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EMPLOYMENT  
RELATIONS BOARD

In the Matter of the Arbitration )  
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 between )  
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 BEAVERTON POLICE ASSOCIATION )  
 (Association) )  
 )  
 and )  
 )  
 CITY OF BEAVERTON )  
 (Employer) )

OPINION AND AWARD  
PROFESSIONAL STANDARDS  
SERGEANT PREMIUM PAY  
INTEREST ARBITRATION

BEFORE: Kathryn T. Whalen, Arbitrator

APPEARANCES: For the Association:

Mark J. Makler  
Joseph Lindsay  
Garrettson, Gallagher, Fenrich & Makler, P.C.  
3220 NW 185<sup>th</sup> Avenue, Suite 100  
Portland, OR 97229

For the Employer:

Diana Moffat  
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P.O. Box 908  
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PLACE OF HEARING: Beaverton, Oregon

DATE OF HEARING: July 23, 2010

HEARING CLOSED: October 1, 2010

AWARD ISSUED: November 12, 2010

## I. INTRODUCTION

The City of Beaverton (City or Employer) and the Beaverton Police Association (Association or Union) are parties to a 2009-2012 Collective Bargaining Agreement. The parties were unable to reach a settlement on a mid-term issue concerning premium pay for a newly-created special assignment, that of Professional Standards Sergeant. They submitted this issue to interest arbitration pursuant to ORS 243.746.

The parties selected Kathryn T. Whalen to serve as arbitrator from a list provided by the Oregon Employment Relations Board. A hearing was held on July 23, 2010, at City Hall in Beaverton, Oregon. The parties had a full opportunity to present evidence and argument in support of their respective positions. The parties elected to submit written closing briefs. The Arbitrator closed the record upon receipt of those briefs.

The City filed written objections to certain portions of the Association's Brief contending it contained references to matters not in evidence. The Association objected to consideration of the City's objections because they were submitted after the record was closed.

The Arbitrator ruled the City's objections would not be considered or the record reopened to receive them. I assured the parties that my deliberations and decision would be based solely upon evidence in the record.

The parties agreed the Arbitrator could have until November 12, 2010, to issue her decision.

## II. PROPOSALS OF THE PARTIES

The City's Last Best Offer (LBO) proposal is to maintain the current contract language with no premium pay for the Professional Standards Sergeant.

Exhibit C-1; Exhibit A-7

The Association's LBO proposes:

The Sergeant assigned as the Professional Standards Sergeant shall receive an additional five percent (5%) pay increase to his/her base salary for the period of the assignment. In addition to the regular work duties as the Professional Standards Sergeant, this premium is intended to compensate the employee in this assignment for carrying BPD electronic communications devices off-duty, answering telephone calls during off-duty hours and handling professional standards investigation matters during the assigned employee's non-regularly assigned hours of work.

Exhibit C-2; Exhibit A-6.

## III. STATUTORY PROVISIONS

ORS 243.746 (4) provides in relevant part:

Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of an existing agreement, unresolved mandatory subjects submitted to the arbitrator in the parties' last best offer packages shall be decided by the arbitrator. Arbitrators shall base their findings and opinions on these criteria giving first priority to paragraph (a) of this subsection and secondary priority to subsections (b) to (h) of this subsection as follows:

(a) The interest and welfare of the public.

(b) The reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body. A reasonable operating reserve against future contingencies, which does not include funds in contemplation of settlement of the labor dispute, shall not be considered as available toward settlement.

(c) The ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided.

(d) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits, and all other direct or indirect monetary benefits received.

(e) Comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities. As used in this paragraph, "comparable" is limited to communities of the same or nearest population range within Oregon. \* \* \*

(f) The CPI-All Cities Index, commonly known as the cost of living.

(g) The stipulations of the parties.

(h) Such other factors, consistent with paragraphs (a) to (g) of this subsection as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. However, the arbitrator shall not use such other factors, if in the judgment of the arbitrator, the factors in paragraphs (a) to (g) of this subsection provide sufficient evidence for an award.

