



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

September 18, 2000

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Risk Management Division
Department of Administrative Services
1225 Ferry Street S.E.
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Human Resources/Labor Relations Division
Department of Administrative Services
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Re: Opinion Requests OP-2000-2

Dear Messrs. Hartman and Kennedy:

You have asked several questions about the authority of the Department of Administrative Services (DAS) to reimburse the legal expenses incurred by a state employee in successfully defending against a criminal prosecution. Your questions and our short answers are set out below, followed by a discussion.

1. Does DAS have authority to adopt by rule a program to reimburse the legal fees and costs incurred by a state employee in the employee's successful defense against a criminal prosecution on charges arising from the performance of official duties in circumstances where the employee would be entitled to state-paid legal defense and indemnification under the Oregon Tort Claims Act (OTCA) had the charges been brought as a civil tort action?

Although the issue is not without doubt, we believe DAS has such authority under the statutes authorizing it to direct and manage the risk management and insurance programs of state government so long as DAS determines that such a program is necessary or desirable for the efficient operation of state government. In addition, subject to approval by DAS's director and legislative review, DAS's Personnel Division may amend the merit pay system and salary plans for classified, unclassified and management service employees to include such a reimbursement program as an additional item of compensation. As discussed in the response to question two, however, neither the DAS Risk Management Division nor the DAS Personnel Division may unilaterally implement such a compensation program for represented employees.

We conclude that the Public Employees' Benefit Board (PEBB) does not have authority to provide insurance to reimburse state employees for legal expenses incurred in defending against criminal charges arising from the performance of official duties.

2. May DAS lawfully agree, in a collective bargaining agreement, to reimburse the fees and costs incurred by a state employee in the circumstances described above? Would this be a mandatory subject of bargaining?

DAS may agree to such a provision in a collective bargaining agreement. The provision would be a mandatory subject of collective bargaining.

3. Would your answers to question two be different if a proposed reimbursement program also applies to situations in which the OTCA indemnification and defense provisions would not be available for an analogous tort claim because the employee committed malfeasance in office?^{1/}

No.

Discussion

1. DAS's Authority to Reimburse Employees for Criminal Defense Expenses

Your first question is whether DAS may establish a program to reimburse state employees for expenses incurred in successfully defending against criminal prosecution on charges arising from the performance of official duties in circumstances where the employee would be entitled to state-paid legal defense and indemnification under the OTCA had the charges been brought as a civil tort action. We have identified three potential sources of such authority: (1) the statute authorizing DAS to establish and maintain risk management and insurance programs for the state, (2) the statutes authorizing DAS's Personnel Division to establish a merit pay system and salary plans for classified, unclassified and management employees, and (3) the statutes authorizing PEBB to provide benefit plans for state employees.^{2/}

a. DAS's Authority to Provide Insurance Programs of State Government

We first consider whether DAS's risk management powers and duties^{3/} include the authority to provide insurance to reimburse employees for criminal defense costs. Those powers and duties are set forth in ORS 278.405, which states in part:

The Oregon Department of Administrative Services shall direct and manage all risk management and insurance programs of state government except for employee benefit insurance programs as otherwise provided in ORS chapter 243. Authority granted the department in this section includes but is not limited to the following authority:

(1) ***To provide all insurance coverages*** including coverage of related legal expenses required by law, requisitioned by individual agencies, or ***which the department determines necessary or desirable for the efficient operation of state government***, including but not limited to casualty insurance, property insurance, workers' compensation insurance and surety insurance.

(2) To purchase insurance policies, develop and administer self-insurance programs, or any combinations thereof, as may be in the best interest of the state in carrying out the authorities granted in subsection (1) of this section.

ORS 278.405(1) and (2) (emphasis added).^{4/}

In interpreting a statute, our goal is to discern the intent of the legislature. ORS 174.020; ***PGE v. Bureau of Labor and Industries (PGE)***, 317 Or 606, 610, 859 P2d 1143 (1993). We first examine the statute's text and context, including other provisions of the statute, related statutes, and prior versions of the statute. In so doing, we consider statutory and judicially developed rules of construction that bear directly on how to read the text, such as the rule that "words of common usage typically should be given their plain, natural, and ordinary meaning," *id.* at 611, and the rule that a reviewing court is "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010; ***PGE***, 317 Or at 611. If the legislative intent is clear from the statute's text and context, the search ends there. If the text and context are not clear, we may resort to the legislative history for evidence of the legislature's intent. ***PGE***, 317 Or at 611-612. If, after considering the text, context and legislative history, we are unable to determine the legislature's intended meaning, we may resort to general maxims of statutory construction to resolve any remaining uncertainty. *Id.* at 612.

