editorial Comment: This is no more than a continuation of previous case law that if an employer has a legitimate confidentiality concern regarding releasing an internal investigation the Association has a duty to negotiate in good faith to try to meet the employer's concerns while at the same time being able to satisfy its duty of fair representation to its members.

BOARD RULES THAT UNION VIOLATED ITS DUTY TO BARGAIN IN GOOD FAITH

In this case, *Tri-Met v. ATU*, 22 PECBR 506, (2008), there was no question that the union's negotiator did not have authority to bind the Union or its members. However, the relevant issue was whether or not the employer was on notice of that lack of authority.

The Board found there were no ground rules requiring ratification before they begin negotiating, nor did the Union ever tell the employer that any agreement reached about meals and rest breaks would be subject to ratification by the membership. Therefore, the Board ruled that the employer could act in good faith expecting that the negotiator did have authority to make a binding agreement.

Editorial Comment: Ground rules are becoming more and more important even if they are not mandatory subjects of bargaining. It is important for any negotiations where membership ratification is necessary that the employer be put on notice of that fact.

EMPLOYMENT RELATIONS BOARD FINDS FAILURE OF THE STATE OF OREGON TO REDUCE THE AGREEMENT OF SETTLEMENT OF A GRIEVANCE TO WRITING TO BE AN UNFAIR LABOR PRACTICE

The case of *Oregon AFSCME v. State of Oregon*, 22 PECBR 236 (2008), arose when parties reached a settlement regarding a grievance and the Department of Corrections refused to reduce the agreement to writing and sign it. The ERB said in order to prove this violation (which is subsection 1(h) of O.R.S. 243.672) that a party must prove that:

1. There was an agreement,
2. The agreement was not contingent upon approval or ratification, and
3. One side refused to agree to reduce the agreement to writing and sign it.

In this case, the Department of Corrections admitted all of those, but claimed that it was without any authority to reduce the agreement to writing based on the Oregon Constitution which requires recoupment of the entire amount of a salary over payment. The Employment Relations Board interpreted State's statutes and the Constitution as not being mandatory and that the settlement was enforceable.

Editorial Comment: This is an unusual case. Most cases arise on a claim that parties never really had a complete settlement of the agreement. Here the State admitted there was a settlement but tried to claim that it was without legal authority to make it.

EMPLOYMENT RELATIONS BOARD RULES THAT AN EMPLOYER VIOLATED ITS DUTY TO BARGAIN WHEN IT UNILATERALLY ADOPTED A SIGNING BONUS AND A HIRING INCENTIVE PAY PLAN

The case of *Northwest Education Association v. Northwest Regional Education School District*, 22 PECBR 247 (2008), occurred when the employer decided to unilaterally implement the two bonus programs. It also tried to raise the defense that it was offering those bonuses to people who were not yet members of the bargaining unit. However, the ERB found that the policy required the new employee to agree to accept the job in order to receive the bonus and that as soon as that contract was made, then the employee was part of the bargaining agreement.

As a remedy the Board ordered the District to cease and desist offering such a policy without bargaining it. The request for a civil penalty was denied.

Editorial Comment: If the employer is allowed to offer wage increases selectively without bargaining them, it has the ability to destroy a labor organization or seriously cripple it.

EMPLOYMENT RELATIONS BOARD RULES THAT PORTLAND STATE UNIVERSITY COMMITTED AN UNFAIR LABOR PRACTICE WHEN IT FAILED TO PROCESS A GRIEVANCE

The case of *Portland State University Chapter of the American Association University Professors v. Portland State University*, 22 PECBR 302 (2008), arose when an employee filed a grievance and also filed an EEOC claim. The University claimed that because the employee was pursuing a remedy through a statutory administrative process, it did have to process the grievance for the same claim. The ERB adopting case law from elsewhere, ruled that just because an employee seeking resolution in a discrimination case under State or Federal law does not give the employer the right to fail to process a grievance on the same issue. In this case, the University's investigative report over the alleged discrimination was also ordered to have to be provided.

ERB RULES THAT THE LEBANON SCHOOL DISTRICT VIOLATED ORS 243.672 (1)(a) WHEN IT DISCIPLINED A MEMBER OF THE ASSOCIATION FOR DIRECTLY CONTACTING A SCHOOL BOARD MEMBER

The case of *Lebanon Education Association v. Lebanon School District*, 22 PECBR 323 (2008), arose because teachers became upset with how a principle was implementing what they believed was District policy. One the teachers contacted a Board member and expressed concern over this. The School Board ended up disciplining the teacher for going outside the chain of command. The ERB ruled that this violated ORS 243.672 (1)(a) because the employees were exercising their right for protected union activity.

Memos that the School Board published trying to regulate how employees exercised their rights as a labor organization were also found to violate the PECBA. The ERB also ruled that the Association did not have to exhaust the grievance procedure before filing an unfair labor practice complaint over these issues. The District was found to have violated the PECBA by refusing to provide information regarding the discipline imposed on the bargaining unit member in a timely manner.

THE ERB RULES THAT AN EMPLOYER WHO TELLS BARGAINING UNIT MEMBERS HOW TO VOTE IN AN UNION ELECTION COMMITS AN UNFAIR LABOR PRACTICE

The case of *Oregon AFSCME v. Department of Corrections*, 22 PECBR 372 (2008), arose when a lieutenant told bargaining unit member that a union representative was “evil” and that employees should vote for someone else in an upcoming election for the union vice president. The ERB declared that a clear violation of the PECBA.

Editorial Comment: Dah!

ERB RULES THAT MULTNOMAH COUNTY COMMITTED AN UNFAIR LABOR PRACTICE BY TRANSFERRING WORK OUT OF A BARGAINING UNIT AND FAILING TO BARGAIN OVER DOING SO

Multnomah County Corrections Association v. Multnomah County, 22 PECBR 422 (2008), occurred when the County decided to transfer work outside of the bargaining unit for the pretrial service program. The ERB found that when it did so, the County did not respond to a timely staff request to bargain over the transfer of work. The work was going to go from the Corrections’ Association to the Parole and Probation unit. The ERB also found that the County was untimely in its obligation to provide information to the Association.

FINAL Editorial Comment: The Employment Relations Board for much of 2007 issued very few opinions due to the friction between various Board members. Two of the Board members have changed, and the two new ones are very experienced former Administrative Law Judges for the ERB, Vicki Stilley Cowan and Susan Rossiter. The result of this is that the ERB will act in a timely fashion to enforce the PECBA. This is something that should occur, but we have not been able to take for granted for a couple of years.

2007

DUTY OF FAIR REPRESENTATION

In January 2007 the Oregon Employment Relations Board (ERB) once again rejected a claim by a union member that her union had breached its duty of fair representation. *Dennis v. SEIU Local 503*, Case No. UP-26-05 (2007).

Dennis was fired from her position at the Oregon State Hospital. Her union filed a grievance, but after review decided not to go to arbitration. Dennis filed a charge against the union for failing to properly represent her with the ERB. The ERB rejected her arguments. Dennis argued that a patient’s computer contained critical exculpatory. However, the ERB ruled that the union was not required to obtain this evidence and noted

that although Dennis could have obtained the evidence for her case before the ERB, she failed to do so. The ERB also rejected her argument that the union should have conducted an additional investigation regarding statements made by a coworker and a patient. Finally, although the union used a formal screening process to decide whether or not to proceed to arbitration, a process involving union staff members and stewards who are not involved with Dennis's bargaining unit, Dennis challenged the screening process as flawed. The Board rejected this argument and noted that although it might be possible to improve the screening process, the record did not indicate that the union's decision was "wholly irrational or arbitrary."

The ERB's opinion includes a detailed statement of an Oregon public employee union's duty of fair representation. Oregon's Public Employee Collective Bargaining Act (PECBA) imposes a duty on labor unions to fairly represent all employees for whom the union is the exclusive representative. The Board explained:

"To establish that a union breached its fair representation by refusing to process a grievance, a complainant 'must present facts which, if proven, would establish that the labor organization had a hostile motive, acted dishonestly, or made its decision not to pursue the grievance without any basis.'"

A union's deliberate actions in processing or refusing to process a grievance may violate the duty of fair representation "if the union acted arbitrarily or in bad faith." In addition, if a union fails to timely file a grievance without excuse, such negligence may violate its duty of fair representation.

The Board stressed that it defers to a union's decision-making to permit unions to be free to act in what they perceived to be the best interest of their members, "*without undue fear of lawsuits from individual members.*"

Generally the Board will not substitute its judgment for that of a union that rationally decided not to process a grievance. If a union acts in good faith, it need not pursue even a potentially meritorious grievance. Instead, the Board focuses on (1) whether the union conducted a proper investigation and (2) used a rational method of decision making in reaching its conclusion.

