

In the Matter of the Interest Arbitration

between AFSCME Council 75, Local 1246 (“Union”),

and

Oregon Department of Human Services, Stabilization and
Crisis Unit (“SACU” or “Agency”).

Findings,
Discussion and
Award.

Case Numbers:	Arbitrator’s QC1.
Representing the Union:	Jennifer Chapman, General Counsel, AFSCME Council 75, 1400 Tandem Ave. NE, Salem, OR 97301.
Representing the Agency:	Neil Taylor, Assistant Attorney General, 1162 Court Street NE, Salem, OR 97301-4096.
Arbitrator:	Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	In the Union’s offices in Salem, Oregon on April 20, 21, 22, and May 2, 2016.
Witnesses for the Union:	Rick Krump, Christina Sydenstricker-Brown, Amanda Guma, Lisa Neal, Joni Linda Peterson, Jack Stone, Cheylan Edison, Brian Lewis, Katrina Brink, Nathan Kennedy, Randall Ridderbusch, and George Naughton.
Witnesses for the Agency:	Brian Belleque, Bradley Heath, Lindsey Sande, Scott Hillier, Jana McLellan, and Ralph Amador, Mark Rasmussen, Erin Haney, Laura Traeger, Craig Cowan, and Tessa Baston.
Post-Hearing Argument received:	From both parties by email on July 15, 2016.
Date of this award:	July 29, 2016.

This is an interest arbitration of the parties' 2015-2017 collective bargaining agreement (CBA) under the authority of ORS 243.742 *et. sec.* The parties agree that the preliminary requirements of that statutory scheme have been met, and there are no procedural challenges to this proceeding. Both parties properly submitted last best offer packages as required under ORS 243.746(2). The hearing was orderly. At the instigation of the parties, we began with tours of several SACU facilities, of the Oregon State Penitentiary, and of the Oregon State Hospital in order to give me a sense of the similarities and differences among those facilities. The parties agreed that those tours were non-evidentiary. At hearing, each party had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. A court reporter took down testimony and the advocates had the benefit of that transcript in preparation of their post-hearing briefs. At the request of the arbitrator, the parties submitted additional exhibits on May 12 and a series of interrogatory responses on July 11, 2016. Because the parties contemplated testimony that would include patient names, they agreed to jointly redact the official transcript in that respect. Each party is responsible for redacting its own exhibits. The parties agreed that the Agency shall become the official custodian of the record in this case and shall hold me harmless in that regard. Both parties filed timely post-hearing briefs which have been carefully considered.

Only two provisions the of 2015-2017 CBA are at issue, compensation and overtime errors. The parties' full proposals are attached to this Discussion and Award; but in a nutshell the Union proposes to eliminate the four bottom steps of the prior salary schedule and to add four steps at the top and a general 1% increase on December 1, 2015. The Agency proposes participation in a progressive certification system developed and administered by the National Alliance for Direct Support Professionals (NADSP) with a 3% incentive for the first level, 5% for the second, and 7% for the third. Each certification level has an education and training component; and the Agency would pay the administrative costs associated with the program and pay for most, but not all, of the time required for each certification level. The Agency costs its own proposal for certification pay (somewhat generously) at about \$927,000. Most of that cost would pay for to 60 hours of training time per registered employee (almost \$500,000) and to miscellaneous costs of the program, with only about \$260,000 going to the employees in the form of certification pay during the period at issue here, at a cost of about \$129 per eligible employee per month. With respect to overtime errors, the Union proposes to add progressive financial disincentives for repeated assignment errors, and the Agency proposes to keep the existing language but to add an explicit filing deadline for claims of assignment error. The Agency costs the step change part of the Union's proposal at about \$4,138,000 in additional funds and offers no guess about the cost of the overtime proposal.¹

¹The Union's pay proposal does not specify the transition from the current to the proposed new salary schedule. The Agency's cost estimate assumes that employees on any of the eliminated first four steps would move up to step one on the new schedule and that employees previously at the top step would move onto the first newly added step regardless of how long they had been topped out on the prior schedule. At hearing, the Union agreed that that was how it had understood its proposal.

Statutory Authority

ORS 243.746(4) provides that in proceedings such as this “Arbitrators shall base their findings and opinions on these criteria giving first priority to paragraph (q) 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:
 - (C) Except [for the Department of State Police troopers], for the State of Oregon, comparable includes comparison to other states; and
- (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.

Subsection (5) requires me to “select only one of the last best offer packages submitted by the parties and...promulgate written findings along with an opinion and order...based on the criteria prescribed in subsection (4) of this section.”

Findings of Fact

The Agency and the work. When Fairview closed in the 1990s the State initiated the State Operated Community Programs (SOCP) for Fairview residents who were difficult or impossible to place in the community.² In 1994 the Employment Relations Board (ERB) and the Court of Appeals found the employees of SOCP to be “guard[s] at a mental hospital” within the scope of ORS 243.736(1). *State of Oregon, Dept. Of Human Services, Mental Health and Developmental Disability Services Div. v. AFSCME Council 75*, 125 Or.App. 625 (1994). The Court’s opinion includes this description of the work performed (at 499-501, footnotes omitted), a description that remains generally accurate today:

*** [SOCP] operates three “behavioral” group homes for individuals with developmental disabilities. The facilities are called behavioral because the residents have histories of various “inappropriate and unacceptable behaviors.” One of the purposes of the facilities is to attempt to manage and modify those behaviors.

The group homes, which are located in residential communities, are considered treatment facilities and operate 24 hours a day, seven days a week. They are equipped with a security system that is connected to interior and exterior doors and windows. If a door or window is opened, an alarm sounds. The alarm is generally off during the day. An alarm control panel indicates specifically which door or window has been opened. The security system includes an intercom system, which is connected to the residents’ bedrooms and can be used to monitor the residents’ bedrooms and can be used to monitor the residents while they are in their rooms. In addition, the windows are made of extra-thick shatterproof glass; the walls are backed by plywood; and doors are solid-core metal framed; and each home is enclosed by a six-foot fence with a single unlocked gate.

Each of the three homes has five residents. All fifteen residents came from Fairview Training Center (Fairview). Thirteen of those were from secure cottages at Fairview, and most have been in other community programs but were returned to Fairview because of misconduct or because they could not adapt to a less-structured environment. Two of the residents are in the homes involuntarily. The others are there on a voluntary basis and have the legal right to leave the program. ERB found that all five residents at one of the homes are not considered any less dangerous than when they lived at Fairview, and that they “are considered risks to the community.” They have histories of sexual assaults, particularly on children, and most are repeat offenders. ERB found that these residents

“can become noncompliant and physically aggressive *** [including] striking other clients and staff; kicking; biting; scratching; throwing furniture or other objects. These behaviors are unpredictable.”

²The operation of Fairview Training Center was gradually wound down from about 1992 to 2000.

