

In the Matter of the Arbitration )  
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 between )  
 )  
 FEDERATION OF OREGON PAROLE )  
 AND PROBATION OFFICERS )  
 MULTNOMAH COUNTY CHAPTER )  
 (Union) ) AWARD ON REMAND  
 ) INTEREST ARBITRATION  
 )  
 and )  
 )  
 MULTNOMAH COUNTY )  
 (Employer) )

BEFORE: Kathryn T. Whalen, Arbitrator

APPEARANCES: For the Union:  
  
Daryl S. Garrettson  
Attorney at Law  
P.O. Box 8  
Lafayette, OR 97127

For the Employer:  
  
Kathryn A. Short  
Assistant County Attorney  
Office of Multnomah County Attorney  
501 SE Hawthorne Blvd., Suite 500  
Portland, OR 97214

HEARING: September 27, 2013

RECORD CLOSED: September 27, 2013

AWARD ON REMAND: October 14, 2013

## I. OVERVIEW

Multnomah County (County) and the Federation of Oregon Parole and Probation Officers, Multnomah County Chapter (FOPPO) are parties to a collective bargaining agreement that expired on June 30, 2011. The parties were unable to reach a settlement on all terms of a successor agreement. They submitted their remaining issues to interest arbitration pursuant to ORS 243.746. I issued my award in that matter on May 11, 2012. I concluded the County's Last Best Offer (LBO) was more consistent with the interest and welfare of the public and awarded its LBO.

On June 25, 2012 the FOPPO filed an unfair labor practice with the Oregon Employment Relations Board (ERB) alleging that the County had unlawfully filed a LBO that was less favorable than its Final Offer.

On July 3, 2013 ERB issued its decision. ERB found that the County committed a *per se* violation of ORS 243.672 (1) (e) by making three regressive proposals on mandatory subjects of bargaining in its LBO by reverting to prior contract language in: (1) requiring health care professional verification of absence under certain circumstances; (2) requiring that saved Holiday Bonus days be used in the fiscal year in which they were awarded; and (3) limiting workers' compensation supplemental benefits to three months.

ERB remanded the case back to me to determine if the three revised proposals would change my award. More specifically, ERB ordered that the County's LBO was modified by rescinding the three regressive proposals and replacing them with the language in its Final Offer. ERB ordered that FOPPO's

LBO was to remain the same. ERB stated that I could determine whether to adhere to my prior award, award FOPPO's LBO, or order a new hearing (or allow additional evidence or submissions by the parties).

Subsequent to ERB's order, the parties tried to resolve this dispute but could not. They then submitted this matter to me consistent with ERB's order on remand. On September 3, 2013 I notified the parties that I had decided to hold a limited hearing to receive evidence concerning the County's revised LBO.

The parties' resubmitted their respective LBO's consistent with ERB's order. A hearing was held on September 27, 2013 at which the parties had an opportunity to present evidence and argument about the changes to the County's LBO.

## **II. PARTIES' POSITIONS**

### **A. FOPPO**

Pursuant to ERB's order on remand, the Arbitrator has the jurisdiction to change her prior award or not consistent with the statutory criteria for interest arbitration. Contrary to fundamental policies of the PECBA, the County did not narrow this dispute with its original LBO. Instead, the County intentionally submitted three regressive proposals to gain an advantage in interest arbitration.

FOPPO had no choice but to file the unfair labor practice after the County engaged in its intentional conduct. If the County is allowed to go back to its Final Offer two years down the road without consequence it would thwart the policies of the PECBA. It is not in the interest and welfare of the public to award the

County's LBO under these circumstances. The only appropriate remedy to deter conduct of this nature is to award FOPPO's LBO.

**B. County**

FOPPO asked ERB to award its LBO as a remedy to the County's unfair labor practice and ERB did not do so. ERB's role was to address the County's conduct. The Arbitrator's role is different from that of ERB. The Arbitrator's role is to apply the substantive statutory interest arbitration criteria; not to address the County's conduct.

