

IN THE MATTER OF THE INTEREST ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D., ARBITRATOR

AFSCME (Security Unit),

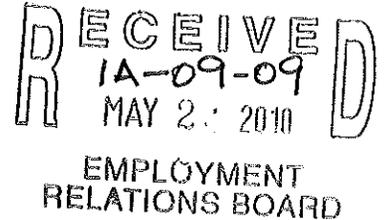
Union,

and

STATE OF OREGON, DEPARTMENT OF
ADMINISTRATIVE SERVICES ON
BEHALF of DEPARTMENT of
CORRECTIONS,

Employer.

INTEREST ARBITRATOR'S
OPINION AND ORDER



(DOC Security Unit, 2009 through 2011 CBA)

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I. INTRODUCTION

Negotiators for the Department of Corrections and the AFSCME Security Unit, consisting of more than 1800 corrections employees at eleven institutions throughout the State of Oregon, agreed on all but two provisions of their 2009-2011 Collective Bargaining Agreement. Those issues are now before me in this interest arbitration

proceeding pursuant to ORS 243.746—namely, 1) proposed unpaid furloughs of unit employees and/or the elimination of holiday pay; and 2) a proposed one step rollback on the salary schedule, to be effective through June 30, 2011 (or for twelve months from the date of a valid interest arbitration award).¹

The parties selected me as their interest arbitrator pursuant to the statutory procedures, and they exchanged “last best offers” (“LBO’s”) on the two outstanding issues on March 18, 2010. See, Exhs. S-3 and S-5. I convened a hearing on April 5-6, 2010 in Portland, Oregon at which the parties had full opportunity to present evidence and argument. Following the close of the testimony, counsel filed simultaneous electronic post-hearing briefs on April 23, 2010.² In my consideration of the issues, I have also been aided by a transcript of the hearing, prepared by a certified court reporter. Having carefully considered the evidence and argument in its entirety in light of the statutory principles set forth in ORS 243.764, I am now prepared to render the following Interest Arbitration Opinion and Order.

II. BACKGROUND

A. Statutory Framework

The AFSCME Security Unit is strike-prohibited, and thus eligible to utilize the statutory interest arbitration procedures. Under that process, the interest arbitrator is

¹With respect to salaries, each party has proposed a step freeze, but the State’s final offer includes a one step rollback in addition. The Union strenuously opposes the rollback.

²The Union’s Brief contained two attachments, an interest arbitration award by Arbiter Timothy D. W. Williams dated April 1, 2010 in *Oregon Dept. of State Police and Oregon State Police Officers’ Assn.*, as well as a reprint of a February 24, 2010 newspaper article from *The Oregonian* regarding the reactions of state workers to a proposal by Gov. Kulongoski that state workers forego holiday pay in order to assist in meeting necessary budget reductions. The State filed an objection to my consideration of the newspaper article, arguing that it constituted evidentiary material submitted after the close of the hearing. Without resolving that issue, I offered the State an opportunity to file supplemental briefing with respect to the piece from *The Oregonian*, and the State submitted a supplemental brief on April 29, 2010.

required to consider the parties' respective LBO's as a package with respect to the unresolved issues, and to select one LBO in its entirety—or the other in its entirety³—by applying the following statutory criteria:

(4) Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, unresolved mandatory subjects submitted to the arbitrator in the parties' last best offer packages shall be decided by the arbitrator. Arbitrators shall base their findings and opinions on these criteria giving first priority to paragraph (a) of this subsection and secondary priority to paragraphs (b) to (h) of this subsection as follows:

(a) The interest and welfare of the public.

(b) The reasonable financial ability of the unit of government to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body. A reasonable operating reserve against future contingencies, which does not include funds in contemplation of settlement of the labor dispute, shall not be considered as available toward a settlement.

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

³ Since the passage of SB 750 in 1995, an Oregon interest arbitrator has been required to select either one side's LBO "package" in total, or to select the other. In other words, unlike many other states (and unlike Oregon before the passage of SB 750), an Arbitrator is not allowed to evaluate the parties' offers on an issue-by-issue basis, selecting the better proposal—or if necessary, combining elements of the two proposals, or even crafting a different contract clause altogether, if necessary—so as to develop a total package that in the arbitrator's view best serves the interests of the parties and the public.

(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.

ORS 243.746(4).

Although the statute directs the interest arbitrator to give priority to criterion (a), i.e. “the interest and welfare of the public,” and to give only secondary priority to criteria (b) through (h), most arbitrators have found it impossible to apply a standard such as “the interest and welfare of the public” without considering the secondary factors. As the late Carlton Snow observed shortly after the enactment of SB 750, “In the abstract, it is impossible to find meaning in the phrase ‘the interest and welfare of the public.’ The meaning of this criterion must be found as it is applied within the context of other criteria and the facts of a given case.” *Oregon Public Employees’ Union, Local 503 and State of Oregon (OSCI Security Staff)*, IA-11-95 (Snow, 1996). At the same time, this dispute arises in the context of a deepening budgetary shortfall for the State⁴ that tends to overshadow most of the secondary factors other than “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.” ORS 243.746(4)(b). In addition, many other units of State employees have already settled with the State, or interest arbitrators have ruled on issues that the parties were unable to resolve on their

⁴ The evidence established that the State has had to deal with a revenue shortfall of approximately \$3.9 Billion in the 2009-2011 biennium, and that an additional shortfall of \$2.5 Billion is projected for the following biennium.

own. Therefore, there is an existing trend on issues such as furloughs and step freezes that tends to elevate the relative importance of the traditional factor of internal comparability, i.e. a comparison between the proposals at issue here and those already adopted, and/or awarded in interest arbitration, in other State bargaining units.

