

APPENDIX A

I. The Standard of Review

The following is a discussion of the “standard of review” which will apply to Civil Service Board (Board). Included is a review of the State Personnel Law, which the Charter language in question is based upon, and of the Employment Relations Board decisions, which the Board will be able to rely upon in performing its appellate function.

1. Classification Action Appeals

Section 4-401 of the revised Charter provides in relevant part:

Section 4-401. Duties of the Board. The duties of the Board shall be:

- (1) Review classification actions taken by the Director affecting an employee in the classified service, where the employee alleges such action to be without a rational basis or contrary to law or rule or taken for political reason and remand back to the Director of Human Resources for further review and action.

The language above quoted which defines the Board’s authority, was based upon and is, in essence, the same language found in ORS 240.086 which governs the power of the Employment Relations Board (ERB) in reviewing classification appeals by employees of the State of Oregon. In relevant part, ORS 240.086 provides:

“The duties of the [ERB] shall be to:

- (1) Review any personnel action affecting an employee who is not in a certified or recognized appropriate collective bargaining unit, that is alleged to be arbitrary, or contrary to law or rule, or taken for political reason, and set aside such action if it finds these allegations to be correct.” (emphasis added).

The Employment Relations Board decision which applies and discusses the operative language in ORS 240.086, which is quoted and underscored above, is in the case of Gladys Patterson v. Department of Fish and Wildlife, ERB Case No. 1431 (December 1983). About its authority, ERB says the following:

“This is the first position allocation [reclassification] appeal from a classified state employee to come before this Board since extensive amendments to state personnel law by the 1979 Legislative Assembly***. Unchanged by the amendments, however, were the grounds on which this Board may review personnel actions, namely that such actions be ‘alleged to be arbitrary or contrary to law or rule or taken for political reason’***.’ ORS 240.086(a). Appellant here appeals to us on the ground that Respondent’s action in refusing her request for reclassification to accounting Clerk 2 was arbitrary.***

It is not for this Board to decide whether Respondent’s decision in allocating Appellant’s position was the correct one (i.e. whether we would have selected a different classification), but rather whether there is a rational basis to support the decision which respondent has made. This is the test of ‘arbitrariness’ which we have followed pursuant to Paul v. Personnel Division***. The court there said:

‘The word “arbitrary” is not a catchall provision. It may not be used as the vehicle for a policy decision. Rather, it applies to action which is taken without cause, unsupported by substantial evidence, or non-rational. Its typical application is in cases where there is no evidentiary basis for the challenged personnel action.’

There is here a rational, evidentiary basis for respondent's decision that Appellant's position should be classified as that of Accounting Clerk 1***." (pages 7-8) (emphasis added)

Along the same vein, in a more recent reclassification appeal, Barbara Rice v. Corrections Division, ERB Case No. 1475, (1985) the ERB said the following about its appellate role:

"Accordingly, this Board consistently has held that an agency classification decision will be upheld unless there is no evidentiary basis to support it. Gladys Patterson v. Department of Fish and Wildlife, Case No. 1431 (1983); Ruth Haucke v. Employment Division, Case No. 1075 (1981). In other words, the agency will prevail unless the evidence is so slim as to require a directed verdict for the appellant were the matter being tried before a jury." (page 8)

In addition to hearing appeals concerning classification matters, it is also ERB's duty to hear appeals by non-union State employees in discipline cases. The ERB applies the "no reasonable employer" standard, but only in the disciplinary cases. Brown v. Oregon College of Education, 52 OR App. 251 (1981). Disciplinary appeals are discussed in further detail below. The important point here is that there is a major difference between the "no reasonable employer standard" applicable in disciplinary appeals, and the "without a rational basis" or "on an arbitrary basis" test applied by the ERB (and to be applied by the Civil Service Board) for classification appeals.

The primary distinction between the two tests is the extent to which the Board or the ERB may substitute its judgment for that of management where there is evidence to support management's position. As the ERB explained in Gladys Patterson v. Department of Fish and Wildlife, supra, a classification decision by the employer must be "upheld unless there is no evidentiary basis to support it." In other words, if there is some evidence to support it, the decision must stand. As also further explained above, the standard for classifications appeals may not be used by the ERB or the Board as the vehicle for a policy decision. Classification policy is for the employer. Gladys Patterson v. Fish & Wildlife, supra.

As previously mentioned, a further explication of the "no reasonable employer" standard appears in Part II of this report below.

2. Examination Appeals

City Charter Section 4-401 provides that the duties of the Board shall be:

(3) Review appeals by candidates for appointment or promotion to positions in the classified service, when applicants allege that rules promulgated under Chapter 4 of the City Charter were not followed, were contrary to law or made for political reasons. If the Board finds an allegation to be correct, it shall order such actions necessary to fulfill the purposes and principles of this Chapter

The standard for examination appeals contains only "half" of the standard to be applied for classification appeals. Specifically, the sole issue for the Board will be whether the Director's decision was "contrary to rules promulgated for examinations, or...was contrary to law or for a political reason." Thus, if the Director did not violate any rules promulgated for examinations, or some law (example, ORS 659.030 prohibiting race discrimination) and if the decision was not for a "political reason" (the "political patronage" rule), the Director's decision must stand.

