

**OREGON EMPLOYMENT RELATIONS BOARD
STATUTORY INTEREST ARBITRATION**

LINCOLN CITY POLICE)	INTEREST ARBITRATION
EMPLOYEES ASSOCIATION,)	OPINION AND AWARD
)	
Union,)	CASE NO. ME-17-14L
)	
and)	
)	
CITY OF LINCOLN CITY,)	
)	
Employer.)	

The Lincoln City Police Employees Association (Association or Union) and Lincoln City (City or Employer) are parties to a Collective Bargaining Agreement (CBA), which expired on June 30, 2014. Pursuant to Oregon’s statutory dispute resolution procedures, ORS 243.746, interest arbitration was held before Arbitrator David Gaba in Lincoln City, Oregon on August 24-25, 2015 for the purpose of determining the terms of the parties’ successor contract.

At the hearing the parties had the opportunity to make opening statements, examine and cross-examine witnesses, introduce exhibits, and fully argue all of the issues in dispute. No transcript of the proceedings was provided. The Post-hearing brief was filed by the Association on September 17, 2015 and by the City on September 24, 2015.

Appearances

On behalf of the Union:

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On behalf of the Employer:

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I. INTRODUCTION

A. The Parties

Lincoln City is located on the northwest coastline of Oregon. Its economy is based largely on tourism and, as a result, its population is variable. It has a population of 8,381 full-time residents, however, at the peak of the vacation season there may be many more people vacationing in the city.

The Lincoln City Police Department (“Department”) consists of twenty-six (26) officers, seven (7) of which are currently vacant. The Department is headed by Chief of Police Keith Kilian, and includes a Lieutenant, four (4) sergeants, three (3) detectives, and seventeen (17) officers. The Department’s budget is the City’s largest expense, with police services accounting for approximately one third of the expenditures from the general fund.

The Lincoln City Police Employees Association (“Association” or “Union”) employees are prohibited from striking, and thus eligible to utilize Oregon’s statutory interest arbitration

procedures which provide for contract issues at impasse to be submitted to interest arbitration pursuant to ORS 243.746.

B. The Bargaining and Procedural History

The Lincoln City Police Employees Association and the City of Lincoln City have been parties to numerous Collective Bargaining Agreements (CBA) and have been the subject of at least two previous interest arbitrations in 1999 and 2001.

The parties arrived at their current impasse through a long and convoluted process to which this Arbitrator has limited knowledge. It is clear that the parties entered into a Collective Bargaining Agreement that expired on June 30, 2014. The parties exchanged written proposals on or about April 21, 2014. Because the Union employees at the Lincoln City Police Department are prohibited from striking, on or about January 5, 2015, the parties petitioned for interest arbitration and submitted their respective final offers and cost summaries. The dispute went through the statutory process and ended in this interest arbitration proceeding.

The Association and the City entered into the following stipulations which include the Consumer Price Index (CPI) used for the first two (2) years of the Collective Bargaining Agreement, agreements on insurance, bilingual pay, and tentative agreements as follows:

1. The Parties' exhibits as to previous tentative agreements (TA's) will be part of the Arbitrator's final award.
2. The applicable CPI for 7/1/14 and 7/1/15, are both at 2.3%.
3. The parties' stipulate to the introduction of their comparator exhibits, with the reservation that both parties will enter into evidence the underlying CBAs and wage information. Both parties' reserve the right to argue the accuracy of those numbers and the appropriate jurisdictions in their Closing Argument Briefs.
4. Both parties' agree to accept telephonic testimony of certain witnesses.

Interest Arbitration Opinion and Award

5. Both parties' agree that our insurance and bilingual proposals are the same.¹

The parties selected the undersigned as their Interest Arbitrator pursuant to the statutory procedures. As the Interest Arbitrator, I am to determine which Last Best Offer, in its entirety² (either from the Union or the Employer), better meets the following statutory criteria of ORS 243.746.

RELEVANT STATUTORY LANGUAGE

The Oregon Revised Statutes govern this interest arbitration proceeding to resolve the parties' dispute. As set forth in ORS 243.746(4)-(6):

(4) 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 the 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 paragraphs (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 a settlement.

¹ Exhibit C-42.

² Since the passage of SB 750 in 1995, an Oregon interest arbitrator has been required to select either one side's Last Best Offer "package" in total, or to select the other. In other words, unlike many other states (and unlike Oregon before the passage of SB 750), an Arbitrator is not allowed to evaluate the parties' offers on an issue-by-issue basis. In most other jurisdictions an interest arbitrator would have the freedom to: select the better proposal(s); combine elements of two proposals; or even craft a different contract clause altogether so as to develop a total package that, in the arbitrator's view, best serves the interests of the parties and the public.

(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 the situations described as follows:

(A) For any city with a population of more than 325,000, “comparable” includes comparison to out-of-state cities of the same or similar size;

(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;

(C) Except as otherwise provided in subparagraph (D) of this paragraph, for the State of Oregon, “comparable” includes comparison to other states; and

(D) For the Department of State Police troopers, “comparable” includes the base pay for city police officers employed by the five most populous cities in this state.

(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.

