

BEFORE THE ARBITRATOR

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EMPLOYMENT  
RELATIONS BOARD

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In the Matter of the Interest Arbitration

Of a Dispute Between

BEAVERTON POLICE ASSOCIATION

And

CITY OF BEAVERTON

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Appearances:

Garettson, Gallagher, Fenrich & Makler, P.C., Attorneys at Law, by Mark J. Makler, appeared on behalf of the Association.

Bullard, Smith, Jernstedt and Wilson, Attorneys at Law, by Adam S. Collier, appeared on behalf of the Employer.

INTEREST ARBITRATION AWARD

The City of Beaverton (herein "Employer") and the Beaverton Police Association (herein "Association") filed a petition for interest arbitration pursuant to ORS 243.742, et seq. They selected the Undersigned to act as arbitrator. The parties each timely filed last best offers (herein "LBO's") and the Association timely amended its LBO. The undersigned held a hearing April 23, 2008, in Beaverton, Oregon. The parties each filed post-hearing briefs, the last of which was postmarked May 23, 2008.

BACKGROUND

The Employer is an Oregon municipality which is a suburb of Portland. It has a police department with approximately 135 rank and file sworn police officers. The Association is a labor organization which is the certified collective bargaining representative of those sworn police officers. This collective bargaining unit is one of two of the City of Beaverton. The other unit is represented by the Service Employees International Union. That unit includes about 225 employees. There are also a large number of unrepresented employees of the Employer.

The parties' current collective bargaining agreement is in effect from July 1, 2005, until June 30, 2009. It provides that the parties may renegotiate Articles 13, 14, 25 and 26 for the period July 1, 2007 to June 30, 2009. Health insurance was among those issues. Under the agreement the Employer maintains three health plans, ODS Point of Service (herein "POS"), ODS Preferred 200 (herein "P200"), and Kaiser HMO (herein "Kaiser"). The plans are offered to all employees of the Employer and, until the

matters in dispute, were offered under identical terms to all employees of the Employer. The enrollment of unit employees in each of the plans is as follows: POS, 105: P200 4: Kaiser, 24.

In the negotiations leading to this dispute, the parties agreed to essentially retain the three health insurance plans in effect. The changes they agree to make include, but are not limited to:

1. Increase the out-of-pocket maximum for all three plans.<sup>1</sup> For example, for the POS plan, the former in-plan annual maximum was \$1,000 per individual and \$2,000 per family. This was increased to \$1,250 per individual and \$2,500 per family.
2. Under the current agreement, the employees contributed for the July 1, 2006, June 30, 2007 period the following monthly payments for the POS Plan:

Single	Employee plus 1	Employee plus family
\$0	\$45.26	\$68.25

As of the submission of last best offers, as amended, the parties have agreed to the following contributions:

Single	Employee plus 1	Employee plus family
\$0	\$60.00	\$80.00

The parties proposed no change with respect to the other plans for which the Employer pays the full premium.

3. The parties increased the dental insurance maximum benefit from \$1,500 to \$2,000.

#### ISSUES<sup>2</sup>

The parties submitted last best offers, which after modification, as provided by ORS Sec. 243.76, were identical in all respects<sup>3</sup> except as follows:

<sup>1</sup> The out-of-pocket maximum is rarely reached in the Kaiser plan. The out-of-pocket maximum does not apply to office visit co-payments and prescription co-payments.

<sup>2</sup> The parties stipulated that the dispute is properly before me under ORS 243.746

<sup>3</sup> There is a minor variation between the parties with respect to Section 25.1's retroactivity provisions, but the parties stipulated at hearing that the intent of both of their proposals was the same, to make the provisions retroactive.

