

DECISION AND AWARD

MARION COUNTY *

Employer, *

and *

Re: Interest Arbitration
2005/2006 Agreement

MARION COUNTY LAW *

ENFORCEMENT ASSN. *

Union *

For the Employer: **Thomas C. Gunn, SPHR**
Employee Relations Manager
Marion County

For the Union: **John Hoag, Esq.**
David A. Snyder, Esq.
Snyder & Hoag
Eugene, Oregon

Arbitrator: **Thomas Angelo**
Mill Valley, California

November 30, 2005

SUMMARY

This case arises out of a bargaining relationship between Marion County (hereinafter "County" or "Employer") and the Marion County Law Enforcement Association (hereinafter "MCLEA" or "Association") and involves a dispute with respect to prospective terms and conditions to be included in the parties' labor agreement. This is an interest arbitration proceeding, and the process requires an arbitrator to adopt one or the other of the parties' Last, Best Offers (LBO). Three issues form the basis of the dispute: whether an attendance policy should be negotiated; changes to the parties' health and welfare coverage; and wage adjustments over the life of the Agreement.

For the reasons set forth below the dispute shall be resolved by the adoption of the Union's LBO. This conclusion principally rests on the view that the County's offer involves a significant change to the *status quo* and carries with it significant secondary, adverse impacts on employees, but without any tradeoff that warrants adoption of the proposal. While the Union's package has its own problems, on balance application of the statutory criteria in light of the evidence supports adoption of the Union's proposals.

ISSUES PRESENTED

The parties stipulated the following issue is presented:

Which LBO should be selected?

In addition the parties stipulated the matter is properly before the arbitrator for resolution.

STATEMENT OF FACTS

This proceeding takes place pursuant to ORS 243.742 *et seq.* and is intended to resolve the parties' collective bargaining dispute in accordance with various statutory criteria found in Section 746(4). The relevant statutory language directs that:

Arbitrators shall base their findings and opinions on these criteria giving first priority to paragraph (a) of this subsection and second 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 other services, provided by, and other priorities of, the unit of government as determined by the governing body.
- (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 [For cities with a population more than 325,000 and counties with a population over 400,000, comparable jurisdictions may include those of similar size which are out-of-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 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.

The parties began negotiations in October 2004. The parties were unable to agree on three general areas of their agreement, and each provided LBOs that may be summarized as follows:

A. Article 12 – Other Leaves

Article 12 of the parties' Agreement is entitled "Other Leaves" and generally addresses absences with and without pay, absences for workers' compensation reasons, absence to perform military or other governmental leave and issues related to those topics. Under the existing Agreement the County has initiated disciplinary action against employees it believed were involved in sick leave misuse. From the County's standpoint it is doing nothing more than exercising its disciplinary authority to insure unit employees properly utilize their leave entitlements. The Union contends that, absent a written policy, managers have improperly disciplined employees and have applied the unwritten rules in an inconsistent fashion. The County's efforts have resulted in arbitration of the discipline.

The MCLEA proposed a change to Section 7 of Article 12, concerning absence without leave, to add the following language:

This section shall not be utilized to discipline employees who are legitimately ill and have to take leave without pay because of that illness, or because of any other statutorily approved leave until the County reduces to writing its policy for when it disciplines employees for use of sick leave and negotiates that policy with the Association. (Jt. Exh. 1).

The County sought to roll over the existing language and rejected the Association's proffer, contending among other things that the "just cause" provision of the Agreement protects unit members from arbitrary or unwarranted discipline and that there was otherwise no benefit to the public by allowing employees to misuse leave entitlements.

B. Article 14 – Wage Adjustment

The MCLEA proposed wage increases in July 2005 of 3% and in July 2006 of a minimum of 2% and maximum of 5% and that the increase be measured by the CPI-W. This would amend the current agreement by changing the CPI from the CPI-U to the

CPI-W. The County's proposed the same wage increases, but the 2006 increase would continue to be measured by the CPI-U.