Although the statute directs the interest arbitrator to give priority to criterion (a), i.e. “the interest and welfare of the public,” and to give only secondary priority to criteria (b) through (h), as a general rule most arbitrators have found it impossible to apply a standard such as “the interest and welfare of the public” without considering the secondary factors. As the late Carlton Snow observed shortly after the enactment of SB 750:

In the abstract, it is impossible to find meaning in the phrase ‘the interest and welfare of the public.’ The meaning of this criterion must be found as it is applied within the context of other criteria and the facts of a given case.³

LAST BEST OFFERS

The Association’s Last Best Offer dated August 10, 2015, is as follows:

All prior tentative agreements and the following:

A. Association’s Last Best Offer

1. All Tentative Agreements to date.

2. Article 21 – Health and Welfare⁴

Section 1. Health and Welfare Benefits.

All full- or part-time regular employees covered by this Agreement and their family members, will have the choice of electing coverage under CIS ESB Trust Regence Blue Cross Blue Shield (BCBS), Plan V-C or V-E Preferred Provider Plans (PPP) Rx4, with the hearing aid rider, and Vision Service Plan (VSP). In addition, employees will have the choice of electing dental coverage under either the Oregon Dental Service (ODS) Dental Plan III or the Willamette Dental Plan. The City will pay the premium and will be reimbursed by the employee by payroll deduction for that portion specified in Section 2 of this Article.

The parties acknowledge that they do not have control over the tier coverage structure or the plan year configuration of the insurance

³ Oregon Public Employees’ Union, Local 503 and State of Oregon (OSCI Security Staff), IA-1 1-95 (Snow, 1996).

⁴ The parties’ stipulated their insurance proposals are the same. Exhibit C-42.

provider, but do recognize the potential duty to bargain significant impacts by any such changes, should they occur.

Section 2. Premiums.

- (a) Each employee who is enrolled in Plan V-C PPP Rx4 VSP shall contribute ten percent (10%) of the full premium for his or her tier of coverage under that Plan.
- (b) Each employee who is enrolled in Plan V-E PPP Rx4 VSP shall contribute nine percent (9%) of the full premium for his or her tier of coverage under that Plan.
- (c) Regardless of which medical plan an employee elects, the employee shall contribute ten percent (10%) of the full premium of the employee's elected dental plan.
- (d) All part-time bargaining unit employees shall be entitled to employee only coverage specified in Section 1 of this Article, and shall reimburse a portion of the premium as specified in this Section. To the extent the employee wishes dependent or family coverage that is made available, the employee shall reimburse the additional premium through payroll deduction.
- (e) The City will maintain an IRC Section 125 plan so that the contribution payment by employees can be done by a pre-tax Section 125 plan payment.
- (f) If any other full-time employee of the City contributes less for full family health insurance coverage than the contribution amount set forth above, the Association shall have the option to re-open Article 21.

3. Article 22 – Wages

Section 2. Cost of Living Adjustment (COLA).

- (a) Effective July 1, 2014, the wages for all employees shall be increased by an amount equal to the Portland CPI-W Index, January to December of the previous year, with a minimum of two and one-half percent (2.5%) and a maximum of four percent (4%).
- (b) Effective July 1, 2015, the wages for all employees shall be increased by an amount equal to the Portland CPI-W Index, January to December

of the previous year, with a minimum of two and one-half percent (2.5%) and a maximum of four percent (4%).

- (c) Effective July 1, 2016, the wages for all employees shall be increased by an amount equal to the Portland CPI-W Index, January to December of the previous year, with a minimum of two and one-half percent (2.5%) and a maximum of four percent (4%).

Section 8. Incentive Pay.

Incentive pay will be made up of three (3) opportunities for premium pay: certification pay, bilingual pay, and ORPAT pay.

(a) Certificate Pay:

- i. Employees with an Intermediate Certificate from DPSST shall receive an additional two percent (2%) of their base pay. For employees hired before July 1, 2011, a minimum of thirty four dollars and sixty two cents (\$34.62) per pay period will be applied.
 - ii. Employees with an Advanced Certificate from DPSST shall receive four percent (4%) of their base pay. For employees hired before July 1, 2011, a minimum of sixty nine dollars and twenty three cents (\$69.23) per pay period will be applied.
- (b) Bilingual Pay⁵: Effective upon execution of this agreement, all police employees who are directed to use a bilingual (English/Spanish) skill in direct customer contact situations and who annually pass a City approved Spanish language test shall receive four percent (4%) of their base pay after the employee passes his/her first test.

(c) ORPAT Pay:

Sworn employees will maintain flexibility and physical fitness and take the ORPAT twice annually. The DPSST standards for ORPAT are five minutes and thirty seconds (5:30). The City will conduct the test every six (6) months. Sworn employees who pass the ORPAT with a time of five minutes and thirty seconds (5:30) or less shall receive an additional two percent (2%) of their base pay for that six (6) months and each one

⁵ The parties stipulated their bilingual proposals are the same. Exhibit C-42.

where a passing score is obtained thereafter. At any point that an employee is unable to pass the ORPAT, they will forfeit the two percent (2%) incentive pay until their next passing ORPAT score.

Section 10. Detective/SRO.⁶

The assignment of a police officer or senior police officer to duty as a detective or school resource officer (SRO) is a rotating assignment that can be reassigned at any time. During the period of the assignment to the detective slot, the police officer or senior police officer so assigned will be compensated at the first step in that range which would be at a higher salary level and not less than five percent (5%). Upon reassignment from detective, the employee will revert to the former range at the step assignment then appropriate, giving consideration to the step increases the employee would have been eligible for at the former range during the period of duty as detective. Regular step increases shall be implemented on an employees' anniversary date.

