

Agency Report

Employment Relations Board

Analyst: John Borden

Request: Acknowledge receipt of the report.

Recommendation: Acknowledge receipt of the report.

Analysis: The Employment Relations Board (ERB) was directed by budget note during the 2012 legislative session (SB 5701) to complete the following items and then report to the appropriate policy committee and the Joint Committee on Ways and Means during the 2013 legislative session:

1. Review its administrative processes and procedures and make any necessary changes to improve the timely disposition of hearing and mediation cases;
2. Propose to the 2013 Legislature an expedited hearings process as well as any statutory changes that will improve the timely disposition of its hearing and mediation cases;
3. Conduct a review of recent opinions issued by the Board and its administrative law judges to evaluate the quality of opinions issued and how they can be improved upon; and
4. Report on the number of frivolous claims received and recommendations for reducing the number of any such claims.

ERB has met the direction of the budget note and has taken the following actions:

- Established timelines for issuing recommended and final orders;
- Identified specific types of contested case-types for expedited processing;
- Involved stakeholders in a review of the agency's processes and procedures;
- Established a Rules Advisory Committee to review rules and procedures related to contested cases;
- Completed an independent review of some recent recommended and final Board orders; and
- Involved stakeholders in a discussion of complaint or other actions by parties that lack legal merit.

The Board has acted on some of the recommendations made by stakeholders and resulting from the independent review of recommended and final Board orders, which it believes will improve the timely disposition of its cases. The Board continues to evaluate its current rules and practices.

The Board is unable to report on the number of complainant or respondent actions that may lack merit due to the subjective nature of such actions. However, the Board's processing of cases in a more timely manner and its review of its standards for dismissal of complaints may limit such filings in the future.

The Board states that it is able to address improvements in the timely disposition of cases administratively without the need for statutory change.

The performance of the agency will need to be monitored in the future to see if Board's actions have

improved the timely disposition of its cases.

The Legislative Fiscal Office recommends acknowledging receipt of the report.



Oregon

John A. Kitzhaber, MD, Governor

Employment Relations Board

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February 28, 2013

Sen. Richard Devlin, Co-Chair
Rep. Peter Buckley, Co-Chair
Joint Committee on Ways and Means
900 Court Street NE
Salem, Oregon 97301

Re: Employment Relations Board Report on Budget Notes
House Bill 5701 (2012)

Dear Sen. Devlin and Rep. Buckley:

The 2012 Legislature directed the Employment Relations Board (ERB) to take certain actions before the 2013 legislative session, and then report on the results of those actions to the appropriate policy committee and the Joint Committee on Ways and Means during the 2013 legislative session. Listed below are the legislative requests followed by the results received or actions taken to date.

1. Review ERB's administrative processes and procedures and make any necessary changes to improve the timely disposition of hearings and mediation cases.

The Board initially met with stakeholders to discuss ERB operations and solicit suggestions for changes and improvements. Based on stakeholders' suggestions and comments, the Board began a review of its administrative rules, established timelines for issuing recommended and final orders, and identified certain types of cases for expedited processing. As our backlog of recommended and final orders dwindles, the Board intends to reduce the amount of time between submission to the Administrative Law Judge (ALJ) or Board and issuance of the recommended or final order.

The Board also began identifying contested cases where rapid processing is important. These include: representation cases, cases involving potential back pay, and cases where parties request expedited processing. Once a case is identified as being appropriate for expedited consideration, the Board is utilizing several options including: assigning the case to an ALJ for hearing and drafting findings of fact for submission to the Board for issuance of a final order, assigning the case to an ALJ with directions to process the case rapidly, and having an ALJ or the Board Chair work with parties to develop a set of stipulated facts for submission to the Board for determination and issuance of a final order.



Finally, the Board has convened a Rules Advisory Committee to review rules and procedures related to contested cases and submit recommendations to the Board. Part of this review is to look at ways to make the contested case process move more expeditiously. The Rules Advisory Committee submitted its report on February 25, which is being reviewed by the Board.

2. Propose to the 2013 Legislature an expedited hearings process as well as any statutory changes that will improve the timely disposition of hearings and mediation cases.