B. Budgetary Framework of the Contested Issues

The State of Oregon is constitutionally required to balance its budget. Unfortunately, when difficult economic times result in high unemployment, income tax receipts decline just as the cost of providing unemployment benefits and other assistance to victims of the economic downturn increases. That is precisely the situation facing the State of Oregon today. The State has responded with a combination of voter-approved tax increases and a program of budgetary austerity. As one approach to dealing with the shortfall, the State has pursued furloughs of State employees, asking each employee to take fourteen unpaid days off during the remainder of the biennium. Another approach has been to pursue salary step freezes and rollbacks. All bargaining units of State employees will have a step freeze, just as the Union and the State have each proposed here, and the overwhelming majority—all but three—will in addition have step rollbacks, as proposed in the State's LBO. Tr. at 176-77.

Despite the uniformity of the furlough approach across units of State employees, there is no "one size fits all" furlough system that will work equitably in every situation. For example, a library or a government licensing office could close one day a week (perhaps on a Monday or a Friday, giving the employees a three-day weekend), which would usually constitute little more than a minor inconvenience to the public. But a correctional institution must continue to function twenty-four hours per day, 365 days per

year,⁵ and because the State's institutions are already staffed near the limits, in many (if not most) cases, an employee serving a furlough day would need to be replaced by another employee, probably on overtime. Thus, furloughs tend not to achieve the desired expense reductions in "round-the-clock" essential operations. *See, e.g.* Exh. S-49 (October 14, 2009 "Furloughs in Round-the-Clock Operations: Savings are Illusory," Report for the Senate Rules Committee, California Senate Office of Oversight and Outcomes).

In recognition of that fact, the State has proposed instead that corrections employees give up holiday pay for the ten holidays remaining in the biennium,⁶ and that each employee take four additional furlough days.⁷ This proposed application of the "furlough" concept, however, raises serious issues of internal comparability. That is, other State employees who have been asked to take unpaid time get an actual day off in return (and if they are lucky, perhaps a three-day weekend in the bargain). Under the State's proposal, the result would be similar, at least to the extent that individual corrections employees do not work on the holiday and lose holiday pay, i.e. the employee would suffer a reduction in income but would have a day off. Corrections employees who

⁵ One cost-saving alternative in the corrections context, which could become necessary at certain levels of budget deficits, would be to close some institutions and release prisoners who have not yet completed their sentences. Obviously, it would generally be in "the interest and welfare of the public" to avoid that approach if reasonably possible.

⁶ Under that proposal, which will be analyzed in detail later, an employee who does not work on a scheduled holiday would not receive the eight hours of "holiday pay" called for under the current CBA. An employee who does work the holiday, on the other hand, would be paid at time-and-one-half for hours actually worked, but would not receive the additional eight hours of "holiday pay." According to the State, this approach would result in the necessary savings, would be easier to administer, and would tend to focus days of decreased staffing on holidays, days when inmate programs and services are already reduced. Thus, according to the State, its plan would result in less disruption to operations and less need to replace a "furloughed" employee with another, often on overtime.

⁷ The State's original proposal would have encompassed fourteen unpaid holidays in the biennium, but because four of those holidays have come and gone, the State has included four furlough days in its LBO.

actually work on the holiday, on the other hand, would also suffer a reduction in pay, but unlike virtually all other “furloughed” State employees, they would *not* receive a day off.⁸

Similarly, step freezes and rollbacks, although they no doubt save the State money, also can create internal inequities and morale issues. For example, the Union argues that “step freezes wreak havoc on the rationality of the pay structure.” Union Brief at 4. That is so, argues the Union, because “new hires end up being paid the same as more senior employees, a status which is carried forward even when step increases are reinstated.” *Id.*⁹ In addition, the step rollback proposed by the State here would in essence undo an “add/drop”¹⁰ agreement reached by the parties for the 2007-09 CBA. The effect would be to deprive the employees of the increased salary step they previously achieved in bargaining—except for new hires and the approximately twenty percent of current employees who are now at the first step (those employees would not be reduced to the prior first step because, as I understand it, that step has been “abolished,” i.e. removed from the State’s payroll system, not just “suspended”). Anger over this perceived unfairness of the rollback, like anger over the inequities inherent in a step freeze, also

⁸ The Union attempts to overcome this inequity in its LBO, the terms of which will be analyzed in detail later. For now, it is enough to note that the Union proposes that employees who cannot be spared by the institution on what would otherwise be a furlough day, work without pay on that day, but be credited with a “personal business day” that they would be entitled to use later at a time when they *can* be spared (which, according to the Union, will often be during a scheduled vacation, i.e. some of the employee’s scheduled vacation time would end up being converted to “personal business” leave instead).

⁹ The Union explains that in a 2003 interest arbitration proceeding between these parties, the arbitrator awarded the State’s proposed step freeze, and employees solidly rejected a tentative agreement for the 2009-2011 CBA at issue here based largely on the employees’ continuing anger over the inequities resulting from the step freeze imposed in 2003.

¹⁰ In an “add/drop,” the parties eliminate the lowest pay step and add a new step at the top of the scale. In effect, then, every employee advances one step on the scale.

contributed to the rejection of the tentative agreement by the employees. Union Brief at 6.¹¹

III. THE SPECIFICS OF THE PARTIES' LBO PROPOSALS

A. Step Freeze/Rollback

Each LBO proposes a one year salary freeze, but the State also proposes rolling back the salaries of all employees on July 1, 2010 to June 30, 2009 levels—except new hires and those currently at the first step (in effect, “suspending” the add/drop Letter Agreement between the parties dated December 13, 2007). *See*, Exh. S-3 at 2. The State points out that virtually every other bargaining unit in the State has agreed to (or an interest arbitrator has awarded) a freeze and step rollback. The Union agrees that a freeze is appropriate, but vigorously opposes any rollback. Thus, the substantive difference between the parties is whether a rollback should be awarded.