4. Article 29 – Term of Agreement

This Agreement shall be effective and retroactive the 1st day of July, 2014 and shall remain in full force and effect through the 30th day of June, 2017. This Agreement shall remain in full force and effect for the duration of any successor negotiations.

To open negotiations for a successor agreement, the Association shall notify the City of its intent to modify or add to the existing Agreement no later than January 15, 2017.

Exhibit A-1.

The City's Last Best Offer is as follows:

1. All Tentative Agreements to Date;
2. Except as modified by the attached articles and except as modified by tentative agreements, current contract language;

⁶ Both parties have proposed and agree to add "SRO" to Section 10 Detectives; therefore, this issue will not be briefed.

3. Articles 21 (Health and Welfare), 22 (Salaries) and 29 (Term of Agreement) modified per attached language.

2. Article 21 – Health and Welfare⁷

Section 9. Fitness.

The City provides a membership for an employee and family members residing in the same household desiring to use facilities at the Lincoln City Community Center. The City encourages all police officers to use this benefit.

If a police officer fails to pass the ORPAT at the time listed in Article 22, Section 8(d) after a good faith effort, the City will reimburse the employee in an amount of up to five hundred dollars (\$500) for one or more pre-approved expenditures designed to aid the officer in becoming more physically fit and help him/her pass the ORPAT on a subsequent attempt. Examples of reimbursable expenses are for tools or methods to decrease weight, increase exercise, improve physical stamina and improve nutrition. The police officer is eligible for this reimbursement for the period within six (6) months after his/her failure to pass the ORPAT and one time during the term of this Agreement.

Beginning with the first ORPAT in 2016, any police officer who does not pass the ORPAT, at the DPSST standard time, twice in any three (3) ORPAT tests will be submitted to a fitness for duty evaluation pursuant to Lincoln City policies.

3. Article 22 – Wages

Section 2. Cost of Living Adjustment (COLA).

- (a) Effective and retroactive on July 1, 2014, the wages for all sworn employees shall be increased by one percent (1%).
- (b) Effective and retroactive on July 1, 2014, the wages for all non-sworn employees shall be increased two percent (2%).
- (c) Effective July 1, 2015, the wages for all employees shall be increased by an amount equal to the Portland CPI-W Index,

⁷ The City's insurance proposal is the same as the Association's; therefore, only the FFDE proposal is included.

January to December of the previous year, with a minimum of one and one-half percent (1.5%) and a maximum of three percent (3%).

- (d) Effective July 1, 2016, the wages for all employees shall be increased by an amount equal to the Portland CPI-W Index, January to December of the previous year, with a minimum of one and one-half percent (1.5%) and a maximum of three percent (3%).

Section 3. Step Plan.

Employees shall be eligible for consideration for advancement through the steps upon completion of one (1) year of service and thereafter upon a satisfactory performance evaluation from their supervisor, as approved by the Chief of Police.

Section 8. Incentive Pay.

Incentive pay will be made up of four (4) opportunities for premium pay: certification pay, response time pay, bilingual pay and ORPAT pay.

(a) Certificate Pay:

- i. Employees with an Intermediate Certificate from DPSST shall receive an additional two percent (2%) of their base pay. For employees hired before July 1, 2011, a minimum of thirty four dollars and sixty two cents (\$34.62) per pay period will be applied.
- ii. Employees with an Advanced Certificate from DPSST shall receive four percent (4%) of their base pay. For employees hired before July 1, 2011, a minimum of sixty nine dollars and twenty three cents (\$69.23) per pay period will be applied.

(b) Response Time Pay:

All employees of the Police Department are emergency responders. As such, employees must be able to respond to an emergency within twenty-five (25) minutes travel time from their residence to the LCPD. Those employees who meet and maintain the response/travel time requirement will receive one percent (1%) of their base pay. All employees hired after July 1, 2011, shall reside within a twenty-five (25) minute response time from the LCPD.

(c) Bilingual Pay: Effective upon execution of this agreement, all police employees who are directed to use a bilingual (English/Spanish) skill in direct customer contact situations and who annually pass a City approved Spanish language test shall receive four percent (4%) of their base pay after the employee passes his/her first test.

(d) ORPAT Pay:

- i. Sworn employees will maintain flexibility and physical fitness and take the ORPAT twice annually, approximately every six (6) months (generally May and November).
- ii. The DPSST standards for passing ORPAT are five minutes and thirty seconds (5:30). Sworn employees who pass the ORPAT with a time of five minutes and thirty seconds (5:30) or less shall receive additional pay according to the table below.

Title	Pass DPSST standard once/year	Pass DPSST standard twice/year
Sergeant	\$1,500	\$3,000
Detective	\$1,340	\$2,680
Sr. Police Officer	\$1,293	\$2,586
Police Officer	\$1,238	\$2,476

- iii. Incentives will be paid in a lump sum amount beginning on December 1, 2015 based on ORPAT tests taking place after May 1, 2015, and annually thereafter, according to the table attached. Should this date fall on a Saturday or Sunday, payment would be issued on the next business day.
- iv. For any sworn employee who is unavailable to take the regularly scheduled ORPAT on the date(s) due to an approved pre-scheduled vacation, illness/injury or other approved leave that could not be anticipated, one (1) make-up test will be scheduled approximately one (1) month after the last test date or as soon thereafter as practical.
- v. Notification of the make-up test date will be given at the same time and in the same manner as the regularly scheduled testing dates. Employees who are unavailable for any of the reasons set forth in section iv, above and wish to take the make-up test must submit a request at least one (1) week before the make-up test date by email or memorandum to the Chief of Police. All timely submitted requests will be approved.