1. The July 1, 2006, June 30, 2007 office visit co-pay was as follows:

POS		P200		Kaiser
In plan	out of plan	in plan	out of plan	
\$5	70% <sup>4</sup>	90%	70%	100%
The Employer proposes to change this as follows effective for the July 1, 2008 to June 20, 2008 period:				
\$15	70%	90%	70%	\$15
The Association proposes to change this as follows:				
\$10	70%	90%	70%	\$10

2. The per visit emergency room co-payment effective July 1, 2008, when the beneficiary is not admitted to the hospital:<sup>5</sup>

	POS	P200		Kaiser
		in plan	out of plan	
<b>Current</b>	\$50	\$100, then 90% paid	\$100 then 70%	\$50
<b>Employer</b>	\$100	\$100, then 90% paid	\$100 then 70%	\$100
<b>Association</b>	\$75	\$100, then 90% paid	\$100 then 70%	\$75

3. Prescription Drug Coverage

	POS		P200	Kaiser
	Generic	Brand <sup>6</sup>		Non-formulary not covered
<b>Current</b>	\$5	\$20 plus cost over generic	90%	\$5 for formulary
<b>Employer</b>	\$15	\$20 plus cost over generic	90%	\$15 for formulary
<b>Association</b>	\$10	\$20 plus cost over generic	same	\$10 for formulary

<sup>4</sup> The percentages are the payment by the plan. The employee pays the remainder.

<sup>5</sup> It is waived, if the beneficiary is admitted.

<sup>6</sup> If the physician prescribes that the prescription to be "dispensed as written" the cost over generic is waived.

## POSITIONS OF THE PARTIES

### ASSOCIATION:

The Employer has agreed that its ability to pay is not in issue. The posture of the parties, even if the Employer's offer is adopted is that the Employer will save about \$98,188. Therefore, the adoption of the Association's offer will result in a savings to the Employer of \$16,091. The arbitrator should also keep in mind that the Association has agreed to other changes in the status quo which the Employer has already accepted by virtue of identical last best offers. Given that the Employer has no issues with ability to pay and that the Association's proposal and that the Association's proposal is not a financial burden to the Employer, the Association's offer should be adopted. Its offer is in the interest and welfare of the public to maintain a highly trained and effective public safety force.

The Employer's finance director has taken the position that the Association's offer will cost the Employer about \$82,000 more than the Employer's offer. It can be assumed this will be expensed during the next twelve months. This equates to about \$51 per member per month. In other words, this is about .15% of the Employer's budget.

Under ORS 243.746 the primary factor to be considered is the interest and welfare of the public. This means that the arbitrator is to consider all of the other factors (b) through (h). The Association's comparisons show that the office visit co-payment of the Association (\$10) clearly falls within an acceptable band the average. Association exhibit A-23 shows that the employees here will be making a monthly co-insurance contribution of \$80 per month, almost double the average of the comparators. Similarly, the Association's prescription co-payment of \$20 over generic clearly falls within an acceptable band of the comparators. Exhibit A-23 demonstrates that for generic prescriptions co-pay all of the comparator jurisdictions the generic prescription co-pay the Association would have either a \$10 co-payment or a 10% co-payment. For a brand prescription co-payment, all jurisdictions have a \$20 co-pay or, at most, a 20% co-payment.

The Association notes that it has already agreed to a \$1,250 higher out-of-pocket maximum than the average of the comparators.

The reason that this contract did not settle, from the perspective of the Association, is that the Employer wanted to treat every employee of the Employer the same whether they were in the protective services or not. Police are exposed to health risks that other employees are not. The testimony in this case underscores the Association's position. Officer B was injured while on duty. His wife has cancer and he will face an additional \$3,000 per year under the Employer's offer because his family has a number of significant prescriptions per year. In 2007, they had 105 prescriptions for which he paid \$1,050. At \$15 per prescription he will have to pay an additional \$525. Officer J has a family member who must be treated at an emergency room. The increase in emergency room visits from \$50 to \$100 means that he will have to pay an additional \$200 per year.