#### **IV. FINDINGS AND OPINION**

##### **A. Overview**

Deputy Chief (DC) Terry Merritt is the second in command at Beaverton Police Department (BPD). Among other things, Merritt oversees the Professional Standards Division. Professional Standards Lieutenant (PS Lieutenant) Jim Monger reports to DC Merritt.

As mentioned above, the Professional Standards Sergeant (PS Sergeant) is an assignment that was recently created after the arrival of a new Chief of Police. The Assignment announcement indicates BPD posted the opening on or about February 16, 2010. Exhibit A-2.

According to the job description, The PS Sergeant reports directly to the PS Lieutenant. The PS Sergeant is responsible for "reviews, audits, and assessments of activities associated with the safe, effective and efficient operation" of the BPD; as well as performing "objective investigations of alleged police misconduct"—in other words, Internal Affairs (IA) investigations. Exhibit A-2. Merritt explained BPD wanted consistency and fairness in its IA investigations. BPD hoped to better achieve these goals with this assignment.

The job description further provides that in addition to duties described in the Police Sergeant classification, the PS Sergeant: will identify performance/procedural/conduct trends and training needs and make training recommendations. The PS Sergeant also may be involved in hiring and position assignment recommendations as well as make purchasing requests.

The minimum qualifications for the job are: five years as a police officer, including six months as a sergeant with the BPD; a DPSST Supervisory Certificate or eligibility to receive one; and two years of college work is recommended. The maximum duration of the assignment is three years. Exhibit A-2.

Sergeant Mike Smith was the only applicant for the assignment. Smith has worked for BPD for more than 15 years. He has held a variety of positions and assignments, among them two stints as detective for a total of nearly six years. He was promoted and served as Patrol Sergeant for two years and then voluntarily returned to work as detective before being promoted again to Sergeant three years ago.

Smith previously had performed several IA investigations as a sergeant, though they did not involve serious (economic discipline) charges. He received the appointment and then began working as PS Sergeant in late February. Exhibit C-8.

Smith was not involved in the mid-term bargaining between the City and the Association concerning the assignment; but knew that there was an issue between the City and Association about the work schedule for the assignment. He decided to apply for the assignment regardless of any pending issue(s). Later, after he began working in the assignment, he learned of the premium pay issue.

Article 19.2 of the Collective Bargaining Agreement addresses internal investigation procedures involving discipline of an economic nature. Exhibit A-1, p. 28-30. These contractual provisions set forth rights, responsibilities and procedures for such investigations. Such investigations are considered more serious, and generally are more formal, than investigations involving lesser, non-economic discipline.

BPD intends that the PS Sergeant will perform IA investigations that could lead to economic discipline. To date, Smith has not handled an economic discipline IA investigation on his own; although he has performed four, possibly five, IA investigations. He sat in on two interviews conducted by Lieutenant Monger that involved potential economic discipline. Smith also has been involved in audits and inventory of the property room and audits of adult and juvenile jail logs. He has not done any training yet as a PS Sergeant; but could be asked to

do it. Smith has been working closely with Human Resources (HR) in connection with the hiring process—developing postings and job requirements.

By his choice, Smith typically wears comfortable, plain clothes (logo/polo shirt/pants); not a uniform. His regular hours are Monday through Friday from 8 a.m. to 5 p.m. which is the shift he, personally, prefers. Except for three investigative interviews, he has performed all of his duties within his regular work hours. Exhibit C-8.

Smith performed the three interviews either by coming in early or leaving late because the employees involved worked a different shift than him. One of the interviews was with Monger. Monger did not tell him he had to stay after hours. Smith could have put in for overtime for these off-schedule hours, but instead took “flex” time. He used Article 9.2 (c) of the Agreement which allows for flexible schedules in certain situations. Exhibit A-1, p. 7.