A union has discretion to withdraw a grievance based on its judgment if there is insufficient evidence to support the claim. A union's good faith decision not to pursue a potentially meritorious grievance, *even if mistaken*, is not a breach of its duty of fair representation. The union's discretion extends to the manner in which the union investigates a potential grievance, "so long as some reasonable good faith investigation is undertaken."

The cost of arbitration is a legitimate factor for the union to consider in deciding whether or not to proceed to arbitration of a grievance. The duty of fair representation does not

require a union to take a grievance to arbitration “just because the grievant offers to pay for it.”

Finally, the ERB observed that the duty of fair representation does not require a union to represent a bargaining unit member in the same manner as an attorney represents a client.

Editorial Comment: This decision provides a useful summary the duty of fair representation under PECBA. It demonstrates once again that it is extremely difficult for a employee to prevail in such a claim if the union has conducted a reasonable investigation and made a good faith decision (i.e. a decision that was not arbitrary or made in bad faith).

GOOD FAITH ALLOWS HARD BARGAINING UNDER OREGON’S PECBA

When the Clatskanie School District proposed to terminate its early retirement incentive program, it presented the proposal and provided information showing the increasing costs of the program. The District explained that it needed to terminate the retirement incentive program due to inadequate school funding and increasing costs of the program. The District maintained this firm position over the course of four (4) bargaining sessions.

The ERB cited its long established standards to determining whether or not a party has engaged in “surface bargaining” rather than bargaining in good faith: use of dilatory tactics, the proposals made by the party, the behavior of the party spokesman, concessions or counter proposals made, failure to explain or reveal bargaining positions, and the overall course of negotiations.

The fact that the District’s proposal to end the early retirement incentive program was “politically unacceptable” to the Association that did not indicate that the District failed to bargain in good faith. The ERB found that the District’s negotiator was “cordial throughout the negotiations.” The District made no concessions from its initial position. The union made several proposals which would have limited the benefits.

The District explained its bargaining position and never refused to provide information to the Association. An employer’s explanation that its proposals were made for financial reasons was sufficient: no further justification is required. In sum, notwithstanding the fact that the proposed elimination of the retirement incentive program was predictably unacceptable to the Union and that the District made no concessions or even counter proposals during negotiations, the ERB did not find that the District unlawfully failed to bargain in good faith. It noted that it has found unlawful surface bargaining only on two occasions. Moreover, the ERB reiterated that a party may engage in hard bargaining at the table so long as it remains willing to negotiate toward a collective bargaining agreement.

Board Member Paul Gamson wrote a strongly worded dissent in which he argued that “good faith requires a party to do more than merely go through the motions.” He was especially concerned that the Board did not engage in a close examination of the

District's conduct in this case because the proposal to eliminate the retirement incentive program was made not in contract negotiations, but in mid term bargaining. Board Member Gamson noted that since mid term bargaining does not include mediation, the expedited bargaining requires that the parties meet a higher standard of good faith than in regular negotiations. *OSEA v. Clatskanie School District*, Case No. UP-9-04 (2007).

Editorial Comment: All in all, we believe the ability to take – and stick to – a firm position in contract negotiations is important for efficient, good faith bargaining.

2006

EMPLOYMENT RELATIONS BOARD RULES THAT BACK PAY AWARD CAN NOT BE REDUCED BY WORKERS' COMPENSATION BENEFITS RECEIVED BY A TERMINATED EMPLOYEE WHILE WORKING FOR ANOTHER EMPLOYER

In the case of *AFSCME v. City of Portland*, 21 PECBR, 495, 542 (2006) arose on a City request for clarification of an order when a grievant was reinstated with back pay. The City did not want to pay the grievant for the period of time when he received time loss benefits for his Workers' Compensation claim from another employer he was working for during the time he was terminated. The City also did not want to grant him a medical leave during this time period, allegedly because he didn't work enough hours. Lastly, the City didn't want to make a PERS contribution on his behalf because he had withdrawn his account from PERS due to his termination.

The ERB first ruled that the time the employee was unable to work due to his injury when he was mitigating his damages by working during the time period of his termination, could not be an offset for the employer, but the actual amount of Workers' Compensation benefits he received could be an offset just like interim earnings could be an offset. However, upon rehearing the ERB reversed itself and ruled that just as unemployment benefits cannot be an offset, neither should workers compensation benefits.

The ERB also ruled that the City wrongly denied the FMLA request because denied it on the basis that the employee didn't work enough hours, when the reason he didn't do so was because he had been wrongfully terminated. However, the ERB noted that the denial of FLMA benefits must be taken up in an appropriate forum (State or Federal Court). Lastly, the ERB quickly ruled that City had to make a PERS contribution on behalf of the employee. Why the grievant withdrew his PERS money, was irrelevant.

Editorial Comment: The management representative dissented on the set off for workers compensation).

ERB DETERMINES CITY OF ASHLAND COMMITTED AN UNFAIR LABOR PRACTICE WHEN REFUSING TO TURN OVER AN INVESTIGATION OF ACTIONS OF THE CHIEF OF POLICE MADE BY CITY ATTORNEY'S OFFICE WHEN THE ASSOCIATION MADE AN APPROPRIATE SHOWING OF RELEVANCE

In a case of the *Ashland Police Association v. City of Ashland*, 21 PECBR 512 (2006) occurred because of a series of events that began with the Ashland Chief of Police responding to a call concerning a potential barricaded subject who then attempted to stab the Chief. The City Administrator ordered the City's legal department to undertake an investigation into the circumstances of the incident.

Meanwhile, the Association President met with the City Administrator indicating that the Association did not have confidence in the Police Chief and was considering a vote of no confidence.

After the investigation was concluded, the Association's attorney requested a copy of the investigation. The City refused to provide one, citing attorney-client privilege. The ERB ruled that this refusal was appropriate as the Association could not show that the investigative report was needed for purposes of contract administration, i.e., analyzing potential grievance. A potential vote of no confidence in the Police Chief is not recognized as a sufficient reason to produce reports under the Collective Bargaining Act.

However, six months later, when two Association members were facing discipline, the Association then alleged that the report was necessary for looking at even handed imposition of discipline, and the ERB found that the City's refusal to provide the report did constitute an Unfair Labor Practice. In the case, the City Attorney had informed the Association's attorney that only if the Association could prove the relevancy would the City consider giving the report. The ERB stated that the standard was once the Association provides the City with probable or potential relevance, then the City has to produce the report. The Association does not have to jump through the City's hoops.

Lastly, the ERB rejected the claim of Attorney-Client privilege citing case law that if an attorney is merely a scrivener, then it is not providing legal services. In this case, conducting the investigation and an evaluation of the incident for the City Administrator was not giving professional legal services because there was no proof that it was conducted in anticipation of litigation. However, the advice that the City Attorney would have given to the City Administrator would be exempt from disclosure.

ERB CLARIFYS ITS REINSTATEMENT ORDER FOR IMPROPERLY TERMINATED EMPLOYEES TO INCLUDE EXPENSES IN COMMUTING TO INTERIM EMPLOYMENT

In the case of *Lebanon Association of Classified Employees v. The Lebanon School District*, 12 PECBR 533(2006) the ERB had ordered reinstatement of improperly

terminated bargaining unit members for back wages, minus interim earnings with interest at 9 percent per annum. The District requested clarification on a number of issues. The ERB first ruled that employees who found interim employment at locations farther than their district work sites could receive reimbursement for the added commuting expenses. Secondly, there was an employee who had no income for a number of months, and then found interim earnings that was higher for the pay he would have received at the District. The Board stated that only for those months where the earnings were greater, no back pay was due. It decided that each month's calculation should be self contained and the District could not use interim earnings from one month to offset back pay from another month. In another case, a part time employee who had worked for the District only 20 hours a week and then gone out and found a full-time job where the total earnings were greater than the part time earnings, the Board indicated the District can reduce its back pay obligation only for the earnings on 20 hours per week and not on the extra hours that the employee found.

ERB HOLDS THAT SCHOOL DISTRICT VIOLATED ITS CONTRACT WITH THE EMPLOYEES WHEN IT REDUCED CONTRACTUALLY NEGOTIATED BENEFITS FOR ALREADY RETIRED EMPLOYEES

ERB ALSO HOLDS THAT EMPLOYEES WHO WOULD GIVE NOTICE OF INTENT TO RETIRE IN ORDER TO TAKE ADVANTAGE OF EARLY RETIREMENT BENEFIT HAD VESTED RIGHTS. HOWEVER, THE ERB RULED THAT UNTIL AN EMPLOYEE RETIRES, AS A GENERAL RULE, THEIR RIGHTS FOR RETIREMENT BENEFITS ARE NOT VESTED AND CAN BE BARGAINED AWAY

In a decision that may contradict Supreme Court rulings on retirement benefits, including the recently decided *Strunk* case, the ERB while ruling that those employees that are retired have rights to the benefits that were negotiated in contracts before they retire, stated:

“Retirement benefits vested for employees who have already retired, but a union may negotiate to eliminate benefits for current employees.”