The County's revised LBO is now more favorable to FOPPO than the one originally submitted. The County's LBO again should be selected.

**III. DISCUSSION**

ERB's order on remand was specific. I am to decide whether or not my award should be changed due to the three revised proposals in the County's LBO. I agree with the County that my role here is to substantively apply the criteria of ORS 243. 746; not to remedy an unfair labor practice. I also find the revisions in the County's LBO are more favorable to FOPPO than the County's initial LBO. The original reasons for my award are not changed by these revisions.

**IV. CONCLUSION**

I will issue an order which adheres to my prior award; that is I will award the County's revised LBO. In arriving at this decision, even if not specifically mentioned, I have reviewed and considered all of the evidence, authorities and

arguments submitted by the parties. My decision is for the reasons I have explained above.

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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 County's Last Best Offer. Pursuant to ORS 243.746 (6) my fees and costs will be borne equally by the parties.

Respectfully submitted,



Kathryn T. Whalen  
Arbitrator

Date: October 14, 2013

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OPINION AND AWARD  
INTEREST ARBITRATION

BEFORE: Kathryn T. Whalen, Arbitrator

APPEARANCES: For the Union:

Daryl S. Garrettson  
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P.O. Box 8  
Lafayette, OR 97127

For the Employer:

Kathryn A. Short  
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Portland, OR 97214

HEARING: March 22 and 23, 2012

RECORD CLOSED: April 13, 2012

AWARD ISSUED: May 11, 2012

## **I. INTRODUCTION**

Multnomah County (County) and the Federation of Oregon Parole and Probation Officers, Multnomah County Chapter (Federation) are parties to a collective bargaining agreement that expired on June 30, 2011. The parties were unable to reach a settlement on all terms of a successor agreement. They submitted their remaining issues to interest arbitration pursuant to ORS 243.746. A hearing was held on March 22 and 23, 2012 in Portland, Oregon before Arbitrator Kathryn T. Whalen. The parties elected to submit Post Hearing Briefs. The record was closed on April 13, 2012. The parties agreed the Arbitrator could have until May 28, 2012 to issue her decision.

## **II. OVERVIEW OF ISSUES AND PROPOSALS OF THE PARTIES**

The parties submitted to arbitration issues concerning: (1) wages and term of the agreement, (2) an incentive for passing the Oregon Physical Abilities Test (ORPAT), (3) changes to the Worker's Compensation article, (4) carry-over of holiday bonus pay and (5) retiree medical insurance. They agreed that all tentative agreements were a part of their Last Best Offer (LBO) packages.

### **A. Wages and Term of Agreement**

The County's LBO proposes a three-year agreement (expiration June 30, 2014) with a 0.0% wage increase effective July 1, 2011; 3.3% effective July 1, 2012; and minimum increase of 1.0% and a maximum increase of 4% effective July 1, 2013 depending upon the annual percentage increase of the Portland CPI-W<sup>1</sup> 2<sup>nd</sup> Half July-December 2011 to July-December 2012.

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<sup>1</sup> Consumer Price Index for Urban Wage Earners and Clerical Workers.

The Federation's LBO also proposes a three-year agreement with a Cost of Living Adjustment (COLA) of 2% effective July 1, 2011; 3.3% effective July 1, 2012 and a reopener on wages and other direct monetary compensation for the period of July 1, 2013 to the end of the contract term.

The Federation proposes an incentive of 1% for bargaining unit members that pass the ORPAT, effective July 1, 2012. The County proposes the status quo; that is, no ORPAT incentive.

**B. Workers Compensation**

The Federation proposes that employees approved for Workers Compensation benefits (1) will receive supplemental benefits for one year instead of the current limits in the contract (320 hours); or (2) an employee may submit his/her Workers' Compensation payment to the County in return for a regular paycheck (instead of a supplemental check); (3) the County will make full retirement contributions as though the employee was still working his or her full or part-time schedule; and (4) all medical appointments related to Workers Compensation will not be charged to paid leave time (but counted as time worked). The County proposes the status quo—no changes as proposed by the Federation.

