Public Employee Unions

~ Recent Decisions & Legislation ~

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AGENDA

- **Legislative Updates**
  - Veterans' Day
  - Social Media
  - Domestic Violence
  - Bereavement
  - PEBB/OEBB
  - Union Organizing
- **The Cases**
- **ACA Bargaining Considerations**

The contents of this presentation is not intended as legal advice, but rather as announcements on timely labor and public employment matters.

2013

SB1 – Veterans Day

Veterans Day Off

"An employer shall provide an employee who is a veteran as defined in ORS 408.225 with paid or unpaid time off for Veterans Day" if:

- The employee would otherwise be required to work on that day; and
- The employee provides 21 calendar days' notice.

Veterans Day Off

Unless:

- It would cause significant economic or operational disruption, or undue hardship as described in ORS 659A.121, and then
- The employee gets another day off within the year

Veterans Day Off

Misc.:

- Employer must approve or deny 14 days before Veterans Day, and inform employee if it is paid or unpaid
- Bargaining impacts?

HB 2654 – Social Media Passwords and Access by Employer

Added to ORS Chapter 659A (Unlawful Discrimination):

Unlawful employment practice to:

- Require or request an employee, or an applicant for employment, to disclose or to provide access to social media via
- User name, password or other means of authentication that provides access to a personal social media account

Unlawful Employment Practice to:

- Compel to add employer or agent to list of contacts
- Compel to access a personal social media account in the presence of the employer
- Take or threaten to take any adverse action for employee's refusal

However, an employer may (a):

Conduct an investigation, without requiring a disclosure that provides access to a personal social media account, for the purpose of ensuring compliance with laws, regulatory requirements or prohibitions against work-related misconduct based on receipt by the employer of specific information about activity of the employee on a personal online account or service.

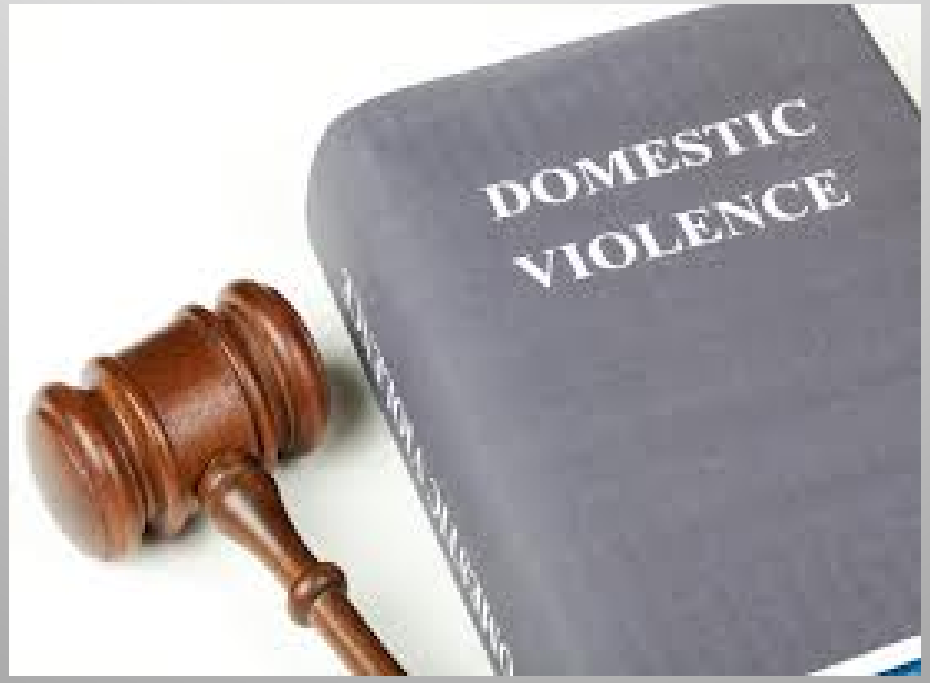
And, an employer may (b):

Conduct an investigation that requires an employee, without disclosure that provides access to a personal social media account, to share content that has been reported to the employer that is necessary for the employer to make a factual determination about the matter.

Nothing in this section prohibits an employer from:

- Accessing information available to the public about the employee or applicant that is accessible through an online account.
  - Provides a broad definition of “social media”.