Each group home has approximately 18 employees, including a manager who is excluded from the bargaining unit. All current bargaining unit members have worked at Fairview. Twenty-one of the employees have worked in “guard” positions while at Fairview. *** All staff members, regardless of classification, are required to monitor residents’ behavior and location, to be familiar with residents’ prescriptions, to be alert to actions that indicate an escalation of inappropriate resident behavior, and to be prepared to intervene to quell the behavior. Although considered a last resort, staff “regularly” physically restrain residents through the use of personal holds.³

In 2014, SOCU was replaced by the current Stabilization and Crisis Unit (SACU). The Director of DHS explained that change—and the changes to the program over the prior decade—this way:

The new name—Stabilization and Crisis Unit (SACU) supports the working trend over the last several years as the program is geared toward serving those individuals who are in crisis, and have exhausted all other resources within the state. The goal is to serve these individuals through the crisis period and into stabilization so that they can successfully return to an appropriate community placement.

SACU will continue to be a safety net for Oregon’s most vulnerable, intensive, medically and behaviorally challenged individuals with intellectual or developmental disabilities (I/DD) and to provide support when no other community-based option is available to them. This includes people with developmental disabilities coming out of the Oregon State Hospital, correctional systems, and from crisis situations where counties and private providers cannot meet the needs of the individual, to ensure their health and safety. ***

SACU consists of twenty-three residential homes along the I-5 corridor from Portland to Eugene, with a total capacity of 108, serving 98 adults and 10 children. ***

Thus the employees in this bargaining unit have two simultaneous duties and responsibilities, the clinical responsibility for moving the residents toward care by private sector facilities and the security responsibility for preventing the residents from doing harm to the public, to their house neighbors or to themselves. The current position description for the Mental Health Therapy Technicians (MHTT)—who compose the vast majority of the unit—make this dual responsibility clear in its list of “typical tasks:”

1. Basic Patient Care. Typical tasks: monitors and/or assists patients in daily living activities such as bathing, feeding, grooming and dressing; assists with lifting, moving, turning and waking patients; assists with medical care such as collecting specimens (urine, and sputum); measuring

³Bargaining unit employees are now eligible for PERS fire and police pensions. HB 2618, in the 2015 regular session, extended the definition of “police officer” in ORS 238.005 to include these strike-prohibited employees. HB 2618 included a little over \$500,000 to fund that change.

blood pressure pulse and respiration...

2. Case Monitoring/Treatment. Typical tasks: serves as resource person for a small group of assigned patients by attending to their basic physical, emotional and social needs such as assuring that patients have such personal items as soap, toothbrushes and shampoo and are bathed, groomed, properly clothed and fed, and by observing birthdays and holidays; observes and records behavior; documents patients' responses to treatment, and shares information with treatment team; provides input for changes in treatment programs; spends time daily/weekly interacting with patients individually or as a group; participates in patient activities such as hiking and skating outings, family night, picnics, pet projects, games and other activities.

3. Safety/Security Measures. Typical tasks: observes and maintains security procedures; assists in random searches of patient areas and facilities for contraband and weapons; under direction and supervision of a physician or Registered Nurse, uses restraining and seclusion procedures on out-of-control patients as necessary; enforces safety procedures against rule violations such as smoking in rooms and the presence of potentially harmful objects; *protects patients from other patients who present a threat to their safety*; makes regularly scheduled ward checks to account for whereabouts of patients; *monitors patients on suicide precaution observation...*

4. Behavioral Management. Typical tasks: Monitors a potentially violent group of patients by ensuring that patients follow rules; observes patient potential for violent and socially destructive behavior and intervenes following hospital policies and procedures...

SACU now serves about 100 residents in 23 group homes staffed by about 540 bargaining unit employees.⁴ Over 463 of those 540 are Mental Health Therapy Techs (MHTTs).⁵ In general, the resident population had grown more criminal and more dangerous in recent years. Many have been victims of sexual or physical abuse or domestic violence. All of the residents are considered a risk to others, including other residents, and many are a risk to themselves. The goal of the program, nonetheless, is the integration of the residents into the community, to whatever degree that is possible; and SACU has somewhat reduced the average length of stay from SOCU days.

With the program's growth has come a slight specialization in group home construction because not all of the current residents are equally destructive of the facilities and because some residents are medically fragile. Twelve of the homes—56 beds—are now “hardened,” with half-inch tempered glass on the insides of the windows and plywood behind the sheetrock on the walls. The six foot to twelve foot fences around hardened

⁴Three of the authorized homes are devoted to medically fragile residents, and those three are staffed primarily by nurses rather than MHTTs. One of those homes is currently not active.

⁵The unit also includes Behavioral/Vocational Specialists, program analysts, office specialists and employees in several other classifications.

facilities are doubled. The Agency vehicles assigned to transport the residents of those homes are similarly hardened. (About 60-70 of the residents require such secure transport.) All exterior doors, at all of the homes, have double locks, i.e., key pad and keyed lock. Interior and exterior doors generally have magnetic locks which help to prevent residents from kicking the doors down. Every employee wears a wrist alarm for immediate call for assistance. Furnishings are sparse and are generally firmly attached to the floor in order to reduce the weapons potential for an out of control resident. The walls are bare for that same reason and to prevent residents from eating torn decorations or using them for self-injury. Residents' personal possessions are kept in locked storage and are available by request. Each room has a locked Lexan "media cabinet" with video screen, etc. (Plexiglass proved too easily broken.) Every room is searched on a regular basis for any unauthorized object because *any* unauthorized object has tool and weapons potential. The transport vehicles are similarly searched. Each resident is allowed one out-going phone call per shift (but may receive more calls). All calls are monitored. Residents' family members are sometimes complicit in planning "escape," and at least one resident has a history of attempted 'suicide by cop' by making reasonable sounding but totally false 911 reports that he is armed and threatening the neighbors.⁶ The of the homes that are not "hardened" are still double locked, but they house residents who require less architectural planning.

The general acuity of the residents continues to increase. As the Agency explained to the 2015 Legislature,

The degree of dangerousness and acuity of co-occurring mental illness that SACU clients present is steadily increasing as measured by:

- Severity of aggressive and assaultive client behavior
- Numbers of psychiatric hospitalizations
- Active legal sanctions based on past criminal behavior
- Increasing amount of overtime of staff for additional client coverage
- Increased attention to injuries and assaults within crisis situations

* * *

The changing face of our population includes individuals who are street savvy, well versed in client rights, complex involvements with other agencies (law enforcement, corrections, and mental health) and most noticeably have a presenting mental health issue that impacts their daily life along with their developmental disability.

⁶Residents are not kept locked in the homes all the time. The general goal is to get each one out three times a week. Such outings take additional accompanying staff besides the driver. Some require two-on-one or three-on-one attendance. The degree of possible social contact on such outings varies from resident to resident. Periodic appointments with doctors and psychiatrists also require secured transport and attendance. The accompanying MHTT serves as the patient advocate in doctor's appointments, describing symptoms, care plan, and medical information. Two or three MHTTs attend any resident during hospitalization.