**C. Holiday Bonus Carry-Over**

In the Sick Leave article, the Federation proposes the deletion of language that requires holiday bonus days to be used in the fiscal year they are awarded so that such a bonus could be carried over into the next year. The County proposes the status quo; no change to existing language.

**D. Retiree Medical Insurance**

In the Pension article, the Federation proposes to delete language concerning employees "employed on or before July 1, 1992" as it pertains to monthly medical insurance premium payments. The County proposes the status quo; no change to the existing language.

**III. APPLICABLE 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. Notwithstanding the provisions of this paragraph, the following additional definitions of "comparable" apply in situations described as follows:

\* \* \*

(B) For counties with a population of more than 400,000, "comparable" includes comparison to out-of-state counties of the same or similar size; \* \* \*

(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.

As stated above, 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 is insufficient to properly evaluate and decide this case. Rather, based upon the evidence and arguments presented, it is necessary to consider secondary factors in order to determine which LBO better satisfies the interest and welfare of the public.

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

Below I discuss the parties' positions and the statutory factors as applied to the evidence. I make my ultimate findings and conclusions at the end of this discussion.

**A. Background**

The Federation represents approximately 117 parole and probation officers (PPOs) who work for the County in the Department of Community Justice (DCJ). DCJ operates 24 hours a day and supervises approximately 7,600 adult probationers and parolees and those defendants requiring pretrial services. DCJ also operates a juvenile detention facility and is responsible for approximately 360 youth on formal and informal community supervision. DCJ is recognized as a national leader in both adult and juvenile community justice. Carl Goodman is the Assistant Director of the Adult Services Division. Federation Exhibit (F) 16, 20.

The job of PPOs is to provide supervision, surveillance and counseling for adult offenders on formal probation and parole. C-34; F-18. They wear many hats. On any given day PPOs may act as law enforcers, counselors, educators and crime prevention specialists. Often, PPOs are the only support system for offenders and their families. F-21.

As minimum qualifications, PPOs must have experience and training that typically consists of a Bachelor's degree with major course work in psychology, sociology, social work or the like as well as two years of experience in social counseling or community corrections. They also must have a valid driver's license and within a year of hire receive a certificate in Basic Probation and Parole. C-34; F-18.

**B. Wages and Term of the Agreement**

As set forth above, the County proposes a three-year agreement with increases of 0.0% and 3.3%; and a COLA increase of a minimum of 1% and maximum of 4% for the third year of the Agreement. The Federation proposes increases of 2% and 3.3% for the first two years of the Agreement. In the third year, the Union seeks a reopener on wages and direct monetary benefits. The Federation also proposes an ORPAT incentive of 1%.<sup>2</sup>

**1. Reasonable Financial Ability to Pay**

The County provided a cost summary for the Federation and the County's proposals. The cost estimate for the County's proposal assumed an average COLA for the third year.

The County's three-year proposal was estimated to cost \$999,318 or a 5.88% increase. The County omitted the third year from the cost estimate of the Federation's proposal. The cost increase for the Federation's proposal without the third year was estimated as \$1,410,564 or 5.37%.<sup>3</sup> C-35, C-36. The County's cost estimate of the Federation's ORPAT incentive for three years ranged from \$159,701 to \$253,089 depending upon how many candidates pass the test. C-36.

The Federation did not object to the County's costing analysis. The Federation pointed out, however, that the estimated cost of the ORPAT incentive

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<sup>2</sup> Based upon the evidence and argument of the parties, the ORPAT incentive is not a significant issue between them. I find it unnecessary to discuss it separately from the Federation's overall wage proposal.

<sup>3</sup> These cost estimates included the assumptions of: \$31.57 average hourly wage; 117 budgeted positions; uniformed PERS blended rate at 35.72%; and insurance at 8.5%. The costing did not account for step increases. C-35; 36.

included both soft and hard costs in terms of test administration. The ORPAT test already is administered to Deputy Sheriffs.