The "standard of review" for examination appeals is purposefully abbreviated because the pre-employment selection process of examinations is primarily, if not solely, an administrative function. In its expertise, the Board has observed that the great majority of examination appeals are an expression by a candidate who did not do well on the test of unspecified frustration or understandable dissatisfaction with the outcome. Few candidates identify any specific Board rule or policy violation. Further, it is a rare occasion that the Board has found it necessary to re-do the entire examination. The "standard of review" appearing in Chapter 3-050 of these Rules was written in light of this experience. Accordingly, in the event the Board finds a rule violation, it will have the latitude to fashion a remedy which fits the situation. Only the rare serious rule violation has deprived one or more candidates of a fair and equal opportunity for employment or has brought into question the integrity of the entire process. Even where a procedural error was found, it has rarely been necessary for the Board to invalidate the entire test and require all candidates to re-apply.

Again, the rule will allow the Board to fashion the appropriate remedy for the particular rule violation, if any is found.

3. Disciplinary Action Appeals

City Charter Section 4-401(2) provides the duties of the Board shall be to review suspension, demotion or discharge of permanent employees in the classified service when employees allege discipline was not for cause. If an employee's allegations are found to be correct, reinstatement may be ordered under terms and conditions as may be deemed appropriate by the Board.

Since the case of Sherris v. City of Portland, supra, the Civil Service Board has endeavored to determine whether the discipline imposed was "for cause." The Board is edified by the approach of the Employment Relations Board in reviewing disciplinary appeals in the State's "merit system." The ERB applies the "no reasonable employer" standard. In Oregon School Employees Association v. Klamath County School District, 9 PECBR 8832 (August, 1986), the ERB said the following about the "no reasonable employer" standard.

****In judging discipline cases under the State Personnel Relations Law, this Board applies a 'no reasonable employer' standard, as explicated by the Court in Brown v. Oregon College of Education, 53 Or App. 251 (1981). We also have applied that standard in cases under the Public Employee Collective Bargaining Act (PECBA) to modify discipline and to reverse a discharge. We believe that the reasonable employer's standard comprehends the generally-accepted elements used by arbitrators or others in making just cause determinations. Consequently, when confronted with (1)(g) complaints concerning 'for cause' discipline questions, this Board will use the reasonable employer standard to determine: first, whether the employee's conduct warranted discipline, and second, if so, whether the discipline imposed for the offense was objectively reasonable." Brown, supra, 52 Or App. at 260. (page 8850) (emphasis added)

Quoting from the Brown case, the ERB gave the following overview of the "no reasonable employer" standard:

"There is no explicit and comprehensive recipe that describes the traits of the reasonable employer. The ingredients must be discerned, and sometimes inferred, from a variety of sources. The Oregon Legislature, courts and this Board have enunciated some of the traits possessed by the reasonable employer; for example, it:

"Does not take action based on political, religious or racial reasons, or because of sex, marital status, or age;

"Disciplines in good faith and for cause;

"Does not impose sanctions disproportionate to the offense or discipline for inconsequential offenses;

"Considers the employee's length of service and prior service record, warns employees about what conduct is improper and generally is consistent in applying disciplinary sanctions;

"Takes disciplinary action in a timely manner;

"Gives an employee who is being dismissed notification of the charges against him and of the kinds of sanctions being considered, and at least an informal opportunity to refute the charges to someone authorized to make or effectively recommend the final decision;

"Bears the burden of proving all elements necessary to justify the discipline exacted; and

"Adopts and enforces reasonable regulations governing the work and conduct of its employees and imposes appropriate forms of discipline where it has good cause.

"My own experience in the field of employment relations and a review of some literature in the field lead me to conclude that the reasonable employer also incorporates other traits. For example, it:

"Makes a fair and objective investigation before administering discipline, except in extraordinary

circumstances; obtains substantial evidence before imposing sanctions; uses progressive discipline, except where the offense charged is gross or the employee's behavior probably will not be improved through such measures; and does not, through its own actions, exacerbate disciplinary problems." Brown at 8-9; footnotes omitted. (pages 8851 and 8852)

As ERB's decision above quoted indicates, the principles of "progressive discipline" have relevance in the "no reasonable employer" standard. On this score, a significant case is Oregon School Employee's Association, Chapter 89 v. Rainer School District 13, ERB Case No. UP-85-85 (appeal to Court of Appeals pending), wherein the ERB said the following about "progressive discipline":

"Complainant argues that Gamble's termination was not justified because the District failed to use progressive discipline. The Contract does not specify what progressive discipline steps, if any, are required. This Board has previously held that the 'reasonable employer' used progressive discipline 'except where the offense charged is gross or the employee's behavior probably will not be improved through such measures.' But the concept of progressive or corrective discipline as a component of just cause, does not require an employer to follow some lock-step progression of disciplinary measure before it may legitimately discharge an employee. Where a contract is silent concerning any requirement for specific disciplinary steps, the progressive discipline component of just cause may be satisfied by corrective measures that put the employee on notice that further misconduct may result in the discipline ultimately imposed and that give the employee a reasonable opportunity to modify his behavior. Gamble was warned in writing that his chronic tardiness could lead to dismissal ('gravest consequences'). The changes in his hours of work and the time clock requirement, although not normally regarded as disciplinary measures, were imposed by the supervisor in an attempt to correct the tardiness problem. We find that the warnings given to Gamble and the opportunity provided him to correct his behavior were sufficient to comply with the contractual just cause requirement." (pages 25-26).

CONCLUSION

Whereas the appellate jurisdiction and authority of the Board will be limited in classification and examination matters, the Board's authority in disciplinary cases will remain substantial. Since the "no reasonable employer" standard embodies the principles of "just cause," there is a body of ERB decisions, and decisions by arbitrators nation-wide, court decisions concerning employee discipline and arbitral treatises on employee discipline such as Elkouri and Elkouri's How Arbitration Works, 4th edition, which are appropriate for the Civil Service Board to refer to when reviewing discipline cases.