The text of ORS 278.405 begins by granting DAS broad general authority to "direct and manage all * * * insurance programs of state government except for employee benefit insurance programs as otherwise provided in ORS chapter 243." ORS 278.405(1) specifically authorizes DAS to provide "all insurance coverages" that it determines to be "necessary or desirable for the efficient operation of state government."

We first consider whether the proposed reimbursement program can be structured as an "insurance program" within the meaning of ORS 278.405. Criminal defense expense reimbursement can be provided through a legal expense insurance policy purchased from an insurer or a program of self-insurance.^{5/} We believe that either arrangement would constitute an "insurance program" for purposes of ORS 278.405.

The next issue is whether the proposed insurance program would be one "of state government" for purposes of ORS 278.405. It is possible to interpret the phrase "insurance programs of state government" as limiting DAS's authority to situations in which the state itself has some risk of loss or liability, i.e., an insurable interest. The examples of permissible insurance coverages listed in ORS 278.405(1) -- casualty, property, worker's compensation and surety insurance -- provide some support for this interpretation because they all protect the state

itself against a risk of loss or liability. For the reason that follows, we do not believe the statutory context supports such a limited interpretation.

ORS 278.405 expressly excepts from DAS's authority "employee benefit insurance programs, as otherwise provided in ORS chapter 243." Employee benefit insurance provides coverage for employees to insure them against the risk of loss of wages (e.g., death or disability insurance) or the risk of liability for medical or other costs (e.g., health insurance). Such employee benefit insurance does not insure the state against any risk to the state itself for loss or liability. If the phrase "insurance programs of state government" were intended to limit DAS's authority to situations in which the state itself had an insurable interest, there arguably would be no need to except employee benefit insurance from DAS's authority.

Although the issue is not entirely without doubt, we therefore conclude that the reference to "insurance program of state government" was not intended to limit DAS's authority to situations in which the state has an insurable interest. Rather, ORS 278.405 grants DAS discretionary authority to establish and maintain all insurance programs, other than employee benefit insurance programs provided in ORS chapter 243, that it determines to be necessary or desirable for the efficient administration of state government.^{6/}

We next consider whether the proposed insurance program would be an "employee benefit insurance program as otherwise provided in ORS chapter 243," in which case it is expressly excluded from DAS's authority. ORS 278.405. ORS chapter 243 authorizes employee benefit insurance plans through PEBB. For the reasons explained below in Part 1.c. of this opinion, we believe that ORS chapter 243 does not authorize PEBB to provide the criminal defense expense reimbursement coverage described in your question.

Finally, we consider the scope of DAS's authority to provide insurance under ORS 278.405(1) and (2). The text of ORS 278.405 indicates that the legislature intended to delegate broad authority to DAS in this area. The first sentence of ORS 278.405 states that DAS's general authority over "insurance programs of state government" includes, but is not limited to, the authority described in subsections (1) to (6). In turn, ORS 278.405(1) grants DAS discretionary authority to provide all insurance coverages requisitioned by agencies or which DAS determines to be "necessary or desirable for the efficient operation of state government."

We previously construed ORS 278.405 as giving DAS broad delegative authority, explaining as follows:

ORS 278.405(1) and (2) permit the Department of General Services to provide any insurance coverages requisitioned by a state agency or which the department "determines necessary or desirable for the efficient operation of state government," either by procuring private insurance policies, establishing self-insurance programs, or mixing the two methods. That part of subsection (1) [of ORS 278.405] which permits the department to provide such coverage as it "determines necessary or desirable for the efficient operation of state government," contains terms of delegation under which the Department of

General Services has broad policymaking authority to determine what forms of insurance programs are reasonably helpful to the effective operation of Oregon state governmental programs.

Letter of Advice dated March 31, 1986, to Holly Miles, Manager, Job Training Partnership Administration (OP-5924) at 3, *citing Springfield Education Assn. v. School Dist.*, 290 Or 217, 223, 228-230, 621 P2d 547 (1980).^{7/}

ORS 278.405(1) lists examples of the insurance coverages that DAS is authorized to provide as “including but not limited to casualty insurance, property insurance, workers’ compensation insurance and surety insurance.” The Oregon Supreme Court has recognized that the word “including” as used in a statute may have one of several meanings.

“Including” can and has been interpreted as a word of enlargement, or of illustrative application, as well as a word of limitation[.]

Premier Products Co. v. Cameron, 240 Or 123, 125, 400 P2d 227 (1965). Here, the inclusion of the words “but not limited to” belies any suggestion that the list of examples was intended as a limitation in the form of an exhaustive list of the types of insurance that DAS may provide. *See Gholson v. US*, 532 A2d 118, 119 (DC App 1987) (“legislative intent that ‘include’ be read as a term of enlargement rather than limitation is further underscored by coupling its use with the phrase ‘but not limited to’”); *Pennsylvania H.R. Com'n v. Alto-Reste Pk Cem Ass'n*, 453 Pa 124, 130-31, 306 A2d 881, 885-86 (1973) (same).