The County admits it has the financial ability to meet the costs of either LBO. It is not claiming inability to pay. Rather, the County argues that its proposal better responds to taxpayer demands for accountability and efficiency from government. The Federation submits that since the County is not asserting inability to pay this factor is not an issue in this case.

I agree with the Federation. Since the County admits it has the ability to pay, this factor need not be discussed further and is not important to my decision.

## **2. Attraction and Retention of Personnel**

Between 2007 and 2011, the County lost 44 bargaining unit employees, with an average of 8.8 per year or average turnover rate of 8% for that time period. Most of this turnover was due to retirements, promotions or health-related reasons—31 employees (5%). C-19. Goodman testified that on average a parole and probation officer remains on the job for 10-15 years; some 10-20 years. C-29.

In terms of recruitment, Goodman testified—and the numbers show—that the County has received an abundance of applicants for positions to be filled. Most recently, in 2011, the County had 190 applicants for six open positions. In 2010 for three open positions there were 173 applicants. C-21.

The County argues that this evidence demonstrates that wages paid to bargaining unit employees do not negatively affect the County's ability to attract and retain personnel. The Federation acknowledges the evidence establishes

that currently the County is not having a problem in retaining qualified personnel. The Federation argues, however, it would be folly to predict that this trend will continue if the pay scale is eroded as it would be under the County's proposal.

According to the Federation, the lack of turnover in part must be attributed to the 2004 contract wherein the parties agreed County PPOs should be the highest paid in the state. The workforce is relatively senior, with over half having 14 or more years with the County. The Federation contends I should look to the future—not the past; and consider if the County will be able to continue to attract and retain qualified personnel. See, for example, *Oregon State Police Officers Association v. State of Oregon*, IA-18-99 (Langford, 2000).

The evidence shows the County currently has the ability to attract and retain qualified personnel. I have considered the Federation's contention about seniority of the unit, but I find the evidence is insufficient to demonstrate a substantial change will occur during the term of this agreement.

### **3. Comparability**

The parties disagree about comparable jurisdictions except for two Oregon counties: Clackamas County and Washington County. Both parties use these two counties in their comparability analysis. They disagree, however, on other comparables.

#### ***State of Oregon***

The County objects to the Federation's use of the State of Oregon as a comparable jurisdiction primarily because it is a different political subdivision. The County argues the Oregon statute does not permit comparisons between

different political subdivisions. See ORS 243.746 (4) (e) (B); *FOPPO and Josephine County*, IA-03-07, at 13 (Brand, 2008); *Milwaukie Police Employees Association and City of Milwaukie*, IA-08-10, at 18 (Stiteler, 2011). The County also argues, contrary to Federation claims, that in 2004 the County did not consider the State as a comparable jurisdiction; rather, the County considered how the State was paying its PPOs for informational purposes.

The Federation contends the evidence establishes the parties used the State as the primary comparator in 2004 negotiations. And, even if not included as a comparator under ORS 243.746 (4) (e), it is still appropriate to consider the State under ORS 243.746 (4) (a) and (h). The Federation also claims the State is an appropriate comparable because the Oregon statute speaks to community, not to the manner in which it provides the service. Further, the statute does not define the parameters of population range.

FOPPO became the exclusive bargaining representative for County PPOs in 2004 and the parties commenced negotiations for their first Agreement soon thereafter. Bargaining notes indicate the parties discussed a number of California and Washington counties as well as four counties in Oregon (Marion, Lane, Clackamas, and Washington). California State Parole and the State of Oregon also were considered. The parties took into account a variety of factors in addition to population in negotiating compensation. C-44 to C-46; F-53 to F-58.

PPO Pat Brasesco was at the bargaining table for the Federation in 2004. He recalled that ultimately the parties agreed County PPOs should be the top paid PPOs, above State PPOs. As a result, the parties agreed to a percentage

increase (10.3%) that put County PPOs just above the State. C-23. Bargaining notes and wage figures are consistent with Brasesco's testimony.