The Union concedes that the goal of treating all State employees alike weighs in favor of the State’s proposed rollback. Union Brief at 23. Yet these internal comparability considerations cannot be determinative, according to the Union, because treating them as conclusive “would effectively render collective bargaining and this dispute resolution process meaningless.” *Id.* Thus, the Union urges the Arbitrator to consider the fact that

¹¹ As an aside, there are two unfair labor practice charges pending before ERB in connection with the negotiations that resulted in the rejected tentative agreement. First, the Union has charged that the State violated the law when a Department official, not part of the State’s declared negotiating team, “shopped” a proposal to corrections employees that the State might be willing to grant certain concessions if the Union would agree to forego holiday pay in lieu of more traditional “furloughs.” Those activities, according to the Union, violated the statutory provisions outlawing “direct dealing.” ORS 243.672(1)(3). In addition, the Union contends the State engaged in bad faith bargaining by introducing a new subject into the negotiations, i.e. elimination of holiday pay, later in the process than was allowed under the parties’ agreed ground rules. *See*, Exh. U-13. The State, on the other hand, has filed a charge alleging that the Union’s negotiating team failed to meet its obligation to support ratification of the tentative agreement. *See*, Exh. S-8; *see also*, ORS 243.672(2)(b). While these pending charges form part of the background with respect to the issues before me, the parties have not asked me to consider the substance of the charges in reaching my decision, and thus I have proceeded to consider the proposals as reflected in the respective LBO’s, independently of any allegations of unfair labor practices..

“the 2003 interest arbitration that froze step increases still weighs heavily on employees,” and while “staff understand the need for sacrifice—they have proposed a one year wage freeze and furloughs—[they are] unwilling to accept a roll-back that would exacerbate the problem.” *Id.*

The parties differ on the projected costs to the State under their respective proposals.¹² The State projects the additional cost (over the cost of the State’s LBO) of the Union’s proposal for no rollback at roughly \$4 Million, Exh. S-6,¹³ while the Union’s economist calculated the difference as approximately \$2.8 Million. Exh. U-4.¹⁴ Given the nature of the data, the spread of \$1.2 Million or so between the parties’ respective estimates of the additional cost of the Union’s proposal is not particularly large.

B. Furloughs/Holiday Pay

The State proposes that each employee give up holiday pay for the ten contractually recognized holidays remaining in the biennium, and that each employee also take four unpaid furlough days to bring the total number of furlough days (or the equivalent savings in forgone holiday pay) to fourteen days. The State points out that employees who work on a holiday, although they will lose eight hours of holiday pay, will nevertheless receive time-and-one-half for hours actually worked. Employees who

¹² The Legislature did not appropriate funds for any salary increases in the 2009 Regular Session. Exh. S-21 at 30. Therefore, according to the State, in evaluating the relative costs of the LBO’s, the issue is how much in unfunded costs the Department will need to bear.

¹³ The State estimated the unfunded costs of its proposed rollback as \$3,363,186, compared to unfunded costs of \$7,547,713 under the Union’s proposal for no rollback.

¹⁴ As an aside, the parties’ costing information, in general, seems imprecise, although perhaps precise as it can be under the circumstances, i.e. it appears to be based largely on gross projections based on numbers of employees multiplied by average earnings, etc. without micro analysis (presumably because of lack of reliable data) of issues such as turnover rates, usage of overtime, and similar factors. Thus, I take the parties’ projected costs and savings as reflecting ballpark figures which may be informative in relative terms, but do not necessarily provide the level of reliable detail that would be helpful if the precise costs of the respective proposals were the driving force behind choosing one LBO package or the other.

do not work on a holiday will not receive holiday pay, but they will have the day off, making the effect essentially the same as employees in other bargaining units who are furloughed. State Brief at 15. Moreover, while conceding that the State will need to schedule carefully in order to avoid additional overtime costs with respect to the four furlough days (which could significantly reduce the savings which otherwise might be expected to accrue), the State argues that its proposal would impose minimal operational burdens on the Department because inmates are accustomed to reduced activities and staffing levels on holidays, and because staffing would not be affected by the withdrawal of holiday pay (thus, there is no additional overtime cost associated with the suspension of holiday pay). Consequently, argues the State, “reducing the holiday pay is the most cost effective way to implement these savings, resulting in minimal impact on day-to-day operations.” State Brief at 15.

The Union’s LBO takes a different approach altogether. It gives the Department the option to impose furloughs or not,¹⁵ but if the Department chooses to do so, the Union proposal would give employees the right to request specific furlough days that work best for them. If the Department finds that the requested furlough day can be granted, taking into consideration factors such as staffing levels and the need, if any, for a replacement employee on overtime, then the employee will take a furlough day without pay, just like State employees in other bargaining units. If, however, the Department determines that the requested day cannot be granted, the employee will work as scheduled, but will have his or her monthly compensation reduced by the equivalent of one day. At the same time, however, the employee would receive a “personal business day” to be banked and taken

¹⁵ Given the State-wide use of furloughs, at the direction of the Governor, it seems highly unlikely that the Department would choose not to implement some form of furloughs.

in the future at a time approved by management.¹⁶ In practice, those days would most likely be taken during scheduled vacations, i.e. at a time the employee would be off work in any event. That is so, argues the Union, because its proposal would require the employees to utilize personal business days prior to using accrued vacation days. Another advantage of this approach, says the Union, is that it gives the employees an opportunity to request specific days off, recognizing that it will often not be possible to grant the request, but management will nevertheless be allowed to realize the furlough savings. The final—and in the Union’s view, perhaps most important advantage of its approach—is that the corrections officers “will feel respected and like they are being treated the same as other state employees.” Union Brief at 25.