The Employer is trying to achieve in interest arbitration what it could not have obtained voluntarily. This case arises from a limited contract reopener. If the Employer succeeds in its goal here, it will just seek increased contributions in a few months. The Association has gone to great lengths to attempt to achieve a reasonable settlement. It did not merely seek to maintain the status quo

EMPLOYER:

This case is before the arbitrator on a limited reopener. Even in that regard, the differences between the positions of the parties are limited. The issues involve the office visit co-pay, emergency room co-payment and prescription drug co-payment. ORS 243.746(5) requires the arbitrator to select the last best offer of one side or the other based upon the statutory criteria. The Employer's offer meets these criteria and the Association's does not.

The "interest and welfare of the public" criterion is not defined, but can be understood by reference to the public policy statement of the interest arbitration statutes which refer to the efficient operation of public agencies where employees are denied the right to strike and the maintenance of high morale among those employees. The statute should not be used to get more by arbitration than would be gained by the right to strike. The parties tentatively agreed to the Employer's last best offer last fall and, thus, the Employer's offer is what the employees would have achieved if they had the right to strike. The Association has had little incentive to settle because it continues to receive insurance at a lower cost. It is fair to assume that the Association would not have suffered a wage loss over these issues.

Moreover, it is clearly not in the interest and welfare of the public to reward the Association for over-reaching. The Association thereafter offered wage concessions in order to obtain its position. These concessions were withdrawn in its arbitration final offer.

The Employer proposed a \$200 one-time cash payment to help offset the co-payments. However, this offer was rejected by the Association. Unlike the Association, the Employer's arbitration final offer includes the \$200. The regressive nature of the Association's successive offers is reflected in the increase cost to the Employer. Its final offer cost the Employer \$872,884, its last best offer cost \$911,164, and its amended last best offer cost \$983,230. The Association is now offering nothing in exchange for its co-payment provision.

By comparison, the Employer's strike-permitted general employee bargaining unit accepted an offer identical to the Employer's last best offer. The Employer's final offer is virtually identical to that recommended by its benefit's committee which will go into effect sooner than will the changes for the Association. The Employer's offer promotes consistency, sustainability and stability among its employees.

While the Employer believes the first criterion requires the adoption of its view, it alternatively argues that the secondary criteria do as well. The Employer is not making an inability to pay argument; however, the "ability to pay" criterion is not that limited. The criterion is addressed to the relative

ability to pay. The Employer's cost of health insurance has risen by nearly \$1.34 million (over 31%) from fiscal year 2004-05. The Association has presented no evidence that the employees' out-of-pocket costs have risen significantly. The Employer's offer is a reasonable attempt by the Employer to rein in the rising costs.

The Association has failed to present any evidence that justified its offer on its own merits. This is not about the ability of the Employer to pay, but what is a fair and reasonable wage and benefit package.

The Employer's recruitment and retention history favors the Employer's offer. The burden of proof on this issue rests with the Association. Speculation that there might be a problem in the future does not meet this burden. The plain language of the statute mandates that there be actual proof of a present problem "at the wage and benefit levels provided." The Employer's exhibits demonstrate that virtually none of the employees have left to go to work for another jurisdiction. The turnover is only about 3.7% per year. The Employer has no shortage of applicants.

The "overall compensation" criterion supports the position of the Employer. For each of the two comparison groups the Employer offered in evidence the Employer's offer results in overall compensation equal to up to 4% above the average of overall compensation in the groups at the 10 year level with intermediate certification and either an AA or BA. However, when the Employer's health insurance contribution is also considered the Employer's offer is 6% to 9% above the average of the comparison group.

The Employer compares even more favorably when its most popular health insurance plan is compared to the most popular plan offered by each the primary and secondary comparators. The testimony of Ms. Kirschten is that the Employer's ODS plan is so generous that very few public employers offer the plan. In addition, the Employer's proposed \$15 co-payment is far lower than the co-payment required by nearly every one of the comparators. The Employer's dental plan also provides benefits better than the dental plans offered by the comparators.

Ms. Kirschten's undisputed testimony was that because the Employer's insurance plan is so rich, very few employees waive coverage to go on their spouse's insurance plan. In fact, the opposite is true. While four of the Association's members testified regarding the potential effect that a \$15 co-payment would have on them, not one of them was aware of a more generous health insurance plan. The Association did not present evidence on this criterion and, thus, there is no question that the Employer's final offer meets this criterion.

