

BEFORE ARBITRATOR ROSS RUNKEL

In the Matter of the Interest Arbitration)
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 between)
)
 MULTNOMAH COUNTY,)
)
 and)
)
 FEDERATION OF OREGON PAROLE)
 AND PROBATION OFFICERS,)
 MULTNOMAH COUNTY CHAPTER.)

INTEREST ARBITRATOR'S
OPINION AND AWARD

March 27, 2015

HEARING: February 26, 2015
Portland, Oregon

HEARING CLOSED: March 20, 2015

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INTRODUCTION

This matter came before me as arbitrator selected by the Parties using the procedures of the Oregon Employment Relations Board. This is an interest arbitration designed to resolve a dispute as to the terms to be included in the Parties' 2014-2017 collective bargaining agreement. The matter is controlled by the Oregon Public Employees Collective Bargaining Act, ORS Sections 243.650 et seq. A hearing was held on February 26, 2015 in Portland, Oregon. Each party presented witness, testimony, exhibits, and arguments. The Parties filed post-hearing briefs by email on March 20, 2015.

OPINION AND AWARD

1. LAST BEST OFFERS

The Parties have tentatively agreed upon all contract articles except Articles 6, 7, 11, 14, 22, 24, and 27. The Parties have proposed identical language for Articles 6, 7, 14, 22, and 27. That leaves Articles 11 (Compensation) and 24 (Shift and Work Assignments) for decision in this case.

The specific issues on which the last best offers diverge are:

- A. Shift and Work Assignment (Article 24): The Federation proposes current contract language, the most significant feature of which is that a vacancy is filled "on the basis of seniority provided the employee is able to perform the work in question." The County proposes significant changes, the most significant feature of which is that, "County work assignment decisions will be made to enhance individual professional growth, strengthen the overall

knowledge base within the Department and effectively meet the operational needs of each unit."

- B. Trainer premium (Article 11.8): The Federation proposes substituting "Survival Skills Instructor" for "Continuum of Force Trainer," and proposes language that would require payment of the 3% training differential for each trainer designation. The County proposes current contract language, which provides that the 3% differential is paid "once even if an officer trains in more than one area."
- C. Longevity pay (Article 11.14): The Federation proposes that the longevity premiums be based on the number of years of "County service." The County proposes that the longevity premiums be based on the number of years of "County service in the Probation/Parole Officer Classification."
- D. Overtime (Article 11.6): The Federation proposes adding the sentence, "Paid leave counts as hours worked." The County proposes current contract language, which says overtime is "based on hours worked."

2. STATUTORY CRITERIA FOR DECISION, ORS SECTION 243.746(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 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. 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:

* * *

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

* * *

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

(g) The stipulations of the parties.

(h) Such other factors, consistent with paragraphs (a) to (g) of this subsection as are traditionally taken into consideration in the determination of wages, hours and other 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.

3. BACKGROUND

The County employs approximately 128 Parole and Probation Officers who are represented by the Federation.

The County does not assert an inability to pay, but does not want that translated into a decision that it should pay.

The evidence is clear that the County has no difficulty attracting new hires, that its officers tend to make a career with the County, and that departures from employment can rarely be attributed to dissatisfaction with compensation levels or working conditions.

The Parties provided extensive data designed to show how the overall compensation package compares to other jurisdictions. The Parties have agreed on the basic economic package, and the remaining issues in Article 11 will have a relatively minor financial impact. The comparability analyses were primarily designed to address the question of whether the County offered a quid pro quo for its proposal dealing with Article 24.

The County's position is that it has proposed a COLA, a 1% pay adjustment, and longevity pay in exchange for its Article 24 proposal. The County calculates that these increases put the Parole and Probation Officers at 2.19% above market on average, and between 4.72% and 5.50% above market for years 10, 15, and 20. The Federation calculates that even after these increases the Parole and Probation Officers will be between 4.7% and 8.0% below average.