C Article 13 -- Health and Welfare

This Article addresses various forms of insurance, disability and retirement entitlements. The County views the current arrangement for health insurance as a "recipe for fiscal mischief if not disaster" in light of present and expected costs. (County pre-hearing Brf., pg. 15). It has proposed capping costs and providing employees a \$1000 payment to be used, if so desired by the employee, to transition to a new plan. The County's proposals in Article 13 are as follows:

Section 1 regarding "Medical Insurance" is replaced with a new Section entitled "Medical, Dental and Vision Insurance". The County agrees to continue the current ODS medical, vision and dental plan designs for plan years 2006 and 2007 if offered or unless modified by mutual agreement of the parties. In addition the County will offer Kaiser health, vision and dental plans to unit employees.^{1/}

The County proposal amends Section 2 of the Article to change coverage to each "benefits eligible" employee from each "full time" employee.

The County proposes a new Section 3 regarding its health insurance contribution. It caps payments at \$851.00 per employee, per month for the 2006 plan year and caps its contribution for the 2007 plan year at \$906.00 per month. Any premium cost above the County's payment cap is to be borne by the employee. The County proposes the

^{1/} Elsewhere in its proposals on this Article the County agrees to allow employees to use Section 125 and 132 plans for healthcare, health premiums, dependent care and transportation

elimination of the prior Section 3, where it agreed to pay the “full premium” for dental insurance, and the elimination of Section 5, which requires that benefits “be equal to or better than those in effect at the time of signing of the Agreement.” With respect to the parties’ existing Health Insurance Study Committee (HISC), the County proposes the Committee be retained but with additional purposes identified in the Agreement and a slightly different composition. Finally, the County proposes to delete existing language that allows it to reopen insurance provisions under certain conditions and the MCLEA to reopen wage provisions in response.

The Union’s proposals for Article 13 were designed to rollover existing language with three changes. First, it proposed adding the Oregon Public Service Retirement Plan as an option in Section 6 of the existing Agreement; second it too proposed eliminating the reopener language contained in Section 9; and third it proposed the County offer a 125 plan to employees.

This arbitration is the result of the parties’ inability to resolve their outstanding bargaining issues. The Undersigned was selected to hear the matter and proceedings were conducted in Salem, Oregon, on September 16, 2005, at which time the parties were afforded a full opportunity to present evidence and examine witnesses. The proceedings were transcribed and post-hearing arguments were timely received on or about October 20, 2005.^{2/}

DISCUSSION

At the outset some introductory comments are warranted with respect to the Last, Best Offer system of interest arbitration. When the process was first developed, the

^{2/} This opinion has been delayed somewhat because the Arbitrator did not realize the parties’ briefs had been received until mid-November. I apologize for the delay

theory was, because an interest arbitrator would be required to accept one or the other set of proposals, the parties would be driven to agreement as their bargaining positions were redesigned to be attractive to a third party. I am not persuaded this objective is necessarily achieved in every case.

The more difficult part of the LBO system is the decisional problem created for the interest arbitrator. Because the arbitrator is required to select one or the other package of proposals, none of the trading that typically takes place in negotiations is possible. This typically means that an LBO that contains proposals that lack merit as stand alone issues must be adopted because they are part of an overall package that is more consistent with the statutory criteria than the alternative package. It is for this reason that many arbitrators prefer the option of selecting proposals on an issue by issue basis ("cherry picking" in the words of opponents of the idea) so as to create a final agreement that includes, in the arbitrator's opinion, the best of each LBO.^{3/}

This is all mentioned, of course, because the parties in this case have each proposed language with which I agree and some proposals that I don't find especially persuasive. I have taken this opportunity at the outset to engage in arbitral whining so as to not have to repeat myself later in the opinion. Nonetheless, it should be clear at the outset that, were it not for the law and the stipulations of the parties, I would propose a different resolution to this impasse.