I credit Brasesco's testimony together with the other bargaining history evidence. Regardless of whether the State was considered a comparable jurisdiction, previously the parties have considered State wages in negotiating wages for County PPOs.

That being said, I agree with the above arbitrators that the Oregon statute does not permit different political subdivisions to be considered as comparable jurisdictions. For that reason and given the County's objection, I do not accept the State as a comparable jurisdiction.

Certainly the parties, themselves, may agree to consider State compensation as they have done previously. Also, it is possible that State compensation might be considered under different circumstances in connection with other statutory factors. Here, however, State compensation was not a factor in my decision.<sup>4</sup>

### ***California Counties***

At hearing, the County submitted as comparables five California counties: Fresno, Kern, San Joaquin, San Mateo and Ventura. C-11. The Federation objects to the use of the California counties for three reasons: (1) The County never offered these counties during the course of bargaining and so the Federation had no opportunity to consider this information at the bargaining table; (2) Testimony established that Probation Officers for California counties do not supervise parolees (post prison supervision in Oregon) and so California

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<sup>4</sup> Even If it had been a factor, State compensation would not have changed the outcome here.

counties do not employ "similar employees"; and (3) Testimony established California counties do not share a common negotiation environment with Oregon (e.g., no binding arbitration or right to strike) and as a result are not "comparable communities."

LGPI consultant Dana Bennett conducted a compensation comparability analysis for the County. She performed a West Coast population analysis using counties in Oregon, Washington and California. She also looked at job descriptions for county population comparators.

Bennett excluded Washington counties because there was not a close enough job match. She retained the Oregon counties of Washington and Clackamas because they were within 50%-150% of Multnomah County's population (738,351).<sup>5</sup> She also included the five California counties mentioned above. Bennett further conducted an alternative compensation analysis using only the Oregon counties of Clackamas and Washington.

The County admits that it did not use California counties at the bargaining table. The Federation submitted testimony that California PPO supervision of offenders is different from that of the County. Also, the evidence indicates California governing labor laws differ significantly from Oregon. (Testimony of Brennan Mitchell).

I agree with the Federation and find the record is insufficient to establish that California counties are appropriate comparables for purposes of this proceeding.

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<sup>5</sup> The Federation's population numbers were slightly different from the County's for the population of Multnomah County, Clackamas County and Washington County. F-17; C-10. These differences were not important to my decision.

### ***Comparability Summary***

Both parties provided a variety of exhibits showing a comparison of overall compensation received by County PPOs. The evidence was presented in summary form as well as in different "snapshots" over years of service and with/without certifications. The parties' methodology was basically the same; but there was some discrepancy in numbers.

The County provided an overall compensation comparison utilizing solely Clackamas and Washington counties. I find this analysis is most consistent with my above conclusions. C-12.

The County's numbers illustrate County PPO compensation as compared to that of Clackamas County and Washington County PPOs at 5 years of service, 10 years of service, 15 years of service and 20 years of service (with a Bachelors Degree and Advanced Certificate). A summary of the percent of market average shows the County at: -4.3%, 1.2%, 1.6% and .05%, respectively, with an overall market average of -.02%. C-12.

#### **4. Cost of Living**

The parties both rely on the Portland CPI-W. For the years in dispute, the known CPI-W for 2011 (2<sup>nd</sup> half of 2010) was 1.2%. The parties agree the proper figure for the second year of the contract is 3.3% (2<sup>nd</sup> half of 2011). For the third year of the contract, the figure is unknown. C-23.

## **5. Other Considerations**

### ***Leadership, Responsibility and Risk***

The Federation argues that the County is a leader in the state and nation with respect to Adult Services of the DCJ. And, contends the Federation, PPOs employed by the County must deal with far greater responsibility for protection of the public than any other county or the State of Oregon. F-13 to F-15.