The list of examples may be illustrative, however, evincing a legislative intent to authorize DAS to provide only insurance that is similar to the list of examples. Certainly, there is no suggestion in the examples listed that the legislature contemplated that DAS would provide criminal defense insurance. Yet, by its express terms, ORS 278.405(1) authorizes DAS to provide *all* insurance coverages that DAS determines necessary or desirable for the efficient operation of state government. The use of the word “all” would appear to negate any conclusion that the legislature had something less in mind. *See Quintero v. Board of Parole and Post-Prison Supervision*, 329 Or 319, 986 P2d 575 (1999).

In summary, we conclude that the proposed reimbursement program, if adopted in the form of insurance, would be an “insurance program of state government.” For the reasons stated in Part 1.c., we also conclude that such a program would be other than an “employee benefit insurance program as otherwise provided in ORS chapter 243.” Accordingly, ORS 278.405 authorizes DAS to establish and maintain the proposed reimbursement program if DAS determines that the program is necessary or desirable for the efficient operation of state government.^{8/} DAS may establish the program by purchasing a legal expense insurance policy from an insurance company or establishing a program of self-insurance.^{9/} As discussed below in Part 2, however, DAS may not unilaterally implement such a reimbursement program as to represented employees.

b. DAS's Authority to Establish Compensation Plans

DAS's Personnel Division has statutory authority to establish and implement a merit pay system for classified service positions, ORS 240.235(1), and salary plans for unclassified and management service positions for which salary is not fixed by law. ORS 240.240(2). Under these provisions, DAS Personnel may adopt, as an additional item of compensation or salary, a reimbursement program for legal expenses incurred by classified, unclassified or management service employees in successfully defending against criminal charges arising out of the performance of official duties.^{10/}

Modifications of the current merit pay system or salary plans must be approved by DAS's director, ORS 240.235(2) and 240.240(2), and submitted to a legislative review agency. ORS 291.371(2). Moreover, as discussed in Part 2 below, DAS may not unilaterally implement such a reimbursement program as to represented employees.

c. PEBB's Authority to Provide Employee Benefit Insurance

PEBB has authority to establish and administer health and dental benefit plans with expenses paid in whole or in part by the state, ORS 243.125, 243.135, and is required to offer long term care insurance to eligible employees and their eligible family members, ORS 243.291. In addition, PEBB may

contract with carriers to provide at the expense of participating eligible employees and with or without state participation for coverage, including but not limited to, insurance or other benefit based on life, supplemental medical, supplemental dental, optical, accidental death or disability insurance plans.

ORS 243.275(1). For purposes of this letter, we refer to this authority as the authority to provide "other insurance benefits."

PEBB also has authority to offer flexible benefit plans under which it may offer:

- (a) Health or dental benefits as provided in ORS 243.125 and 243.135.
- (b) Other insurance benefits as provided in ORS 243.275.
- (c) Dependent care assistance as provided in ORS 243.550.
- (d) Expense reimbursement as provided in ORS 243.560.
- (e) Any other benefit that may be excluded from an employee's gross income under the federal Internal Revenue Code.
- (f) Any part or all of the state contribution for employee benefits in cash to the employee.

ORS 243.221(2); *see also* ORS 243.560(1) (authorizing PEBB to provide an expense reimbursement plan), ORS 243.555(1) and (3) (defining "expense reimbursement plan" and "qualified employee expenses"). ORS 243.221(2)(b) incorporates PEBB's authority to provide other insurance benefits under ORS 243.275(1).

The only other provisions in ORS 243.221(2) that arguably authorize PEBB to provide legal expense insurance or reimbursement are ORS 243.221(2)(d) (expense reimbursements) or (e) (other excludable benefits). For this purpose, "expense reimbursement" is limited to reimbursement of "qualified employee expenses." ORS 243.555(1). "Qualified employee expenses" are "expenses for dependent care, medical expenses, insurance premiums and any other expenses qualified for tax free reimbursement under the federal Internal Revenue Code." ORS 243.555(3). Similarly, excludable benefits under ORS 243.221(2)(e) are benefits "that may be excluded from an employee's gross income under the federal Internal Revenue Code."