That “street savvy” also complicates the process of staff supervision.⁷ The record includes this illuminating example of the performance requirements for bargaining unit employees:

You neglected the care of Client AA ... when you failed to supervise Client AA who was able to insert an object into his rectum.

*** [I]t was reported that you didn’t properly lock client AA’s plastic vampire teeth in a cabinet in his room. Client AA isn’t allowed to have any objects without staff supervision because of his potential for self-harm, including putting objects in his rectum. ***

It was also reported you left client AA’s room for 20 seconds to go to another room which didn’t give you visual contact with client AA during that time. According to client AA’s Behavioral Support Plan (BSP), staff need to be in contact with AA at all times. The 20 seconds you were out of the room violated the BSP.

SACU opens a formal investigation of every such charge, with the accused employee on administrative leave pending the outcome. Investigation of each allegation of abuse averages over six months, and there are an average of just over ten staff unavailable to work at any given time due to ongoing investigations.

The five-resident-community-home arrangement is unique to Oregon. Before the closure of Fairview, by comparison, food preparation, laundry, some personal hygiene tasks, recreation and doctor’s visit security were all performed by other regular employees on the Fairview campus, as was the administration of each resident’s special dietary program and some security functions. Nurses were on site, whereas they now make periodic—typically monthly—visits. Those tasks are now all performed by the group home MHTTs. Other states take a more institutional approach to the care of this population.

There is a separate Behavior Supervision Plan (BSP) for each resident, detailing that individual’s medical and behavioral history and the objects s/he is permitted to handle. Employees are required to carefully document resident behavior, including the administration of medication. Each employee is required to review daily changes to *each* resident’s BSP, because regardless of the day’s assignment, each employee in a particular home will probably encounter all the residents of that home every day, and every bargaining unit employee may be required to control a difficult resident at any time.

The Agency continually trains staff in how to safely deal with residents. The first line of defense is the ability to de-escalate problematic behavior; but there is also monthly training

⁷Residents sometimes complain about staff. It seems fair to project that even if the staff were absolutely perfect in performance, residents would still sometimes complain about staff. Of course, it is also fair to assume that errors happen, even, sometimes, potentially serious and avoidable errors.

on various ‘holds’ to physically restrain a resident at reduced risk of personal injury to the employee, the resident, or other residents. Every resort to restraint takes four or five staff. Special protective clothing (to minimize injuries and guard against bites, e.g.) is provided for dealing with some residents. Nonetheless, physical injuries to staff are common from being bitten and punched and having hair pulled and pulled out. Damage includes bruising, black eyes, broken noses, hair loss, and more serious injuries. Staff typically do not report injuries that do not require a doctor’s attention or result in time loss.⁸ Staff assignments rotate every four hours for the safety of both the residents and the staff.

There are around two thousand private sector facilities in Oregon that provide developmental disability or mental health services, and most of those have employees doing clinical work that might be somewhat similar on paper to employees in this bargaining unit. But those other facilities all have the option to reject a resident who proves to be too hazardous to the staff, to other residents or to himself or herself. Many such rejected residents eventually end up at SACU. For that simple reason—regardless of the accuracy of the image—SACU has a reputation as a dangerous place to work, and employees with skills and experience somewhat similar to those of bargaining unit employees are commonly reticent to apply despite SACU’s relatively high pay rates. Similarly, when new SACU employees first encounter the realities of the day to day working environment, some of them leave before completing trial service.

All staff turnover in this work environment is clinically problematic. The homes are surrounded by tall fences not only to keep the residents in but also to minimize outside stimulation for the residents. These individuals do not deal well with novelty and change. Bargaining unit employees comprise the residents’ entire day to day social and physical support system, so the relationship between the residents and the employees requires a high degree of trust on each resident’s part. Personal trust is non-transferable and must be freshly earned whenever a new employee is assigned to deal with a particular resident. Some residents try to manipulate every new employee, and those attempts commonly include a marked increase in crisis behavior.⁹ There is no dispute in the record before me that it takes from several months to up to a year for the residents to get accustomed to new staff. That characteristic of the work makes every new employee a burden to the existing staff for the first six to twelve months.

⁸A group of SACU employees filed a tort claim notice in the closing days of 2015 alleging that they “have sustained repeated physical and emotional injuries at the hands of violent and mentally ill patients. Despite repeated requests for additional staffing, training, safety measures and protections, the State has failed to protect plaintiffs and has failed to prevent ongoing assaults.” (Exhibit U24.) As the Agency points out, a tort claim notice is only the first step on a very long road of establishing a claim.

⁹One knowledgeable and experienced witness testified that virtually every house has at least one resident who will target or attack every new employee.

Recent Staffing Changes. At the joint urging of SACU and the Union, the 2015 Legislature funded two new programs specifically aimed at staffing and safety problems at SACU. The new FLOAT program is an attempt to address excessive overtime and staffing shortages; and the COAT program (Crisis Oversight Assessment Team) is an attempt to deal systematically with difficult resident management problems without being forced to bounce from emergency to emergency.¹⁰ Both changes include the creation of intermediate levels of organization.

Covering vacancies in this bargaining unit is difficult because every house has a minimum staffing requirement for each shift, but every hands-on employee must be familiar with the treatment plan for each resident. That has made it difficult to reach outside a house for vacancy coverage. For purposes of the FLOAT program, SACU has been divided into seven “islands,” of 3-4 houses each. One of the islands encompasses the three homes for medically fragile residents, and the FLOAT personnel for that island will consist of five HTT2s. Each of the other six islands will be served by new FLOAT staff of six to ten MHTTs. The MHTTs and HTT2s in FLOAT will be required to maintain familiarity with the program requirements for all the residents within their island and will be available for covering staffing vacancies in those houses.

The Agency and the Union agreed that additional management staff would improve the program. The added area managers and assistant managers added as part of the FLOAT program will also be stationed in the houses they are responsible for. At the same time, the parties agreed to changes in the CBA to allow staff to be transferred between houses within an island so that each employee may be exposed and trained on the program requirements of each resident within his or her island of homes.

COAT consists of 28 FTE new positions, 27 of which are bargaining unit Psychiatric Social Workers and MHTTs. For purposes of the COAT program, too, SACU houses are divided, this time into three regions, each staffed by 2.8 FTE PSWs and 5.6 FTE MHTTs. Each COAT team will consist of a BBS I and BBS II, and their responsibility will be to improve the management plans for each resident, to train and coach the staff at the residences, and to help whenever it is necessary to transfer a resident from one house to another. The new CBA includes agreements that COAT positions will received a 10% pay differential and will not be open for seniority bidding. COAT positions will be staffed for 16 hours each day. (At the parties’ joint request, Legislature also added several new classifications to address issues of quality assurance, financial accountability and licensing.)