- vi. Either employees who took the test and failed or who were unavailable for reasons other than those specified above at the time of the make-up test, will be counted as having failed and will need to wait for the next regularly scheduled test date to take the ORPAT again.

Section 10. Detective/SRO.

The assignment of a police officer or senior police officer to duty as a detective or school resource officer (SRO) is a rotating assignment that can be reassigned at any time. During the period of the assignment to the detective slot, the police officer or senior police officer so assigned will be compensated at the first step in that range which would be at a higher salary level and not less than five percent (5%). Upon reassignment from detective, the employee will revert to the former range at the step assignment then appropriate, giving consideration to the step increases the employee would have been eligible for at the former range during the period of duty as detective. Regular step increases shall be implemented on an employees' anniversary date.

4. Article 29 – Term of Agreement

This Agreement shall be effective and retroactive, to the extent specified, the 1st day of July, 2014 and shall remain in full force and effect through the 30th day of June, 2017. This Agreement shall remain in full force and effect for the duration of any successor negotiations.

To open negotiations for a successor agreement, the Association shall notify the City of its intent to modify or add to the existing Agreement no later than January 15, 2017.

Exhibit C-2.

While the City and Union have proposed a number of relatively minor contract changes, the essential issues in dispute are salaries, response time, and fitness. The Employer's Last Best Offer includes a proposed change in the health insurance benefits, fitness of the sworn employees, and response time requirements.

II. ANALYSIS

Arbitrator Tim Williams authored the first interest arbitration decision involving the State of Oregon and the Oregon State Police Officers' Association in 1985. Under the statutory authority in place at that time, Arbitrator Williams provided the award on an issue by issue basis. In doing so, Arbitrator Williams was free to edit individual proposals to ensure compliance with statutory criteria.

Since that time, the Public Employee Collective Bargaining Act (PECBA) has been amended by the legislature and interest arbitration is now provided on a total package basis. Arbitrators no longer have the authority to edit the parties' proposals and must simply select one package or the other. Under this statutory scheme, each package must be viewed as a whole and the advisability of awarding the package considered in light of the criteria as set forth above. This obviously puts the Interest Arbitrator in a position, at times, of awarding a package that has individual parts that he or she does not find to be meritorious. In such a case, the package as a whole may be viewed as better tuned to statutory criteria even though individual parts are seen as having substantial deficiencies. Awarding provisions that are seen as deficient does not always make the Interest Arbitrator feel comfortable; and, in the instant case, the undersigned is in the uncomfortable position of choosing a Last Best Offer (LBO) in which he will award contract language that he finds personally offensive.

In the case at hand, the Interest Arbitrator spent a considerable amount of time reviewing the exhibits provided by the parties and giving full and thoughtful consideration to the parties' arguments. Both parties provided lengthy and well written briefs. Ultimately, the Arbitrator is awarding the Lincoln City Police Employees Association Final Offer package as he finds that it

is the best total fit to the statutory criteria. This Arbitrator does so reluctantly as there are parts of the package which he believes are unwarranted, poor public policy, and simply unfair; and in fact, would have found for the City on two of the three issues presented. This Interest Arbitrator offers the following multi-point analysis on an issue by issue basis to explain the reasoning by which he arrived at the above conclusion.

There is concern expressed in the briefs of both parties that data being used lacks clarity and precision. The Arbitrator notes that his experience leads to the conclusion that this assessment is generic to interest arbitration in general. No matter how hard the parties try, employment data is extremely difficult to ascertain with certainty. Changes are constant; senior employees retire and junior employees are hired, new positions are created, old positions are eliminated, employees are promoted, and work is reclassified.⁸

Further, the traditional statutory factors previously listed are not as helpful in this proceeding as they are in many other arbitrations. Specifically ORS 243.746(e) provides:

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. For the use of comparability as statutory criteria, the statute restricts comparable communities to “communities of the same or nearest population range within Oregon.”⁹ However, for these parties Arbitrator Harris clarified this requirement when she found:

⁸ *The State of Oregon Department of State Police and Oregon State Police Officers' Association* (Williams, 2010).

⁹ ORS 243.746(4)(e).

First of all, the Arbitrator does not feel compelled to restrict her comparisons to coastal communities only. There is no such requirement in the statute and to read such a requirement into the language would be to exceed the interest arbitrator's jurisdiction. Moreover, the statute does not require that a city be identically equal in population to its comparator. Rather, it must be "in the same or nearest population range within Oregon." In the Arbitrator's judgment, the third list of communities presented by the Union, as well as the list of communities presented by the City, both fall within the same or nearest population range so as to satisfy the requirements of the statute.

Given that both the third set of the Union's comparators and the City's comparators fall within the appropriate population range, other factors such as geographical proximity may be considered. "Comparable" as used in the statute is a broad term and reasonably includes, at a minimum, geographical proximity. Where, as here, population ranges used by the City and by the Union in its third set of comparables are strikingly similar, the Arbitrator is of the view that communities within a 100 mile radius of the City provide a better basis for wage and benefit comparisons. As an additional basis for this choice of comparators, the Arbitrator notes that only the Union has compared "overall compensation" as required by the statute.¹⁰

The above reasoning still resonates and the parties' appropriate comparators are those cities that are within 100 miles of Lincoln City and are up to fifty percent (50%) more or fifty percent (50%) less in population than Lincoln City.¹¹

The statutory criterion also requires the Arbitrator to give first consideration to the interest and welfare of the public. It is the Arbitrator's conclusion that the interest and welfare of the public is best served by an award that has the least chance of increasing employee turnover,

¹⁰ *Lincoln City and Lincoln City Police Employees Association*, IA-02-97 (Harris, 1997).