21 PECBR page 64.

Does this mean that changing retirement benefits is a mandatory subject of bargaining? Or is it merely a permissive subject of bargaining that an union can decide to negotiate? There is not a clear answer in this decision. However, since the matter is monetary, it appears that this Board is poised to rule that it would be a mandatory subject of bargaining. This contradicts Oregon case law which is that once an employee begins employment with a promise of retirement benefits, that promise is enforceable from date of employment. This rule was not changed in the recent *Strunk* decision, which centered on what exactly the Legislature had promised.

Editorial Comment: It now appears that the ERB misinterpreted the Supreme Court decision and has changed the rules regarding retirement benefits, so the employees that are members of an Association can lose rights that would be vested if they were not members of the Association. It is a bad decision and, should, but will not be challenged. However, on the other hand, many of the “right to strike” unions have virtually no bargaining power and such groups as classified employees, whose members are not teachers, but work for districts, are threatened with their jobs being contracted out. Given this type of pressure, it is easy to understand why they have sold away their retirement benefits, such as a medial retirement stipend, which are becoming increasingly costly.

A DIVIDED ERB RULES THAT AN EMPLOYER MUST TURN OVER NOTES OF A MEETING WHERE OUTSIDERS CRITICIZED EMPLOYEES

The case of Oregon AFSCME v. State of Oregon, 21 PECBR 129 (2005) occurred when members of the real estate community met and criticized practices of real estate regulation investigators. The supervisors in the real estate department wanted to keep the complaints confidential, believing that was necessary in order to receive honest comments from industry representatives. However, members of the bargaining unit became concerned about the complaints and asked for them in order to evaluate whether there was a potential grievance or not.

The ERB ruled that the failure to give the information of the meeting violated the agency’s duty to bargain in good faith. (ORS 243.672 (1)(a)).

In this case, the State argued that the request did not relate to a specific grievance or contract matter since no one had been disciplined. However, the Board stated that as long as the information is of “probable or potential relevance to a grievance or contract it would be discoverable.” Id. page 134.

The Board specifically rejected the claim of confidentiality. Now former Board member Thomas dissented, pointing out there was no grievance and the employer had taken no adverse action against employees. She argued that until there was a grievance or other contractual matters that were relevant for the information that it should not had been disclosed.

Editorial Comment: Prior ERB decisions were in line with her dissent.

DESCHUTES 911 SERVICE DISTRICT COMMITS MULTIPLE ULPS

The Deschutes 911 Service District gave an emergency dispatcher a written reprimand for sick leave abuse and feigning illness. In short, the dispatcher called in sick to care for her sick son, got sick herself, and then called in sick for a second shift because she was recovering from her illness. Shortly before the second scheduled shift began, she was observed by a supervisor outdoors on a cold blustery day watching her daughter’s softball game. The District investigated the incident and issued a written reprimand.

At the time of these incidents, the Association was negotiating its first contract. The prior bargaining representative had negotiated a collective bargaining agreement that required that discipline be issued only “for just cause.” The Deschutes 911 Employees Association filed a ULP charging that the written reprimand issued the dispatcher was not supported by just cause. The Association further alleged that the District had violated Oregon law by making a unilateral change in a mandatory subject of bargaining by eliminating the requirement that discipline be supported by just cause.

Shortly after the dispatcher received the reprimand, Attorney John Hoag requested that the District produce the investigation file and discipline imposed for similar offenses. He specified that the information should be produced within two weeks. When the District failed to timely respond, the Association charged that its delay constituted an unfair labor practice.

The ERB found that the reprimand given the dispatcher for attending her daughter's softball game on a day she called in sick was a change in the status quo and that the change violated the District's duty to bargain with the Association. The reprimand was not supported by just cause since the dispatcher did not violate a District work rule. The Board determined that she was in fact sick and rejected the District's argument that if she was well enough to sit and watch her daughter's game, she was well enough to work. The Board noted that the District had no work rule requiring that employees who call in sick stay at home. The Board ordered the District to withdraw the reprimand and make the dispatcher whole.

The ERB also found that the District violated the law when it failed to timely provide information requested by John Hoag on behalf of the Association including documents supporting the reprimand and all discipline over the past three years for abuse of sick leave. The District agreed that the Association was entitled to this information--it disagreed that the information could have been provided more promptly. After reviewing the evidence, the ERB agreed with the Association: there was no evidence the documents were difficult to locate or voluminous. In light of all the circumstances, the District's 35 day delay in providing the documents violated the law.

Editorial Comment: This is an important win for the Deschutes 911 Employees Association and all Oregon Associations since it upholds the fundamental principle of just cause, even when there is no contract in force due to a change in bargaining representatives. The Association's current contract includes strong just cause language that will assure its members' job security in the future. The decision warns employers that if they want to change wages hours or working conditions that are mandatory subjects of bargaining, such changes must be made through the collective bargaining process. Moreover, the ERB reaffirmed that when an association asks the employer for documents, they must be provided promptly—not when the employer gets around to it. We frequently need to obtain information from employers to bargain effectively or represent members in discipline disputes: this ruling will undoubtedly be useful in the future.

THE EMPLOYMENT RELATIONS BOARD ORDERS RELEASE OF EXECUTIVE SESSION MINUTES BY THE SCHOOL DISTRICT

The case of *Union Baker ESD Assoc. v. Union Baker Education Service Dist.*, 21 PECBR 286 (2006) occurred because the Association became aware, as the result of what occurred in a school Board meeting, that the Board wanted to negotiate the resignation of a bargaining unit member. The Association was concerned that the Board had received a complaint about the member which was not processed in accord with the Collective Bargaining Agreement, so the Association requested copies of parts of the Executive Session tapes that would be relevant to that member.

The District refused to provide them and claimed as a defense, that the Association did not have a grievance to pursue.

Following the *Eugene Police* case, the Board stated once an employer has signaled its intent to discipline, i.e., terminate a Bargaining Unit member, that a request for information would be timely. The District was founded to have committed an Unfair Labor Practice.

2005

ERB ORDERS DISCLOSURE OF CITY OF BEAVERTON'S HR INVESTIGATION INTO A HARASSMENT CLAIM UNLESS THE CITY CAN PROVE IT IS COVERED BY ATTORNEY-CLIENT PRIVILEGE

This case started when a Detective filed a complaint with the Department stating that he was the victim of a hostile work environment and work place harassment. The Detective named a Sergeant and a Lieutenant as instigators.

Six months later the Detective filed a second complaint with the HR director alleging that the investigation into the first complaint had been inadequate an HR employee was ordered to investigate the second complaint. She interviewed approximately 18 people, promising to maintain confidentiality to the extent permitted by law, in order to get candid interviews.

Two months later, the Detective notified the HR investigator that based on what he had heard at a training session, he believed he was going to be subject to retaliation and discipline. Two days later the Sergeant, who was the subject of the first complaint, filed an Internal Affairs complaint against the Detective for alleged insubordination at the training session.

Meanwhile the City decided that the second complaint was unfounded.

Numerous people were then interviewed concerning the IA complaint. However, the HR investigator refused to share the notes of her interviews with the IA Sergeant. The investigation concluded with a sustained finding and a recommendation that discipline be considered up to termination.

Then the attorneys for the Association requested copies of the HR investigation. The City refused to provide it. The due process hearing went forward with the Association claiming that the failure to disclose the HR investigation prejudiced its ability to respond. Ultimately no discipline was imposed.

The Association filed a 1(e) complaint for failure to provide the relevant information, and the Board held that the City's actions constituted a violation of the duty to do so and rejected the City's attempt to rely on EEOC enforcement guidelines which suggested that the investigations should be confidential. The ERB ruled that the requirement for disclosure took precedence over the EEOC guidelines.

Also, the City alleged attorney-client work product. The ERB ruled that this issue had not been fully developed and could be reasserted by the City, but that a blanket claim of privilege would not protect the City. The City also tried to claim that it need not produce notes made during a grievance investigation and purely subjective information such as impressions, and the ERB rejected that defense.

Board member Thomas dissented, claiming that Court should recognize that employee harassment and hostile work place investigations may be confidential and that subjective notes are work product for potential litigation and should also be confidential.

Editorial comment: Employers constantly promise that workplaces will be free of harassment and hostilities. However, no such common law lawsuit exists for a hostile work environment per se, or harassment in general. It is only if a hostile work environment or harassment is related to a person because of being a member of a protected class (such as sex, race or disability) that a cause of action occurs. One can expect in the future that local governments have the following options: 1) revoke those promises; 2) run all such investigations through a City or County attorney's office and claim attorney-client work product; or 3) try to get the law amended. In prior decisions, the ERB has consistently refused to have exceptions to the duty to disclose information if discipline is being considered.