The Union describes its proposal as “substantially similar” to a furlough provision agreed to by the State in its contract with the Association of Oregon Correctional Employees (“AOCE”), a separate Union that represents correctional employees at some State institutions, performing the same jobs as the employees in this unit. The AOCE approach, which appears in a Letter of Agreement at pages 62-65 of the 2009-2011 CBA between AOCE and the Department, Exh. S-32, achieves “fourteen (14) days of furlough obligation outlined in the Governor’s Budget” by providing for “14 unpaid furlough days per employee, in exchange for pre-scheduled vacation days prior to 6/30/2011.” *Id.* The LOA modifies the contractual vacation bidding process (a change which appears to have been designed to ensure that officers with less seniority could bid for sufficient vacation

¹⁶ There appears to be a difference of opinion between the parties as to whether this future day off would be paid or unpaid under the Union’s LBO. *Cf.* Union Brief at 9 (“If an employee’s requested day is not available, he or she will work, have eight hours of pay deducted that month, and then convert *an already scheduled* vacation day from paid to **unpaid** status”) (italics in original; bold supplied) *with* State Brief at 4 (“If a requested furlough day cannot be approved, the employee will work, have his or her base pay reduced, and then earn a *paid* personal leave day to be placed in a new, separate leave bank”) (emphasis supplied). I will analyze this issue later in the course of my evaluation of the respective proposals.

to meet the required number of furlough days).¹⁷ Once vacations are bid, the employees are required to designate a minimum of two days during each week of scheduled vacation that will be counted as unpaid furlough days, and there are detailed provisions regarding how an employee must meet the furlough obligations if converted vacation days are insufficient, including mandatory scheduling of unpaid furlough for employees who have not scheduled sufficient furlough days. *Id.* at 64. The Union argues that its LBO, like the AOCE agreement, will allow employees to take unpaid days off during their scheduled vacations, creating savings for the Department without impacting operations.

The State counters that the Union's LBO is not the same as the AOCE Agreement in several important respects. First, it would allow employees to work voluntary overtime to make up for furlough days. *See*, Exh. S-5, §§ 5 and 17. The State calculates the additional cost of this feature of the Union's LBO at \$5.2 Million, assuming 75% of employees cover lost furlough wages with overtime work.¹⁸ The State also points out that if employees use personal business days in lieu of paid vacation, their vacation balances will grow beyond 300 hours, at which point the State would be required to buy out the excess under the provisions of Article 32, § 10 of the Agreement. The State calculates this unfunded obligation, assuming 90% utilization of furlough days during scheduled

¹⁷ I note that the Union's LBO here does not include a similar "matrix" modifying the existing vacation bid procedures.

¹⁸ The Union says that the State misreads its LBO proposal, that § 5 is not designed to "guarantee" a right to work overtime, but rather to make clear that "an employee who 'volunteers' for overtime work is treated the same as those required to work overtime." Union Brief at 11. I assume that the Union intends the provisions of § 17 to be read the same way ("employees will be allowed to work voluntary overtime on shifts other than their regularly scheduled shift" on a "mandatory unpaid furlough" day). On the other hand, it is not entirely clear to me why the Union has placed "volunteers" in quotes in its LBO, and I note that at least in some circumstances, the parties' CBA anticipates that a vacancy must be filled from a "voluntary overtime list" in seniority order or on a rotating basis. *See*, e.g. Exh. S-7 at 27 ("Voluntary Overtime" at Coffee Creek Correctional Facility); *see also*, *Id.* at 31 and 35. Thus, it appears to me that employees, or at least some of them, would have a right to work "voluntary overtime" on furlough days under the Union's LBO, reducing the savings to the State.

vacations, at \$4.8 Million. Exh. S-6 at 2.¹⁹ In addition, the State notes that the Union's costing of its proposal understates the true cost because "other personnel expenses" ("OPE"), such as retirement, social security, and other payments associated with payroll are not accounted for, nor does the Union's calculation include any overtime costs necessitated by giving employees some choice of furlough days.

IV, INTEREST ARBITRATOR'S ANALYSIS

A. Step Freeze/Rollback

Beginning with the step freeze and rollback issue, it is difficult for me to ignore the fact that virtually every other State bargaining unit will be subject to a freeze *and* a rollback. Thus, as the Union all but concedes, internal comparability overwhelmingly favors the State's LBO on that issue. The Union's primary argument to the contrary is that this unit still resents the distortions of the seniority-based pay system introduced as a result of the 2003 interest arbitration award, the effects of which continue to the present day. In addition, it is undisputed that roughly 20% of the present bargaining unit will not suffer a pay reduction, because the State does not propose reducing the pay of those at the current first step (the old first step having disappeared with the last add/drop agreement). These distortions, which will linger even after the step freeze ends, create "internal inconsistencies and bad feelings; feelings that exacerbate the frustration caused by the 2003 interest arbitration decision." Union Brief at 13. Moreover, they impact the morale of the employees. Consequently, the Union contends, the State should carry a "heavier

¹⁹ It is not immediately clear to me, however, why the AOCE approach—to which the State agreed in bargaining—does not suffer from the same infirmity. Under that Agreement, as I understand it, employees serve unpaid furlough days during periods of scheduled vacation, i.e. they take unpaid days off instead of vacation days, which could cause their vacation leave banks to grow to the point that buy-out would be necessary.

burden” to justify that rollbacks (particularly when their effects will carry forward into future agreements) are consistent with the “interest and welfare of the public.” *Id.*

I understand and sympathize with the frustrations of the roughly two-thirds of the unit who voted against the tentative agreement, at least in part because of the rollback issue. But many of the same distortions of the salary scale that affect this unit also apply to the many other units of State employees who have already agreed to the rollback. In addition, I recognize that the Union projects that its proposal is not as expensive as the State believes. But whether the additional cost to the State of dropping the rollback would be \$4 Million, as the State argues, or \$2.8 Million as the Union contends, it is simply money that the State does not have. I note that the projected operating reserve in the General Fund at the end of the 2010 Legislative Session in February was \$6.7 Million. Exh. S-11. Thus, even if I were to accept the Union’s calculations on the additional costs of dropping the rollback, i.e. \$2.8 Million, that figure reflects nearly half of the projected reserves *for the entire State budget*. In these times of unprecedented budget woes in Oregon, granting a proposal that represents half of the State’s obviously inadequate operating reserves would be extraordinary.²⁰

More importantly, however, I find the internal comparability argument highly persuasive, despite the Union’s arguments that the effects on morale of this unit outweigh

²⁰ The present economic conditions distinguish Arbitrator Helms’ observation in 2003, quoted by the Union at page 21 of its Brief, that “less than \$4 Million in a total budget of over \$37 Billion is truly de minimus [sic].” The evidence here established that the State has continually and diligently searched for additional sources of revenue and for programs that can be cut without eroding essential services. While I agree that there were economic difficulties in 2003, I take arbitral notice that today’s budget crisis is substantially worse. Moreover, every bargaining unit could make the argument that another \$3 Million or \$4 Million or so could be found to fund worthwhile contract provisions, but the multiplier effect of that form of analysis would quickly overwhelm the State’s efforts at austerity.

those considerations.²¹ It would simply be inequitable to ignore the fact that so many other State employees have accepted (or have been ordered to accept) a step freeze and a rollback. For all these reasons, I find that the interest and welfare of the public strongly favor the State's proposed step freeze and rollback.