Thus, legal expense insurance would be eligible for inclusion in a flexible benefit plan as an expense reimbursement or excludable benefit only if the value of the coverage is excludable from the employee's gross income or otherwise qualifies for tax free reimbursement under the federal Internal Revenue Code. ORS 243.221(2)(d), (e); 243.555(1), (3). The state's reimbursement of an employee's personal legal expenses would not qualify for such favorable tax treatment. *See Old Colony Trust Co. v. Com.*, 279 US 716, 49 S Ct 499, 73 L Ed 918, 7 AFTR 8875, 1 USTC 408 (1929) (employer payment of employee's personal expenses as a benefit must be included in employee's gross income in absence of specific exclusion); *O'Malley, Thomas*, 91 TC 352 (1988) (no exclusion for legal expense reimbursement). Because the federal Internal Revenue Code contains no express exclusion for reimbursement of an employee's personal legal expenses, such an employee benefit would be taxable income to the employee.^{11/} Thus, group legal insurance does not qualify as an "expense reimbursement" or other excludable benefit that may be included in a flexible benefit plan under ORS 243.221(2)(d) or (e). Accordingly, PEBB has no authority to provide, as part of a flexible benefit plan, employee benefit insurance in the nature of reimbursement of an employee's legal costs incurred in defending criminal charges.

We next consider PEBB's statutory authority to provide other insurance benefits. Under ORS 243.275(1), PEBB may contract with carriers to provide coverage "including but not limited to, insurance or other benefit based on life, supplemental medical, supplemental dental, optical, accidental death or disability insurance plans."^{12/} It seems clear that the phrase "including but not limited to" modifies either the phrase "insurance or other benefit" or the list of permissible insurance coverages ("life, supplemental medical, supplemental dental, optical, accidental death or disability").^{13/} Because the former phrase already contains broad, expansive language ("or other benefit"), it seems unlikely that the legislature would find it necessary to add the words "including but not limited to" to that particular phrase. We therefore conclude that the phrase "including but not limited to" probably was intended to modify the list of permissible insurance coverages.

The question then becomes how broad this grant of authority was intended to be. We conclude above that the phrase “including but not limited to” in ORS 278.405(1) is expansive of DAS’s authority to provide insurance and that the list of examples following this phrase does not qualify or restrict that authority. Our conclusion as to DAS’s authority is predicated in part on the fact that the list of examples in ORS 278.405(1) follows a statement authorizing DAS to provide “all” insurance. PEBB’s authority under ORS 243.275 is not expressly so all encompassing.

Nevertheless, we find the text and context of ORS 243.275(1) ambiguous and the legislative history unhelpful.^{14/} Therefore, we consider, at the third level of statutory interpretation under *PGE v. BOLI*, the maxims of statutory construction. The maxim that appears most pertinent is that directing a court to construe a statute as it believes the legislature would have acted, had the legislature specifically addressed the issue. *State v. Gulley*, 324 Or 57, 66, 921 P2d 396 (1996) (citing *PGE*, 317 Or at 612). One possible clue to what the legislature would have done is contained in the insurance benefits that PEBB is expressly authorized to provide. All of those benefits -- medical, dental, life, disability and long-term care -- insure against contingencies that could affect a broad spectrum of employees and their family members, i.e., sickness, injury, death and disability. The great majority of state employees, on the other hand, are unlikely ever to face criminal prosecution on charges arising out of the performance of their official duties. Moreover, criminal defense insurance, unlike the expressly authorized PEBB insurance benefits, is not typically included in employee benefit packages. Yet, if we were to conclude that PEBB has authority under ORS 243.275(1) to provide criminal defense insurance, then DAS would not have authority to do so because ORS 278.405 excepts from DAS’s authority employee benefit insurance programs provided in ORS chapter 243. As between DAS and PEBB, we believe it more likely that the legislature would have intended to give DAS authority over a program of insurance that reimburses the legal fees and costs incurred by a state employee in the employee’s successful defense against a criminal prosecution on charges arising from the performance of official duties. Such insurance does not merely reduce an employee’s expenses as do other PEBB benefits. Rather, it tends to serve the same policy that the Tort Claims Act does, i.e., providing assurance to public employees that the discharge of public duties will not create a risk of personal liability which would discourage people from seeking public employment or, once employed, from taking official action. Thus, we conclude that ORS 243.275(1) does not authorize PEBB to provide such criminal defense insurance because it is not an “employee benefit insurance program.”^{15/}

2. DAS's Authority to Negotiate and Enter into Collective Bargaining Agreements for Employee Legal Expenses

You next ask whether DAS has authority to agree in a collective bargaining agreement to reimburse a state employee's legal expenses incurred in the employee's successful defense against a criminal prosecution in circumstances where the employee would be entitled to state-paid legal defense and indemnification under the OTCA had the charges been brought as a civil tort action. You also ask whether this would be a mandatory subject of bargaining. We first address DAS's authority to agree to such a provision in a collective bargaining agreement and then discuss whether such a subject is a mandatory or a permissive subject of bargaining.

a. Personal Legal Expenses as a Collective Bargaining Subject

The Public Employees Collective Bargaining Act (PECBA), ORS 243.650 to 243.782, obligates the state and labor unions representing state employees to engage in collective negotiations with a willingness to enter into written and signed contracts evidencing agreements resulting from those negotiations. ORS 243.656(5). DAS represents state agencies in collective bargaining. ORS 243.696, 240.321(1). Employees in state-recognized bargaining units must have "all aspects of their wages, hours and other terms and conditions of employment" established through collective bargaining between the state and the unions. ORS 240.321(2).