TEN YEAR PAST PRACTICE OF TAKING HOME CARS RULED NOT TO BE SUFFICIENT

In the case of *Oregon AFSCME v. Lane County*, 20 PECBR 987 (2005), the ERB found that a ten year past practice of building inspectors taking home vehicles did not create a past practice that would be binding on Lane County. The evidence in this case was that a prior supervisor who had retired had given building inspectors authorization to take

County vehicles home on a daily basis. However, the testimony from the public works department directors from 1982 through the present was that they did not ever recall approving vehicle take home privileges. The County Administrator indicated he had no recollection of ever approving vehicle take home privileges, and that the County's written policy was that take home vehicles were prohibited. When this came to the County's attention, the practice was discontinued.

The ERB ruled that the County had no obligation to bargain over change in a past practice when it stopped employees from taking home the vehicles, because the County was unaware of the past practice, and it contradicted written County policy.

Editorial Comment: Ignorance is bliss was certainly enforced by the Employment Relations Board.

IN TWO RECENT CASES THE ERB DISMISSES DUTY OF FAIR REPRESENTATION COMPLAINTS

In the cases of *Tran v. AFSCME and Multnomah County*, 20 PECBR 948 (2005), and *Tancredi v. Jackson County Sheriffs Employees' Association and Jackson County Sheriffs Office*, 20 PECBR 967 (2005), the Board reiterated its long standing policy of giving deference to a labor organizations' decision in representation matters, especially in discipline cases, and dismissed duty of fair representation cases filed by individual bargaining unit members. One alleged race discrimination, the other alleged a bad faith decision not to take his termination to arbitration.

Editorial Comment: Should you get an individual bargaining unit member who alleges discrimination and/or a bad faith failure to process a grievance, it is important to get legal advice upon which you can rely. Do not hesitate to contact us in those cases no matter how obvious the issue may seem at the time.

2004

BEND POLICE ASSOCIATION OBTAINS HOLLOW VICTORY IN UNFAIR LABOR PRACTICE BUT THEN IS ABLE TO SETTLE THE CONTRACT

The Bend Police Association had previously filed an unfair labor practice against the City for making a new insurance proposal after negotiations were over and mediation had been cancelled. Based on uncontested facts, the Administrative Law Judge had found that at the initial bargaining session, the City had promised that it was not going to propose a change in co-pay, i.e., the 95/5 split for premiums or plan design. However, just before mediation, the City made an offer to the Association which it was to present to its membership. Because that was to occur during mediation, the parties cancelled mediation.

After the offer was rejected, the City sent out a final offer with a hard dollar cap for insurance payment. The ULP followed. The City counter-claimed against the Association alleging that the Association didn't bargain in good faith.

The Board found that the City made the promises as stated and that the City's refusal to proceed to interest arbitration was an unfair labor practice but found that the City was able to make its new insurance offer. With a straight face, the Board said that that proposal helped narrow the issues between the parties.

The Association had filed a motion to reconsider and was intending to appeal the decision when the parties were able to settle the contract. Part of the settlement was dropping the unfair labor practice.

Editorial comment: The term "ivory tower idiocy" is the nicest thing I can say about the Board order. First, the Board got around its long-standing rule that new proposals can't be made after bargaining by stating that since the parties really didn't go to mediation, that somehow the rules shouldn't apply. Obviously, given this order, no one can avoid mediation in the future. Perhaps it's a self-perpetuating economic issue for the ERB.

Secondly, stating that a hard-dollar cap will help the parties settle the issue when there had been a promise of leaving the status quo alone of the 95/5% split on insurance, is pure baloney.

THE SETTLEMENT

The parties settled a three-year contract with the first year to be retroactive. The wage increases are as follows:

1 July 2003	2%
1 January 2004	2%
1 July 2004	1.5%
1 January 2005	1.5%
1 July 2005	an increase in the annual USCPI-U, January to January minimum of 2%, maximum of 5%, plus 1%. If the CPI exceeds 6% instead of the increase, the Association, at its option can re-open on wages and insurance.

In July 1, 2004, the 95/5 split between the City and employee, changes to a 93% payment by the City and 7% by the employee.

Bilingual incentive pay was also added to the contract.

2003

EMPLOYMENT RELATIONS BOARD (ERB) RULES THAT THE CITY OF MADRAS AND THE MADRAS POLICE EMPLOYEES' ASSOCIATION COMMITTED UNFAIR LABOR PRACTICES - 2003

After negotiations and mediation had been unsuccessful, the City of Madras decided it wished to adopt a 15-step plan for its wages. Through mediation it had advocated staying with the existing 6-step plan. The City requested that the Association return to the bargaining table to discuss the new plan. The Association, on advice of yours truly, refused to do so. The City went ahead and modified its final offer and utilized the 15-step plan in its last best offer. The ERB found that the City's actions in doing so were an unfair labor practice. The ERB cited previous case law that a party could not advance new proposals that were not subject to the negotiation process. The ERB held in abeyance any remedy pending receipt of the Interest Arbitration decision. Based on prior decisions, the remedy should be a new arbitration in which the City should be prevented from advancing a 15-step plan.

The Association also filed a second count of an unfair labor practice complaint because the City had not told the Association during negotiations that it was going to be annexing its industrial park. This would produce significant revenue in the second year and even more revenue in the third year of the contract. The Association suggested that this was highly relevant since the City was claiming that it was going broke. The ERB found that City's failure to accurately disclose its financial condition was an unfair labor practice, but stated it wouldn't have made this an independent unfair labor practice if it hadn't found that the City had committed one by its new plan. That type of statement is unprecedented and the Association had requested reconsideration. Reconsideration has been denied.

The Association had urged the Board to find the City guilty of bad faith bargaining for using comparable jurisdictions based on population figures that were not available during bargaining. The ERB found that the parties had not sufficient agreement on the issue of comparability and declined to make such a ruling.

The City had filed the initial unfair labor practice complaint for the Association's failure to return to the bargaining table. That complaint was dismissed. However, a week before the hearing, the City amended its unfair labor practice complaint and accused the Association of bad faith bargaining for not lowering its wage proposal from 25% to 5% until right before the hearing. The Association put on un-contradicted evidence during the hearing that it had floated an offer of a 3% increase in the first year of the agreement plus fully paid insurance during mediation and was met by silence from the City, which it took as being rejected. The ERB ruled that that was insufficient.

Editorial comment: It ain't over until it's over! The result of this ruling will result in more time in bargaining, leaving meaningless paper trails, making CYA offers which will not aid negotiations, but will occur.

EMPLOYMENT RELATIONS BOARD DECIDES THAT OREGON STATE HOSPITAL'S DISCONTINUANCE OF THE USE OF STEEL HANDCUFFS DOES NOT INVOLVE A MANDATORY SUBJECT OF BARGAINING - 2003

The case of *SEIU v. State of Oregon*, 20 PECBR 189 (2003) involves the first safety case since the passage of Senate Bill 750. Under the existing law, safety issues are permissive subjects of bargaining unless they "...have a direct and substantial effect on the on the job safety of public employees." In this particular case, the ERB ruled that the discontinuance of steel handcuffs did not have such an effect.

This case turned on the facts of the use of handcuffs. The ERB relied heavily on the history of OSH where in the past year, the steel handcuffs had been used on seven out of twenty-three wards, approximately 58 times out of 760 emergency restraint episodes.

Instead of using steel handcuffs OSH was attempting to train staff on using a communication technique called Professional Assault Training which limits the use of physical hands-on intervention to be a last resort. If it is needed, the staff is supposed to be trained on the use of body wraps or a stretcher to deal with the patient. There was limited testimony about the effectiveness of body wraps. The ERB concluded that the record could not show from one use of the body wrap whether its ineffectiveness was due to failure to train or the failure of the wrap. The ERB resolved all doubts in favor of the employer, noting that the State had a goal of reducing steel handcuffs because of the therapeutic nature of a hospital and declared that the "evidence was insufficient to establish that such methods are inherently defective or that they cannot be used effectively in conjunction with . . . (all other methods)." *Id.* p. 196. In addition, the ERB said it was relevant that the "evidence did not establish that the ban on steel handcuffs has resulted in increased injuries for OSH employees." *Id.*

The State had raised the defense that this should be a prohibited subject to bargaining due to federal regulations for the handling of patients. The ERB did not address that issue.

Editorial comment: This is a disappointing decision in that the ERB has clearly placed the bar high and put public safety labor organizations in a quandary. If they demand to bargain in a timely fashion over the discontinuance or the failure to use a safety item, the ERB appears to be relying on the absence of victims. Most persons dealing with public safety recognize that the issue of substantial safety risks and danger does not show up every day, and one certainly does not want to be in the position of having to wait for bleeding or dead victims before a safety case can be litigated.