HB2903 – Domestic Violence Leave Law Expansion



Amends ORS 659A.270 – .285:

Protections because of Domestic Violence, Harassment, Sexual Assault or Stalking ~

- Employer must now post the relevant laws and statutes in a conspicuous place
- Extends leave to new and part-time employees

HB2950 – Bereavement Leave

Amends ORS 659A.156 – .186:

Oregon Family Leave Act

Leave may now be taken to deal with the death of a family member by:

- Attending the funeral or alternative to a funeral,
- Making arrangements, or
- Grieving the death

Amends ORS 659A.156 – .186:

- Leave must be taken within 60 days of the date of notice of the death
- 2 weeks of leave per family member
- May not require the leave to be concurrent
- Doesn't expand the total of 12 weeks leave

HB2279 – PEBB/OEBB

Public Employees' Benefit Board (PEBB)

- The governing body of a local government may elect to participate in a benefit plan offered by the PEBB.
- This decision is in the discretion of the governing body of the local government and is a permissive subject of collective bargaining.

HB3342 – Union Organizing

Public Employer Accountability Act

Made a part of PECBA

- It is the policy of this state that public funds may not be used to subsidize interference with an employee's choice to join or to be represented by a labor union
- Purpose is to maintain neutrality of public bodies in labor organizing

Public Employer Accountability Act

- It is an Unfair Labor Practice to violate new section
- Provides that the ERB "shall impose a civil penalty equal to triple the amount of funds the public employer expended to assist, promote or deter union organizing."
  - Emergency declaration of effective upon signature

The cases…

Multnomah County Corrections Deputy Assoc. v. Multnomah County

Oregon Court of Appeals

257 Or App 713 (2013)

The facts

- The County and the Union were bargaining a CBA reopener
- Union proposed: “[A]ll sworn employees shall receive forty (40) hours of approved training per year, of which at least twenty (20) hours shall be DPSST-approved training.”

The facts

- The County declared the proposal to be a permissive subject of bargaining and refused to bargain over it
- The Union nonetheless included the proposal in its Final Offer
- Each party filed an Unfair Labor Practice Complaint

The issue

- Whether the union's proposal presented a "safety issue" under ORS 243.650(7)(f):

  For strike-prohibited employees, "employment relations" includes safety issues that have an impact on the on-the-job safety of the employees.

The ruling

- "[I]t must be apparent from the face of a proposal itself –that is, 'directly' and without reference to extrinsic evidence – that the proposal involves a 'safety issue'."
- "[A] matter involves a safety issue. . . If it would reasonably be understood, on its face, to directly address a matter related to the on-the-job safety of employees."

The ruling

- The court found that the evidence only established that DPSST-approved training *could* involve safety, not that it *would* involve safety.
- Not all of the training courses offered by DPSST were safety related.

The ruling

- The court went on to find that the proposal concerned "assignment of duties", which is expressly excluded from the definition of "employment relations" under ORS 243.650(7)(g)

Portland State University Chapter of the American Association of University Professors v. Portland State

Oregon Supreme Court

352 Or 697 (2012)

The facts

- PSU and union had a CBA that provided for grievances to be resolved by binding arbitration
- CBA also contained a “Resort to Other Procedures” (ROP) clause which allowed employer to discontinue the grievance & arbitration procedures if the employee filed a claim on the same subject in an external legal proceeding

The facts

- Union filed a grievance over the non-renewal of a member's contract
- Employer later learned that the employee had also filed a complaint with BOLI
- Employer, thereafter, refused to arbitrate the grievance under the CBA, as per the ROP

The allegation

- Union filed a ULP under ORS 243.672(1)(g) which provides that it is a ULP for a public employer to:

  "Violate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award. . ."

The OR Supreme Court ruling

- The Court concluded that the Board has authority to interpret and apply external statutes when fulfilling its statutory obligation to determine whether an employer or labor organization has committed an unfair labor practice.

The OR Supreme Court ruling

- The Court agreed with the Board that the ROP was illegal and unenforceable as it was facially discriminatory under both statutes because it imposed a form of employer retaliation for protected conduct that "reasonably would impede or deter an employee from pursuing his or her statutory rights."

Portland Police Association v. City of Portland

Case No. 25 PECBR 94 (2012), appeal pending

The facts

- The City terminated a police officer for violating its use of force policies after he was involved in a fatal shooting
- The union grieved the dismissal and an arbitrator found that the City lacked just cause for the termination

The facts

- The arbitrator found that the officer had an "objectively reasonable basis" to believe that Mr. Campbell posed an immediate risk of serious injury or death
- Therefore, the officer did not violate any policies when using deadly force

The facts

- The City refused to comply with the arbitration award, citing the public policy exception of ORS 243.706(1)
- The union filed a ULP under ORS 243.672(1)(g) – *refusal to accept the terms of an arbitrator's award*

Public Policy Exception

- ORS 243.706(1): As a condition of enforceability, any arbitration award that orders reinstatement of a public employee, or otherwise relieves the public employee of responsibility for misconduct, shall comply with public policy requirements as clearly defined in statutes or judicial decisions . . .