¹⁰The Agency initially requested that the Emergency Board authorize and fund an emergency response team. The E Board rejected that request, and the Agency and AFSCME returned to the 2015 Legislature with the COAT proposal. At their joint request, the 2015 Legislature also added several new bargaining unit classifications to address issues of quality assurance, financial accountability and licensing data management.

The initial posting for the new management position at the top of the COAT program failed; and a second posting for management positions was approaching the interview stage at the time of the hearing in this case. The Agency hopes to have one of the COAT teams fully operational by the end of the summer of 2016.

Together, the FLOAT and COAT programs will increase the Agency staff by 127 permanent positions—84.26 FTE—at an operational cost of about \$5.7M General Fund dollars and about \$7M in Federal matching funds. MHTTs for 2015-2017 will increase by 80 from the previously authorized 501 FTE.¹¹ AFSCME and SACU jointly assured the Legislature that those two programs will also change both the overtime and the employee safety profiles of the Agency under the 2015-2017 CBA, and a budget note makes it clear that the new positions were created for that purpose.

Bargaining history. AFSCME represents the employees in about 24 different State of Oregon bargaining units. By long-standing agreement of the parties, about 20 of those units bargain most issues—including general pay increases—at a common table. SACU was included in those common table negotiations for the CBA at issue here, and this bargaining unit is included in the central table agreement for one 2.25% increase and one 2.75% increase during the period of the 2015-2017 CBA that is at issue here. The compensation adjustments at issue in this case will be additions to those bargained increases.

DISCUSSION: SALARY PROPOSALS

ORS 243.746(4) requires me to give “first priority to paragraph (a) [the interest and welfare of the public] and secondary priority to” the other specifically listed statutory factors, i.e., ability to pay, recruitment and retention, overall compensation, comparability, the CPI, stipulations of the parties, and “other factors.” But almost all discussions of the interest and welfare of the public necessarily refer to the other listed factors; and the other listed factors lend themselves to hard numbers and therefore serve as factual anchors for consideration of the interest and welfare of the public. We therefore begin the discussion with the secondary factors and end with the primary factor.¹²

Ability to pay: “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

¹¹These numbers do not distinguish the HTTs (Habilitative Training Tech) who do the work of the MHTTs at the homes for medically fragile residents.

¹²The “overall compensation” factor—paragraph (d)—is traditionally reflected by conducting compensation comparisons on an “all things considered” basis; and the parties agree that there are no significant stipulations of the parties—paragraph (g).

body. ***” As a preliminary matter, the parties fundamentally disagree in their interpretation of the term “the unit of government” in this part of the statute. AFSCME argues (Post-hearing Brief at 16) that “determining SACU’s ability to pay requires an analysis of the State of Oregon’s budget as a whole;” and the Agency argues (Post-hearing Brief at 22 & 24, emphasis in the original) that the ability to pay “is measured not in terms of an abstract pot of money, *but on what the governing body has determined are its priorities,*” and “the governing body has not prioritized a several million dollar wage increase across the board for the SACU bargaining unit...” Thus, the Agency argues, only the funds in the DHS budget are relevant to ability to pay, and because the Legislature did not specifically budget for the additional cost of AFSCME’s proposal, DHS has no ability to pay it. But that interpretation of the statute would make an employer’s budgetary determinations *dispositive* of its ability to pay, and no public employer would have any ability to pay any increased personnel costs which were not specified in its own budget. That would, of course, eviscerate the interest arbitration process. (The employer’s failure to budget the funds at issue is exactly why the parties find themselves in interest arbitration.) But what ORS 243.746(4)(a) actually says is *not* “within the specific limitations of the budgetary choices made by the public employer,” but “giving *due consideration* and weight to...other priorities of the unit of government as determined by the governing body.” The governing body in this instance is the Oregon Legislature, and its determination of priorities is set out in the overall State budget: the State government is the “unit of government” in cases involving State agencies, giving due consideration and weight to the Legislature’s budgeting for the agency at issue.

The Legislatively Approved Budget for the entire DHS Agency for 2015-2017 is about \$10.6B. Of that \$10.6B, \$2.75B comes from the State’s General Fund (GF); \$7.3B comes from Federal funds; and half a million comes from other funds.¹³ Seniors and People With Disabilities accounts for about \$5.4B of that total and is divided into two divisions, Aging and People with Disabilities, and Individuals with Developmental Disabilities (I/DD). SACU is part of I/DD. The current biennial budget includes a formal note—as did its predecessor—instructing DHS to cut costs for the biennium. Paradoxically, that budget note exists side by side with the Legislature’s substantially broadening eligibility for DHS services.

I/DD’s total Legislatively Approved Budget is not quite \$2.27B, of which almost \$725M is GF money, a bit over \$1.5B is Federal funds and \$36.5M is other. Within I/DD’s total \$2.27B Legislatively Approved Budget, about \$115M supports SACU, of which \$42M is GF money, \$71M is federal funds, and \$2M comes from other sources. Through February of 2015, SACU was showing a bit over a \$49M deficit, including a \$14M deficit in GF dollars. (Those numbers include the new positions, the two central table COLA increases, and the cost of the Agency’s own proposal here.)

¹³This bargaining unit receives an average reimbursement of \$64 in federal funds for every \$100 of GF expenditure. Those federal revenues are paid in the quarter following the GF expenditures.

The current budget note from the Legislature is part of a continuing exchange with DHS, which continues to generate growing costs for the State budget. Over the last five years DHS has been repeatedly required to appeal repeatedly to the Emergency Board. In part, that is because a period of economic downturn, such as the 2008 experience, simultaneously reduces the State's income and encourages growth in the DHS caseload.¹⁴ DHS's most recent request from the Emergency Board was in the week before the hearing in this case (although the particulars of that request are not in the record).

AFSCME's ability to pay analysis turns primarily on the most recent audited Comprehensive Annual Financial Report (CAFR) for the fiscal year ending June 30, 2015. That CAFR showed a GF balance of about \$2.29B, of which about \$676M was unassigned. (An additional \$231M was committed and assigned but technically subject to legislative reallocation.) Beginning with the high impact year of 2010-2011—after the 2008 economic downturn—the GF balance has increased over fourfold over the last five fiscal years and by 67% from FY 2014 alone. AFSCME argues that the stability of the State's financial condition overall—and its ability to absorb additional costs—is shown by the fact that it maintains an Education Stability Fund (ESF) and a Rainy Day Fund (RDF) of about \$376M and \$387M respectively for the 2015-2017 biennium. AFSCME's analysis lumps those two funds together with a \$310M GF operating balance as of June 30, 2015, and concludes that the funds available to pay a wage increase amount to 7% of the total estimated almost \$18B 2015-2017 expenditures.¹⁵

The first problem with that rosy picture, as SACU points out, is that the most recent CAFR presents a fiscal snapshot as of the end of the prior fiscal year and does not reflect either the legally required subsequent contribution of \$158M to the RDF nor the \$362M required to finance Oregon's "Kicker" requirement.¹⁶ Subtracting those liabilities leaves an unallocated net of about \$229M, according to the Agency, which is only about 1.3% of the GF budget. By most reasonable fiscal standards, 1.3% is not the ragged edge of desperation, but it certainly could not be called financially fat. The second problem with AFSCME's

¹⁴I take notice of the notorious fact that Oregon has no sales tax and thus its state budget is heavily dependent on personal income tax. That dependence means that spikes in the unemployment rate have immediate budgetary consequences.