The "cost-of-living" criterion supports the Employer's offer. The only evidence submitted on this criterion was the Employer's. This shows that over the last ten years unit employees' wages have outpaced inflation and will continue to do so with the Employer's offer.

The Association's evidence has no relation to the statutory criteria. The Association's charts offered to show that employees contribute more to health insurance than elsewhere are irrelevant.

First, the comparators are not within the statutory requirements for comparator communities. Second, the comparisons failed to show that the benefits here are far better than elsewhere. The Employer contributes more to health insurance than elsewhere because it offers a better plan.

The fact that a few of the Association's members will be affected by the \$15 co-payment more than other members will is irrelevant. Obviously, some beneficiaries use these services more than others. That is the entire purpose of the health insurance. Ms. Kirschten testified that the high cost of the premium is driven both by the high benefit level and the richness of the health plan. Twenty-nine of the Employer's 490 employees have driven the Employer's health care costs higher. The Employer needs an increase in the out-of-pocket maximums and co-payments to offset the increased costs. The Employer's offer of a payment of \$200 will offset co-payments for most employees for a long time. Employees have a VEBA/MSA and a Section 125 plan to use to offset costs.

## DISCUSSION

### Standards for Decision

Under ORS 243.746 the arbitrator is to select the final offer of one party or the other, without modification. The decision is to be based upon the following criteria as stated in the statute:

243.746 . . .

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.

(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; and

(C) For the State of Oregon, "comparable" includes comparison to other states.

(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.

This case is somewhat unusual in that it occurs during the term of a comprehensive collective bargaining agreement and involves limited issues. It is further unusual in that the parties have submitted a very narrow set of differences with respect to health insurance. The above standards must be applied in the light of the dispute the parties have chosen to frame for interest arbitration. They are applied to a whole offer giving appropriate weight to the various issues.

#### Public Interest

The statute requires that the arbitrator give greatest weight to the public interest. This provision was adopted because the legislature believed that arbitrators had not previously given the public interest sufficient consideration.<sup>7</sup> ORS 243.742(1) states the public policy behind the interest arbitration statute. It is to advance "the high morale" of covered employees and to effect the "efficient operation of such departments." The public also has an interest in having its public employers set a good example by being responsible employers. The public interest standard is amorphous and often there are public interest considerations arguably supporting the final offer of both sides. Some arbitrators have stated that the public interest is best determined by a careful evaluation of the enumerated secondary criteria.<sup>8</sup> However, in this case, the public interest in employee morale must be discussed independently. It is not in the interest of the public in employee morale and responsible personnel policies to allow a public employer to unfairly target benefits against employees who have serious medical problems in their family. Otherwise, the discussion of the interest and welfare of the public is included in the discussion of the other criteria.

#### Application of ORS 243.746(4)(b)-(d) Criteria

The comparison criterion and overall compensation criteria are the criteria which are entitled to the most weight among the secondary criteria. The small total cost difference involved in this dispute does not implicate the "ability of the Employer to pay," or the "impact on the level of services" under ORS 243.746 (4)(b). The cost-of-living criterion of ORS 243.746(4)(f) has little application in this dispute other than the fact that without changes to the current health insurance plan, the cost increases associated with the health plan would far outstrip the general cost of living. ORS 243.746(4)(c) deals with the ability of the Employer to attract and retain staff. This dispute focuses on employees who have high medical costs. The public interest criterion of maintaining employee morale generally requires that this criterion not be applied in this dispute because replacing staff on the basis of their family medical costs would undermine employee morale. The criterion does have application in that employees with

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<sup>7</sup> IAFF and City of Bend IA-09-05 (Snow)

<sup>8</sup> Oregon Public Employees Union and State of Oregon, IA-11-93 (Snow)

high medical costs have generally not opted for coverage under their spouses' plans. This would suggest that benefits here are generally higher than elsewhere.