As PS Sergeant, Smith is not required to carry or respond to an electronic communications device (Blackberry/Nextel) while off-duty. Smith also, however, serves on the Hostage Negotiation Team (HNT). In that capacity he is required to carry such a device and must call in if he receives a call/page.

In addition, Smith has been and is an instructor for the Emergency Vehicle Operation Course (EVOC) and sometimes does Saturday training. Smith does not receive a premium for his HNT or EVOC duties.

Since working in the PS Sergeant assignment, there have been jokes from co-workers. Smith has noticed some employees (particularly younger ones)

seem nervous around him and/or leave him alone (one supervisor). Still, he believes he has a good working relationship with everybody.

**B. Application of the Statutory Factors**

ORS 243.746 (4) requires the arbitrator to give first priority to the interest and welfare of the public when evaluating the parties' LBOs. As recognized by other arbitrators, this factor is not well defined. Standing alone, it may be insufficient to decide a case. In this dispute, based upon the evidence and arguments presented, it is necessary to consider limited secondary factors in order to determine which LBO better satisfies the interest and welfare of the public. The Arbitrator finds the City's LBO is more consistent with, and favored by, relevant statutory factors. My reasoning follows.

This case does not involve any of the following factors: the City's financial ability to pay,<sup>1</sup> its ability to attract and retain employees, CPI or cost of living, or stipulations of the parties. The Association's primary argument for premium pay is based upon an internal analysis of the PS Sergeant assignment. The Association also argues the premium is justified when the assignment is compared to those who perform IA investigations in certain other, nearby jurisdictions.

On the other hand, the City claims the PS Sergeant assignment does not justify premium pay based upon the express language of the Association's LBO, the nature of the assignment and/or other internal comparisons. The City further does not agree with most of the external comparators selected by the

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<sup>1</sup> The City calculated the additional cost of the Association's LBO over two years as \$9,018.88. Exhibit C-11. The Association did not object to this calculation.

Association; and argues no appropriate external comparison justifies the proposed premium pay.

1. **External Comparisons**

ORS 243.746 (4) (e) provides for a comparison of overall compensation of other employees performing similar services with the same or other employees in comparable communities. The statute defines comparable as limited to communities of the same or nearest population range within Oregon.

As indicated above, the parties did not agree on a list of comparable communities. The City's population is about 86,860. Relying upon the statutory language, the City selected comparable communities within 150% to 50% in size compared to the City of Beaverton: Gresham, Hillsboro, Bend, Medford, Springfield, Corvallis, Albany and Tigard. Exhibit C-9; City Notebook of Comparator Data; Testimony of Dana Bennett.

In contrast, the Association took a market-based approach and selected nearby jurisdictions of Gresham, Hillsboro, Portland, Salem and Tigard. Exhibit A-8; A-9; Testimony of Debra Feagler. The parties' lists overlap with three comparable communities: Gresham, Hillsboro and Tigard.

The City analyzed special assignment pay for sergeants for its identified list of comparators; none provided premium pay for IA investigations. Exhibit C-7. The Association analyzed compensation of its nearby comparables by comparing if other employees were represented, received premium pay for IA investigations and by comparing base pay (minimum and maximum steps) for those who performed such duties. On the Association's list, none of other police

agencies provided premium pay; the Association argues, however, other employees performing the work are paid more on market average than the City's PS Sergeant. Exhibit A-8; A-9.

Importantly, no matter which external comparators are used, none provided premium pay for IA investigations. Further, the evidence shows there are differences in which classifications/employees perform the work and whether or not they are represented by a labor organization. I am not persuaded that external comparators provide an "apples-to-apples" comparison, or enough similarity to the PS Sergeant assignment, to be proper comparables in this particular proceeding.

For the above reasons, I find this factor favors the City's LBO; but it does not weigh heavily in my decision. As discussed below, the most important factor to my decision is that of internal analysis and comparisons within BPD.