The Board does not see a need for statutory changes. The administrative rules currently contain three expedited hearing processes for unfair labor practice complaints: complaints that pertain to scope of bargaining, complaints alleging that a law violation has been committed during or arising out of collective bargaining procedures, and a catch-all provision for other complaints. During the past year, the Board has informed stakeholders and parties of these rules at trainings, meetings, and workshops. The Board has also relayed information to stakeholders of other processes for expedited case resolution, such as the use of declaratory rulings and consent orders.

The Board anticipates that the Rules Advisory Committee has suggested rule revisions addressing timely disposition of contested cases. After the Board has had time to review these suggestions, a rule-making proceeding will be initiated.

The Board has improved the scheduling of mediation cases by filling a mediator position. As of March 12, we will be fully staffed in mediation (State Conciliator and two mediators).

3. Conduct a review of recent opinions issued by the Board and its administrative law judges to evaluate the quality of opinions issued and how they can be improved upon.

With the cooperation and assistance of the University of Oregon Labor and Education Research Center and the Oregon Labor and Employment Relations Association, a committee (Committee) consisting of an equal number of labor and management representatives developed criteria for evaluating six recommended and four final orders issued over the past two years.

Using the criteria developed by the Committee, the orders were then reviewed by four individuals (not Committee members) whose backgrounds include significant expertise and experience in labor law. Based upon the review, the Committee submitted suggestions to the Board in late December 2012. These suggestions were:

- a. Decrease the amount of time to process recommended and final orders, particularly when no objections are filed to a recommended order.

- b. Consider adopting the procedure used by the National Labor Relations Board, so that the Board would adopt or reject the ALJ's recommended order, with particular emphasis on unique or distinctive issues that require more attention.
- c. Condense, shorten, and reduce the number of findings of fact. Orders should include findings of fact, i.e., a summary of and conclusion about what was presented at the hearing, and not a recitation of the exhibits or testimony.
- d. Clearly define the issues at the start of the order, and make sure the conclusions address these issues.
- e. Recite the law needed to decide the issues, and routinely cite the important cases.
- f. Focus the analysis on the important issues. Do not address every argument the parties raise.

Prior to receiving the Committee's suggestions, the Board had already decreased the time to process recommended and final orders. Since receiving the suggestions, the Board has adopted some of them, while still considering others.

- 4. Report on the number of frivolous claim received and recommendations for reducing the number of any such claims.

At our meetings with stakeholders, they expressed concern about unfair labor practice complaints and defenses to unfair labor practice complaints that lack merit and are filed only because the complainant or respondent wishes to gain some advantage in negotiations or grievance processing with the threat of legal action. The stakeholders also admitted, however, that a decision that a complaint or defense is frivolous or lacks merit is highly subjective.

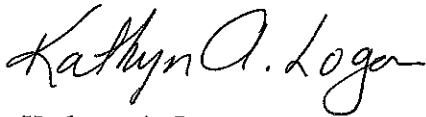
Currently ERB dismisses unfair labor practice complaints without a hearing if an investigation reveals that the case presents no issue of law or fact that warrants a hearing. ERB also dismisses appeals filed under the State Personnel Relations Law (SPRL) that do not meet the requirements of the law. Unfair labor practice complaints and SPRL appeals that are not timely filed are also dismissed. Prior to proposing that the Board dismiss a case, the ALJ works with the parties during the investigation phase to determine if a case has merit. Many cases are withdrawn or settled during this phase (approximately 41% in Fiscal Year 2012).

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Notwithstanding these dismissals, ERB is taking the following actions to encourage the filing of unfair labor practice complaints and defenses that present legal issues requiring resolution and discourage the filing of complaints and defenses seeking only a tactical advantage:

- a. Continue to make all necessary changes to promptly process unfair labor practice complaints. Parties are more likely to pursue a less than meritorious claim (or defense to a claim) if they think it will take many months to process the complaint.
- b. Examine ERB's rules to determine if a different standard for dismissal of complaints or a procedure for granting summary judgment is necessary.

Submitted for the Board by:



Kathryn A. Logan
Board Chair

KAL:lgw