IN THE MATTER OF THE INTEREST ARBITRATION	)	
	)	
between	)	
	)	
Marion County Law Enforcement Association,	)	**OPINION AND**
Association	)	**AWARD**
and	)	
Marion County,	)	
Employer.	)	

Before Arbitrator: Kenneth M. Fitzsimon

Date of Hearing: May 20, 2009

Place of Hearing: Salem, Oregon

Representing the Association: David A Snyder
Snyder & Hoag
P O Box 12737
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Representing the Employer: Jeffrey P. Chicoine
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This Interest Arbitration arises between the Marion County Law Enforcement Association, hereinafter referred to as the "Association", and Marion County, hereinafter referred to as the "County" or the "Employer". Kenneth M Fitzsimon was selected to serve as Arbitrator, and his Award shall be final and binding upon the parties

The parties submitted their last and final offers on the following issues to the Arbitrator as provided in ORS 243.746(3). At the hearing held on May 20, 2009 in Salem, Oregon, the parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. The parties elected to submit the matter on the basis of evidence presented at the hearing as well as post hearing briefs, which were timely received on or about June 26, 2009. The timeline for the issuance of the award herein was extended by agreement of the parties.

RELEVANT STATUTORY CRITERIA

In arriving at his Decision and Award, the arbitrator weighed and considered the following criteria set forth in the Oregon Employees Collective Bargaining Act, ORS 243.746(4) and the Rules of the Oregon Employment Relations Board ("ERB"), OAR 115-40-015(8):

ORS 243.746(4) 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:

(A) For any city with a population of more than 325,000, "comparable" includes comparison to out-of-state cities of the same or similar size;

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

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

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

(g) The stipulations of the parties

(h) Such other factors, consistent with paragraphs (a) to (g) of this subsection as are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment However, the arbitrator shall not use such other factors, if in the judgment of the arbitrator, the factors in paragraphs (a) to (g) of this subsection provide sufficient evidence for an award

LAST BEST OFFERS

Marion County Law Enforcement Association submitted, in summary, the following last best offer:

1. **Article 9 - Vacations**

   Add language allowing the senior requesting employee on same shift to utilize a scheduled vacation if the employee to whom the vacation request was previously granted cancels at least 24 hours prior to such scheduled vacation

2. **Article 13 – Health and Welfare**

   Section 1 Medical Insurance

   Effective on first day of month following execution of the agreement ; Employer to pay 95% of ODS family medical insurance program; if two employees are married or domestic partners, only one such employee will be required to pay the 5% for the couple's ODS family medical insurance premiums

   Employer to pay full premium to continue Kaiser Plan family medical insurance program for each employee in the bargaining unit

Section 3 Dental Premiums

Employer to pay full premium to continue family dental insurance program for each employee in the bargaining unit enrolled in the Kaiser Plan family medical insurance program.

Effective on first day of month following execution of the agreement; employees enrolled in the ODS family medical insurance program will pay 5% of his/her dental insurance premium; if two employees are married or domestic partners, only one such employee will be required to pay the 5% for the couple's dental insurance premium

3. **Article 14 – Wage Adjustment**

Section 2 Effective 7/1/08, employees to receive a 3.00% wage increase.

Effective 7/1/09, Employer will pay the 6% PERS "pick up"

Effective 7/1/2010, 2% to 5% COLA equal to percentage increase of January 2010 All Cities Average CPI-W

4. **Article 44 – Life of Agreement**

3 year agreement, commencing 7/1/08.

Marion County submitted, in summary, the following last best offer:

1. **Article 13 – Health, Welfare and Retirement Benefits**

Section 1 Medical and Dental Insurance

Employer to continue to provide HMO, PPO and POS medical options and two dental plan options currently offered subject to premium share arrangement and modifications to the current PPO plan provided by ODS; such premium share changes and plan modifications to go into effect as soon as practical after implementation of the agreement

A. Employer to pay 95% of premium for medical and dental coverage; employee to pay 5% through payroll deduction with option of pre-tax 125 plan.

B. PPO plan provided by ODS shall be modified as follows:

(i) $100 annual deductible per individual up to $300 per family

(ii) 20%/40% co-insurance will replace the 10%/40% arrangement (20% for providers in network, 40% for other providers, and

(iii) $100 co-payment for each emergency room visit.