## **2. Internal Analysis and Comparisons**

The City argues that the specific language of the Association's LBO is important because it states that the premium is intended to compensate the employee because of three criteria: (1) for carrying a BPD electronic communications device off-duty; (2) answering calls during off-duty hours; and (3) handling professional standards investigation matters during non-regularly assigned work hours. The Employer contends the evidence shows that the PS Sergeant is not required to do the first two things and is not regularly required to work outside his normal work hours. As a result, argues the Employer, the Association's LBO cannot be sustained.

Merritt and Smith agreed that the PS Sergeant is neither required to carry an electronic communications device off-duty nor answer calls during off-duty hours in connection with this assignment. In addition, Smith has only worked outside regularly-schedule hours on three occasions since he began the assignment in order to conduct interviews with employees on schedules different from his own. At his choice, he took flex time rather receiving overtime compensation when he worked outside his 8-5 shift. His time sheets do not show any off-duty hours/compensation for his PS assignment. Ex. C-8.

The Association argues that the PS Sergeant assignment will require work outside regular hours because of BPD procedures which provide for employee interviews normally when the interviewee is on duty, "unless the serious nature of the investigation dictates otherwise or by mutual agreement." Exhibit A-4, p. 7 [Procedure Implementing G. O. 3.01.00.] The Association also relies on the testimony of Daryl Garrettson. On many occasions, Garrettson has been to IA investigations outside the regular work day.

Smith did not know about the above written procedure until just before this arbitration hearing, but had scheduled interviews outside his regular hours on the three occasions mentioned before. Garrettson's testimony was based on his experience in other jurisdictions.

I find Smith's limited off-duty work on three occasions (and Garrettson's testimony of his experience elsewhere) insufficient to justify a five percent premium. That conclusion, coupled with the fact that the PS Sergeant is not required to carry electronic communications devices off-duty or respond to off-

duty calls, causes me to agree with the City and find that the record does not justify the premium based upon the three criteria identified in the Association's LBO.

Also, the language of the Association's LBO is similar to that contained in the Agreement for Detective Sergeant. Article 26.3 provides in relevant part:

The Sergeant assigned to supervise the Detective unit shall receive an additional five percent (5%) pay increase to his/her base salary for the period of the assignment. In addition to the regular work duties as the Detective Sergeant, this premium is intended to compensate the employee in this assignment for carrying a pager and answering telephone calls during off-duty hours.

Exhibit A-1, p. 36.

In contrast to PS Sergeant, BPD Detective Sergeant Tim Lowman reported that he is obligated to carry his Blackberry/cell phone all the time—24/7—unless he is on vacation. He is obligated to respond to the device if called and to be available if his assistance is needed. Detective Sergeant Jim Shumway and WIN Sergeant (Narcotics/Drug Enforcement) Rich Preim have the same obligations.

Lowman was familiar with the history of five percent premium and was aware of the justification for it. He said it "pretty much" was for having to carry the phone and being tied to it.

BPD has other sergeants who perform extra duties; namely, Training Sergeant, Traffic Sergeant, Tri-Met Sergeant and Community Policing Sergeant. These sergeants, like the PS Sergeant, are not required to carry an electronic communications device during off-duty hours or answer calls when off-duty. They do not receive extra compensation due to off-hours duties. Exhibit C-10.

The above evidence further supports the conclusion that the PS Sergeant does not have off-hours obligations that support the Association's proposed five percent premium.

Besides the five percent premium received by the two Detective Sergeants and the WIN Sergeant, the parties have negotiated additional pay for detectives. Police Officers working the detective assignment receive an additional five percent to their base salary for their first six months in the assignment and then another five percent (a total of ten percent) for the remainder of their assignment. Exhibit A-1, p. 36.

The Association argues that the PS Sergeant is an internal Detective assignment with heightened requirements. According to the Association, like detectives, the PS Sergeant's investigative duties and abilities support premium pay. The City disagrees and contends the facts do not support that the PS Sergeant assignment is similar to either a Detective or Detective Sergeant.