ORS 243.746(4)(d) and (e) Overall Compensation and Comparisons

The Employer offered total compensation comparisons to two comparison groups. The primarily comparison group was Medford, Gresham, Hillsboro, and Bend. These are cities with populations within 15,000 of Beaverton's. Its secondary group was the cities next closest in population; Eugene, Salem, Springfield, Corvallis and Tigard. The primary comparison groups meets the requirement of ORS 243746(4)(e) and is sufficient to resolve this specific dispute. The other comparisons are helpful in understanding the primary comparison.

The Employer offered comparisons between its most popular health plan and those of the comparator jurisdictions. They show the following as of July 1, 2007

	Deductible	Co-pay	Emer.	Hosp. Co-pay	Rx (gen/brand)	Er. Fam. Cost	Ee cost
<b>Medford</b>	\$150/\$450	5%	\$150	5% (aft. ded.)	10%/25%	\$920	\$45
<b>Gresham</b>	\$300/900	10%	\$100	10% (aft. ded.)	10%/10% aft. ded.	\$1120	-0-*
<b>Hillsboro</b>	\$200/\$600	10%	\$100	10% (aft. ded.)	10%/10% aft ded.	\$908	-0-*
<b>Bend</b>	-0-	\$5	\$50	\$50/day/\$250 max	\$5/\$15	\$1080 com. Rt.	\$81
<b>Beaverton(Er)</b>	-0-	\$15	\$100	-0-	\$15/\$25+ cost over	\$1352	\$80

\$1077cm rt.

\*employee premium cost sharing begins in 2008.

Ms. Kirschten of the Employer's benefits broker described the Beaverton health plan as among the "richer" of the health plans that her firm sees. The above comparison indicates that the basic health plan benefits used by most employees tend to be better than most of the closest comparators for physician services and hospitalization. The Employer's premium cost is among the highest. The available evidence indicates that the employee contribution here is among the highest. The same is generally true for the Employer's secondary set of comparisons. The prescription benefit proposed by the Employer is less generous than those of other plans for inexpensive medications and brand name prescription drugs. The Employer proposed physician co-payment standing on its own is less generous than the comparator's while the Associations' is closer to average. However, when the total plan is

taken into consideration, the total benefit for office treatment here will remain better than almost of the comparators for those who do not have frequent office visits. The Association's proposal with respect to prescription drug co-payments appears closer to the average of the comparators.

The Employer offered the only data with respect to overall compensation of employees beyond the health plan. Employee compensation outside of health insurance is above average, but generally closely comparable for employees with 10 years of service. This is true because there is a small range of difference among the comparators. Accordingly, other compensation is not a significant factor in this case.

The Association offered comparisons of the specific benefits involved in this dispute. The Association offered comparisons to the following Oregon cities: Eugene, Gresham, Hillsboro, Lake Oswego, Portland, Salem and Tigard. These cities are significantly larger than Beaverton, but are in the same relative area. While they are not truly comparable under ORS 243.746(4)(e), they are instructive in this specific dispute. It is conventional wisdom in labor relations that larger employers tend to pay higher wages and benefits. The Association's data demonstrates that the Employer, as of July 1, 2007, paid substantially more than any of the larger comparators for the non-composite monthly insurance premium, about \$400 per month more than the average. This is still true even though employees pay a higher monthly contribution and have a higher out of pocket maximum. This is true because the benefit level is higher in Beaverton and the claims experience in Beaverton is higher than most. As of July 1, 2007, employees here paid a lower co-payment than all of the comparators. The Employer's co-pay proposal is clearly supported. By contrast, most of the comparators have an employee co-payment of 10% for generic and 20% for brand prescriptions. The parties' agreed upon method is a fixed dollar contribution plus requiring employees to pay the cost difference between a generic and brand drug, if any. The only other comparators to have a fixed dollar contribution, Salem, which requires \$10 and \$20, respectively, and Eugene \$10 for generic, provide a better benefit with respect to brand drugs with generic equivalents. The Beaverton benefit is better than any of the comparators for generic drugs and brand drugs dispensed as written or without generic equivalents which have a total cost of over \$100.