Section 4 Association may submit disputes regarding claims of changes in benefit plans to binding arbitration within 30 days of notice

Section 5 Retirement

Employee will pay the 6% of salary to the Individual Account Program (IAP) with Employer held harmless in the event of

final order of court or agency determining such action to be unlawful, ineffective or unenforceable (individual employees to repay any salary or retirement benefits improperly paid, and taxes of FICA, including any ordered interest) In such case the parties shall agree to the means and methods of implementation but shall require fulfillment of the obligation within one year from the expiration of appeals applicable to the determination Nothing in the agreement shall prevent the parties from negotiating lawful wage or benefit provisions utilizing dollars subject to repayment

2. **Article 14 – Wage Adjustment**

Section 1 Effective the first pay period after 7/1/08, employees to receive a 2 13% cost-of-living increase

Effective the first pay period after 7/1/2010, employees are to receive a 2% cost-of-living increase unless either party elects to reopen the agreement. The reopener shall be limited to the subjects of medical and dental insurance, retirement and annual wage adjustments unless the parties agree to reopen on other subjects Such reopener must be noticed in writing, no later than 1/1/2010 In the event of a reopener, the 2% cost-of-living increase for 7/1/2010 shall become void and there shall be no obligation to provide such increase

3. **Article 44 – Life of Agreement and Termination**

Agreement to terminate 6/30/2011. In order to renew or modify the agreement, written notice must be given to the other party by 11/1/2010; negotiations shall begin at such time as agreed by the parties. There shall be no retroactive effect of any provision of the agreement except as specifically provided.

BACKGROUND

Marion County is located in western Oregon and has a population of 314,865 The bargaining unit is composed of deputy sheriffs working either in the Jail ("Institutions") or patrol ("Enforcement") and Administrative Services Secretaries, Corrections Nurses, and Evidence Officers. The parties commenced bargaining over a successor to the expired 2007-2008 agreement by exchanging proposals in November 2007, and held their first bargaining session in December 2007 On December 19, 2008, the County presented its final offer and petitioned for interest arbitration pursuant to ORS 243 742 On May 6, 2009, the County presented a **revised last best offer** differing significantly from its previous Last Best Offer (LBO) in wages, retirement and insurance as well as other provisions

On May 14, 2009, the Association filed an unfair labor practice complaint with the Employment Relations Board alleging multiple violations of the Public Employee Collective Bargaining Act and seeking relief including but not limited to: **"Ordering Marion County, at the sole option of the MCLEA, to resubmit a Last Best Offer that is consistent with both its conduct through the 2007-2008 negotiations and mediation and with its December 2008 Final Offer to the State Conciliator, and proceed to interest arbitration based upon a lawful County LBO with the cost of the second interest arbitration and court reporter to be borne solely by the County".**

The revised LBO is the subject of this interest arbitration[1]

EMPLOYER'S ARGUMENTS

The Employer argues that the primary criteria of the interest and welfare of the public predominate over the other criteria; promotion of public safety and welfare is the very reason for the Sheriff's Office existence; the Sheriff's Office fulfills its mission through its employees, primarily the deputies who staff the jail and enforce the laws on the roads and highways of the County. The substantially higher costs of the Association LBO would significantly hinder the Sheriff's Office in performance of its mission The Association LBO would result in further reductions of another 21 FTE staff positions to 328 workers, which had already been reduced by 26.75 FTE positions from the budgeted staff positions of the 2007-2008 budget (376 FTE) Even when arbitrators have applied the interest and welfare of the public in the context of the secondary criteria, they do return to the primary consideration

The Sheriff's Office cannot fund the Association LBO without making cuts to the personnel budget that are directly proportional to the costs of the Association's proposals; the County itself has no excess funds to underwrite the additional costs of the Association LBO; its adoption would result in fewer officer on patrol and in corrections facilities, likely resulting in releasing criminals from the County jails; such cuts are clearly and directly contrary to the public interest, health, and safety.

All but one of the County's contingency funds are restricted in how they may be expended and are therefore unavailable to fund the Association LBO; the general fund contingency fund is not intended to cover the costs of labor settlements and would be

[1] The parties do not seek an adjudication of the unfair labor practice complaint by the Arbitrator and none is provided by this opinion and award. A potential finding of an unfair labor practice by the ERB will be considered only in the context of Association argument as an "other factor" set forth in ORS 243 746(4)

almost entirely consumed by the excess costs of the Association LBO

There is little dispute that the County does not have the ability to pay the Association proposal and this inability to pay should trump other considerations, including the fact that deputies' pay is lagging behind that in comparable jurisdictions The hard evidence shows that the Sheriff's Office is having no difficulty in attracting and retaining qualified staff The parties have historically used the CPI-W index as the benchmark for their cost-of-living increases; specifically the January to January, 12 months change and applying that benchmark from 2003, the Association members have not lost ground to inflation