Detectives as well as Detective Sergeants are a part of the Investigations Division which is a separate division from Professional Standards. Their immediate supervisory hierarchy is not the same as the Professional Standards Division. Exhibit C-4.

Merritt has worked for the BPD for over 24 years, starting as a patrol officer and moving up through the ranks to DC. For many years, once he advanced from police officer and detective, he performed IA investigations as a Sergeant (both Patrol Sergeant and Detective Sergeant) and even while President of the Association. He continued to perform IA investigations, taking

them with him when he was promoted to Patrol Lieutenant. He did them until he was promoted to Captain.

Merritt said that the PS Sergeant is not a detective position. He reported the main difference between detective assignments and the PS Sergeant assignment is that there is no expectation that Smith will take his phone home or respond after hours as required by Detectives and the Detective Sergeant.

Merritt acknowledged that Smith's detective experience would be helpful and include "good tools" (skill set) worth looking at in making the PS Sergeant assignment; but such experience is not a job requirement. Merritt further explained that criminal investigations typically involve abilities and demands that are different from IA investigations.

Similarly, Garrettson said the criminal detective skill set can translate well to IA investigations; but Garrettson, too, described important distinctions between the two types of investigations in terms of mind set, questions and procedural rights/ obligations.

The Association contends the PS Sergeant assignment carries a sense of urgency due to a 30-day timeline to complete the IA investigations and an added pressure because of the expense of officers on paid administrative leave.

Merritt acknowledged that serious cases can trigger efficiency concerns and BPD wants to get them done as quickly as possible. Still, Merritt explained that fairness and consistency are more important than how long an IA investigation takes; and an investigation can take longer depending upon the availability/location of witnesses.

The evidence does not convince me that the PS Sergeant assignment is a detective assignment with heightened requirements that warrant the five percent premium. Rather, the PS Sergeant is in a different division and has requirements, duties and responsibilities that distinguish it from that of a detective assignment.

The Association claims that the PS Sergeant has additional training duties that are greater than other training assignments which receive a five percent increase in base salary; namely Field Training Officer and Senior Training Officer. As a result, argues the Association, the PS Sergeant should be similarly compensated.

Although the PS Sergeant may, or is expected, to work with the Training Division and make training recommendations, Smith has not done this work yet. The record lacks specific and sufficient evidence to support this Association argument.

The Association asserts that its LBO is a reasonable compromise because in exchange for the premium pay the Association is willing to make the PS Sergeant assignment an on-call assignment like that of Detective Sergeant.

The record does not support a finding that the PS Sergeant is an on-call assignment like that of Detective Sergeant. It is not appropriate for me to decide whether it should be an on-call assignment.

The Association contends historically those acting in capacity of IA investigator have received either premium pay or higher pay. In support of this argument, the Association relies primarily on the testimony of Merritt regarding his performance of IA investigations from one officer job to another.

Merritt described his work history with IA investigations to establish historical background about who performed such investigations at BPD as well as his familiarity with and knowledge of them. I do not find his testimony to support a practice of premium pay for IA work nor does it justify a premium for the newly-created assignment of PS Sergeant.

**C. Conclusion**

For all the foregoing reasons, the Arbitrator concludes the evidence and arguments establish that the City's LBO is more consistent with relevant statutory factors of ORS 243.746 (4). In arriving at this conclusion, I have considered all of the evidence, authority and arguments that are part of the record in this case even if not specifically mentioned in this opinion.

I will issue an award selecting the City's LBO. My fees and expenses will be shared equally between the parties.

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Having carefully considered all evidence, authority, and argument submitted by the parties concerning this matter, pursuant to ORS 243.746 (4) the Arbitrator selects the City's Last Best Offer dated July 8, 2010. The Arbitrator's fees and expenses will be shared equally between the parties.

Respectfully submitted,



Kathryn T. Whalen  
Arbitrator

Date: November 12, 2010