¹⁵AFSCME also points out that the I/DD budget has increased overall by about 48% from the 2011-2013 biennium, 29% of that increase being in GF dollars (although a substantial part of that increase may be the budgeted costs of FLOAT and COAT).

¹⁶The most recent CAFR reflects the cost of the kicker for the 2013-15 biennium but not for 2015-2017.

picture of ability to pay is that it depends on the availability of ESF and RDF funds.¹⁷ Nothing in the record suggests that those funds are legally available for a pay increase at SACU. Indeed as far as the record shows, contributions to the RDF, and the funding of the Oregon kicker are legally *required*, which seems inconsistent with that fund's availability for such purposes.¹⁸

Recruitment and Retention: "The ability of the unit of government to attract and retain qualified personnel at the wage and benefit levels provided." The turnover rate for SACU is only slightly elevated. BLS data show that the average turnover rate in the public sector for the period from 2011 through 2015 was just under 16%.¹⁹ The turnover rate in the SACU bargaining unit is similar to that national average. For calendar 2014, there was almost a 15% turnover for MHTTs and almost a 16% turnover for the bargaining unit overall. In 2015 those rates increased to about 18% for both MHTTs and the unit overall.²⁰

That picture darkens when we focus on SACU's success at bringing new employees fully into the workforce. There are currently about 463 MHTTs. During the five year period from 2011 to 2015, SACU hired 419 MHTTs.²¹ There is no way of avoiding the conclusion that anything approaching a 90% hire-and-rehire rate over the last five years shows a

¹⁷SACU points out (Post-hearing Brief at 24) that the last sentence of this statutory paragraph specifies that "A reasonable operating reserve against future contingencies...shall not be considered as available toward a settlement."

¹⁸Two additional financial environmental factors affect this element: First, the recent Legislature took steps to increase the eligibility for personal support workers in the homes of the disabled; and second, the state has been at best marginally successful in dealing with its retirement program, and PERS premium costs continue to increase.

¹⁹SACU notes (Post-hearing Brief at 19) that "turnover" is a term of art and BLS defines that term much more broadly than most employers, including the State.

²⁰The second largest classification in the unit, Habilitative Training Tech 2, fared even worse: In 2014 its overall turnover rate was 27%, and in 2015 it was a massive 40% mostly (30 of 82) in the form of resignations. But that classification is not large enough to be informative of the bargaining unit overall.

²¹Those 419 hires came from a raw applicant pool of 4,287. It is not shocking that it takes about ten raw applications to get to each actual new hire. The record offers no explanation for a change in the proportions of the hiring process (Exhibit S69): For 2010 and 2011 a small percentage of those who passed the minimum qualifications were referred for possible hire (22% and 14% respectively). That changed somewhat in 2012 (47%) and then changed massively since 2013. Since then the percentages of minimally qualified applicants referred for possible hire have been 87%, 94%, 93%, and (in 2016) 97%.

recruitment and retention problem.²² Moreover, of those 419 hires, 83 left within the first six months on the job. Of those 83 departures, 39 have been trial-service removals, and 27 have been resignations or no-shows. Having to hire 419 in the last five years for a 463 MHTT workforce, and about a 20% “all causes” departure rate in the first six months, do not show that SACU has been able to attract *qualified* personnel. The Agency apparently does not conduct departure interviews, but as far as this record shows, a substantial part of the first-six-months departures are motivated by concerns for personal safety.

Apart from the first-six-months data, the quit rate for SACU MHTTs overall compares favorably with the similar classification at OSH: OSH saw a 9.6% resignation rate over the last five years compared with 6.75% at SACU. (Exhibit S70.)

MHTTs are a sharply specialized subset of direct support professionals. The recruiting and training cost for a new direct support professional in general has been estimated at about \$10,000, not counting the cost of filling the vacant position on overtime. (Exhibit U19.) In the rehabilitation community in general, there are serious consequences to every personnel change as the replacement employee has to reestablish the trust of the patients. Those common consequences are magnified at SACU.

Comparability: “Comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities. As used in this paragraph, comparable is limited to communities of the same or nearest population range within Oregon *** for the State of Oregon, comparable includes comparison to other states.”²³

A comparability analysis under a statutory scheme such as ORS 243.746 traditionally includes several distinct steps: 1) determining the potential comparable employers, 2) determining the appropriate “benchmark” classification(s) to be compared across those

²²It is not a 90% “rehire” rate because such data often shows that the same positions are opening again and again while there may be substantial continuity among senior employees. SACU argues (Post-hearing Brief at 20) that “trial service removal numbers are not relevant because, like regular dismissal, they are human resource transactions that are Employer initiated.” Trial service removals are part of the hiring process and are relevant to an employer’s “ability to attract...*qualified* personnel.”

²³The listed factors to be considered also include “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.” Those numbers are not very informative considered in isolation; and this factor is traditionally taken as an instruction to conduct the required compensation comparison on an ‘all things considered’ basis. AFSCME calculates the overall value of the total compensation of SACU MHTTs at \$14.73 to \$20.78 per hour.

employers, 3) determining the point(s) on the salary schedule at which comparison should be made, 4) identifying the classifications that perform “similar services” for each of the comparable employers, and 5) designing a calculus to reflect all the direct and indirect benefits of the employees at issue for purposes of comparison (as required by ORS 243.746(4)(d)).

SACU proposes comparison with four contiguous states, Washington, Idaho, Nevada and California, which the State’s major unions—including AFSCME—have agreed to in the past as the basis of a joint salary survey. (Neither party finds local government comparators; and the statute expressly allows comparison with other states.) AFSCME offers an alternative set of state comparators but fundamentally “questions whether there are *any* true comparables” (Post-hearing Brief at 21, italics in the original.)

Determination of the benchmark classification(s) for purpose of comparison in this case is not difficult. As a DAS Labor Relations Manager testified with respect to tracking wage growth against changes in the CPI (V Tr. 715), the Agency used the MHTT classification “Because they are by far the bulk of this bargaining unit. *** If you do an average of all of them, if you do a weighted average, at lease, it’s very, very close to this because they are so much of the bargaining unit.” MHTT is compellingly the appropriate benchmark class for purposes of comparison.²⁴

The Agency proposes comparison at the top of the salary schedule on the grounds that Oregon’s workforce generally is mostly distributed at the top of the schedule. AFSCME did not contest that proposal, and I assume that comparison solely at the top is appropriate for this bargaining unit.