The County asserts that the arbitrator should adopt the County's LBO in consideration of the primary or the primary and the secondary criteria combined and should therefore disregard the pending unfair labor practice complaint because it is not a factor traditionally associated with the setting of wages or conditions of employment as contemplated by ORS 243 746(4)(h); likewise, the status quo test applied in the prior interest arbitration between the parties is inapposite because there is no status quo to defend and because the financial needs of the County supply the requisite "compelling need" test for this third level of analysis

ASSOCIATION'S ARGUMENTS

The Arbitrator must give first priority to the interest and welfare of the public, a term undefined in the PECBA The prevailing view of this primary criterion has been found to have meaning largely with regard to the secondary criteria The interest and welfare of the public as defined with reference to the secondary criteria supports the adoption of the Association's LBO

In interest arbitration under ORS 243.746, the burden of proof rests on the party proposing a change in the status quo and no deference is to be given to the Employer's proposals simply because they are the Employer's. The County's choice of comparables is flawed because the counties of Jackson, Deschutes and Linn do not encompass a major city and are isolated rural Counties Deschutes County should also be excluded from consideration as a comparable due to the failure of the County to provide evidence supporting the alleged wages and insurance benefits provided in Deschutes County The use of a median rather than an average as well as data including compensation not presently received[2] by the employees further flaws the County's analysis of comparability

Despite these flaws in methodology, consideration of the County's data supports the Association's position that wages and benefits paid by Marion County lag significantly behind other Oregon Counties with the nearest population range Marion County's payments for medical, dental and vision insurance are not out of line with payments made by the comparables it selected. The County's proposal of a 2% wage increase in third year of the contract (2010-2011) is illusory

The Arbitrator should give no weight to the comparisons between wages and the CPI-W because wages and benefits presently received, comparability and the ability to attract and retain shows that other factors considered by the parties in their negotiations can account for the annual wage increases

Although the County is currently enjoying an increase in the quality of its applicant pool and has reduced vacancies in its Jail, this is likely due to current economic conditions; if one assumes that the economy will improve at some point in the next year or two, it is imperative to assure that the County will be able to attract and retain qualified employees when more options are available

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[2] The County's data includes its *proposed* 2 13% wage increase

The County failed to prove that it is unable to pay the cost of the Association's LBO; it has a substantial burden of proof with respect to its claimed inability to pay

The Association's insurance proposal should be adopted because it is heeding the suggestion of a previous arbitrator to work with the County to provide relief for the increasing costs of insurance benefits; the Association's 5% premium sharing proposal will cause employees to be more judicious in their use of the benefit; it encourages migration to the less costly fully-paid Kaiser plan; the ODS insured employees would pay substantially more than deputies employed by Clackamas and Lane Counties; equity compels a single 5% premium share for married or domestic partnered employees.

The Association proposal on modifying vacation usage policies is eminently reasonable; the County has budgeted staff to allow vacation leave to be used; the proposal would allow another employee to utilize the successfully bid vacation when the bidder cancels; this would reduce the employee's accrued vacation and the County's liability to pay for accrued unused vacation

There is no compelling evidence that justifies modification of the current contractual language regarding a date certain for commencement of negotiations and submission of proposals for successor agreements; prompt opening of negotiations is of critical importance to facilitate a timely agreement. Adding a no retroactivity requirement will impact some of the parties' tentative agreements and could have substantial consequences in the negotiation and implementation of future contracts

DISCUSSION

According to the Employer, under PECBA, the interest and welfare of the public are clearly the primary criteria, and consideration of subsections (4)(b)-(g) are to be given secondary weight. A plain reading of the statute supports that view, but its failure to further define what is "the interest and welfare of the public" renders that language unhelpful in determining which of conflicting LBOs should be adopted as the parties' collective bargaining agreement Due to this paucity of direction, many interest arbitrators have found those words to have meaning with regard to the secondary criteria This Arbitrator shares in the prevailing interpretation of the statute which defines such "interest and welfare" by reference to the secondary criteria (Association Pre-Hearing Brief footnote one lists the many interest arbitrations that have adopted that interpretation) In order to objectively analyze which of the last best offers meets the public interest and welfare, the secondary statutory criteria must be utilized.

In order to determine which of the competing LBOs should be adopted, it is useful to analyze each component proposal in light of the statutory criteria before assessing which of the LBOs, taken as a whole, best satisfies the criteria.