I find that the County's comparability analyses are preferable for a variety of reasons, some of which will be briefly stated here. Both Parties' lists of comparable

jurisdictions included Clackamas County and Washington County. The Federation included the State of Oregon. The State should not be included as a comparable jurisdiction due to the wording of ORS 243.746(4)(e)(B) which interest arbitrators have almost universally interpreted as meaning that counties should be compared to counties and not to the State of Oregon. For Washington County, the Federation used a classification that is considered a lead position, and has not been used for more than 10 years. The County used a consistent date for its calculations, while the Federation's use of different dates results in some mismatch and lack of actual comparisons. The Federation did not include the County's 1% VEBA contribution. Although Multnomah County officers supervise a proportionately higher number of high risk offenders than officers in the other two counties, this appears to be offset by relatively smaller caseloads and a more vigorous provision of support services.

4. DISCUSSION

A. First priority and second priority.

The statute commands that an arbitrator give "first priority" to "the interest and welfare of the public," and "secondary priority" to the other criteria. The legislature has declared that the interest and welfare of the public (subsection (a)) must be the "first priority." Other arbitrators have pointed out that the other criteria (subsections (b) through (h)), although given "second priority," are quite helpful in determining what is in the interest and welfare of the public. This is probably due to the fact that the "second priority" criteria tend to be more exact and easier to quantify, and to the fact that they are familiar criteria. It is also due to the fact that these tend to be the

criteria that typically are most relevant to the public interest and welfare. However, in order to be faithful to the statutory command regarding "first priority," the "second priority" criteria cannot be used simply as a proxy or substitute for the interest and welfare of the public.

In this case both Parties have emphasized the first priority of the interest and welfare of the public, with little reference to second priority criteria (the most notable exception being a quid pro quo analysis as to Article 24). This poses a special challenge to an arbitrator to determine what is in the interest and welfare of the public, and which proposal is better to meet that interest. The challenge is magnified by the fact that there is no singular public interest, and multiple interests can be in conflict with each other.

The primary public interests in this case are the safety of the public and the fostering of cooperative labor relations. It is self-evident that safety is a public interest because that is the essential reason that any county operates a department that provides supervision of offenders that are on parole or on probation. The interest in cooperative labor relations is expressed by statute - ORS Sections 243.650 et seq. The Parties' current contract expressly states the objectives of "enhancing community safety and reducing criminal activity to protect the people of Multnomah County and to provide an orderly and peaceful means of resolving any misunderstandings or differences which may arise."

B. Shift and Work Assignment (Article 24).

Attached to this Opinion are pages 12 through 14 of County Exhibit 101 [identical to Federation Exhibit A-2], showing the text of Article 24 from the current contract and

the County's proposed changes. The County proposes extensive changes, and the Federation proposes retaining the current contract language.

The heart of the Parties' disagreement as to Article 24 deals with filling vacancies. The current contract, which the Federation proposes retaining, provides that a vacancy is filled "on the basis of seniority provided the employee is able to perform the work in question." The essence of the County's proposal is that, "County work assignment decisions will be made to enhance individual professional growth, strengthen the overall knowledge base within the Department and effectively meet the operational needs of each unit." Under the County's proposal, seniority would be one of several factors to take into consideration.

Article 24 has had a somewhat tortured history. Following some reassignments of officers during 2009-2010, there were several grievances which ultimately resulted in an arbitration in favor of the County. During the negotiations for the 2011-2014 agreement, the Parties reached a tentative agreement on Article 24 in June 2011. This tentative agreement was not implemented because the parties were at impasse on other issues, and those other issues went to interest arbitration, with a final award being issued on October 14, 2013. The Parties signed the new contract on February 13, 2014. Two weeks later the Parties began negotiations for the 2014-2017 contract, and on March 17 the County proposed significant changes to Article 24 - including the proposed change for filling vacancies quoted above.

Both Parties place strong emphasis on the interest and welfare of the public, the primary statutory factor. The County emphasizes safety of the public as the key public interest in support of its goal of being able to have the most qualified officer

placed in any specific work assignment, asserting that its proposal "balances the safety of the public with providing fair compensation." The Federation emphasizes the public interest in fostering a stable bargaining relationship between the Parties in support of its goal of maintaining the status quo.

Applying a secondary statutory factor, there is no other county in the state that make assignments based on seniority. All are at management discretion.