EMPLOYMENT RELATIONS BOARD RULES THAT THE CITY OF REDMOND COMMITTED AN UNFAIR LABOR PRACTICE COMPLAINT BY REFUSING TO NEGOTIATE UNTIL THE ASSOCIATION DROPPED ITS POSITION THAT THE CITY'S PROPOSALS WERE UNTIMELY AND COULD NOT BE MADE THIS YEAR - 2003

The contract between Redmond Police Officers' Association and the City of Redmond required that if a party wished to make proposals they had to be delivered to the other side on or before November 1st. The Association did so. The City's proposals were not delivered until November 5th. The Association informed the City during the first bargaining session that the Association believed, due to contract language, the City was prohibited from making proposals this year. The City's response was to refuse to meet and bargain until the Association dropped that position.

The ERB characterized this as a negotiation process that went astray. It ruled that the City had committed an unfair labor practice by refusing to continue to negotiate. The City had attempted to plead a counter claim, alleging that the Association position was bad faith bargaining, but the ERB refused to rule on it, deeming the City's pleadings to be insufficient. The ERB also declined to interpret the Collective Bargaining Agreement provision as the City requested.

In a footnote the ERB stated what should have occurred is that if the Association stuck to its position, the City could have advanced its proposals and the Association could have filed a grievance to enforce the contract.

Editorial comment: Again, the ending is far from over. During recent bargaining, the City made "responsive" proposals that included an insurance cap. More litigation will follow.

EMPLOYMENT RELATIONS BOARD VACATES MADRAS INTEREST ARBITRATION DECISION - 2003

(However, this case is not over yet.)

As reported in the last Newsletter, the City of Madras prevailed in an Interest Arbitration decision. However, the Employment Relations Board (ERB) had previously ruled that the City of Madras, and the Association had committed Unfair Labor Practices.

At the request of the Association, the ERB vacated the Interest Arbitration decision and ordered the parties back to "fast track" negotiations. If the negotiations are unsuccessful the parties are to go to Interest Arbitration with Last Best Offers consistent with the Final Offer that had been previously filed in this case.

If that remedy means what it says, then the Association must have a Last Best Offer with close to a 25% wage increase. The City cannot use its 15-step pay plan, but can stick with its previously offered 4% raise, plus a draconian insurance cap. The

Association has request clarification of the ERB's Order in this case. At this time of sending this Newsletter to clients, the ERB had not ruled on the motion to clarify or reconsider the Remedy Ordered. The subsequent negotiations were unsuccessful, so its off for round two.

ERB ALJ RULES THAT MARION COUNTY CANNOT TAKE INFORMATION TECHNICIANS OUT OF MCLEA - 2003

Marion County used to be organized so that the computer technicians worked in various departments and reported to department directors. Approximately a year or so ago, Marion County centralized the Department of Information Technology and transferred all the technicians to that Department. It did so to two technicians who worked for the Marion County Sheriff and who are MCLEA members. The County involuntarily moved those technicians out of MCLEA on the grounds that they are not in the Sheriff's Department anymore.

There was one problem with Marion County's plan. It didn't change the day-to-day operations of those technicians. They still work physically in the Marion County Sheriff's office, and all of their work is done for the Marion County Sheriff.

The ALJ ruled the employees are still going to be in MCLEA. Marion County has appealed that decision. It has indicated that if it is unsuccessful, since there is no money in the Sheriff's budget for those employees, it will lay them off and fill the positions in the IT Department.

Editorial Comment: Marion County will not prevail in front of the Employment Relations Board as case law is rather settled in this area, and an Unfair Labor Practice Complaint will be filed over the County's conduct. The "white hat and empty head defense" will not cut it in the ULP.

EMPLOYMENT RELATIONS BOARD STICKS TO ITS REMEDY IN MADRAS AND THE CLIENT SETTLES THE CONTRACT - 2003

As reported in the last Newsletter, the Employment Relations Board entered a remedy in this case prohibiting the Association from lowering its Last Best Offer from a 25% wage increase, and the City was not allowed to re-offer its 15-step wage plan in Interest Arbitration. The Association asked for clarification of that and suggested to the Board it was in error with its remedy. The Board responded with a harshly worded Order indicating that it meant what it said.

Given this reality, the Association President, Tanner Stanfill, negotiated a two-year contract where the Association agreed to a 90/10 split in insurance premiums and received wage increases the second year of the contract. Part of the settlement was driven by the fact that the City was going to have a Last Best Offer with a hard dollar cap

that would have devastated many Association members, and that the City's proposed annexation of its industrial park appeared to be put on hold, with the anticipated revenues not coming in this fiscal year.

The best part of the settlement negotiated by President Stanfill is that it is only a two year contract, so negotiations can start in the near future for a successor agreement.

Editorial comment: I believe that Officer Stanfill did an excellent job dealing with a very bad deck of cards. Previously stated, it is indeed tragic that the ERB made bad law on the backs of the smallest Association that I represent.

ERB REVERSES THE ALJ AND RULES THAT MARION COUNTY CAN REMOVE THE INFORMATION TECHNICIANS FROM MCLEA - 2003

In spite of the ALJ's ruling that Marion County could not simply create a new Department of Information Technology, and transfer employees out of the Sheriff's office, while leaving them physically in the Sheriff's office doing the exact same work, the Employment Relations Board blessed Marion County's action.

The ERB went to great lengths distinguishing its previous cases, which seem to be on point in prohibiting such shenanigans and pointed out that there was no proof that Marion County did this in order to take members out of the Association.

Under a disturbing footnote the ERB noted that this decision was consistent with its preference that right to Interest Arbitration units be limited and not be a "mixed units," i.e. having employees in it who have the "right to strike."

Editorial comment: This case may have no precedent value, but could be a vehicle, which the ERB will use in future cases to strike down "mixed units."

LANE COUNTY'S INFAMOUS CHRISTMAS PARTY AND THE INVESTIGATION THAT OCCURRED THEREAFTER IS REVIEWED BY THE EMPLOYMENT RELATIONS BOARD - 2003

The case of *Lane County Peace Officers' Association v. Lane County Sheriff's Office*, 20 PECBR, 443 (2003), was the Association's Unfair Labor Practice Complaint against the County for its investigation into allegedly inappropriate conduct that occurred during the Association's 2001 Christmas party.

The Employment Relations Board (ERB) rejected the argument that the Association could claim that activities at the Christmas party were protected and that the County could not investigate its members. The ERB noted that the alleged misconduct included fighting, intoxicated behavior and sexual harassment, all of which violated

County personnel policies, and that the Sheriff's Office could investigate those allegations.

The ERB also ruled that the County's refusal to allow the President and other Executive Board Members to represent employees under these circumstances was reasonable because those personnel were the subject of the County's internal investigation. Other Association representatives, including the Association's attorney, sat in on the interviews, so the ERB ruled that the County's actions did not deprive Association members of their Weingarten rights.

However, general questionings by the County's investigator were deemed to be irrelevant to the investigation of the Christmas party, as the names of Association officers who assisted bargaining unit members in the past had no relationship to the Christmas party. The ERB found that such questions violated the PECBA. The County was ordered to cease and desist from asking about such activities.

The ERB also concluded that questioning representatives, namely the President and an Executive Board Member, who called a bargaining unit member who was complaining about the Association party, intimidated him by threatening to cause him to be disciplined for engaging in this malicious gossip, was a protected activity. The ERB stated that:

“As a general rule, an employer may not interrogate union officers about their contacts with bargaining unit members or about the substance of those conversations... Certain conversations are not absolutely privileged. For example, a union officer's directions to union members to engage in picket line violence may not be privileged.”

In this case, the ERB concluded since the Association was legitimately concerned about the fact that the bargaining unit member, who was not present at the party, might himself be violating the County's policy by spreading rumors, the phone call to him was none of the County's business.

Editorial comment: This decision is interesting and welcome. In a case approximately ten years ago, in a comment that was dicta, or not relevant to the main decision, the ERB had allowed the County to ask the Association President what a bargaining unit member told the President, when the member had just been arrested for off-duty criminal conduct. How that dicta can be squared with this case, one doesn't know, but this opinion as limiting an employer's ability to inquire as to conversations between Executive Board Members and individuals, certainly will provide some protection for Association leaders in the future.