The real problem arises when we come to determining whether the appropriate states actually have “employees performing similar services;” and that is the focus of AFSCME’s doubt that there are any true comparables in this case. There is no dispute that no other state houses residents of such high acuity in small isolated homes in the community. This makes it problematic to find informative comparators: none of the neighboring states have employees who work with residents of such high acuity in such isolation. One axis of similarity or dissimilarity between two classifications is their supervision received and expert assistance available. In Oregon, alone, employees in this bargaining unit are regularly required to make decisions about resident management and deal with daily security emergencies without recourse to expertise outside their own small house. AFSCME argues that performing MHTT work in an institutional setting is substantially different than

²⁴SACU objects to AFSCME’s comparability analysis in terms of an MHTT benchmark (Post-Hearing Brief at 2) despite the fact that the Agency’s own CPI presentation takes that approach and recognizes that the MHTT component of this bargaining unit is compelling (Post-hearing Brief at 21).

performing that same work in an isolated home in the middle of a quiet suburban or exurban community; and the record compellingly supports that argument.²⁵ Even the responsibilities of clerical employees are substantially different in this unit because Office Specialists here are trained in OIS and are regularly required to use that training to restrain residents.

It is part of the law of the case here that the ERB was correct in determining that these employees “are ‘guards in a ‘mental hospital.’” *State of Oregon, Dept. Of Human Services, Mental Health and Developmental Disability Services Div. v. AFSCME Council 75*, 125 Or.App. 625, 634. The “typical tasks” set out in the MHTT classification (quoted above at p. 6) description describe those responsibilities, and the description is well-supported by the record before me. In the face of the factual record in this case and the Court’s opinion in *Mental Health and Developmental Disability Services Div. v. AFSCME Council 75*, I must conclude that it simply is not informative to compare these MHTTs to any class of employees that does not have the “overriding responsibility” (8 PECBR at 6683) or “focal duty” (8 PECBR at 6682) of “keeping residents...in and under the control of” the Agency. *Developmental Disability Services* 125 Or.App. at 632. None of SACU’s proposed comparators meet that requirement.

SACU offers comparator classifications from Nevada, Washington and California and from the private sector in Oregon. With respect to the proposed private sector employees, nothing in those class descriptions is reasonably similar to the listed “typical tasks” of the SACU MHTTs. Similarly, nothing in the classification description offered as the comparable from Washington (for Mental Health Technician 3) is reasonably similar. The Agency also suggests that California’s Psychiatric Technician might be a match, even though the classification description says those employees work “in a State hospital” and even though the focus of the Oregon MHTTs appears to be fundamentally different without regard to issues of licensing or participation in developing treatment plans (V Tr. 682). Even if those dissimilarities could be overcome, however, the closest the California class description comes to the MHTT security duties is “protects clients from personal injury.” The record does not show that a focal duty of the proposed comparator is keeping the public safe from the residents and the residents safe from one another and from self injury. In the face of that dissimilarity, I cannot agree that Oregon’s MHTTs fall “between two chairs” (Tr. 4:683-684) in the California scheme.

Turning to Nevada, the format of classification descriptions for Nevada is not as robust as Oregon’s format: there is no informative list of typical tasks in the Nevada format. The closest the Nevada Mental Health Therapy Tech 3 class description comes to presenting a picture similar to Oregon’s MHTT duties is this: “may supplement the work of mental health professionals, health specialists and nursing staff ... for clients in a mental

²⁵The Agency’s Post-Hearing Brief recognizes (at 15) that a fundamental difference in the structure of the work would make two classes of employees improper comparables.

health facility...such as psychiatric hospitals, treatment centers, psychological evaluation service units, sexual offender units, rural clinics, and related treatment areas...” The classification description notes that “In addition, the following duties apply to positions in 24-hour/7-day a week settings” [emphasis is in the original] the Nevada MHTT3s may

Implement verbal intervention for clients who are escalating and, as necessary, restrain or utilize appropriate behavioral and environmental controls for clients who are a threat to themselves or others and may be hostile, combative, aggressive or assaultive...

If there was a reason to believe that those special 24/7 duties were exercised in rural clinics, the two groups of employees would be reasonably comparable. But there is no dispute in the record here that no other state places residents of such acuity in small isolated houses in suburban or rural areas, and I cannot conclude that the listed special 24/7 duties are found in “rural clinics” as distinguished from the more usual psychiatric hospitals and treatment centers. The duties and responsibilities do not appear comparable.

In short, I must agree with AFSCME’s argument that in light of the acuity of SACU residents, the isolation of the houses, and the “guard at a mental hospital” nature of the responsibilities of bargaining unit employees there are no reasonable comparable employees in neighboring states or in the private sector. On the other hand, however, I find AFSCME’s proposal to compare these employees with Oregon Corrections Officers to be unpersuasive. The security of the residents is only half of the responsibility of these employees. Their duties are also clinical; and those clinical treatment responsibilities are entirely foreign to Corrections Officers.²⁶ Similarly, I am not persuaded by SACU’s proposal (Post-hearing Brief at 12-13) to compare SACU MHTTs with those employed by OSH who lack the crucial resident security focus of SACU employees, and who work in a well-supported institutional setting rather than in small isolated group homes. As far as this record shows, the MHTTs at OSH are not guards at a mental institution.

I can find no way to avoid the conclusion that there are no informative comparables for SACU’s MHTTs. Perhaps that conclusion should not be surprising in light of the undisputed fact that no other state deals with I/DD and mentally ill residents of such high acuity in small, isolated houses broadly scattered throughout the community. Still, in thirty years of hearing interest arbitration cases in Oregon, Washington and Alaska I have never encountered or read of a case with no informative comparables. On the other hand, not

²⁶The very difference in ratios of employee to resident shows the mismatch: While MHTTs work one-on-one with residents, there are typically at least scores and very often hundreds of prisoners for each on-duty CO. At the Oregon State Penitentiary, for example, a residential unit of 565 is staffed by four Corrections Officers on day and swing shifts and by one on graves. Corrections facilities are an exemplar of institutional care, and residents are serviced by food service employees, counselors, medical staff, etc. in addition to COs.

every factor listed in ORS 243.746(4) is useful in every case. Considerations of changes in the CPI are frequently not informative; and serious problems in recruitment and retention are sometimes self correcting as employers adjust compensation to attract and retain necessary staffing. The absence of informative comparables here is unusual but not crippling.