Over the past four years the County has had 35 newly hired officers that finished initial training (typically one year) and were placed in permanent assignments. Of these, 16 (46%) were assigned to specialized units such as sex offender, domestic violence, mentally ill. Assistant Director Neal testified that newer officers are being placed in high risk positions, that officers assigned to these positions need special training, and that assigning them on the basis of seniority creates a risk to the public. Chris Whitlow, a survival skills lead, testified that one year of training makes an officer fit for a specialty case load. Although there is a clear difference of opinion, there is no real evidence one way or another.

There was no showing of any specific risk created by any of these assignments, that any of the newly-assigned officers were not fit for the assigned work, that any of the newly-assigned officers would have been more fit for different assignments, or that more experienced officers in other units would have been more fit for these assignments. There was no showing as to any of these assignments that the County had in mind a different officer who would have been better.

Mr. Neal also expressed concern about officers staying in one position so long that they become stale, yet again there was no showing as to any specific cases that

would illustrate that there is an actual problem rather than an expression of concern. In short, considering the County's core interest in the safety of the public, the evidence fell short of showing that its proposal would enhance public safety.

The Article 24 language in the current contract was put there as a result of collective bargaining. As District Manager Schreiner testified, this was a major subject of negotiations. Although tentatively agreed to in June 2011, it actually went into effect in February 2014. The County now urges a significant change in the bargained-for status quo.

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.

As for quid pro quo, the County has offered a COLA, a 1% pay adjustment, and longevity pay. The Federation discounts this on the ground that the longevity pay proposal was never made at the bargaining table, but was first presented during mediation and was never the subject of any face-to-face negotiations. In any event, offering a financial incentive in exchange for changing a significant and recently-bargained Article is not enough to justify the proposed change without also showing that there is something unworkable with the current Article or that there is a need for a change. In other words, offering a financial incentive is not enough to overcome the fact that there is insufficient evidence that the County's proposal advances the public's interest in decreasing the safety risk.

The County has failed to establish that the current contract language is not working well, that it is causing any operational problems, or that it is causing any increase in the safety risk to the public. In saying this I do not require proof that there has been an actual injury to a member of the public or proof that there has been an increase in recidivism. The essential factual issue deals with safety risk, and the record in this case does not contain a factual basis for finding that the current contract increases the safety risk or that the County's proposal will decrease the safety risk. Therefore, the County's evidence fails to meet the statutory "first priority" of the interest and welfare of the public.

The public interest advanced by the Federation is the encouragement of collective bargaining and the settlement of disputes by employers and their employees' representatives, as laid out in ORS 243.656. In the long history of collective bargaining in this country, there have been thousands of instances in which a union has wanted decisions made solely or primarily on the basis of seniority and management has wanted decisions made solely or primarily on the basis of merit or operational efficiency. It has been the role of collective bargaining to resolve these disputes. During negotiations for the current contract, the Parties were able to agree to the current language of Article 24. It is difficult to perceive any significant change in circumstances since the tentative agreement in 2011 or since the signing in February 2014.

The County seeks to have an arbitrator compel a significant change to an important Article that the Parties agreed to quite recently, and with little evidence of changed circumstances or a showing that there is a need for change.

Although a secondary statutory factor (comparable counties' practices) weighs in favor of the County's proposal, the primary statutory factor (interest and welfare of the public) weighs heavily in favor of the Federation's proposal.

C. Trainer premium (Article 11.8)

Currently officers assigned to be trainers (such as survival skills or EPICS) or assigned to be field training officers (FTOs) are paid a 3% premium. For an FTO that premium is paid only during the time served as an FTO, and for the others it is paid year-round. If an officer is assigned to more than one of these (such as both an FTO and a survival skills trainer), the premium remains at 3%. The Federation proposes that 3% be added for each such assignment that an individual officer has, and the County proposes retaining the status quo.

The Federation emphasizes the inequity involved when an officer is assigned to more than one task yet gets only one premium. The County emphasizes the fact that an officer cannot be doing two of these tasks at the same time, and asserts that some officers would be overcompensated at the rate of 6% (eight officers) or 9% (four officers).

My view is that the current system results in a rough form of equity, and that the Federation has not shown that there is sufficient additional work involved to justify adding 3% more pay.