Public Policy Exception

- Including but not limited to policies respecting sexual harassment or sexual misconduct, unjustified and egregious use of physical or deadly force and serious criminal misconduct, related to work.

ERB three-part analysis

1. Did the arbitrator find that the grievant engaged in the misconduct?
2. If so, did the arbitrator reinstate or otherwise relieve the grievant of responsibility for the misconduct?
3. If so, is there a clearly defined public policy set forth in statutes or judicial decisions that renders the award unenforceable?

The ruling

The arbitrator found that the officer had not engaged in the misconduct, therefore the first step of the analysis was determinative and there was no need to address the second and third steps

FOPPO, Multnomah County Chapter v. Multnomah County

Case Nos. UP-032-12, 25 PECBR__(July 3, 2013)

The facts

- The County (employer) and Association (union) bargained for a successor CBA
- The parties were unable to reach agreement on the entire CBA, so proceeded to Impasse
- Both parties filed their Final Offers, and then their Last Best Offers (LBO)

The facts

- The union claimed, at the arbitration hearing, that three of the County's LBO proposals were regressive from their Final Offer
- The union did not file a ULP with the ERB, nor move to stay the arbitration
- Rather they waited until after the arbitration decision, and then filed a ULP under ORS 243.672(1)(e)

The ruling

- The Board found that a regressive proposal on a mandatory subject of bargaining, without any countervailing concessions, occurring between a final offer and an LBO is a *per se* violation of ORS 243.672(1)(e) - *refusal to bargain collectively in good faith with the exclusive representative*

The ruling

- The Board further explained that, although the statutory scheme permits a party to alter its final offer in its LBO, such changes must narrow, rather than expand, the scope of the parties' dispute

Milwaukie Police Employees' Association v. City of Milwaukie

Case No. 25 PECBR 263 (2012)

The facts

- Officer was investigated for misconduct
- One of the allegations was that the officer was outside of the City limits during meal or rest periods
- During the investigation, the union offered evidence that officers routinely left the City limits during their paid meal and rest periods

The facts

- Officer is subsequently terminated
- The union filed a grievance and proceeded to arbitration
- At the arbitration hearing the Chief testified that through the investigation he became aware that the City policy regarding meal and rest periods was not being followed and that he intended to enforce the policy in the future

The allegations

- Once the Chief started to enforce the policy, the union filed a ULP alleging the City interfered with protected activity, and therefore was in violation of the "because of" and the "in the exercise of" prongs of ORS 243.672(1)(a) - *interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662*

The ruling

- The City did not violate the “in the exercise of” prong as the Chief’s testimony at the arbitration hearing did not constitute a threat of retaliation against union members for their testimony
- He merely stated his intent to prospectively ensure compliance with a policy that he discovered was not being followed

The ruling

- The City did not violate either prong of (1)(a) when it began to enforce the policy, as the City was not responding to the protected activity, but rather responding to the non-compliance it discovered
- It does not matter that the non-compliance was discovered during the course of protected activity

The ruling

- The Board also found that a change to the practice of allowing officers to take rest and meal periods outside of the City limits did not concern a mandatory subject of bargaining
- The Board distinguished previous cases by noting that these were rest and meal periods on paid time

AFSCME v. City of Portland

Case Nos. 24 PECBR 1008 (2012)

Ruling on Reconsideration, 25 PECBR 85 (2012)

appeal pending

AFSCME v. City of Portland

- UP-46-08
- Filed 12-12-08
- Hearing before ALJ 3-16-10
- Recommended Order 6-20-11
  - 15 months to get a ruling. . .
- Oral Argument to the Board 10-3-11
- Final Order 6-29-12

AFSCME v. City of Portland

- Charging fees for staff time for materials the union sought regarding 2 grievances.

The Board:

- We begin our analysis as to whether charging a union for the costs involved in responding to its information request is mandatory for bargaining. In [prior cases] we held that it was. We now believe we erred in reaching this conclusion.

AFSCME v. City of Portland

Charging for information is a permissive subject for bargaining. We erred when we held, as we did in *Lebanon Community School District*, that it was a mandatory subject. We correct that error in this proceeding.[19] Accordingly, the City did not make an unlawful unilateral change in a mandatory subject of bargaining when it applied its policy regarding charges for public records information requests and billed AFSCME for the cost of staff time needed to respond to AFSCME's requests for information relevant to the Mersereau and Oswalt grievances.