¹¹ See, *Benton County Deputy Sheriff's Association and Benton County*, IA -16-01(Collins, 2002) in which the issue of size was directly addressed by the Arbitrator. Arbitrator Collins found that "although 'population range' is not defined in the Act [PECBA], it is reasonable to assume that all Oregon counties with a population of approximately 50 percent more or less than Benton County would fall within that limit." See also; *Marion County Law Enforcement Association and Marion County*, IA-14-08 (Fitzsimon, 2010).

decreasing employee morale, inserting language into the contract that may be illegal, or raising taxes. Of course, these goals are mutually incompatible.

A. THE INDIVIDUAL PROPOSALS

1. Wages, Insurance and Bilingual Pay

First, both Last Best Offers contained a maintenance of the status quo for insurance. Additionally, both Last Best Offers contained a new four percent (4%) incentive pay for bilingual pay.

Wages

Standing alone, the City's Last Best Offer on this issue would be awarded. As stated in its brief, the City "proposed wage increases of 1% for sworn employees and 2% for non-sworn employees¹² retroactive to 7/1/14, and 1.5% - 3% for both 7/1/15 & 7/1/16. The CPI for 7/1/15 was known, and stipulated to, at the time of hearing to be 2.3%. (*Ex. C-42*)" The City further argues that "there is no justification for awarding the Association's wage proposal of a minimum of 2.5% to a maximum of 4% for each year of the contract."

As this arbitrator has previously held, where a party in an interest arbitration seeks to change the status quo, it must do so by satisfying a "compelling need" test. The party that seeks to modify or change the status quo bears the burden of proving that:

- a. a "compelling need" for change exists;

¹² The additional 1% for the non-sworn employees is to help compensate them for not being eligible for the ORPAT incentive.

- b. the party's proposal addresses that "compelling need"; and,
- c. the party proposing to change the status quo has the burden to justify taking away a benefit that was previously obtained through negotiated settlement.¹³

The Association's proposal with a floor of 2.5% going forward is not supported by the wages of comparable jurisdictions at this time. The parties have elected to use the "CPI-W Portland" which can be quite volatile. While the issue may very well be moot, the possibility exists that the CPI-W for Portland could be zero (0) or less than zero (0) for the upcoming year resulting in a possible 2.5% wage increase for the bargaining unit. A 2.5% increase in real wages is not supported by the comparable jurisdictions and if this issue was the only one before me I would find the City's proposal to be closer to meeting the "interest and welfare of the public."

2. Response Time

The City proposed "status quo for response time requirements and pay." The response time provision was bargained in the 2011-2014 Collective Bargaining Agreement and provided that employees hired after July 1, 2011, "shall reside within a twenty-five (25) minute response time from the LCPD." An incentive pay of one percent (1%) was offered to the officers to assist in additional housing costs of living within that radius. The City alleges that it often needs to call officers to work at the last minute to cover sick calls or for a quick response to an emergency.

¹³ *Gladstone Police Association and City of Gladstone*, IA-10-00 (Gaba, 2001).

The Union is seeking to delete the “Response Time Pay” provision of the Agreement in its entirety stating that: “Based on the City’s calculations this would result in a savings of \$49,438 over the three-year contract.” The Union argues that “there is no way for an officer to live outside of town enough to distance themselves from that sort of contact and still comply with the response time requirement.” The Union further argues that the proposed language “contradicts the language of the emergency responder and need for a quick response in an emergency.” In addition, the Association argues that “The response time requirement is currently harming the public the department serves as the department is losing qualified, trained employees to other jurisdictions and having a difficult time recruiting employees to live within 25 minutes of the Police Department.”

The Union ignores the fact that the City had previously “bought” the Response Time language in bargaining as part of a *quid pro quo*. As stated by Arbitrator Runkle in a recent Oregon Interest Arbitration award:

Interest arbitrators typically place the burden of proof and the burden of persuasion on the party that is proposing a significant change in the status quo. This is sometimes expressed as a need to show (1) that the existing situation is not working well, (2) that there is a compelling need for change, and (3) that a quid pro quo exists.¹⁴

Here, the Association has offered no *quid pro quo*. In addition, they are now trying to remove through arbitration what they just recently agreed to in bargaining for the recently expired Collective Bargaining Agreement.

Standing alone, this Arbitrator would accept the City’s proposal on this subject and enter an Award in their favor as the Association’s arguments were based on the anecdotal experiences

¹⁴ *Multnomah County v. FOPPO, IA-08-14 (Runkle, 2015)*

of a small number of officers. If Lincoln City officers are truly being priced out of the local housing market, one would expect to see Multiple Listing Service data for the local market and the twenty-five (25) minute radius set forth in the parties' agreement.

Additionally, the undersigned is cognizant that Lincoln City has a small patrol force (seventeen (17) officers), coupled with a large transient population during the summer. From a pure public policy perspective the language of the parties' current Collective Bargaining Agreement makes sense.