Certain subjects, however, may not lawfully be included in collective bargaining agreements and, if included, are unenforceable. *Springfield Education Assn., v. Springfield School District No. 19*, 1 PECBR 347, 350 (1975). A prohibited subject of bargaining is one that, if adopted, would require either party to the collective bargaining agreement to perform an unfair labor practice, violate law or violate public policy. *Petition for a Declaratory Ruling Filed by the City of Portland*, 8 PECBR 8115, 8121 (1985); *Eugene School District No. 4J v. Eugene Education Association and Jack S. Hunter*, 4 PECBR 2403, 2406 (1979); *see also Petition for Declaratory Ruling Filed Jointly by Corvallis School District 509J and Mid-Valley Bargaining Council*, 13 PECBR 598 (1992) (contract proposal for two-tiered seniority system was prohibited subject of bargaining because it conflicted with statute requiring single track system for teachers). A subject is also prohibited if it falls within the exclusive province of an agency whose responsibilities and authority with regard to the subject are incompatible with the collective bargaining process. *See, e.g., AFSCME v. Oregon State Executive Department*, 14 PECBR 180 (1992) (health insurance benefits); *Association of Oregon Corrections Employees v. State of Oregon, Dept. of Corrections*, 14 PECBR 832 (1993), *aff'd* 133 Or App 602, 892 P2d 1030, *rev den* 321 Or 268 (1995) (underinsured motorist coverage).

The Court of Appeals recently concluded that it would not violate public policy for a public body to reimburse an employee's successful criminal defense costs in circumstances where the employee would be entitled to state-paid legal defense and indemnification under the OTCA had the charges been brought as a civil tort action. *See Eugene Police Employees' Association v. City of Eugene*, 157 Or App 341, 348, 972 P2d 1191 (1998), *rev denied* 328 Or 418, 987 P2d 512 (1999) (employer reimbursement of represented employees' expenses in successfully defending against criminal charges not a prohibited subject of bargaining). Furthermore, the proposed reimbursement program would not cause either party to the collective bargaining agreement to violate any express provision of law. The remaining question, therefore, is whether such a reimbursement program would be a prohibited subject of bargaining because it falls within the exclusive province of an agency whose responsibilities and authority with regard to that subject are incompatible with the collective bargaining process.

We conclude above that DAS has authority to establish a program to reimburse employees' legal expenses incurred in successfully defending against criminal charges arising out of the performance of official duties by amending the state's merit pay system and salary plans

pursuant to ORS chapter 240. The Court of Appeals has held that the Personnel Division's authority to establish employee classification and compensation plans is not irreconcilable with its duty to bargain over salaries under PECBA. *AFSCME v. Executive Dept.*, 52 Or App 457, 471, 628 P2d 1228, *rev den* 291 Or 771 (1981) (while Personnel Division is responsible for establishing general salary grades and classifications, specific salaries within each range paid to bargaining unit employees are subject to negotiation or arbitration under PECBA). Accordingly, the Personnel Division's authority to provide criminal defense expense reimbursement as compensation does not relieve it of the obligation to bargain over that subject.

We also conclude above that DAS may establish an insurance program under ORS 278.405 to provide reimbursement of successful criminal defense expenses. In *Association of Oregon Corrections Employees v. State of Oregon, Dept. of Corrections*, 14 PECBR 832, ERB held that the authority to provide underinsured motorist's insurance coverage was within the exclusive province of the Department of General Services (DGS) and that such coverage therefore was a prohibited subject of bargaining. Under the law in effect at the time, the Department of General Services (DGS) was the agency authorized under ORS 278.405 to manage the state's risk management and insurance programs. ERB concluded that DGS's "obligations under its organic law are incompatible with the processes required under the PECBA as discussed generally in [*AFSCME v. Oregon State Executive Department*]." *Id.* at 875.

Although the ERB opinion contains no express analysis, it incorporates by reference the analysis set forth in *AFSCME v. Oregon State Executive Department*, 14 PECBR 180. In that case, ERB concluded that employee health insurance benefits were a prohibited subject of bargaining because they were within the exclusive province of the State Employees' Benefit Board (SEBB).¹⁶ *Id.* at 189. Although SEBB was "situated organizationally" in the Personnel Division of the Executive Department, which at that time represented the state in collective bargaining, ERB concluded that SEBB was operationally independent from the Executive Department, stating:

SEBB is not a public employer. Its decisions are not controlled by a public employer. Rather, it is an autonomous statutory entity which * * * is specifically charged with the responsibility to carry out express legislative purposes in a manner irreconcilable with the bargaining process.