CPI: “The CPI-All Cities Index, commonly known as the cost of living.” The record does not show that bargaining unit employees have lost “real” purchasing power as a result of increases in the cost of living. AFSCME argues (Post-hearing Brief at 23) that “this factor is neutral.” But SACU properly points out that compensation increases over the period of the last three contracts, at least, have consistently outstripped the modest increases in the CPI-All Cities Index. (Exhibit S66.)

Other factors: “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.” Most particularly, it would elevate the pay of SACU’s MHTTs substantially above the pay of MHTTs at OSH. On the other hand, AFSCME proposes to compare the pay gaps between MHTTs and corrections officers in comparable states. That amounts to an appeal to comparable internal equity

The fundamental problem with this appeal is that my consideration of factors other than those set out expressly in paragraphs (a) to (g) requires a threshold judgment that those factors *do not* “provide sufficient evidence for an award.” There is no doubt at all that internal equity is one of the basic components of classification/compensation work (as the Class/Comp Manager for the State testified), along with external competitiveness and financial considerations. (Tr. 4:663.) Only two of those three basic components are reflected in paragraphs (a) to (g) of section (h); and the basic principles of statutory construction forbid me to add a factor that the legislature apparently chose to exclude. It may well be true—it is almost always true, according to the basic principals of class/comp work—that consideration of internal comparability would make a far better evidentiary basis for an award. But the statutory language establishes a condition for my going outside the specifically listed factors; and that condition is not that consideration of the additional factor would provide “better” evidence for an award, but that without the other factor there would not be “sufficient evidence for an award” at all. That condition is not met in the case at hand, and it is improper to consider internal equity.²⁷

²⁷Some arbitrators are willing to back-door what seems to me to be clear statutory language and to address internal equity under the heading of “the interest and welfare of the public.” SACU invites that approach in the case at hand. (Post-hearing Brief at 26.) I respectfully submit that the statute is clear, and the fact that the clear statutory language runs contrary to the basic foundations of class/comp analysis does not make it any less clear. If the Legislature made a mistake in that regard, the result of

The interest and welfare of the public. Most of the arguments offered under this heading amount to repetitions of those made under the various secondary factors. For example, AFSCME argues (Post-hearing brief at 7-8) that “the public interest is one of the driving motivations for AFSCME’s wage proposals. *** The public has a vested interest in ensuring that clients with intellectual and developmental disabilities receive proper care. People with these types of disabilities have an increased need for stability, because it takes time for them to build relationships and trust that their care providers will be able to help them meet their needs. Staffing shortages and turnover amongst the staff assigned to care for them is especially difficult on IDD clients.” AFSCME argues that its wage proposal is aimed squarely at the Agency’s staffing needs by making the hiring wage more attractive and providing an incentive for employees to stay with the agency. Both of those arguments properly fall under the statutory factor recruitment and retention, addressed below; but I agree with AFSCME that the undisputed need for continuity of care in this bargaining unit means that those factors directly touches the interest and welfare of the public.

Similarly, one of AFSCME’s primary arguments in this case is that SACU’s substantial overtime costs—and the substantial amount of *involuntary* overtime—demonstrate a continuing difficulty in recruiting and retaining bargaining unit employees.²⁸ The Agency does not dispute the claim that overtime in general and mandatory overtime in particular were excessive before the FLOAT program went into effect. In fact, that was one of SACU’s and AFSCME’s primary argument to the Legislature in support of the new FLOAT program. Similarly, AFSCME points to the hazardous nature of the work, and to the immediate impact of that hazard on the employees, the potential impact on the surrounding community, and the probable impact on SACU’s ability to hire.²⁹ And that was SACU’s and AFSCME’s primary argument to the Legislature in favor of the new COAT program.

The parties’ joint success at the Legislature becomes AFSCME’s primary hurdle in interest arbitration. Excessive overtime is relevant to recruitment and retention because excessive overtime shows that the required work must be divided among not enough bodies

that error was clear statutory language, and I have no authority to correct such a “mistake.” The consideration of internal equity under the guise of interest and welfare of the public without meeting the preliminary requirement of the “other factors” paragraph would violate the clear language of the statute.

²⁸Over the nine months from July 2015 to March, 2016, mandatory overtime accounted for about 15% of the Agency’s 91,615 total overtime hours. (Exhibit U19.)

²⁹Union witnesses testified that bargaining unit employees consider on-the-job injuries to be ‘part of the job’ and frequently fail to report such injuries as long as they do not require medical attention beyond the first-aid kit or time loss. No SACU witness contested that testimony, and that apparent acceptance by the Agency is shocking.

which suggests a problem in recruiting and retaining qualified people. But the fact that the work is being divided among not enough bodies can also result from the authorized workforce being too small in the first place.³⁰ It is sometimes less expensive for an employer to pay quite substantial amounts of overtime than to increase the authorized size of the workforce. AFSCME and SACU argued to the Legislature that FLOAT was the answer—or at least *an* answer—to the overtime problem. In fact, they *specifically* argued that the overtime data showed that the authorized workforce was too small. The Legislature responded with the substantial increase in the workforce by funding FLOAT. Will there still be excessive overtime, even with the additional employees? That is certainly not what AFSCME and SOCU told the Legislature, and until we have actual overtime data with a fully functional FLOAT program there is no good reason to conclude that the pre-FLOAT overtime data shows a continuing problem with recruitment rather than showing that the pre-FLOAT workforce was simply too small.

Similarly, AFSCME now argues that understaffing is the reason—or at least part of the reason—that the MHTT work looks so scary that new employees leave as soon as they get a real sense of it.³¹ But AFSCME and SACU joined in selling the Legislature on the COAT program as the way—or at least *a* way—to reduce the hazardousness of the work. Once again, there is no good reason to conclude that the pre-COAT retention data shows a need for an increased hiring wage. In short, AFSCME and SACU made to the Legislature many of the same arguments that AFSCME now makes in interest arbitration; so until we know the effectiveness of the Legislature’s response there is no adequate reason to fund additional remedies.

On the other hand, there is room for substantial doubt about how much bang SACU can expect to get for its certification buck under the proposed College of Direct Support

³⁰The true vacancy rate in this bargaining unit has held fairly steady over recent years: Out of a workforce of roughly 500 MHTTs (including the HTTs), there are generally 20 to 25 fillable vacancies. About half of those, at any given time, are openings that have been posted for internal bidding as required by the CBA. On the other hand, there is always a substantial difference between filled positions and personnel available to work. About 20% of the workforce— about 100 of the roughly 500 MHTTs—will be unavailable to work due to sick leave, family medical leave, workers compensation leave, or administrative leave pending investigation of a claim of abuse. This data at least suggests that the problem has always been less recruitment and more a workforce that has simply been too small.

³¹AFSCME is forced to that position. If the work is just too scary to hire into—accounts in the record have new employees using the expression, “no amount of money”—then increasing the hiring wage is not the answer and steps must be taken to deal with the hazardousness of the work. It is only if the hazardousness is the result of short staffing that an increase in the hiring wage would be a sensible response.