3. Oregon Physical Ability Test (ORPAT) and Fitness for Duty Evaluation

Under the expired Collective Bargaining Agreement, sworn employees are to take the Oregon Physical Ability Test (ORPAT) twice annually. The ORPAT is a physical fitness test that is administered over a 1,235 foot obstacle course and tests an officer's mobility, agility, balance, power, and general physical endurance. Article 22, Section 8(c) states:

... Sworn employees who pass the ORPAT with a time of five minutes and thirty seconds (5:30) or less shall receive an additional two percent (2%) of their base pay for that six (6) months and each one where a passing score is obtained thereafter. At any point that an employee is unable to pass the ORPAT, they will forfeit the two percent (2%) incentive pay until their next passing ORPAT score.

The City alleges that it is in the best interest and welfare of the public and the officers, for the officers to be physically fit. The City is proposing a change to the ORPAT incentive pay for those officers who do pass the ORPAT; and instituting a mandatory Fitness for Duty Evaluation (FFDE) for those officers who do not pass the ORPAT. While the expired Collective Bargaining Agreement requires the employees to take the ORPAT twice annually, it does not require the officers to pass the ORPAT; it simply provides a monetary incentive for those who do pass at

least two times in three attempts. The City further alleges that the Association fails to incorporate the Memorandum of Understanding dated November 3, 2011, into its Last Best Offer.

In summation, in its Last Best Offer, the City proposes to change the ORPAT requirement by providing a \$500 reimbursement of expenses toward tools or methods used to aid an employee in reaching their fitness goals so they are able to pass the ORPAT test; to require that an employee who fails two (2) out of three (3) ORPAT tests be evaluated under the City's current Fit for Duty policy; and that employees who pass the ORPAT test be given an increased incentive pay which will be paid out once per year in a lump sum payment.

The Association argues that a mandatory Fitness for Duty Evaluation could potentially end an officer's career and that the "requirement to undergo an FFDE for failing to pass the ORPAT in the required time violates the Americans with Disabilities Act (ADA)." The Association further argues that the ORPAT is not a valid indicator of a police officer's ability to do his/her job. The Police Officer Job Description lists the physical demands as:

While performing the duties of this position, the employee is frequently required to sit, stand, communicate, push, pull, hold, reach, and manipulate objects, tools or controls and enter and exit a motor vehicle. The position requires mobility, flexibility, visual and auditory acuity and the strength necessary to respond to unplanned physical tasks which require substantial physical effort, including the restraint of violent and combative individuals or animals, running as fast as possible while chasing, climbing fences or structures and responding to rescue emergencies. It requires the manual dexterity to operate a firearm as well as the ability to safely operate a motorized vehicle during normal and high speed driving. Duties involve moving or wearing materials weighing up to 25 pounds on a regular basis and may be required to move adults weighing up to 300 pounds on an infrequent basis. Manual dexterity and coordination are required over 50% of the work period while operating equipment such as computer keyboard, motorized vehicle, gun belt, taser, gun, etc. (Exhibit C-33)

The mandatory nature of an employee completing the Oregon Physical Ability Test for all officers in five and one half (5:30) minutes is what the undersigned deems to be problematic with the City's Last Best and Final proposal. I certainly agree that having fit police officers is clearly in the best interest and welfare of the public; however, having experienced police officers is also in the best interest and welfare of the public. It is simply a fact of life that older and more experienced police officers are less likely to pass the ORPAT.

While I applaud the City's efforts to have fit officers, I am also unsure as to what exactly the ORPAT is or how it relates to the Minimum Qualifications required to becoming a Lincoln City Police Officer. It should be noted that any officer who cannot perform the Essential Functions of a police officer should currently be required to submit to a Fitness for Duty Exam. If a medical professional finds such police officer cannot perform the Essential Functions of the police officer role, the police officer should be terminated.

However, there is a lack of evidence linking the ORPAT directly to the Essential Functions of a Lincoln City police officer. The one piece of documentary evidence that was introduced regarding the ORPAT¹⁵ says very little about what the test is supposed to measure. Exhibit 39 in one sentence references that the ORPAT is based on data taken from the Royal Canadian Mounted Police as well as several Job Task Analysis from unnamed Oregon police and correction officers. The totality of evidence I have been provided regarding the ORPAT (excluding the video of applicants taking the test) indicates:

The Oregon Physical Abilities Test (ORPAT) is a hybrid physical ability-job sample physical ability assessment process designed to evaluate entry

¹⁵ City Exhibit 39.

level police officer candidates on the essential physical capacities required to satisfactorily perform their job duties. ORPAT was originally based on data taken from the Canadian RCMP PARE research and tests as well as multiple Job Task Analysis (JTA's) for the Oregon police, and corrections officers.

ORPAT was designed to replicate critical and essential physical tasks and demands faced by police officers in the normal performance of their duties. Both specific tasks and overall physical demands are replicated in the ORPAT through the use of a carefully designed and validated, times "obstacle course."

This would seem to indicate that the ORPAT is a tool "designed to evaluate entry level police officer candidates." The material does not indicate the ORPAT's validity for evaluating an experienced police officer (who may be a little slower, but hopefully more experienced). The evidence is equally murky as it relates to the testimony of the City's expert witness, Dr. Charles Pederson, of Samaritan Occupational Medicine.

Dr. Pederson testified that: "I believe the intent of the ORPAT," is to "simulate what an officer need to be able to do." He also indicated that "I don't think I've done any fit for duty examinations for police officers." Dr. Pederson stated that he had "looked at a video simulation," but that "I have not watched it in person." Dr. Pederson noted that he did review one "study" which he was unable to name, but he believed that the one unnamed study found that the ORPAT "was a good match." Unfortunately, Dr. Pederson did not define where his "belief" originated. Not having conducted Fitness for Duty Examinations for police officers leaves one to wonder on what Dr. Pederson based his opinion. While the ORPAT may be a valid tool for determining whether police officers can meet the Minimum Qualifications of their positions, and whether they are Qualified Individuals to perform police officer work, it is unclear from the evidence provided in this hearing that this is the case.