D. Longevity pay (Article 11.14)

The County proposes that longevity pay be based on experience as a Parole and Probation Officer within the County, and the Federation proposes counting all time worked for the County. The County's collective agreements with both the Corrections

Deputy Association and the Deputy Sheriffs Association calculate longevity based on all-County time. So does Clackamas County. With little other evidence to go on, the Federation proposal is preferable, based on comparability.

E. Overtime (Article 11.6).

The current contract provides that overtime is "based on hours worked." In fact employees have had their overtime calculated based on paid hours rather than worked hours. This has taken place due to an error in programming. The Federation proposes a change in Article 11.6 that would say, "Paid leave counts as hours worked." The County proposes retaining the current contract language. The Federation has provided no significant justification for modifying the contract so that it will perpetuate what appears to be a mistake. The County's proposal to retain the current language is preferable.

5. CONCLUSION

It is clear that both Parties consider that Article 24 is the most significant issue in this case. I have explained above why the Federation has the stronger argument on Article 24. The Federation also has the stronger argument on longevity pay. The County has the stronger arguments on overtime and on the trainer premium. However, the Oregon statute does not permit an interest arbitrator to split up the individual issues and award some to one side and others to the other side.

The Oregon statute compels an interest arbitrator to award - in its entirety - one or the other of the Parties' last best offers. The Article 24 issue is of such great

importance in this case that it cannot be offset by defects in issues of far less importance.

Therefore, I will award the Federation's last best offer.

6. AWARD

It is ordered that the Parties adopt the Federation's last best offer package.

Dated: March 27, 2015

Respectfully submitted,

Ross Runkel

Ross Runkel

ARTICLE 24 – SHIFT AND WORK ASSIGNMENT

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3 1. Vacancy: A vacancy shall exist when:

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5 A. The employee assigned to a budgeted position abandons such position because of
6 transfer, promotion, or demotion to another position or County agency; or upon voluntary or involuntary
7 termination of County employment;

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9 B. Additional budgeted positions are allocated;

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11 ~~C. Workload requirements necessitate reallocation of duties for a period in excess of ninety~~
12 ~~(90) days, for example, a training assignment or assignment to another unit with a workload issue;~~

13
14 ~~CD.~~ When an employee is on unpaid leave that will exceed ninety (90) days, except as
15 otherwise required by law.

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17 2. Temporary Work Assignments:

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19 A. ~~One hundred eighty (180) Days or Less (Temporary Assignments) & Employee~~
20 ~~Rotation Plans: Work assignments and employee rotation plans of one hundred eighty (180) days or~~
21 ~~less shall be solely at the discretion of management. Following such a short term assignment, the~~
22 ~~employee will be returned to his or her regular assignment. Employees shall not be rotated more often~~
23 ~~than once in a twenty four (24) month period.~~

24
25 ~~To further employee development or motivation, the County may rotate employees in the same~~
26 ~~classification between job assignments within a work unit or between work units, subject to the following~~
27 ~~limitations:~~

28
29 1. ~~Any such rotation plan shall be posted ten (10) days in advance with a copy~~
30 ~~provided to the Federation.~~

31
32 2. ~~The terms and criteria of the rotation plan shall apply to all employees in the~~
33 ~~affected job classification within a work unit or work units.~~

34
35 3. ~~The County shall have a plan to reasonably cover the transferred employee's~~
36 ~~regular assignment.~~

37
38 32. Permanent Regular Shift/Work Assignment: A permanent regular vacancy is a vacancy
39 determined by management to be for a duration of over six (6) months. Whenever there is more than one
40 shift or work assignment within the same job classification within a work unit, permanent regular
41 vacancies shall be filled in the following manner:

42
43 A. Management will provide employees a notice of such vacancy, the person to contact, and
44 the deadline for consideration which will be no less than ten (10) days from the notice of vacancy.

45
46 B. The vacancy shall be filled on the basis of seniority considering the criteria identified
47 in Subsection 2.C., below, provided the employee is able to perform the work in question, and has in
48 most cases, preference will be given to employees who have indicated his or her their preference in
49 writing. Exceptions to seniority preference assignment may be made in the following situations:

50
51 1. ~~In regard to work assignment only, when a less senior employee is substantially~~
52 ~~more qualified for the position in question.~~

53 C. The County is responsible for determining all shift and work assignments. County
54 work assignment decisions will be made to enhance individual professional growth, strengthen
55 the overall knowledge base within the Department and effectively meet the operational needs of

1 each unit. For purposes of this article, the factors for consideration in assignment include, but are not
2 limited to, the following. However, even these factors will be evaluated on a case-by-case basis:

3
4 a1. Employee seniority and successful completion of the must have successfully
5 completed their probationary period.