B. Furloughs/Holiday Pay

1. Preliminary Issues

The furlough issue presents a much closer case. Before setting forth my analysis of the proper application of the statutory criteria with respect to that issue (and then of those criteria applied to the parties respective "package" LBO's), it is necessary to consider some of the State's objections to the logistics of the Union's furlough proposal—what the State has termed "structural deficiencies." State Brief at 3, fn. 5. I agree that the Union's proposal is less well developed than it could be, although I suspect that lack of development is attributable, at least in part, to the fact that the Union's negotiators were apparently caught by surprise by the timing of the State's declaration that the parties were at impasse.²² Nevertheless, if the proposal itself contains sufficient detail to resolve potentially troubling ambiguities, it seems to me that it would be improper to decline to consider the Union's approach simply because it is not as clear as everyone involved in this process might have hoped. With those observations as background, I turn to the substance of the State's criticisms of the Union's proposal.

The State notes that Section 7 of the Union's LBO provides that "employees can choose to submit a mandatory unpaid furlough time off request form." *Id.* What if an

²¹ The Union also argues that the State invokes internal equity here, yet ignores it in its furlough proposal by asking these employees to be the only ones in the State to lose holiday pay. I will address that issue in the course of analyzing the parties' furlough proposals.

²² Once impasse was reached, each party had just seven days to formulate its LBO.

employee chooses never to submit a form?” the State asks rhetorically. State Brief at 3, fn. 5. I think it is clear that the Union anticipates that in that event the Department would be allowed to “deduct” one day of pay per month (and two days in a month which “shall” be chosen by the employee) under the provisions of Section 6:

In an effort to ensure that scheduling of mandatory unpaid furlough time off is distributed throughout the term of this agreement, and pursuant to section 8 of this agreement, *the remaining time off may be deducted monthly beginning no earlier than June 1, 2010 at the rate of one day per month [eight (8) hours].*

Exh. S-5 at 4 (emphasis supplied). That the Union contemplates mandatory deductions by the Department if the employee chooses *not* to request a specific day off also seems apparent to me from the provisions of Section 18:

Personal business leave will be awarded in exchange for mandatory furlough days off when time off requests cannot be granted *or monthly deductions are made*. Each employee will earn eight (8) hours of personal business leave per denied mandatory unpaid furlough time off request (pro rata share if the employee is less than full time) *or monthly deduction*.

Id. at 5. While I agree that there is ambiguity in the proposal, the structure of these provisions convinces me that the Union is proposing that furlough time off be assigned in several different ways, i.e. by employee requests for a specific day off that the Department determines may be granted (in which case the employee gets a day off without pay); by the Department’s denial of such a request (which results in a deduction of hours for the month for the employee, but also results in a credit of 8 hours of personal business leave to be used in the future); *or* by mandatory deduction by the State of at least 8 hours per month if the employee “chooses” to make no request.²³

²³ That reading is also consistent with the very first operative section of the Union’s Furlough LBO, i.e. “The employer may implement *mandatory* unpaid furloughs for affected employees as follows:” Exh. S-5 at 3 (emphasis supplied). Perhaps more importantly, it is also consistent with the testimony of the Union’s lead negotiator, Tim Woolery. *See*, Tr. at 247, ll. 16-20.

Second, the State notes that the Union's proposal provides that the supervisor "shall grant the request based upon Vacation Seniority or deny based upon the Unit's standard Off Duty Limits." Section 7. The State then asks "What happens if an employee with less seniority submits a request and has the day off approved, and then an employee with more seniority requests the same day off a few days later?" State Brief at 3, fn. 5. I agree with the State that the Union's proposal inadequately addresses the logistics of the process for handling employee mandatory furlough time off requests. *Cf.* the AOCE Agreement, Exh. S-32 at 64, § 3 ("an employee can request unpaid furlough days as substitutions for single days of vacation, subject to the operating needs of the agency. These dates will only be scheduled on a quarterly basis ('90 days out process' currently in place that avoid overtime).") *Id.*

While not necessarily fatal, this relative lack of detail in the Union's LBO on an integral part of the proposal could lead to disputes in implementation that would undermine the efficacy of interest arbitration. That is, interest arbitration proposals should be sufficiently clear that the major terms, at least, are beyond dispute. Under this proposal as written, it would seem reasonable to me to assume that the Department could administratively set a cut off for furlough day off requests, say the 15th of the prior month, and then award workable furlough days off to the most senior employee requesting any particular day by the deadline. But there is no protection for the Department in the specific language of the Union's proposal should someone claim a seniority violation in that process, e.g. a claim of right to exercise seniority in choosing furlough days closer in time to the actual date itself. The AOCE Agreement, by contrast, reflects a completely different approach on this subject, painstakingly setting forth

vacation bidding eligibility, two phases of bidding, and what happens to vacation slots over and above those needed to fulfill the furlough obligations of the unit, as well as what happens to employees who do not have sufficient vacation hours accrued or who do not schedule sufficient unpaid furlough days to meet the furlough requirements. Exh. S-2 at 62-64. The Union's LBO here would have been strengthened by such attention to detail.