In sum, SEBB and the Executive Department are not a single bargaining entity. SEBB is not a public employer -- or even a functional equivalent -- for purposes of the PECBA.

Id. at 192-93. ERB based this conclusion in part on SEBB's organizational structure, under which an independent board was charged by statute with establishing and administering the state's health and dental benefit plans. ERB also found that SEBB's statutory powers and duties were incompatible with the collective bargaining process. Under those statutes, SEBB had an affirmative duty to provide health and dental benefits, to make benefit plan decisions based on the welfare of both the state and its employees and to give primary consideration to cost

containment principles. The statutes also gave SEBB the authority to terminate any insurance agreement or contract "which in the board's judgment requires such action." *Id.* at 190-91, *citing* ORS 243.145(1).

The ERB opinion in *Association of Oregon Corrections Employees v. State of Oregon, Dept. of Corrections*, provides some support for the conclusion that the criminal defense expense insurance at issue here also is a prohibited subject of bargaining because authority to provide such insurance is within the exclusive province of DAS. That opinion, however, dealt with the authority of DGS, which no longer exists. Before July 29, 1993, the Executive Department represented the state in collective bargaining and DGS, a completely separate agency, was responsible for the state's insurance programs under ORS 278.405. Effective July 29, 1993, however, DGS was abolished and its duties and functions were transferred to DAS. Or Laws 1993, ch 500, § 1.^{17/}

DAS's Risk Management Division administers the state's risk management and insurance programs and DAS's Personnel Division represents the state in collective bargaining. The Risk Management Division has no statutory authority or existence independent of DAS; it is merely an administrative construct subject to DAS's complete direction and control. *See* note 3, above. Although the Personnel Division is created by statute and assigned specific statutory powers and duties, it is controlled by DAS's director. ORS 240.055, 240.057. Thus, a critical element of ERB's reasoning in *Association of Oregon Corrections Employees v. State of Oregon, Dept. of Corrections* -- that separate, independent agencies were charged with managing the state's insurance programs and representing the state in collective bargaining -- no longer exists. Under the current statutory scheme, a single agency -- DAS -- performs both functions.

We also believe that DAS's statutory authority over state insurance programs is not necessarily inconsistent with the bargaining process. Unlike the statutes that governed SEBB, DAS's governing statutes do not require DAS to provide the type of insurance at issue here, nor is there anything in ORS 278.405 that constrains DAS's authority to provide such insurance other than the need for DAS to determine that doing so is "necessary or desirable for the efficient operation of state government." When faced with apparent conflicts between a public employer's duty to bargain over mandatory subjects and its authority over the same subject under another statutory scheme, Oregon courts have, for the most part, resolved the issue in favor of the bargaining obligation. *See, e.g., Circuit Court v. AFSCME*, 295 Or 542, 669 P2d 314 (1983) (PECBA requires juvenile court judges to bargain with union over juvenile court counselors' salaries, grievance procedures and all other mandatory subjects, notwithstanding judges' statutory authority to hire, fire and set salaries of employees); *AFSCME v. Executive Dept.*, 52 Or App at 471 (while State Personnel Division is responsible for establishing general salary grades and classifications, specific salaries within each range paid to bargaining unit employees is subject to negotiation or arbitration under PECBA). Although the issue is not entirely free from doubt, we believe that ERB and the courts would reach the same conclusion here.

In summary, we conclude that the reimbursement of legal expenses incurred in an employee's successful defense against a criminal prosecution, where the employee would be

entitled to OTCA indemnification and defense for an analogous tort claim, is not a prohibited subject of bargaining.

b. Mandatory and Permissive Subjects of Bargaining

We next consider whether the proposed criminal defense legal expense reimbursement is a mandatory or permissive subject of bargaining. Under PECBA, the state must bargain collectively in good faith with its employees' exclusive representatives over "employment relations." ORS 243.650(4), 243.656(5), 243.672(1)(e). Only those subjects defined as "employment relations" under ORS 243.650(7)(a) are mandatory for bargaining. *Portland Fire Fighters Assn., v. City of Portland*, 305 Or 275, 282-283, 751 P2d 770 (1988). A public employer may bargain over permissive subjects but has no legal obligation to do so. *Tualatin Valley Bargaining Council v. Tigard School District*, 314 Or 274, 840 P2d 657 (1992).