2002

ERB RULES ON WHETHER VARIOUS SUBJECTS ARE MANDATORY SUBJECTS OF BARGAINING

The case of IAFF Local 890 v. Klamath County Fire District No. 1, 19 PECBR 533, (2001), arose when the District, in its wisdom, adopted new policies and refused to bargain over the same. The new policies with the ERB's ruling as to whether they are mandatory and must be bargained by the mid-contract procedure are as follows:

- 1) A nepotism policy. Nepotism relates to the employment of relatives. The Board held the policy to be a mandatory subject of bargaining because the policy provided for demotion and possible termination based on a nepotism relationship.
- 2) Driving policy. This new policy would subject employees to discipline if their driving record contains traffic violations which includes off-the-job driving. The Board determined that off duty conduct which subjects employees to discipline is a mandatory subject of bargaining. However, the Board found that a rule requiring employees to report their traffic violations and accidents, which the Board noted was public record, to be permissive. However, the failure of the District to bargain over the "impact" of the reporting requirements was an unfair labor practice. The Board also concluded that the District's requirement for employees to have an Oregon Driver's license to be bargainable since in essence it would require employees not to live in the State of California.
- 3) A new policy requiring employees to have a "positive attitude, proper courtesy in conduct on and off the job" was found to be nothing more than a statement and not a standard of conduct. Therefore, it was not mandatory.
- 4) Personnel records. The new policy would give the District the sole discretion as to whether to remove documents from files. The Board noted that in previous cases it had held that a proposal granting employees the right to submit rebuttals to any critical material to be a mandatory subject for bargaining. Because the Chief's alleged power to remove anything would include rebuttal material, the Board did decide that this proposal was mandatory.
- 5) Workweek. A District policy which could change the hours of employment ERB found to be a per se mandatory subject.
- 6) Family Medical Leave Act. The ERB found that this was a mandatory subject of bargaining.
- 7) Drug and Alcohol Policies. The Board determined that while the District may have the authority to implement a policy concerning drug testing, it cannot do so without bargaining concerning the methods and procedural aspects of the policy.

Editorial Comment: No new ground was plowed here, although the ruling on personnel files was crafted to avoid the Board's prior decision in the Springfield case, which held that the sole discretion of what went in and out of the personnel file was management's. Apparently memorandums of rebuttal have just been exempted from that.

EMPLOYMENT RELATIONS BOARD MODIFIES THE WEINGARTEN STANDARD TO BE A "REASONABLE EMPLOYEE TEST"

The recent decision of AFSCME v. State of Oregon, Department of Corrections, UP-3-00, January 2002, stands for the proposition that bad facts make bad law, in this case for the employer. The case arose out of an investigation by the centralized agency and the Department of Corrections called the SIU, Special Investigations Unit.

Under the facts in question, a lieutenant, a sergeant, and two officers were involved in subduing an inmate. After the inmate had been subdued, the lieutenant hit the inmate. This was observed by the sergeant and two officers. The initial reports submitted by the sergeant and officers, did not mention the lieutenant's hitting of the inmate. However, after consultation with their union representative, the sergeant and officers submitted amended reports. This is because the State of Oregon has come out hard against a code of silence and indicated that an employee who does not report an act of observed misconduct will be subject to discipline.

In this case, the SIU investigator informed the employees that they were merely witnesses to the events. The employees invoked their right to representation, and it was denied.

The ERB adopted a reasonable employee standard and found that under this set of facts the employees had reason to believe that they were at risk and subject to discipline for initially submitting incomplete reports. Therefore, they were entitled to representation. In a footnote, the ERB dismissed any alleged swearing match as to whether the SIU investigator had promised the employees' immunity. An act which is somewhat damning on how ERB viewed the creditability of this particular SIU investigator.

Editorial Comment: Paranoid employees who have a basis for their belief that they may be subject to discipline will now be given greater leeway in requesting representation. However, if a supervisor with the appropriate authority does grant absolute immunity from discipline, the result could be different. One of facts in this case is that the SIU investigators do not have that type of authority.

THE LABOR REPRESENTATIVE ON THE BOARD, KATHERINE WHALEN, ANNOUNCES HER RETIREMENT

Recently I took a phone call from Katy Whalen who announced that she was calling "the players" in the labor side to announce her retirement effective June of 2003. She is urging those who are interested in serving on the Board apply to do so. She intends to hang out her shingle to be an Arbitrator. I believe that Board Member Whalen has been a

zealous advocate of the rights of employees and labor organizations and hope that Governor Kulongoski finds a well-qualified person to take her place. I wish her success as an Arbitrator.

THE ERB RULES THAT THE CITY OF SALEM COMMITTED AN UNFAIR LABOR PRACTICE BY DEALING DIRECTLY WITH A LABOR ORGANIZATION INSTEAD OF ITS ELECTED REPRESENTATIVES

In 1995, as part of SB 750, a former unfair labor practice known as a l(i) was repealed. That prohibited each side during negotiations from talking to anyone but the designated representatives on the other side. Many employers believed that that repeal allowed for directly dealing with represented employees.

However, this ULP arose when the 911 center decided to have a committee to discuss scheduling. The Association informed management that it was willing to engage in mid-contract bargaining but it would not do so through a committee framework.

In response, the manager indicated to the scheduling committee that it would not look at shift schedule change, but would look at bid process and rotation frequency. In addition, he sent a memorandum to all employees and to the Association's counsel criticizing the Association's action, and announcing he would cease all actions to consider schedule changes. He informed them that the Committee would be looking at shift bidding and the rotation process, and that they would put out a survey on that to all employees. The ERB concluded that the direct mailing of a memorandum to all employees by the director, expressing his disapproval of the Association's position, undermined the Association's status as exclusive bargaining representative and impaired its ability to carry out its statutory rights and obligations.

In addition, the ERB ruled that the City's continuing to meet with bargaining unit members in the context of the Committee, as opposed to negotiating with the Association, bypassed the status of the Association as employees' exclusive representative and committed a l(b) violation. Also, the ERB decided that the City was not negotiating in good faith and also committed a l(e) violation.

Throughout this case, were allegations of retaliation because the City had disciplined the Association president for violating the City's FMLA policy and for violating the attendance policy by showing up late to work. The ERB, having been ordered by the Court of Appeals to abandon its previous "but for" test, went to its newly articulated test, which it calls the "because of" test, i.e., did the employer act because of the disciplinary event, or because it wanted to discipline the employee for engaging in protected activity. While this writer can't distinguish the difference between those two legal theories, the Board in this case, determined that there had been no violation because of the discipline of the Association president.

An interesting footnote was the concurring opinion of the management representative of the Board stating that she believed that shift scheduling is not a mandatory subject of bargaining, but shift bidding would be. This case is at 19 PECBR 871 (2002).

ERB RULES THAT LINCOLN COUNTY COMMITTED AN UNFAIR LABOR PRACTICE BY CHANGING THE INSURANCE COVERAGE FOR ASSOCIATION MEMBERS

The case of *Lincoln County Deputy Sheriff's Association v. Lincoln County*, 19 PECBR 911 (2002), arose because the County changed its insurance policy for Association members. This occurred because the County had an insurance committee with multiple labor organizations participating in it. The main organization representing County employees had agreed that whatever benefits the committee recommended would be binding on them. On the other hand, the Association made no such agreement and had bargained for and received full County payment of the higher of the two plans which the County offered.

In looking at the fiscal year 02-03, the County's insurance agent announced an increase in premiums of 36 percent for the higher plan. Therefore, the insurance committee, when considering the cap for the other unions, agreed to a lower tiered, lower cost plan. The County informed the Association that due to this change, it could not continue to purchase the higher plan because there were too few members.

The Board ruled that the County did commit an Unfair Labor Practice by changing insurance plans. The Board pointed out that the County violated its obligation to preserve the status quo by the actions it took through the insurance committee by making it impossible to purchase the higher plan. The Board indicated that a 36 percent increase did not constitute an emergency or business exception, which would excuse the County from its bargaining activities.

For the remedy, the Board ordered the County to self-insure the difference between the old plan and the new plan as opposed to changing and going to the higher plan.

ERB ORDERS THE CITY OF BEAVERTON TO ENGAGE IN IMPACT BARGAINING OVER ITS CHANGING OF THE STANDARDS FOR PROMOTION TO SERGEANT

This case arose when the City changed its past practice for the minimum requirements for promotional opportunities for Sergeants. Sergeants are in the bargaining unit. The prior past practice that the City had utilized, was that applicants to promote to Sergeants did not need to have an associate's degree in order to apply. The change required the degree. The ERB found that the City had changed the past practice and had refused to bargain with the Association over the impact of the change. The Board noted that criteria for any position was an exclusive management right, and the City could change the qualifications

but it did have to bargain the impact, noting that a large number of senior police officers missed the chance to apply for and receive higher wages. Therefore the City was ordered to bargain the impact of the Association's change. See 19 PECBR 925 (2002).

Editorial Comment: I am attempting to find out what occurred in this case. All I have now is that bargaining is ongoing. Perhaps a senior police officer position could have been established, or some other lump sum paid to the employees who could not promote because of the change in policy.

2001

ERB RULES THAT THE FAILURE TO PROVIDE INFORMATION IN RESPONSE TO A REQUEST FOR DETAILS CONCERNING WHY AN EMPLOYEE HAS BEEN ORDERED TO UNDERTAKE A PSYCHOLOGICAL FITNESS FOR DUTY EXAM IS AN UNFAIR LABOR PRACTICE

In the case of *AFSCME Local 328 v. Oregon Health Science University*, 18 PECBR 804 (2000), the ERB ruled that the employer's refusal to provide information concerning why an employee was being ordered to undertake a psychological examination is an Unfair Labor Practice.