The City has failed to show that passing the ORPAT is directly correlated to the Minimum Qualifications of being a police officer. If one can perform the Minimum Qualifications of a job, one is then a Qualified Individual, specifically: “[A]n individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”¹⁶

The ORPAT is challenging for some officers who testified at the hearing. Sergeant Weaver is 56 years old, has worked for the City for 26 years, and brings a wealth of experience to his job. Sergeant Weaver has never had a problem performing the physical demands of the job and has never had a Workers’ Compensation claim; he appears fit and would seem like the type of officer you would want to respond to a call for service at your home. Although Sergeant Weaver appears fit and thinks he can pass the ORPAT, he has failed it in the past. This automatic visit to a doctor for a physical examination (Fitness for Duty Exam) that could potentially end an officer’s career is problematic for Sergeant Weaver, for the freeholders of Lincoln City, and for the citizens of the State of Oregon.

First, the requirement to undergo a Fitness for Duty Exam for failing to pass the ORPAT could possibly violate the Americans with Disabilities Act (ADA). “Under 42 U.S.C. Section 12112(d)(4)(A), an employer may not require a medical examination to determine whether an employee is disabled ‘unless such examination or inquiry is shown to be job-related and consistent with business necessity.’”¹⁷ In *Brownfield*, the court explained, “In interpreting the

¹⁶ 42 U.S.C. § 12111(8).

¹⁷ *Brownfield v. City of Yakima*, 612 F.3d 1140, 1145 (9th Cir. 2010).

‘business necessity’ standard in another ADA context, we have cautioned that it ‘is quite high, and is not to be confused with mere expediency.’”¹⁸

In the present case, the City is trying to use a Fitness for Duty Exam for reasons that are not entirely clear. Without any proof of performance problems, failure to meet physical job demands, or job related issues, the City wants to send officers for medical examinations. Does failing the ORPAT indicate that an officer cannot perform his job? I don’t know. Is the ORPAT simply an agility test under the ADA or is it a medical exam under the statute? Again, it is unclear. Under the ADA, the City can only engage in pre-emptive tests before work is affected if it has “significant evidence” that could cause a “reasonable person” to doubt whether an employee can perform the job.

In upholding the decision to send Brownfield for a Fitness for Duty Exam, the court acknowledged that police officers “encounter extremely stressful and dangerous situations during the course of their work” and explained, “(w)hen a police department has good reason to doubt an officer’s ability to respond to these situations in an appropriate manner, an FFDE is consistent with the ADA.”¹⁹ While the cases above dealt with an officer’s mental health (most Fitness for Duty Exams are ordered for psychological evaluations), the holdings apply to physical examinations as well.

The City has offered no evidence to doubt an officer’s ability to perform his or her job just because he or she can’t pass the ORPAT in the allotted time. The City’s own explanation, that it wants more physically fit officers to reduce workers compensation claims, defeats any

¹⁸ *Id.* (citing *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001)).

¹⁹ *Id.* at 1147.

ADA defense it could raise. Under the ADA, an officer could only be sent for a Fitness for Duty Exam if the City can articulate significant evidence that would cause a reasonable person to believe the officer may not be able to perform the requirements of his or her job. If the ORPAT is truly a valid test of an officer's fitness for duty, why haven't the many officers who have failed it at Lincoln City been sent for a medical review?

The City offered no testimony as to whether or not the ORPAT was even designed to test an officer's ability to meet the physical demands of the job. However, the Association called as a witness Officer Brandon Gould, a former Lincoln City Police Officer, who had attended and successfully completed the Department of Public Safety Standards and Training (DPSST) 8-hour ORPAT instructor class and who formerly served as the City's ORPAT instructor. Officer Gould indicated that it is the position of the Department of Public Safety Standards and Training that the ORPAT was designed to find a way to assess a recruit at the beginning of the Academy and at the end; and that prior to the ORPAT, the Department of Public Safety Standards and Training had no way to assess improvement at the end of the 16-week Academy. Officer Gould's testimony may be incorrect, however, he was the only witness to present evidence in regards to the Department of Public Safety Standards and Training's position.

Most problematic for the Employer is the intent of their proposal and how they plan to implement it. Chief Kilian testified that failing to pass the ORPAT alone was not cause for a Fitness for Duty Exam, regardless of what the City's proposal states. The Chief also indicated in his testimony that he at times responds to calls in uniform and in his patrol vehicle. Yet Chief Kilian hasn't been required to take the ORPAT test. The Chief is clearly a sworn officer who engages in police work on occasion. If the ORPAT is truly indicative of an officer's ability to

perform the Essential Functions of his/her job, then every officer performing police work should be compelled to pass the ORPAT, including the Chief.