“‘Employment relations’ includes, but is not limited to, matters concerning direct or indirect monetary benefits.” ORS 243.650(7)(a). A program to reimburse employees’ legal expenses clearly provides “direct or indirect monetary benefits.” Based on the plain language of ORS 243.650(7)(a), the Court of Appeals recently held that a proposed collective bargaining agreement provision under which the employer would be required to reimburse represented employees for expenses incurred in successfully defending against criminal charges is a mandatory subject of collective bargaining. *Eugene Police Employees' Association v. City of Eugene*, 157 Or App at 354. Based on the holding in that case, DAS would have a duty to bargain with the exclusive representative of state employees over a proposal to provide the criminal defense expense reimbursement described in your question. Because this is a mandatory subject of collective bargaining, DAS may not implement such a reimbursement program for represented employees by amending the merit pay system or salary plans under ORS chapter 240, without bargaining in good faith with the employees' representatives.

3. Personal Legal Expenses when Charges Arose from Malfeasance in Office or Willful or Wanton Neglect of Duty

Your final question concerns DAS's authority to agree in a collective bargaining agreement to reimburse a state employee's expenses in successfully defending against a criminal prosecution if the criminal charges arose from the performance of official duties but the employee would not be entitled to legal representation and defense under the OTCA because the employee was guilty of malfeasance in office or willful or wanton neglect of duty. For the reasons discussed above, the reimbursement of criminal defense costs in such circumstances would not cause either party to the collective bargaining agreement to violate any express provision of law, nor would it fall within the exclusive province of an agency whose responsibilities and authority with regard to that subject are incompatible with the collective bargaining process. The Court of Appeals recently held that the use of public funds to defend public employees against liability for conduct that constitutes either malfeasance in office or willful or wanton neglect of duty does not violate public policy. *Eugene Police Employees' Association v. City of Eugene*, 157 Or App at 344-45.

Under the court's holding, DAS would have authority to agree in a collective bargaining agreement to reimburse criminal defense costs in such circumstances, and the proposed reimbursement would be a mandatory subject of bargaining. *Id.* at 354.

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

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^{1/} ORS 30.285 provides, in relevant part:

(1) The governing body of any public body shall defend, save harmless and indemnify any of its officers, employees and agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

(2) The provisions of subsection (1) of this section do not apply in case of malfeasance in office or willful or wanton neglect of duty.

^{2/} The Public Employees' Benefit Board (PEBB) is part of the Department of Administrative Services (DAS). ORS 243.061(1).

^{3/} The Risk Management Division is the subdivision of DAS that administers the state's Insurance Fund, the state's activities under the OTCA and the state's general liability and casualty insurance and self-insurance programs. Because the statutes discussed in this opinion name DAS as the responsible state agency, we refer in this opinion to DAS, rather than the Risk Management Division.

^{4/} ORS 278.405(6) also authorizes DAS "[t]o adopt rules and policies governing the administration of the state's insurance and risk management activities and to carry into full force and effect the provisions of this chapter, ORS 30.260 to 30.290, 30.880 and 655.505 to 655.555." ORS 278.425(1) creates the Insurance Fund, "which shall be used to provide insurance and self-insurance for the State of Oregon under this chapter, and for participating local public bodies under ORS 30.282 and 278.125 to 278.215."

^{5/} We previously determined that ORS 278.405(2) authorizes DAS to establish and maintain programs of self-insurance. Letter of Advice dated March 31, 1986, to Holly Miles, Manager, Job Training Partnership Administration (OP-5924) at 2-5.

^{6/} We also have considered whether, in authorizing DAS to provide "all insurance coverages, including coverage of *related* legal expenses," the legislature implicitly limited DAS's authority to provide coverage for legal expenses unless those expenses are related to some other covered risk or

liability. *See* ORS 278.405(1). We do not believe that this is a reasonable interpretation of the plain language of this provision, which is a statement of inclusion, not a limitation on DAS's authority.

^{7/} Although the 1986 version of ORS 278.405 referred to the Department of General Services rather than DAS, the language is otherwise identical to the present version.

^{8/} Although we conclude that DAS has authority under current statutes to provide such a reimbursement program if it concludes that to do so would be "necessary or desirable for the efficient operation of state government," we recognize that such a program would likely be controversial. We express no opinion on whether such a program would be "necessary or desirable"; that decision has been committed by the legislature to DAS.

^{9/} We recognize that in a Letter of Advice dated April 12, 1995, to Rick Hill, Juvenile Corrections, Children's Services Division (OP-1995-4), we stated that no statute authorized the use of the Insurance Fund "to indemnify a state employee or agent for the costs of obtaining representation in a criminal investigation or prosecution." *Id.* at 4. That letter, however, addressed only whether a physician under contract with the state, and therefore arguably an agent of the state, could claim indemnification for those expenses directly under existing statutes. The question answered by that letter did not present the issue whether DAS was empowered to establish a new program to reimburse those costs. Standing alone, the part of the OTCA that directly provides for the indemnification of employees and agents of the state permits indemnification only against tort liability. This provision of the OTCA states:

The governing body of any public body shall defend, save harmless and indemnify any of its officers, employees and agents, whether elective or appointive, against any *tort* claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

ORS 30.285(1) (emphasis added).