The employer's defense was that the exam was a non-disciplinary action, and it did not have to nor should it disclose the reasons for the exam. The ERB ruled that it is the duty of the employer to provide objective information, but it is not required to disclose subjective information. *Id.* p. 811. However, in this case, the reason for the exam was allegedly because of the employee's difficulty in communicating with the employee's supervisors. The ERB concluded these were objective facts. The Collective Bargaining Agreement appropriately incorporated the provisions of the ADA, which required that any medical exam be based on objective beliefs. *Id.* p. 812

ERB ADMINISTRATIVE LAW JUDGE RULES THAT MARION COUNTY COMMITTED AN UNFAIR LABOR PRACTICE BY OBJECTING TO ASSOCIATION PROPOSALS

This particular case arose because the County declared numerous Association proposals permissive subjects of bargaining and then later refined the list of proposals that it declared permissive. Proposals for premium pay and proposals for personnel files, which included staleness of discipline after a certain time so it couldn't be used again, were declared to be permissive.

The administrative law judge made a recommended order finding that the Association's proposals were clearly mandatory subjects of bargaining and that the County's declaring them permissive was an unfair labor practice. The ALJ also recommended an order showing that the County's initially, in writing, declaring the

proposals permissive and refusing to bargain over them further, was sufficient to give rise to the unfair labor practice and that the County could not attempt to later sidestep by withdrawing its objections weeks after the ULP was filed.

The County had also changed the shifts of clerical employees working at the jail and nurses on graveyard shift. The Association's complaint alleged that that was a 1(e) violation as it was a change in the existing conditions during negotiations. The ALJ sidestepped that ruling by declaring the County had already bargained that issue in the contract.

Editorial Comment: The County's antics in this case delayed the Association from proceeding to arbitration for a number of months. An appeal may well be taken over the ALJ's conclusion that shift changes in violation of the contract during bargaining is not an Unfair Labor Practice.

ERB RULES THAT A BACKGROUND QUESTIONNAIRE TO BE UTILIZED FOR PROMOTIONAL PURPOSES CONSTITUTES A MANDATORY SUBJECT OF BARGAINING

The case of *Oregon AFSCME Council 75 v. State of Oregon, Dept. of Public Safety Standards and Training*, 19 PECBR 76 (2001) arose when DPSST decided to conduct background examinations of both new hires and employees when they competed for promotions. When DPSST imposed an extensive background questionnaire, AFSCME demanded to bargain over it and DPSST refused on the grounds that it concerned a promotion, a permissive subject of bargaining. However, the ERB held that:

“The protection of individual privacy is a cornerstone of American jurisprudence. This Board has long held that language concerning the personal life of employees is mandatory for bargaining and that it relates to an individual privacy and basic constitutional rights.” Pg. 93

The ERB then engaged in a balancing test because this was not a specified mandatory subject of bargaining. It concluded in this case that because DPSST was considering promoting employees to fill less sensitive public safety training positions that the background questionnaire must be bargained.

Editorial Comment: Amazingly, there was no dissent from the management representative on the Board.

ERB DISMISSES ULP OVER WHETHER A PROPOSAL IS PERMISSIVE BECAUSE THE UNION HAD LOST THE INTEREST ARBITRATION

In the case of *City of Portland v. Portland Firefighters*, the City filed a ULP against the union for bringing an alleged permissive subject of bargaining to interest arbitration. The ERB decided that because the Union lost, that the Board was not going

to enter a decision on a moot subject of bargaining and dismissed the complaint. 19 PECBR 126 (2001).

Editorial Comment: The problem here is that many proposals get left on the floor due to the last best offer process. Many times when one side has claimed that a proposal is permissive, there will never be a definitive answer.

EMPLOYMENT RELATIONS BOARD RULES THAT UNEMPLOYMENT BENEFITS WILL NOT BE AN OFFSET FOR A REINSTATED EMPLOYEE'S WAGES

This case went to the ERB because the State of Oregon terminated a correction employee when his labor organization was negotiating for an initial contract. The ERB ordered the employee to be reinstated to his employment minus pay earned while unemployed. At the time of the hearing, the State did not introduce any evidence as to whether the employee was receiving unemployment benefits.

However, the State deducted the unemployment benefits that it had paid the employee when it reinstated him. The plaintiffs had argued and the ALJ ruled that because the State had not put evidence of benefits in the record at the initial hearing, that it was precluded from raising the issue now. However, the ERB went beyond this and found that its previous case law was based on a statute requiring the repayment of unemployment benefits, and the statute had been repealed. The ERB reviewed previous Court of Appeals and Supreme Court cases and concluded that it should follow a Supreme Court case which held that Social Security benefits were not an appropriate offset in a breach of contract lawsuit. This reasoning of the Supreme Court was cited with approval by the ERB that only interim earnings could be reduced, and the fact that the employee had received a type of welfare benefits, in that case, Social Security, in this case, unemployment, would not be an offset because the public benefit program had nothing to do with the interim earnings of the defendant in a contract dispute.

The ERB found no public policy basis to order an offset and concluded that this was an issue that the legislature or the employment department could address but that the ERB would not. This produced a strong dissent from the management representative on the board and is likely to be appealed by the State at the Court of Appeals.

Editorial Comment: I started this case a number of years ago, simply wanting to get a terminated employee back pay without a reduction for unemployment benefits because an Assistant Attorney General failed to make a record. Now the case has taken on a life of its own, going far beyond this and will undoubtedly be in litigation for years.

2000

ERB REINSTATES AN OREGON CORRECTIONS ENTERPRISE EMPLOYEE WHO WAS TERMINATED FOR ALLEGATIONS OF DISHONESTY AND HELPING AN INMATE VIOLATE PRISON RULES

Based upon Oregon statutes enacted during the last session, the Oregon Corrections Enterprise was broken out as part of the Department of Corrections and set up as a semi-independent agency, which was supposed to be released from state bureaucratic red tape in order to make a profit utilizing inmate labor. Part of the fall out from that program is this agency also acts semi-independently in its handling of personnel matters. This case was a good example of how it is doing things wrong.

In this particular instance, an inmate worker had another inmate's mother send in a jacket to be embroidered through the embroidery program where items are embroidered and sold to government agencies and the public. The problem with doing so is that supervisors had concluded that inmates could not purchase items through this program. (This is contrasted with the Prison Blues project where inmates can purchase items through that program.)

When the supervisor discovered that an inmate was violating these rules, the supervisor panicked. Memos were generated. An inmate then accused a production coordinator of knowing in advance that the inmate was going to send in the jacket. The panicked supervisor confronted the employee who denied any knowledge of this. The supervisor believed that the employee had told the supervisor that he had helped the inmate. The supervisor ordered the employee to turn in memos explaining what had occurred. The employee did so. The problem is that the accused employee has extreme difficulty reading and writing and not knowing the involvement of the inmate he had asked to assist him he had that inmate write his memos. Needless to say, one of those memorandums indicated that the accused employee did have foreknowledge.

In this particular case, the employer's "investigation" into this incident never included an interview of the employee who was terminated. The employee testified at the ERB hearing that he had no prior knowledge of the inmate's actions to get a coat embroidered and did not tell his employer that he was aware of this activity.

The ERB concluded that a reasonable employer would have made a fair and objective investigation before administering discipline, especially considering the employee's 20-year record of employment with no prior discipline. Moreover, the ERB concluded that there was no proof that the employee engaged in misconduct. Therefore, OCE was ordered to reinstate the employee and make him whole.

Editorial comment: This is a textbook case as to how not to investigate allegations of employee misconduct. A competent investigator is needed. It is axiomatic that if a supervisor believes that an employee committed misconduct where the supervisor is a witness, that supervisor should not be the investigator or the decision maker. Lastly, it is

quite basic that the employer should take a deep breath and interview the accused employee before jumping to conclusions.

EMPLOYMENT RELATIONS BOARD CRUSHES ASSOCIATION OF OREGON CORRECTIONS EMPLOYEES' ABILITY TO EXPAND ITS REPRESENTATION OF DEPARTMENT OF CORRECTION EMPLOYEES

The ERB decision which prohibited AOCE from expanding its representation by including 14 right to strike bargaining unit members was discussed in the last newsletter. Shortly after that decision, the Employment Relations Board issued two new decisions. The first was a ruling that AOCE could not represent the right to strike employees who worked at Columbia River Correctional Facility. Given the prior decision, that ruling was expected.

Fundamentally more troubling was the Employment Relations Board's decision that the State of Oregon's decision to recognize AFSCME as exclusive representative of the newly established Two River Correctional Facility in Umatilla was not an Unfair Labor Practice.