In support of these arguments, the Federation submitted testimony and documentary evidence that shows the County is a leader in the state and nation-wide in implementing an evidence-based case management model called "EPICS" which is designed to decrease recidivism rates for high-risk offenders. F-23. In addition, County PPOs supervise 36% of the State's high-risk offenders; 51% of the State's homicide offenders; 23% of the State's kidnapping offenders, and 39% of the State's robbery offenders. F-15. According to the Federation, this evidence shows the greater responsibility and risk that fall upon its members.

The County argues that the Federation failed to prove that its PPOs are providing more services than other employees in comparable jurisdictions. Rather, asserts the County, the evidence indicates the clients they serve are different. Also, County PPOs have fewer caseloads on average and have a considerable amount of support services as compared to Clackamas and Washington Counties. C-38.

On the whole, I find the evidence substantial and convincing with respect to County PPO leadership, responsibility and risk.

### ***Internal Comparisons***

The Federation also contends an internal comparison of County bargaining units supports its wage proposal. The Federation relies upon evidence that shows: (1) no other binding arbitration bargaining unit has either agreed to or had imposed upon them a 2-year wage freeze; (2) only one non-arbitration unit has agreed to two wage freezes; and (3) Corrections Technicians and Supervisors at the County are paid higher than their counterparts in Washington and Clackamas Counties, yet the County proposes a wage freeze for this bargaining unit which is paid less. F-12; F-48.

In 2009, the annual Portland CPI-W was 0% (-.07% Half 1; 0.07% Half 2). In 2009, the Federation took a wage freeze as did three other County bargaining units and non-represented employees. In 2010, MCCDA and Local 88 JCSS took a wage freeze; other employees received a 2% increase. The 2010 annual Portland CPI-W was 1.8; Half 2 was 1.2%. More recent CPI figures and known County wage increases are modest. F-12; C-22, C-23.

### ***Third Year Reopener***

Although both parties seek a three-year agreement, the Federation's proposal is for a reopener for wages and direct monetary compensation in the third year. The County proposes a 1%-4% increase based upon the CPI-W Portland 2<sup>nd</sup> Half. The County argues if the Federation's proposal was accepted, the parties would be bargaining again in less than a year. Its proposal, however, would provide for predictability, continuity, and a period free from negotiations—improved stability in labor relations. (Testimony of Carl Goodman.)

## **6. Ultimate Findings: Wages and Term of Agreement**

The County does not have a problem with attraction/retention of PPOs. This factor works in the County's favor. With respect to a contract reopener, bargaining requires a significant outlay of time, effort and resources for all involved—even for a limited period of time. Labor peace is more likely achieved by providing a respite from bargaining. This consideration favors the County's wage/contract term proposal as well.

On the other hand, the Federation is slightly behind the overall market average of the parties' agreed comparables of Clackamas and Washington Counties. This factor favors the Federation's proposal as does County PPO leadership, risks and responsibility. Portland CPI-W figures and recent internal comparisons favor the first two years of the Federation's proposal.

In a stronger economy, the factors that favor the Federation's proposal would give it the advantage. In the current economic climate, however, secondary statutory factors and relevant considerations put the parties' proposals on equal footing.

### **C. Other Federation Proposals**

The Federation has submitted proposals that would change existing contract articles concerning Workers Compensation, (Article 12), Holiday Bonus Carry-over (Article 8) and Retiree Medical Insurance (Article 22). The County's LBO proposes the status quo; that is, that current language should remain unchanged. Of these proposed changes, it is the Federation's proposals about Workers Compensation that are the most significant.

The Federation proposes that an employee absent from work due to an on-the-job injury may select the option of submitting his/her Workers Compensation payment in return for a regular paycheck paid by the County.

The County argues that this proposal for continuation pay without a cap is unprecedented. The County contends that although MCDSA and MCCDA contracts provide for continuation pay, these contracts differ from the Federation's proposal in significant ways. First, these other contracts provide that employees are not eligible for continuation pay until they have ten years seniority with the County. Second, the employee is entitled to choose continuation pay only once in his or her career with the County.