Next, the State notes that ¶ 7 of the Union's LBO sets forth two standards for denying furlough requests, i.e. "Agency operating requirements" and "the Unit's standard Off Duty Limits." "Those are not one and the same," observes the State. State Brief at 3-4, fn. 5. I assume—although there is little, if any, evidence before me on the subject—that "agency operating requirements" is a broader concept than "off duty limits." But does the Union's proposal anticipate that "agency operating requirements" should be construed in a limited way because of the conjunction with "off duty limits?" It is not clear. Consequently, I agree with the State that, once again, there is a potential for disputes in application of the language proposed by the Union that tend to lessen the attractiveness of the Union's LBO.

The final ambiguity I need to discuss is perhaps the most important, i.e. whether the banked personal business leave (which, under the Union's proposal, will remain on the books until exhausted) is to be taken with or without pay. While the Union's LBO is not as precise as it could be on the subject,²⁴ it seems highly likely to me that the Union proposes that the personal business leave be unpaid, and it also appears to me that the

²⁴ In fact, the Union's LBO is silent as to whether personal business leave is intended to be with or without pay.

State costed the proposal with that same assumption.²⁵ In any event, despite the ambiguity in the written proposal itself, I find that the Union's proposal should be evaluated on the basis that personal business days would be taken without pay. That is precisely what the Union's Brief says at page 9, and it seems to me that is in fact the only way the Union's proposal could be said to be "substantially similar to the AOCE furlough provision." *Id.*

2. Arbitrator's Evaluation of the Parties' Furlough/Holiday Pay Proposals

Turning to an evaluation of the parties' respective furlough proposals, the State argues that its proposal, which derives most of the cost savings to the State from the suspension of holiday pay, is superior because it combines simple logistics with minimal impact on the operations of the Department. That is so because extensive staff reductions are unlikely to be needed to achieve the necessary savings, and any that are needed will occur mostly on holidays, when inmate services and staffing are already reduced. State Brief at 15. The Union asserts, on the other hand, that the State's proposal unfairly treats corrections employees differently from everyone else in the State—first, by requiring them (at least in many cases) to suffer a reduction in pay without getting a day off, and second, by depriving them of holiday pay unlike any other bargaining unit. Union Brief at 9; 24. The Union also notes, and the State essentially concedes, that it will be difficult to schedule the four required furlough days beyond the holiday pay suspension without incurring overtime expense that will erode some of the holiday pay savings.

In evaluating these arguments, I find it difficult to rely too heavily on the costing of the respective proposals by the parties. For example, I note that the State's costing of

²⁵ See, e.g. Exh. S-6 at 2 (costing the Union's furlough proposal as resulting in 90% "personal days" *offset* by vacation payouts). There is no line in the State's costing analysis, however, for the expense of providing paid personal days *in addition to* the vacation offset.

the Union proposal assumes a 90% payout of vacation to offset personal days taken. Exh. S-7 at 2. But while my review of the vacation accruals in the unit, Exh. S-12, shows that there are a minimum of 250 corrections officers who could exceed 300 hours of accrued vacation by utilizing 112 hours (14 days) of personal leave in lieu of vacation over the remainder of the biennium,²⁶ it appears that there are many who are unlikely to reach that level, and it is entirely possible that many who do reach 300 accrued vacation hours may only exceed the limit by a small amount. Therefore, I do not necessarily agree that the Union's proposal would result in vacation payouts at the level calculated by the State, i.e. that 90% of all leave days taken will require an offsetting vacation payout. There will no doubt be many leave days taken that otherwise would have been taken as vacation, and the resulting payout may be substantial, but I do not see data that convinces me the payout will approach the 90% level reflected in the State's costing assumptions.

Similarly, the source of the State's estimate that 75% of the unit would offset furlough wage losses by working overtime is not entirely clear to me, even though I agree that it appears that some employees would be able to work overtime on days that they would otherwise be on furlough.²⁷ On the other hand, the Union's cost projections did not

²⁶ Article 32 of the Agreement provides for accrual of vacation at graduated rates beginning with 15 work days per 12 months of service (applying to employees from six month's of service through five years of service) and topping out at 30 workdays per year for employees with more than 25 years of service. Exh. S-31 at 69. What I do not find in the record is data regarding the length of service of the individual employees shown on Exh. S-12. Nevertheless, because any employee eligible to accrue vacation, even at the minimum rate, will exceed 300 hours if he or she currently has a balance of 188 hours or more of vacation in the bank, I count at least 250 employees who would exceed 300 hours under the Union's proposal. There are no doubt more than 250, but I cannot tell precisely how many, nor by how much they will exceed 300 hours if they substitute 112 hours of personal business leave for time that otherwise would have been vacation leave deducted from their individual vacation balances.

²⁷ It appears to me that the State derived the 75% figure from the Union's summary served with its LBO, i.e. Exh. S-5 at 1. As I read that document, however, the Union appears to have been providing a cost estimate for traditional furloughs, not the holiday pay suspension proposed by the State. The Union seems to have been pointing out that the State would need to backfill the positions of furloughed corrections employees with other employees on overtime, and if the rate of backfill were 75%, the cost would be \$10.7

include “OPE” expenses or consider whether, and to what extent, overtime might be required to cover for employees who are allowed by management to choose a furlough day. In sum, I find the cost calculations of both sides to be less specific than would be necessary for me to base a selection of one proposal or the other solely—or even primarily—on relative cost.

Considering the other statutory factors, then, the main thrust of the Union’s argument, as noted above, is that the State’s furlough proposal singles out this unit for unfair treatment as compared to other units of State employees. With respect to the employees’ concerns about being the only unit that would not get time off in connection with serving a furlough day, I would make two observations. The first is that under the State’s proposal, those who do not work on a holiday will be treated the same as the furloughed employees in all other units, i.e. they will not work and they will receive no pay.²⁸ I understand the employees’ concerns, on the other hand, that those who *do* work the holiday will be treated differently because they will lose eight hours of holiday pay without getting the day off. It strikes me, however, that employees in other units, facing fourteen days of furlough in the remainder of the biennium, might look at the issue differently. That is, employees losing eight hours of pay for each mandatory furlough day might welcome the opportunity to work some of those days at time-and-one-half to supplement lost income—and they might also value that opportunity more than a day off,

Million. Here, however, the State took the 75% figure and applied it as an estimate of how many employees would *choose* to work overtime on days *they* had been furloughed. That strikes me as an entirely different issue.