6
7 b2. Employee is ~~not on a work improvement plan or currently subject to discipline~~
8 performance, as documented in work plans, performance appraisals and disciplinary records.

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10 c3. Unique or particularly strong skills developed as a result of previous experience,
11 training, education, desire and interest.

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13 d4. Training history and/or certification that demonstrate a willingness to participate
14 in ongoing training in order to maintain proficiency and expertise.

15
16 e5. Required certification, such as CADAC, Mental Health licensure or
17 Alcohol/Evaluation certification.

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19 f6. Knowledge of the issues related to the current offense(s), including criminal
20 history and behavior patterns that require a certain level of expertise and a unique set of supervision skills
21 related to the position.

22
23 G. ~~When a new work assignment with substantially different duties is created, it shall be~~
24 ~~posted for ten (10) days to permit employees to indicate their preference for the assignment. An~~
25 ~~employee who has applied for, and accepted, a transfer within the previous twelve (12) months is not~~
26 ~~eligible for transfer unless as determined by management that extenuating circumstances dictate~~
27 ~~otherwise.~~

28
29 D. ~~In the event no expression of preference exists for a shift or work assignment,~~
30 ~~management may fill a vacancy with the least senior qualified employee in the work unit. Involuntary~~
31 ~~changes in shift or work assignment shall require ten (10) days advance written notice to the affected~~
32 ~~employee and the Federation, and shall be made upon consideration of the criteria set forth in~~
33 ~~Subsection 2.C., above.~~

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35 E. ~~When a new work assignment with substantially different duties is created, it shall be~~
36 ~~posted for ten (10) days to permit employees to indicate their preference for the assignment.~~

37
38 4. ~~Trial Service Periods: Upon appointment to a new regular work assignment, including transfers,~~
39 ~~and specifically including any lateral transfer to another classification, the employee will serve a trial~~
40 ~~service period of one hundred and twenty (120) days to demonstrate his or her ability to fulfill the~~
41 ~~requirements of the assignment. If the employee does not satisfactorily fulfill the requirements of the~~
42 ~~assignment, such employee will be returned, first, to his or her previous work assignment, or if it is not~~
43 ~~available, to a vacant position. Such determination of satisfactory performance within the one hundred~~
44 ~~and twenty (120) day trial service period will be made by management.~~

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46 5. ~~Work Unit and Work Assignment Determination and Specification~~

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48 A. ~~Departmental Determination: Each Department, either directly at the Departmental~~
49 ~~level, or by delegation, shall determine the work units and work assignment structure of its organization~~
50 ~~and may change this determination from time to time to reflect changes in the organization's structure~~
51 ~~and/or needs. For example, a Department which has defined its service delivery sites as work units, and~~
52 ~~major functions within those sites as work unit assignments, may choose to treat the entire Department as~~
53 ~~a work unit with the site locations as work assignments. Whenever practicable, to ensure communication~~
54 ~~with employees and discussion of the implementation process and/or of alternatives, the Department will~~
55 ~~notify the Federation thirty (30) days in advance of any planned change in the determination of work units.~~

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~~When changes in the Department structure and/or needs result in the need to make changes to an employee's geographic work location, management will seek qualified volunteers from the affected geographic work location. If there are no qualified volunteers for the change, the least senior qualified employee at that location shall be moved with no less than thirty (30) working day notice period. Available vacancies will be frozen and the affected employee(s) shall select among the vacant positions for which they are qualified based on seniority. The date of freezing shall be four (4) weeks prior to the implementation of the re-org. The freeze will be lifted on the day the affected employee(s) have made their selection.~~

~~B. Listing of Units: In order to assist the Federation in enforcing the terms of the Agreement both in this article as well as in others, the County will provide no later than April 1 of each year a comprehensive listing of all work units within the County by Department.~~