The Employer's POS health plan without changes would have increased by 9.6% over the 2006 rate without changes in the plan benefits. With changes in the plan benefits it will increase by 3.8%. Even with the changes, the increase in cost will outstrip the general rate of inflation. Employees will bear 30% of the increased total premium costs by their increased monthly premium contribution. Employees who use plan benefits will share a greater percentage. The agreed-upon increase will not unfairly shift the burden of increased premium costs to those employees who infrequently use benefits.

The orientation of ORS 243.746(4)(d),(e) is toward overall compensation which is best interpreted in this specific case to require the arbitrator to favor the best overall health benefit because other aspects of compensation are better than the average of comparators. The main thrust of the Association's argument is that the Employer's proposal has a disparate impact on those who have

serious medical conditions. It is undisputed that the Employer's premium costs are not only driven by higher benefit levels here than elsewhere, but the fact that it has a high usage factor. Twenty-nine of the Employer's 490 employees have more than \$325,000 in claims and they represent about 40% of the claims.

The most significant evidence of the disparate impact came from an employee who has a wife with cancer. The family also includes members who have on-going prescriptions for more common conditions. That family had 105 prescriptions in 2005 and has three office visits per week. Even with out of pocket maximums, health savings accounts and the Employer's \$200 *quid pro quo*, the Employer's offer will have a significant cost shifting effect to those who use the prescription benefit. The preponderance of the evidence indicates that even in this situation, the Employer's plan still provides the best overall benefit for this and similar beneficiaries. For beneficiaries who require prolonged or expensive hospitalization, the beneficiary has no deductible and no co-payment for hospitalization. This benefit alone outweighs any difference between the co-payments for prescriptions and office visits. It is also more likely than not that those benefits will outstrip the difference in prescription and office visit co-payments for most of those who more common chronic conditions requiring office visits and prescriptions; however, there may be significant situations in which it does not.

Similarly, the increase in cost of the emergency room co-payment appears to be primarily related to cost savings rather than cost shifting. The purpose is to encourage beneficiaries to think twice about using these expensive services when other services might be reasonably effective. This is an efficient use of benefit dollars. The Employer's position on this issue is supported by the internal comparison among its different plans and the external comparisons.

The Association has pointed to the unfortunate disparate impact this increase has upon Officer J. because his daughter must be treated in an emergency room about four times per year. The Employer's offer of a \$200 *quid pro quo* goes a long way in compensating for the difference. In any event, the overall benefits of the plan here outweigh this expense.

The Association offered newspaper articles<sup>9</sup> which reflect a trend in some health plans to shift prescription costs to the beneficiaries with the highest costs. As noted the public interest in the morale of its officers and in having its public entities be responsible employers requires an analysis as to whether the Employer's proposal unfairly targets any specific class of beneficiaries. One of the purposes of health insurance is to spread the cost of catastrophic medical situations so that an individual is able to be protected in those unfortunate situations. This is an essential element of maintaining morale. I conclude that the Employer's plan does not unfairly target any class of beneficiaries. No employees are being forced from the plan and it is not likely that they will. While the co-payments in issue are high in some ways, they are fixed dollar amounts, rather than percentages. As noted above, the increase in these costs to beneficiaries is generally offset by the other generous benefits of the plan.

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<sup>9</sup> Association exhibit 20.

For the reasons above, I conclude that under the public interest criterion and the secondary criteria the Employer's offer is closest to appropriate. It is adopted.

AWARD

The Employer's offer is herewith ordered to be adopted.

Dated at Sun Prairie, Wisconsin, this 14<sup>th</sup> day of June, 2008

A handwritten signature in cursive script that reads "Stanley H. Michelstetter II". The signature is written in black ink and is positioned above a horizontal line.

Stanley H. Michelstetter II, Arbitrator