City Manager Ron Chandler indicated that “if you have a very fine officer that will lead you down one path... if you have an officer with disciplinary problems that would lead you down another path.” City Manager Chandler also indicated that “we will look at the totality of an officer’s performance in making these decisions to refer.” Based on the City Manager’s position, referral to a Fitness for Duty Exam would seem to be based on the City’s subjective view of the officer rather than the officer meeting the Minimum Qualifications of a police officer.²⁰

Again, the City’s proposal states in part:

Beginning with the first ORPAT in 2016, any police officer who does not pass the ORPAT, at the DPSST standard time, twice in any three (3) ORPAT tests **will** be submitted to a fitness for duty evaluation pursuant to Lincoln City policies.”²¹

The City is not proposing an officer “may” be submitted for a Fitness for Duty Exam pursuant to policy, it is proposing an “automatic” Fitness for Duty Exam. The Chief and the City Manager seem to misunderstand the City’s proposal and interpret in a manner that would clearly violate the ADA. At best, the City’s Last Best Offer on Fitness for Duty is an invitation for litigation; at worst (in the context of the evidence provided at the hearing), it represents a violation of the rights of the officers covered by the Collective Bargaining Agreement.

²⁰ In its Brief the City sought to impeach the testimony of its own witnesses stating:

Finally, the Arbitrator should not be distracted that the Chief and City Manager were not completely clear on how this process would work. That is a responsibility of the Human Resources Manager, a position which was temporarily vacant at the time of hearing. *City Brief* at 9.

²¹ Exhibit C-2, pg. 4 (emphasis added).

The Lack of Comparable Jurisdictions

ORS 243.746 provides, in part:

(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.

The City’s proposal is problematic as the language proposed has not been adopted by any department the undersigned is familiar with.

Some of the contracts provided by the parties do mention the ORPAT. The Canby Police Association agreement provides for a \$250 incentive bonus for passing the ORPAT “in a time that is considered passing.” It states that participation in the test is voluntary and that employees who seek the incentive and don’t pass “will not be deemed ‘physically unfit for duty.’”²² The Seaside Police Association agreement explains the parties bargained away their physical fitness incentive and agreed to increase all positions by five percent (5%) as a quid pro quo.²³ The Independence Police Association contract provides a 2% incentive pay for passing the ORPAT in under four minutes and thirty seconds and notes that only officers passing the test will receive the incentive. The article explains the test is “offered” as an incentive but has no requirement to take the test.²⁴ The Monmouth Police Association agreement has an incentive that ranges from \$125-\$325 but the test is not mandatory and failing to pass does not impact the officer. “Employees who do not satisfactorily complete the ORPAT as defined in this

²² Exhibit A-6, pg. 17-18.

²³ Exhibit A-12, pg. 17.

²⁴ Exhibit R-6, pg. 24.

agreement, shall not be subject to discipline as a result of their ORPAT score.”²⁵ Lastly, the Philomath Police Personnel Association agreement provides an annual \$500 bonus to any officer who passes the ORPAT “at 5 minutes or below. Officers with 10 years of consecutive service with the Department will be eligible for the bonus if they pass the standards at 6 minutes or below.”²⁶

The Lincoln County Sheriff’s Office job description for Deputy Sheriff-Patrol does mandate that officers must regularly pass the ORPAT, however, it is unclear if officers who fail will be referred to a Fitness for Duty Exam.²⁷ The Sheriff’s Office job description grandfathered current hires and noted that deputies hired after July of 2007 must pass the ORPAT in the time required, and does so annually to maintain employment. The totality of the comparable jurisdictions greatly favor the Union’s position. More critically, the Collective Bargaining Agreements of the comparable jurisdictions are evidence that the ORPAT is not directly related to an officer’s ability to perform the Essential Functions of his/her job.

Interest and Welfare of the Public

ORS 243.746(4) dictates that the “interest and welfare of the public” be given primary consideration when deciding which final package to award. Only where the interest and welfare of the public is not an issue standing alone, do arbitrators reference the so-called secondary factors found in ORS 243.746(4)(b)-(h).

²⁵ Exhibit R-10, pg. 24.

²⁶ Exhibit R-14, pg. 17.

²⁷ Exhibit C-40, pg. 3.

It is in the “interest and welfare of the public” to have fit police officers. However, it is also in the “interest and welfare of the public” to have enough police officers,²⁸ as well as experienced police officers.

Chief Kilian testified, when fully staffed, the department has twenty-six (26) officers. Subtracting the Chief of Police and Lieutenant, seven (7) out of twenty-four (24) positions are open. If the City’s proposal is awarded and officers or sergeants who fail the ORPAT are required to undergo a Fitness for Duty Exam, the City is taking an extreme risk that those officers will either be forced into early retirement, forced to look for employment elsewhere, or fail the Fitness for Duty Exam and be terminated. This potential for additional turnover would harm not only the Police Department, but the community as well. Awarding a proposal that will harm the City’s ability to recruit and retain qualified law enforcement is not in the interest and welfare of the public. The City has not shown that it has a “compelling” need for its proposal.²⁹

CONCLUSION

Although most arbitrators have found it necessary to consider the “other factors” in ORS 243.746(4) to determine the interest and welfare of the public, this is one of the exceptional cases where that is not required.³⁰ The City’s proposal on Fitness for Duty is so fraught with problems and managerial misunderstanding that it alone makes the City’s Last Best Offer not in the best interest and welfare of the public.

²⁸ See also; ORS 243.746(4)(c) refers to “[t]he ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided.”

²⁹ *Multnomah County v. FOPPO, IA-08-14 (Runkle, 2015).*

³⁰ See, *Oregon State Police Officers’ Association and State of Oregon, IA-15-03 (2004)*, in which Arbitrator Norman Brand stated: “In my view, this is the rare case in which the interest and welfare of the public may be discernible from the context of the dispute.”