With respect to the analytical process I have used, it is not clear how the legislature expects the process to work. I have assumed that the statute requires that each proposal be evaluated in light of the statutory criteria, as well as the LBO taken as a

^{3/}

The County's pre-hearing brief refers to this approach as having been in effect before 1995, when the legislature moved to the LBO method of resolving disputes.

whole. This necessarily means that a single proposal that fails to fully satisfy the statutory requirements may be adopted nonetheless if the LBO where it appears is, taken as a whole, consistent with the criteria and is the preferred choice. I have therefore considered the criteria both with respect to individual proposals and with respect to the LBOs taken as a package.

Concerning the criteria themselves, the parties have each noted that the term “interest and welfare of the public” has been left undefined by the legislature. As prior decisions reflect, arbitrators have provided their own definition of the phrase, generally agreeing that it should be read in conjunction with the remaining criteria. In my view the absence of a statutory definition was likely designed to allow arbitrators to exercise their expertise in resolving disputes. Having required arbitrators to consider the public’s interest and welfare in resolving a bargaining dispute, the legislature appears to have recognized the difficulty of imposing a definition applicable to every bargaining dispute that might arise under the statutory process.

Rather than force arbitrators to use a single definition of public interest and welfare for the plethora of bargaining relationships that exist in the State, the legislature trusted arbitrators to determine the public’s interest in light of the actual circumstances surrounding a jurisdiction and its bargaining unit. While this may produce a different emphasis on public interest factors, depending on the experience and understandings of different arbitrators and the jurisdiction involved, this is entirely consistent with the role of arbitrators as explicated in the *Steelworkers Trilogy*. As prior opinions have indicated, so long as the criterion is reasonably construed and applied, the statutory requirement is satisfied.

Another issue which has surfaced from time to time has to do with the arbitrator's role in the process. At least one arbitrator has suggested our function is to determine what outcome the parties would have achieved had they been permitted to resolve their dispute through the use of evenly matched economic weapons. Oregon AFSCME and State Department of Administrative Services, IA-110-03 (Helm, 2003). Another view is that a presumption exists in favor of the public employer where LBOs are similar, on the theory that public officials tend to reflect the interest of the public. Clackamas County Peace Officers Assn. and Clackamas County, IA-16-97 (Dorsey, 1967)

I do not see the process as expecting an arbitrator to speculate as to the outcome of an evenly matched economic battle between the parties and then rule on the basis of that judgment. Such an approach involves far too many unknown facts to offer much guidance and tends to fly in the face of the statutory expectation that specific criteria will be considered. While it is appropriate to utilize some of the traditional principles and theories of collective bargaining, as discussed below, inventing a mythical economic showdown and then deciding which party would blink first is too far beyond the statutory scheme to provide a basis for a decision.

Nor do I favor the idea of either party entering the dispute armed with any sort of presumption as to the "public interest." Both parties to an impasse are expressing their good faith belief as to how to best serve the public interest while protecting their organizational interests. There is no reason to believe one or the other party in this type of labor dispute can presumptively be assumed to speak for the public's interest or welfare. I recognize that Arbitrator Dorsey reached a different conclusion based on the statutory directive that deference be given to a public body's decision as to "priorities" in

the expenditure of funds under criterion (b). I read this comment as expressing a different rationale, in that it precludes an arbitrator from changing a public body's spending priorities in subsection (b), not that it vests the public employer with a presumptive edge in applying subsection (a).^{4/}

What the arbitrator is entitled to do is measure the parties' proposals in light of the statutory criteria and traditional concepts of collective bargaining. In this latter regard the parties have each referred to prior awards discussing the analysis required where an effort is made to change the *status quo*. As expressed by Arbitrator Harris in Lincoln County and Lincoln County Sheriff Deputies' Association, IA-08-05, the party proposing a change has the burden of proof and must show the existing arrangements are not working well, that changed circumstances exist to "impel modification" or there is a trade off sufficient to justify the proposal. The County has expressed concern over this type of analysis and to some extent I agree.