In 44 Op Atty Gen 416, 421 n 8 (1985), we recognized that leading legal commentators had consistently tethered the concept of "tort" to the existence of a civil wrong, stating, "This qualification is important because it distinguishes the concept of tort from criminal liability that may result from the breach of a duty imposed by law." ORS 30.285(1) neither requires nor authorizes the state to indemnify an officer, employee or agent against liability for, or expense incurred in defending against, criminal charges. Thus, OP-1995-4 correctly answered the question to which that advice was limited.

^{10/} In 42 Op Atty Gen 403 (1982), we concluded that a county court may, but is not required to, adopt an ordinance authorizing the reimbursement of a county clerk for attorney fees incurred in successfully defending against a criminal prosecution on charges relating to the clerk's alleged abuse of public office. In that opinion, however, we provided the following caveat:

This opinion does not deal with payment of such defense costs for officers or employees of state agencies. Payment in those cases would not be permissible unless the legislature enacts a statute permitting it.

Id. at 407 n 4. This 1982 opinion contained no express analysis on this point and there is no indication that we considered whether such reimbursement could be provided as a part of employee compensation.

After that 1982 opinion was issued, we concluded that the Executive Department's Personnel Division had authority to provide legal service benefits to employees as part of the merit pay system. Letter of Advice dated September 27, 1984, to Anita Leach, Administrator, Personnel Division, Executive

Department (OP-5683). For the reasons discussed in OP-5683, we conclude that DAS's Personnel Division does have authority to provide the reimbursement described in your question.

As discussed in Part 1.a. of this opinion, we also believe DAS has authority to provide an insurance program to reimburse employees' criminal defense expenses under ORS 278.405, which was enacted after the issuance of our 1982 opinion.

^{11/} Amounts contributed by an employer on behalf of an employee under prepaid group legal services plans were previously excluded from taxation by the Internal Revenue Code. 26 USC § 120. The tax exclusion for such plans expired for tax years beginning after June 30, 1992. *See* 26 USC § 120(e). Even when the exclusion was available, the IRS took the position that it did not apply to legal services that relate to an employee's trade or business. *See* 45 Fed Reg 28360 (1980) (to be codified at 26 CFR § 1.120-2(c)(1)(i)) (proposed April 29, 1980). Therefore, payments to an employee for legal expenses incurred in defending against job-related criminal charges may not have received tax free treatment, a condition that must exist for its inclusion in a flexible benefits plan provided by PEBB.

^{12/} ORS 243.221(2)(b) also lists "[o]ther insurance benefits as provided in ORS 243.275" as a permissible flexible benefit plan benefit. For purposes of this analysis, it is immaterial whether the other insurance benefits are included in a flexible benefit plan.

^{13/} The same language is used in defining "benefit plan" for purposes of the PEBB statutes. ORS 243.105(1) provides:

"Benefit plan" includes, but is not limited to, contracts for insurance or other benefit based on life; supplemental medical, supplemental dental, optical, accidental death or disability insurance; group medical, surgical, hospital or any other remedial care recognized by state law; and related services and supplies. * * *

^{14/} We find no guidance on this issue in the legislative history to the PEBB statutes or to the statutes governing PEBB's predecessors, the State Employees' Benefit Board (SEBB) and the Bargaining Unit Benefits Board (BUBB).

^{15/} It is important to recognize that our conclusion rests on a very narrow premise, i.e., that the provision of insurance covering the defense of criminal charges arising from the performance of official duties is not an "employee benefit insurance program" as provided in ORS chapter 243, but rather an aspect of risk management administered by DAS. We express no opinion here as to whether PEBB has authority to provide, as an employee benefit, general litigation insurance that is not restricted to the performance of official duties.

Our conclusion that insurance to reimburse state employees for legal expenses incurred in defending against criminal charges arising from the performance of official duties is not an "employee benefit insurance program" does not mean, however, that either such insurance or general litigation insurance unrestricted to performance of official duties would not be a term or condition of employment subject to collective bargaining.

^{16/} Effective January 1, 1998, SEBB and the former Bargaining Unit Benefits Board were abolished and their powers and responsibilities were transferred to the newly created PEBB. *See* Or Laws 1997, ch 222.

^{17/} ERB's opinion in *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections* was issued on November 10, 1993, after the effective date of the bill abolishing DGS and

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establishing DAS. The opinion, however, refers to DGS as the agency charged with managing the state's insurance programs under ORS 278.405. *Id.* at 875. The opinion therefore appears to have been based on the assumption that insurance management functions were still the exclusive province of DGS.