²⁸ The Union appears to concede this point. *See, e.g.* Tr. at 251 (Woolery) (people in the security unit who are given a holiday off and thus lose eight hours of pay would be treated similarly to employees in other units, but dissimilarly to the rest of the people in their *own* unit).

even on a holiday.²⁹ Thus, there is more than one way to evaluate the fairness of the exchange involved here, i.e. whether it is preferable to give up eight hours of holiday pay (while retaining the right to work many or most of those holidays at a premium pay rate)—or whether it is more advantageous to retain holiday pay, get the holiday off, but lose fourteen *other* days of income. It seems to me that “unfairness” in this situation, at least to some extent, is in the eye of the beholder.

It is true, however, that under the State’s LBO these employees are being treated differently by being the only unit that will lose holiday pay. Nevertheless, both parties agree that the security unit is a “round-the-clock” operation in which furloughs simply do not achieve the goal of saving labor costs. Thus, there are only two choices: either exempt the corrections employees from the kind of sacrifices other units were being asked to make—which would be demonstrably unfair to the employees in the other units—or find some equivalent method of saving money that makes sense in the corrections environment. Under those circumstances, then, the focus should not be on whether anyone *else* has lost holiday pay. Rather, the appropriate consideration is whether the different units, given their varying individual circumstances, are responding in reasonably equivalent ways to the need to sacrifice in a time of severe budgetary shortfalls.

One such equivalent approach, of course, is reflected in the AOCE’s Agreement with the Department. That approach was acceptable to the State, and the Union argues

²⁹ Indeed, as previously noted, the Union’s furlough proposal seeks to reserve the right of employees to work overtime on a shift other than their own on mandatory furlough days, which suggests to me that the Union believes that many employees value the opportunity to work at premium pay more highly than a day off. Exh. S-5, ¶ 17.

that its proposal here is “substantially similar.”³⁰ I agree that there are similarities between the AOCE approach and the Union’s LBO—and the Union’s proposal here even goes beyond the AOCE Agreement in terms of expanding the possibilities for employee choice of single furlough days (with the concurrence of management, of course).

On the other hand, I have already noted several significant differences between the AOCE approach and the Union’s LBO here. For example, the Union’s proposal does not modify the vacation bid procedure to facilitate the opportunity of each employee, including some less senior employees, to have sufficient scheduled vacation within the biennium to meet most or all of the required number of furlough days.³¹ Also, AOCE does not require the creation and tracking of a separate leave bank. Moreover, the agreement between the AOCE and the State contains detailed logistical procedures and time limits for bidding vacation and for designating some of those days as furlough days, as well as explicit provisions about mandatory assignment of furlough days for employees who do not designate sufficient days or who cannot meet the required number of days off without pay in their weeks of scheduled vacation.

But there are additional components of the Union’s proposal that also seem to me to be less than desirable. For example, ¶ 9 provides that “no employee will be required to take mandatory unpaid furlough time off on a recognized holiday unless the employee and the supervisor agree.” I find this provision unwise in the context of the remainder of

³⁰ The State disagrees that the Union’s proposal is the same as the AOCE Agreement, and argues in any event that the Union could have proposed the AOCE approach in bargaining or in its LBO if it wanted the AOCE deal. I would add that there would have been little, if any, reason for the Arbitrator to be critical of a proposal that mirrored an agreement already reached between the State and another bargaining unit of corrections employees performing essentially identical work. For whatever reason, however, the Union’s LBO proposal did not precisely track the AOCE Agreement on this subject.

³¹ It appears that the AOCE provision is a form of “matrix” on vacation bidding which this unit has historically resisted according to Tim Woolery, the Union’s lead negotiator.

the Union's proposal. That is so even though, as I interpret the Union's proposal, management has extremely limited rights, if any, to assign mandatory furlough days.³² In addition, I find it troubling that employees could utilize existing overtime distribution formulas to potentially work overtime on furlough days, thus reducing savings to the State. Finally, I also note that the Union's proposal, unlike the AOCE Agreement, does not establish a firm deadline for use of mandatory leave.³³ Also, unlike the AOCE Agreement, there is a specifically defined dispute resolution procedure in the Union's proposal, less formal (and presumably more expeditious) than the contractual grievance procedure. *See*, Exh. S-32 at 62-65.

Taking all these factors into account, the best I could say for the Union is that the parties' respective furlough proposals are a wash when judged according to "the interest and welfare of the public" standard. In reaching that conclusion, I have found it difficult

³² The language of the Union's proposal as to whether the Department may designate specific furlough days for an employee is not entirely clear. Paragraph 7, for example, appears to me to provide employees with their choice of furlough days off "subject to Agency operating requirements." Reading this language in isolation, I would assume that "Agency operating requirements" could support *denying* a specific day off, but would not necessarily support a management right to *designate* a specific day off for an employee. That is, on its face the proposal does not seem to provide that an employee could be required to take *any* specific day off, whether on a holiday or not. Paragraph 9 calls that reading into question, on the other hand, by providing that an employee may not be "required to take mandatory unpaid furlough time off on a recognized holiday." The natural negative inference from this provision is that—other than on holidays—the Department *does* have the authority to designate specific furlough days. I suppose it might be reasonable to read into the Union's proposal a right of management to designate furlough day(s) for employees who fail to submit requests for specific days off under the procedure outlined in ¶ 7. In fact, it might be *necessary* to imply such a right in order to make the Union's proposal workable (because otherwise employees could avoid "mandatory" unpaid time off by simply failing to designate days on which they wish to be on furlough). If that is the case, however, I see no justification for precluding the State from designating an otherwise appropriate holiday as a furlough day for an employee who has failed to exercise the option to request some other day off during the month. In any event, this issue illustrates the kinds of ambiguities in the Union's proposal that present potentially troubling issues of implementation were the Union's proposal to be awarded by the Arbitrator.