Evaluating a proposed change in the *status quo* on the premise of burden of proof and "compelling" circumstances is largely a restatement of the venerable bargaining adage "if it ain't broke, don't fix it." I disagree with the notion that every proposed change in the *status quo* requires passing a formulaic test, because I believe a proposal must first be considered on its own merits, in light of the statutory criteria, to determine if it simply represents a "better idea" even absent changed circumstances. If that initial inquiry does not offer a sufficient reason to adopt the proposal, then it is appropriate to utilize the *status quo* analysis discussed by Arbitrator Harris. This is so because interest

^{4/}

If a public body determines certain monies should be budgeted toward public transportation maintenance costs and a Union argues maintenance is not a necessary expense, the public employer's decision must be given deference.

arbitrators should attempt to adopt an outcome that utilizes the kinds of theories and rationale that generally operate in the collective bargaining process. Thus, it may be appropriate for arbitrators to ask why the change is needed and what is being offered in exchange for changing existing conditions of employment.^{5/}

The last introductory question concerns the comparability issue that developed between the parties with regard to subsection (e) of the statute. The Association seeks to exclude Jackson County as a comparable jurisdiction and have Washington County substituted in its place. Where subsection (e) is relevant, I have used the County's approach

With the foregoing as background my conclusions with respect to the parties' proposals may be discussed.

A. Article 12 – Disciplinary Actions And Absent Employees

The County has the right, the interest and the need to exercise its disciplinary authority with respect to absenteeism issues. The prior arbitration decisions in this record establish this is a core management right, albeit subject to the application of the just cause standard. The only question here is whether the County should be required to forego such efforts pending the bilateral establishment of its policies with respect to disciplinary action for absences.

The Union's proposal is meritorious and warrants adoption. One of the enduring notions of our legal systems – public and private – is that they embrace the core notion that persons are entitled to know what behavior is inappropriate before they are

^{5/}

Resort to a *status quo* analysis is appropriate under subsection (h) of the statutory criteria, and only if it is applied consistent with the other criteria. Thus, if a proposed change to the *status quo* succeeds on its own merit when measured against the criteria, it warrants adoption. If it does not, it may still be accepted if it passes muster under the *status quo* analysis.

confronted with punitive measures. Similarly, it is in the interest of employees and employers alike for managers expected to enforce work rules to know and understand the contours of those rules. Taken together these principles will not only assist employees in exercising self-help so as to avoid disciplinary problems but will help ensure managers do not impose discipline later held to be inconsistent with the just cause standard

There is nothing in this record to counterbalance the benefits that accompany the Union's proposal. It is true the County may wish to propose a system that may appear draconian when compared to existing practices, but whether the County would ultimately take such a step or whether such measures would survive negotiations are issues and questions that lack sufficient weight to justify the continuation of the County's current "unwritten rule" approach to absenteeism.^{6/}

There is, to be sure, some degree of administrative time and expense that attaches to the Union's proposal. These factors are of little concern, however, when weighed against the value offered by a written, understood absenteeism control system bilaterally created by the parties. Ultimately, the public interest and welfare is served where its public employees operate under a known system of work rules, where its public sector managers are given clear instruction on how to apply and enforce work rules, and where the parties bilaterally establish attendance policies rather than establish them piecemeal through disciplinary arbitrations.

^{6/}

The County suggests the Union may not like the results if its proposal is adopted. It suggests it may wish to adopt some sort of "no fault" system, or that it may propose "some sanction" for FEMA or OPLA use, which is purportedly not allowed under its current policy. The point here is not so much whether the Association will be enamored of the County's proposals, but that it has the right to bilaterally participate in the construction of an attendance control policy. The County is entitled to propose whatever system it believes appropriate and consistent with the law, and the Union can respond however it wishes

In argument the County asserts that the impact of the Union's proposal is to allow an increase in paid time off work, an increase in mandatory overtime for employees and an increase in the County's overtime budget. In fact the proposal calls for none of these things and asks only that absenteeism rules be reduced to writing and then negotiated. There is no reasonable expectation that such negotiations will result in an increase in paid leave beyond what the Agreement already provides. Nor should the institution of an absenteeism policy adversely affect overtime. To the contrary, the existence of a program that identifies a disciplinary consequence in the event of an unjustified absence may well serve as a deterrent.