Polk County Deputy Association v. Polk County

Arbitrator Katie Whalen, June 20, 2013

The facts

- 20-year employee faced with layoff of Corrections Technician position
- CBA provided that employee may bump an employee in an equal or lower job classification, providing that the bumping employee had greater seniority and possessed the qualifications and skills for the position

The facts

- Employee wanted to bump into Records Technician position but was unable to pass the skills test required
- Union filed a grievance for denial of bumping rights
- County made an exception, and entered into a 60-day trial service agreement

The facts

- Employee's father became ill and subsequently died; employee requested time off after 25 days into the 60-day training period to attend to his death
- After more than 30 days into the 60-day training period, employee had only accomplished 2 out of 47 needed tasks/skills

The facts

- At the end of the 60-day trial period, employee was notified that she had failed to obtain the necessary skills and competency for the position, and that she would be returned to the recall list
- The union filed a grievance claiming that the employee was not given a "fair opportunity" to be trained

The arbitration award

- The arbitrator found that the County breached the implied covenant of good faith and fair dealing in the performance and execution of the agreement, by:
  - Not providing for the full 60 days of training
  - Not properly considering the employee's past positive work performance evaluations in contrast to the trainers' notes
  - By favoring another employee for the position

The arbitration award

"I am persuaded that the County did not provide Grievant with a fair opportunity to train for the Records position during the 60-day period. Based upon the totality of the evidence, I find it more likely than not that the County was predisposed to fail Grievant in her Records training."

AFSCME v. Benton County

Arbitrator Timothy Williams
January 25, 2013

The facts

- Employee was a 7-year County employee, serving as a paralegal in the DA's Office
- The DA asked employee to mail a time-sensitive FedEx package
- The DA, subsequently, learned that the package never arrived
- Employee provided DA with copy of sender label

The facts

- FedEx says that the package never entered their system
- "Where did you drop off the package?"
- Employee gestured out the window and said, "Across the street and around the corner at the drop box."
- Employee offers to go to the drop box to get box number...but guess what?

The facts

- That drop box is no longer there!!!
- After that the employee engages in a series of changed stories about where the package was mailed from, and finally finding it in the backseat of her parent's car
- An investigation was opened
- During the investigation, employee made additional conflicting statements

The facts

- During the pre-determination meeting, the employee takes no responsibility and blames everything on the DA being out to get her
- The employee was terminated from employment
- The union filed a grievance

The arbitration award

"[T]he act of dishonesty eats away at the quality of the relationship between the employee and the employer. The Arbitrator will go one step further in some situations as the act of dishonesty so destroys the relationship that there is no reasonable basis upon which employment can continue."

The arbitration award

- “[T]he primary factual question for the Arbitrator to answer, therefore, is whether or not the Grievant was dishonest.”
- “Overall, the Arbitrator finds clear and convincing evidence that the Grievant did make the statement that she now denies and that her denial is not a matter of bad memory but rather deliberate and willful.”

The arbitration award

- In addition, “[t]here is a concept in argumentation theory called argumentum ad hominem which references arguments that focus on attacking the person as opposed to the issue. The [pre-disciplinary] document [from the grievant] is full of such argument.”

The arbitration award

- “It is hard if not impossible to read this document and draw the conclusion that there is a possible way to restore a reasonable workplace relationship.”
- “As the Arbitrator reviewed the document he was almost immediately struck with the thought that Shakespeare said it best in Hamlet, ‘the lady doth protest too much, methinks’.”

The arbitration award

- “Obviously the document in question was created after the discharge and played no role in the actual decision to terminate her employment.

  It is used here, however, to illustrate that the incidences in question had created a rift between the Grievant and her Employer of a magnitude that it could not be reasonably healed.

  Progressive discipline is used only when there is a reasonable basis upon which to believe that there is some likelihood of successfully re-aligning the parties.”

ACA: Bargaining Considerations

ACA: Bargaining Considerations

- Premium Cost shares and changes to insurance benefits are a mandatory subject of bargaining or may have mandatory impacts, unless de minimus.
- Employer has a duty to bargain prior to change in status quo, even if the employer is forced to change by the carrier or by law.
- Need to review collective bargaining language. Must have “clear and express” waiver to avoid bargaining obligation.

ACA: Bargaining Considerations

Sample language for your CBAs:

- i.e.: “Parties agree that benefit changes during the term of this agreement that are mandated by the ACA are not subject to bargaining.”
- i.e.: “The parties acknowledge that the requirements of the ACA may impose changes in insurance benefits and agree that no further bargaining obligation applies when such changes occur.”

ACA: Bargaining Considerations

Sample language for your CBAs:

- i.e.: “If insurance benefits change due to the Affordable Care Act requirements, both parties acknowledge that the employer may implement the required change without bargaining.”

Questions / Discussion

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