³³ The AOCE contract provides that all required furlough days will be completed by June 30, 2011. Exh. S-32 at 62 (second bullet point). The Union's proposal here, by contrast, would allow accumulation of personal business days and require the State to keep them on the books until they have been exhausted. Exh. S-5 at ¶ 19. That approach creates the possibility of a continuing financial liability for the Department, e.g. the possible need several years down the road to backfill the assignments of employees on personal business leave with other employees, perhaps employees working on overtime.

to be precise about the relative cost of the respective proposals for the reasons already noted, but I suspect the differences in costs between the two proposals are within the margins of error of the methodologies used to calculate them. Therefore, the relative cost to the State of the two approaches is not determinative. Turning to other considerations, I find that the State's proposal is supported by its simplicity and by its minimal impact on Department operations—assuming the State is able to schedule the four furlough days for each employee without substantially increasing the cost to the State.³⁴ The Union's proposal, on the other hand, would no doubt be better accepted by the employees and thus would result in higher morale levels.³⁵ Unfortunately, the Union's proposal also contains significant ambiguities and gaps in administration that could lead to disputes in implementation. In addition, like the four furlough days under the State's proposal, the Union's approach leaves open the possibility of the increased cost of allowing employees to choose to work overtime under existing OT distribution policies, even on furlough days off, as well as some level of risk that the positions of employees taking personal business leave days in the future (with no firm time limit under the Union's LBO) will need to be backfilled by co-workers on overtime. Under these circumstances, the

³⁴ On the other hand, the entire rationale of the State's "holiday pay" proposal is that furloughs *do not* save money in the corrections context. Therefore, I am skeptical that the State will be able to schedule four furlough days per employee without eating into the cost savings projected from the suspension of holiday pay. At the same time, I note that at the time of the original tentative agreement (which included the suspension of holiday pay), there were sufficient holidays left in the biennium that no additional furlough days would have been necessary to achieve the required level of savings. Tr. at 180 (Cowan). Thus, I find it somewhat difficult to be too hard on the State in connection with the additional "four furlough days" aspect of its proposal, an aspect that was made necessary because of the time delay occasioned, at least in part, by the membership's rejection of the tentative contract.

³⁵ The Union argues the morale issue in connection with two of the statutory criteria, the ability to attract and retain employees, as well as the primary criterion of "interest and welfare of the public." There is no specific evidence before me, however, that would support a conclusion that the State will not be able to attract and retain qualified correctional officers if its proposal is ordered, particularly in this troubled economic climate. I take seriously, however, the argument that the State's proposal might seriously undermine morale in the unit, and thus not be in the "interest and welfare of the public."

strengths and weaknesses of the two approaches tend largely to cancel each other out, and thus it is difficult to say with conviction that one furlough proposal or the other is more in “the interest and welfare of the public.”

C. Final Balancing of the LBO Packages

After carefully considering the ultimate question, I have determined that the State’s LBO should be adopted. My reasoning is as follows. First, I have found that the statutory criteria, particularly comparability among the State bargaining units that are being asked to endure reductions in income to help balance the State budget, favor the State’s proposed step freeze and step rollback over the Union’s proposal for a step freeze only. The Union argues that even if that is the case, however, the “inequitable” and “demoralizing” nature of the State’s furlough proposal should tip the balance in favor of the Union’s LBO. *Id.* After carefully analyzing the evidence and considering the arguments of the parties in light of the statutory criteria, I must respectfully disagree. First, I find that the State’s step freeze and rollback proposal is *considerably* more in the interest and welfare of the public than the Union’s proposal, given the additional savings and the fact that virtually all other State employees have agreed to a rollback.³⁶

Similarly, while I believe that the Union’s furlough proposal is not clearly deficient as compared to the State’s LBO on that subject—at least when given the benefit of a reasonable construction that overcomes some of the most serious objections advanced by the State—that is simply not enough to carry the day. That is so because in

³⁶ Many of the deficiencies of the State’s rollback proposal, as seen by the Union, would no doubt be true of step rollbacks in the other State bargaining units which have already agreed to that approach. *See, e.g. ante* at 14. Thus, I simply cannot in good conscience find that it is in the interest and welfare of the public to exempt the security unit from the level of sacrifice being endured by virtually all other State employees. That is, I could not do so unless the State’s holiday pay/unpaid furlough proposal were so seriously unfair as to overcome the critical consideration of the potential for erosion of employee morale across the State if one unit were excused from a central element of the shared sacrifice expected of all other units.

light of the ambiguities that remain in the Union's proposal as drafted—ambiguities that prevent the Union's proposal from being clearly superior to the simplicity and operational advantages inherent in the State's holiday pay approach—I must find that the strength of the step freeze/step rollback element of the State's proposal, when judged by the statutory criterion of "the interest and welfare of the public," makes its final offer package superior.

I will award the State's package LBO and order that it be adopted.

INTEREST ARBITRATION AWARD

After carefully considering the evidence and argument in its entirety with the provisions of ORS 243.746 in mind, I hereby render the following INTEREST ARBITRATION AWARD in the matter of The State of Oregon, Department of Administrative Services, on behalf of Department of Corrections, and the AFSCME (Security Unit) with respect to the 2009-2011 Collective Bargaining Agreement between the parties:

1. For the reasons described in the foregoing Opinion, I hereby find that the State's LBO package offer better meets the statutory criteria than the LBO of the Union; therefore,
2. I award the State's LBO and order that it be adopted; and
3. Consistent with the provisions of the statute, I hereby order that the parties share the fees and expenses of the Interest Arbitrator in equal proportion.

Dated this 23rd day of May, 2010



Michael E. Cavanaugh, J.D.
Interest Arbitrator