The Board found that because AFSCME represented most of the Corrections employees on a statewide basis, and that the employees who began to phase in TRCI were mostly transferred from the Pendleton area, that the State had a right to voluntarily recognize AFSCME.

Notably lacking in this decision was any discussion of the unrefuted evidence in this case that the State reversed an initial position of neutrality and recognized AFSCME because AFSCME would split these employees into two different bargaining units, one with the right to strike, and one with the right to interest arbitration.

In one footnote, the ERB indicated that if AOCE would get signature cards and file unit clarification petitions to represent the employees at TRCI, the ERB would consider the case. However, in a subsequent footnote, the ERB reindicated a preference for large wall-to-wall bargaining units, which would all but put the nail in AOCE's attempting to expand to represent a newly created prison facility.

Editorial comment: Big labor and the State teamed up to politically kill the AOCE in this case. While the statute gives priority to desires of employees to form labor organizations of their choice, this current Board has made it clear that it gives employee choice no deference and makes it virtually impossible for employees to leave large labor organizations once they have been placed in them.

ASSOCIATION OF OREGON CORRECTIONS EMPLOYEES V. STATE OF OREGON DEPARTMENT OF CORRECTIONS AND AFSCME – (continued)

At the recent annual Public Sector Labor Law Conference, the Employment Relations Board members discussed their recent decisions in unit clarification cases. In the case of *Association of Oregon Corrections Employees v. State of Oregon Department of Corrections and AFSCME*, Case UC-24-99, the Board found that AOCE would not be able to expand its representation of employees by adding 14 employees to its bargaining unit which had the right to strike in the classifications of Nurse, Health Service Technician, Pharmacy Technician, Dental Assistant and Office Specialist, who work at Oregon State Correctional Institute.

The Board's finding was made in spite of the fact that AOCE is a mixed bargaining unit and represents all of those classifications of employees as well as the Corrections Officers series employees at the Oregon State Penitentiary (approximately 550 employees). The Association also represents the 160 Correction Officers series employees at OSCI. Notwithstanding the above, the Board expressed a preference for not expanding a mixed unit by adding right to strike employees to it, and therefore, denied the Association's petition which was based upon the request of the employees to switch bargaining units from AFSCME.

In the second case of significance, *Lane County Peace Officers Association v. Lane County and AFSCME*, 18 PECBR 400 (2000), the Board ruled that LCPOA could not add maintenance workers to its bargaining unit from the general AFSCME County-wide bargaining unit because there were other maintenance workers employed elsewhere in the County. The Board reiterated its position that it would not expand mixed units by adding employees to them.

Editorial note: At the conference, Board member Thomas, the management board representative, questioned why the previous board members had agreed to let mixed units exist in any event. She pointed out there was nothing in the statutes that give a legislative blessing to mixed bargaining units, which is bargaining units composed of employees that have the right to strike and the right to interest arbitration.

It is this writer's pessimistic assessment that there is an excellent chance that the Board will reverse its previous decision and prohibit mixed units. This could result in all existing bargaining units being separated and the employees with the "right to strike" being probably involuntarily placed in the general County or City bargaining unit. If the Democrats regain control of the Oregon Legislature, it is recommended that the OCPA push for a legislative blessing of mixed bargaining units.

ERB RULES THAT LINCOLN CITY COMMITTED AN UNFAIR LABOR PRACTICE BY REVISING CERTAIN RULES WHICH AFFECTED MANDATORY SUBJECTS OF BARGAINING

In July and September of 1998, the newly arrived police chief in Lincoln City (the arrival of new police chiefs fresh from other states is a direct catalyst in numerous ULPs) changed a number of department policies including policies for off duty conduct,

testifying as a violation of department policy, and leaving training. The Association demanded to bargain over these changes and the City refused to do so.

The ERB re-established its general rule that the continuing duty to bargain prohibits unilateral changes in existing conditions of employment that are mandatory subjects of bargaining. It noted that the employer must notify the representative of proposed changes and utilize the mid-contract bargaining process. The ERB then analyzed whether (1) first there was a change, (2) whether the change affected a mandatory subject of bargaining, and (3) whether there had been a waiver of the duty to bargain. In this particular case, the ERB determined that a number of the City's changes of policy did not violate the contract or were insignificant and dismissed those. However, the ERB did find that the City made significant changes to its policy on off-duty conduct, care and loss of equipment, and members leaving an outside training session and sustained the ULP on those grounds. The case may be read at 19 PECBR 323 (1999).

In a related case that came out of the City's previous actions in a consent decree between the parties, found at 19 PECBR 305 (1999), the City admitted that it committed an Unfair Labor Practice by discriminating against the officer who left training early by attempting to upgrade a counseling memo into an economic sanction after the officer filed a grievance over the counseling.

ERB REINSTATES AN OREGON CORRECTIONS ENTERPRISE EMPLOYEE WHO WAS TERMINATED FOR ALLEGATIONS OF DISHONESTY AND HELPING AN INMATE VIOLATE PRISON RULES

Based upon Oregon statutes enacted during the last session, the Oregon Corrections Enterprise was broken out as part of the Department of Corrections and set up as a semi-independent agency, which was supposed to be released from state bureaucratic red tape in order to make a profit utilizing inmate labor. Part of the fall out from that program is this agency also acts semi-independently in its handling of personnel matters. This case was a good example of how it is doing things wrong.

In this particular instance, an inmate worker had another inmate's mother send in a jacket to be embroidered through the embroidery program where items are embroidered and sold to government agencies and the public. The problem with doing so is that supervisors had concluded that inmates could not purchase items through this program. (This is contrasted with the Prison Blues project where inmates can purchase items through that program.)

When the supervisor discovered that an inmate was violating these rules, the supervisor panicked. Memos were generated. An inmate then accused a production coordinator of knowing in advance that the inmate was going to send in the jacket. The panicked supervisor confronted the employee who denied any knowledge of this. The supervisor believed that the employee had told the supervisor that he had helped the inmate. The supervisor ordered the employee to turn in memos explaining what had

occurred. The employee did so. The problem is that the accused employee has extreme difficulty reading and writing and not knowing the involvement of the inmate he had asked to assist him he had that inmate write his memos. Needless to say, one of those memorandums indicated that the accused employee did have foreknowledge.

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LANE COUNTY PEACE OFFICERS' ASSOCIATION LOSES AN UNFAIR PRACTICE OVER THE ENFORCEABILITY OF AN INTEREST ARBITRATION DECISION.

The Board started by chiding the Association for not filing its own ULP challenging the lawfulness of the award, but filing an ULP challenging the County's unilateral implementation of the Interest Arbitration decision, which the Association refused to sign.

The Board concluded that if an award is supported by substantial evidence, see the OSPOA case, and is enforceable, then the County can unilaterally implement it.

The Association argued that the arbitrator failed to consider part of each parties last best offers in the analysis. The ERB ruled that the arbitrator did not have to discuss portions of parties' last best offer if there is no reason to do so. The ERB also reminded the parties that it is not for the arbitrator to decide whether a proposal is mandatory or permissive, but for the ERB to decide that.

Editorial Comment: The most interesting aspect of this case was that the Association did not directly attack the portion of the last best offer of Lane County, which it should have claimed was permissive or even prohibited, which required an "uncompensated" 15-minute briefing. To attack a subject as permissive subject of bargaining, the proper

record should be made during the negotiation process. Based on this ERB decision it is impossible to determine whether that record was made.

EMPLOYERS, AND IN ONE CASE, A LABOR ORGANIZATION, HAVE BEEN UNSUCCESSFUL IN OVERTURNING INTEREST ARBITRATION DECISIONS

In the case of State of Oregon v. OSPOA, the ERB held that the State committed an unfair labor practice when it refused to implement an interest arbitration decision that went against it and concluded that the ERB's duty is to determine if an Interest Arbitration award (1) is supported by substantial evidence, and (2) is based upon statutory factors.

The Board started by quoting the Eugene case where the City tried to void the Interest Arbitration decision, by reminding the parties that its job is not to substitute its judgment for the arbitrator, but simply to discover if there is evidence on the record to support the award. The ERB concluded that the State's arguments are not aimed at whether the award was based upon the statutory factors, but on how the arbitrator applied them. The ERB stated that their review does not extend to second guessing arbitrator's legal and factual interpretations.

The State attempted to argue that the Board should weigh the evidence and determine whether the arbitrator made the appropriate decision. The Board rejected that approach.

Most importantly, the Board rejected the State's argument that the arbitrator does not have the discretion to determine if the appropriate relationship between the comparables was selected, i.e. where the State of Oregon should fall relative to the other comparables. The ERB rejected the State's argument that the arbitrator could consider no other comparables but the four surrounding states. The arbitrator was given discretion to utilize what the ERB called "certain statutory gray areas that make decisions on how to apply the criteria." The ERB concluded, "we will not disturb his interpretation of these statutory factors."