(CDS) program.³² I must agree with AFSCME (Post-hearing Brief at 15) that “SACU could not identify any training that SACU’s employees would receive as part of the program that they do not currently receive, much less any benefit that would be derived from its adoption.” AFSCME argues that this shows the program would be of little real help to the employees and of little real value to the Agency. But Delaware, Maine and Montana require the CDS curriculum and administer it through a state agency, and Connecticut, Kentucky, Oklahoma, Missouri, Wyoming also administer the program through the state but do not absolutely require it. And five other states offer the program as an option for direct care professionals but administer it through some non-state agency. That evidence of acceptability argues strongly that there is substantial value in that certification program.

Conclusion. On SACU’s side of the scale, the CPI history here slightly favors SACU’s proposal; there are no useful comparators; and the State *could* pay the additional cost of AFSCME’s proposal, but that cost would run counter to a series of budget notes urging DHS to curb cost escalation; and it is not clear how SACU could absorb the additional cost in the absence of an Emergency Board rescue. On AFSCME’s side of the scale, SACU has had a distinct problem in hiring qualified personnel over the last five years, and it is not entirely clear whether all the MHTTs would have effective access to useful training under the CDS program.

There is one final problem with AFSCME’s proposal here that would make it problematic even if the addition of FLOAT and COAT did not deflate the significance of the adverse recruitment data. AFSCME’s economic proposal has three parts: eliminate the bottom four steps, add four at the top, and increase rates by 1% as of December 1, 2015. The recruitment data provides some support for the first of those. It makes sense to argue that hiring at what is now step five might enable SACU to attract more and better applicants. But the record contains no justification at all for adding four steps at the top of the schedule: AFSCME does not even argue that senior MHTTs have been leaving SACU in significant numbers, and the record does not seem to support such a claim, so there does not seem to be a good reason for that change in terms of retention. Similarly, nothing at all supports the proposal to increase wages by an additional 1% on December 1, 2015. In short, the recruitment and retention factor supports, at best, only a part of AFSCME’s proposed change, and I am forced to reject it.

³²The CDS program does not include any training on behaviors of sexual abuse survivors or PTSD patients. In fact, it apparently includes no mental health training at all. Rather, it includes units on resume writing. The program’s development among a vastly different service population is perhaps best demonstrated by its requirement of written testimonials from patients or their guardians.

DISCUSSION: OVERTIME PROVISION

*Proposals.*³³ The parties once, long ago, agreed that an employee who was deprived of an overtime opportunity “shall be paid at the overtime rate for actual hours of the overtime assignment...” That language continued through the 2011-2013 CBA. So, too, did an agreement to study the problem. The immediate predecessor agreement, for 2013-2015, changed the basic approach and gave the passed-over employee the right to the next available overtime. Both parties now propose to tinker with that approach, although in different ways; but they both propose to eliminate the study committee.

The Agency proposes to add a 30 day claim window and a 21 day remedy requirement. Here is that proposed language:

LETTER OF AGREEMENT Overtime Assignment Errors

The Employer will continue the following practice for resolving errors in the assignment of overtime. ~~substantiated grievances concerning overtime assignment errors: s~~Should an employee not be offered an overtime opportunity in violation of Article 29 (Overtime) of this agreement, the employee will report the error in assignment within thirty (30) calendar days of the alleged error. Management will verify the error. Management will ensure that the employee’s place shall remain on the overtime list and that employee shall be offered the next available overtime opportunity within twenty one (21) calendar days from the date of verification of the error.

~~The parties agree to establish a joint committee of two (2) management and two (2) Union representatives to review the overtime process for simplification and possible automation. This committee shall not enter into formal negotiations. The committee shall provide an update to the labor/management team.~~

~~In the event that a new system is piloted in a specified home(s), and overtime errors (voluntary, mandatory, expanded) occurring in the pilot home(s) shall be excluded from this LOA.~~

AFSCME proposes to rewrite the Overtime Assignment Errors LOA, keeping the “next available overtime” approach but adding progressive penalties for repeated overtime

³³Neither proposal is crystal clear. The Agency proposal does not indicate how long management would have to “verify the error” and leaves it unclear whether the *offer* of remedial overtime will be made within 21 days of verification—what the language says on its face—or whether the *remedial overtime itself* will be within 21 days of verification. It also apparently leaves it to the general grievance procedure to establish the result if the Agency misses the 21-day deadline (for whatever is required within that period). The Union’s proposal does not indicate whether it is creating rolling 12-month periods—an administrative burden—or adopting a calendar or fiscal year period.

assignment errors.

- a) If the Employer fails to offer an employee an overtime opportunity in violation of this agreement, the Employer shall rectify the error by offering the employee the next available overtime opportunity.
- b) In addition to subsection (a), if the Employer fails to offer an employee an overtime opportunity in violation of this agreement twice in a 12-month period, the Employer shall compensate the employee for the lost overtime by paying the employee four hours of straight-time wages. This subsection shall not apply if the Employer is liable to the employee under subsection (c).
- c) In addition to subsection (a), if the Employer fails to offer an employee an overtime opportunity in violation of this agreement more than twice in a 12-month period, the Employer shall compensate the employee for the lost overtime by paying the employee eight hours of straight-time wages for each additional missed overtime opportunity.

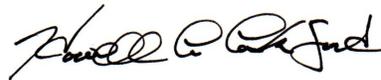
House Managers must approve overtime hours, but in the absence of a House Manager the actual assignment of the approved overtime is sometimes made by a co-worker on duty. The Union agrees that bargaining unit employees were once complicit in causing overtime errors, and that led to the parties' adoption of the current overtime error contract language in the 2013-2015 CBA. The record does not show whether the addition of additional supervisory staff under the FLOAT reorganization will affect the procedure for assigning overtime; but AFSCME points out that the regionalization of overtime—to the new “islands”—and the addition of management personnel is at the heart of the new program. The record does not suggest that the new FLOAT island system will include having a manager on duty in the middle of the night shift when calls commonly come in from staff reporting themselves ill and unable to come to work on the following day shift.

The Agency points out that no other State of Oregon CBA covering a 24/7 operation addresses overtime assignment errors at all. AFSCME responds that the next-available requirement of the immediately prior contract replaced prior language that actually required the Agency to pay for improperly assigned overtime. It seems reasonable to suspect that AFSCME got something at the agency table when it bargained away that prior language, and the record offers no increase in overtime assignment errors since that change or other compelling reason to undo that prior bargain. Certainly, any superiority that AFSCME's overtime language might possibly have is not enough to overthrow the conclusion required by the record with respect to the parties' economic proposals.

AWARD

I select and award SACU's last best offer package.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Howell L. Lankford". The signature is written in a cursive style with a large initial "H".

Howell L. Lankford,
Arbitrator.