With respect to the remaining statutory criteria, none has any significant impact on this proposal. If anything, criterion (b) analysis marginally favors the Union's proposal since a cost savings may be realized if employees have a clear standard to follow and if the parties are better able to determine the propriety of discipline without having to use arbitration to answer questions as to the justification or degree of discipline. Accordingly, based on the proposal and its impact in light of the statutory criteria, the proposal of the Union should be adopted.

B. Article 14 – Wages

The Union argues the parties' wage proposals are identical. The County correctly argues they are not because the Union seeks to change the CPI index from CPI-U to CPI-W. Thus, while the parties propose the same first year 3% increase and propose the same wage range for an increase during the second year of the Agreement, the Union's proposal changes the measure by which the second year increase is to be determined. The County contends use of the CPI-W will result in a second year increase because the

CPI-W historically runs higher than the CPI-U, that the Union has provided no reasonable justification for the change and that no good reason exists to change the status quo.

In considering the record there is too little evidence to support the Union's proposed change in the CPI index. It is not necessarily a more effective, efficient or accurate method by which to measure wage increases, so much as it is merely "different." Moreover, there is insufficient evidence in this record to suggest employees have been denied fair wage increases under the current index. Thus, standing alone and considered on its merits, the Union's proposed change does not warrant adoption.

Using the *status quo* analysis the same conclusion results. The record includes little evidence of any justifiable change in circumstances or of dysfunctional results under the current system, nor does the Union's proposal come with any sort of inducement that would serve as a meaningful *quid pro quo*. Given the uncertainty of the impact of the Union's proposed change on second year wage increases, I am not persuaded the proposal warrants adoption on the strength of this record.

Accordingly, the County's proposal to retain the status quo should be adopted.

C. The Health Insurance Changes

As a practical matter this area of the dispute is the issue that divides the parties. I have considered the proposal first on its stand alone merits and then in light of a *status quo* analysis. In this latter regard the County urges that using the *status quo* approach to a health insurance matter is not appropriate because it fails to address underlying fiscal issues and, generally, is not sufficiently grounded in the statute. For the reasons

discussed above, I do find the analysis consistent with the statute and an appropriate tool to use under certain circumstances.

Moreover, if a health insurance proposal that changes the *status quo* cannot be adopted simply on its merits, it is particularly appropriate to consider whether it comes with a trade off. Health care issues have become so important to employers and employees that they dominate nearly every bargaining relationship and influence a broad range of conditions of employment. Consequently, resolution of the issue tends to require some type of trade off designed to enhance the overall attractiveness of a change to the *status quo*.

The County has advanced a host of reasons for the change in its health coverage, all of which relate to the financial impact of the current contractual arrangement. Essentially the County's concern is that its present obligation to pay premium costs creates not only a drain on its resources but is a drain of unknown proportions. By capping health care costs, the County argues it can better manage its resources, plan for unforeseen expenses and better insure its economic vitality. It argues these latter considerations fall within the scope of subsection (b) of the statutory criteria and, in the words of the statute, are entitled to "due consideration" even if there is no present economic inability to pay the costs of the proposal. The Association contends that not only is the County not claiming an inability to pay for the existing contractual arrangement but its approach obviates future wage increases by shifting premium costs to employees.