According to the County, the Federation's proposal without limitations creates an uncapped, ongoing liability for the County that cannot reasonably be predicted or properly budgeted. As a result, the public interest is not well served by this uncapped liability that no other jurisdiction offers.

The Federation contends its intent is that the above language is limited by the earlier paragraph in Article 12 in which the Federation has proposed a limit on supplemental benefits of 12 months. The Federation asserts that this time limitation was communicated repeatedly at the bargaining table and reinforced in its Post Hearing Brief.

I have reviewed the continuation pay language of the MCDSA and MCCDA contracts. F-32; C-6, p. 43-44; F-33; C-7, p. 47. The County is correct that these agreements provide for continuation pay in lieu of supplemental benefits only to employees with 10 or more years seniority and are an option only

once in an employee's career. These other contract provisions provide detailed procedures and specifications in connection with the receipt of continuation pay. The Federation's proposal does not mirror these contract provisions.

At hearing, Mitchell acknowledged that the Federation's proposals are different from that of the other contracts. He said he was not sure why but believed the language of the other agreements was complex; and the Federation felt the need to provide different language that did not have the 10-year seniority and once in a life-time restrictions.

As the proponent of new language, the Federation bears the burden of convincing me that the status quo should be changed. I find the evidence is insufficient to justify the Federation's proposed continuation pay language and the County has raised legitimate concerns about it.

The Federation also proposed that throughout the period an employee receives Workers Compensation benefits, the County will continue full retirement contributions as though the employee was still working their full or part-time work schedule.

At hearing, the County asserted that this proposal is illegal. According to the County, it would be unlawful for it to do so because the definition of "salary" in the PERS statute excludes Workers Compensation benefits; that is such benefits are non-subject salary. In support of this argument, the County relies upon a decision by the PERS Board in which Workers Compensation benefits were not considered in calculating the final average salary of a fire fighter. C-31.

The Federation responds to the County's illegality claim with a number of arguments: (1) The case cited by the County concerns calculating average salary; it does not state that it would be illegal for an employer to make a full retirement contribution to PERS while an employee is on time loss; (2) the County's illegality argument is untimely as it was not raised at any time in bargaining and such behavior should not be rewarded—especially when the County is wrong about its assertions; (3) if the Federation's proposal is unlawful, then so is the current contract language which provides for retirement contributions for an appropriate amount on supplemental benefits; and (4) in other County agreements, namely those with MCDSA and MCCDA, the County has agreed to the same language the Federation is proposing.

While I have considered all of the above arguments, arbitration is not the authoritative forum to decide an issue concerning the legality of a proposal. Regardless of what I may think, my opinion is not a final or binding determination of this matter.

Further, and more importantly, it is not necessary for me to make a legal conclusion about this issue. As explained above, I have other concerns with the Federation's Workers Compensation proposal as drafted. It is on these grounds that I find the County's proposal better serves the interest and welfare of the public.

Although the Federation's other proposed language changes are in dispute, the evidence and arguments indicate that these are not significant when compared to the Workers Compensation issue addressed in detail above.

V. **CONCLUSION**

This case is a close call. Neither wage proposal was significantly favored by secondary criteria. The Federation's Workers Compensation proposal gives the County's LBO the edge. I conclude the County's LBO is more consistent with the interest and welfare of the public.

In arriving at this decision, even if not specifically mentioned, I have reviewed and considered all of the evidence, authorities and arguments submitted by the parties. I have not addressed some of the parties' arguments because it was unnecessary to do so. My decision is for the reasons I have explained above.

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and	)	
	)	
MULTNOMAH COUNTY	)	
(Employer)	)	

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 County's Last Best Offer. Pursuant to ORS 243.746 (6) my fees and costs will be borne equally by the parties.

Respectfully submitted,



Kathryn T. Whalen  
Arbitrator

Date: May 11, 2012