The County's decision to propose a cap on health care costs is consistent with the solution adopted by a significant number of employers in both the public and private

sector. The problem, in my view, is not so much with the idea of a cap on premium costs as it is the transition from an “employer pays” system to a shared payment system. The County acknowledged this transitional issue by proposing a \$1000 payment in each of the two years of the Agreement.^{7/}

As the Association points out, these transitional payments translate to about \$83 00 per month and even with wage increases the expected increases in premium costs will essentially eliminate the wage benefit. The Association argues too that, when the *status quo* analysis is considered, there is no real justification for the County’s effort to change the Agreement. It views its proposal, which substantially adopts the *status quo*, as the one most consistent with the statutory criteria.

I do not believe the County’s proposal should be adopted under the circumstances presented here. It makes perfect sense to cap premium costs, and the fact that those costs continue to rise is reason enough to change the current arrangement. In my view the County’s proposal – which basically moves all future costs to employees – does not go far enough in softening the transition by either augmenting wages or providing one time payments.^{8/} Although I believe the parties will have to confront this issue and provide some sort of relief to the County – and a myriad of ways of doing that exists in bargaining arrangements around the country – under the criteria the County’s proposal demands too great a change while offering too little in the process.

^{7/}

In argument the Association suggested this offer was made too late in bargaining to be properly considered, but I have opted not to address that contention given the outcome of this dispute.

^{8/}

Clearly a one time payment that does not go to base wages is the least expensive approach in this circumstance, but given the expected increases in premiums, when measured against the County’s proposed wage increases, the net effect is a reduction in earnings

Under criteria (a) I find the public's interest and welfare have been historically addressed by the current contract language and will not be abandoned by retaining the status quo. Conversely, providing little economic improvement over the term of the new agreement is not in the public's interest given the impact such an arrangement would have on morale and related issues. And this is true notwithstanding the fact the County will have to continue to address its obligations in light of increasing health care costs.

With respect to subsection (b), there is no inability to pay and evidence in this record does not indicate the County will have to pay for projected premium increases by wholly abandoning planned or desired projects or services. As with other public jurisdictions the County will have to deal with a public that tends to insist on services but without the obligation of having to pay for them and with the fact that it will have to develop a premium payment system that fairly shares the burden of increases with its employees. The Association must also recognize that it cannot expect to enjoy the present arrangement much beyond the current Agreement, and it should start working with the County, and its bargaining unit, to develop a different, reasonable approach to health care costs.

The Association argues that subsection (c) is at issue with this proposal, contending that the County's ability to attract and retain qualified applicants has been adversely affected by the County's benefits program. There is some suggestion of merit in this claim, but any recruitment problems can also be explained by factors other than wages and benefits. On balance I am not persuaded this factor has any significant influence on the dispute

Using the County's comparable jurisdictions, the concept of a cap is accepted and in place. As indicated above, I think the County has a potentially strong case for adopting a cap, but its proposal simply does not go far enough in warranting its adoption here. It is not clear how and under what circumstances other jurisdictions developed hard caps on premium costs. While a superficial comparison of jurisdictions is appropriate with some issues (wages, for example), the process loses persuasive weight where an entirely different method of addressing health care costs is being proposed. In such cases it is as important to know what path another jurisdiction followed as it is to know its final destination.

In sum, I am not persuaded the public interest and welfare requires adoption of the County's proposal, under the circumstances presented here. Nor do the remaining relevant criteria support the County's position. While the concept of a cap to premium costs is a worthwhile objective and although I believe both parties have an obligation to work toward a different system of financing health care costs, in this case I cannot agree the County's proposal warrants adoption.

D Conclusion

For the reasons set forth above I am constrained to conclude the Association's LBO should be adopted. When the three issues presented are considered singly, the Union's position prevails under the statutory criteria with respect to Article 12 and Article 13 proposals. The County's wage proposal in Article 14 presents the better of the two options on the third issue. When the LBOs are considered as a whole, the Association's approach satisfies the statutory criteria and should be adopted principally because the County's proposed change in the status quo regarding premium payments is

not supported by the record. And, because the health coverage issue dominates this dispute, it has largely dictated the outcome.

AWARD

The Association's Last Best Offer shall be adopted

November 30, 2005

Thomas Angelo