As to **Article 44-Life of Agreement and Termination**, the Association proposes merely to change the dates to reflect a new three year contract term; the Employer wishes to eliminate the date certain for the commencement of negotiations as well as the requirement (in the Association's view) that the written notice by November 1 shall include proposed changes to the contract. The Employer proposal would also provide for no retroactive effect except as specifically provided

In November 2006, the Employer did not submit written proposals by November 1 and the Association claimed violation of Article 44 and filed an unfair labor practice complaint with the ERB The Employer denied violation and before an ERB determination, the parties agreed upon a one-year agreement As part of the agreement, the ULP was dropped without any agreement as to the meaning of the language the Association asserted had been violated The evidence in the record shows that during bargaining for the current agreement, the Association Attorney made remarks to the effect that the County was in violation of Article 44 The statutory criteria of PECBA subsections (4)(b)-(g) provides little assistance in assessing the interest and welfare of the public as to Article 44. It is not unheard of for parties in negotiations to allege violations of contract or longstanding practice in order to secure rhetorical advantage Considered in that way, based upon this record, the Employer proposal to modify the notice requirements of Article 44 is less meritorious than the *status quo* Likewise, as to retroactivity, the differences in retroactive effect in this contract would impact tentative agreements concerning training, court appearances and holiday leave practices,[3] and impose a burden on the process seemingly not justified by the evidence.

The Association proposes to add new language to **Article 9-Vacations**, which would have the effect of allowing another employee to utilize a granted vacation request if the original grantee canceled 24 or more hours prior to the requested vacation The Association vice president testified that "it's rare" and only "recalled a few occasions" when this situation arose. He did not allege any specific denial of such a request, save for his own, about ten years ago. In this instance, it is the Association proposal that imposes a burden upon the vacation scheduling process seemingly not justified by the evidence.

In order to weigh the differing LBOs with respect to insurance and wages, it is necessary to consider the statutory standards set forth in subsection (4)(b) through (h) In applying the standards, the Arbitrator will first consider the criteria set forth in subsections (4)(d) and (4)(e) together.

Comparison of the overall compensation of other employees performing similar services with the same or similar services in comparable communities is the mandate of (e) The only information conveyed by the statute about the choice of such comparables is that

[3] The insurance and wage proposals specify an effective date

they are limited to communities of the same or nearest population range within Oregon In this matter, the community is a county "Population range" is not further defined although some arbitrators have found it reasonable to assume that all Oregon counties with a population of approximately 50 percent more or less than the employer would fall within that limit[4]. The Association suggests that the appropriate communities (counties) as comparators should be Washington, Clackamas, and Lane, excluding Jackson and Deschutes. The Employer suggests Clackamas, Lane, Jackson and Deschutes but also introduced evidence comparing Washington County; although Washington County is approximately 65 percent more populous than Marion County The Association contends that in addition to comparable population, the Arbitrator should consider the size of the largest city within the county and the distance from Portland No authority for this proposition is cited The Arbitrator finds that the appropriate comparables are Clackamas, Lane, Deschutes, and Jackson counties

Subsection (4)(d) obligates the arbitrator to consider the total compensation presently received by the employees and describes total compensation as including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits and all other direct or indirect monetary benefits received The Association takes issue with the Employer calculation of this total compensation for two principal reasons

First; the Employer measures its wages and benefits against the median of the wages and benefits paid by the counties deemed comparable, and second; the Association contends that it is improper to include the 2 13 percent wage increase which would become effective as of July 1, 2008

No authority for the use of the median rather than the mean (average) as a comparator of total compensation is cited, save for a treatise on statistics. The Arbitrator finds the mean

[4] Benton County, No IA-16-01

as the appropriate measure of total compensation The parties cite differing views of whether or not the 2 13 percent wage increase should be included in the calculation of "presently received" compensation. This Arbitrator finds the analysis of Arbitrator Hayduke to be persuasive inasmuch as it is undisputed that under either party's proposal, the employees will be receiving a retroactive wage increase[5]; therefore it is appropriate to utilize the 2 13 percent retroactive increase as presently received compensation

Applying the above-articulated standards to the Employer's own data[6], the overall compensation received by the employees is significantly less than that paid to other employees performing similar services in comparable communities I find that the total compensation is either 6 59 percent or 8 2 percent below the average of the appropriate comparables[7]. These disparities will likely increase in the next two years as two of the comparable communities have contracts that extend through June of 2011

The compensation issues that separate the parties are wages and insurance. The Association seeks a 3 percent wage increase, retroactive to July 1, 2008; a 6 percent Employer paid PERS "Pick Up" in lieu of a wage increase as of July 1, 2009, and effective July 1, 2010, a cost-of-living increase (minimum of 2%, to a maximum of 5%) equal to the percentage increase in the US Cities Consumer Price Index as reported in January 2010 by the Bureau of Labor Statistics (All Cities Average CPI-W) The Employer offers a 2 13 percent wage increase, retroactive to July 1, 2008; and effective July 1, 2010, a 2 0 percent cost-of-living increase unless either party elects to reopen the agreement; such reopener notice to be given no later than January 1, 2010 and such reopener to be limited to the subjects of medical and dental insurance, retirement and annual wage adjustments In the event of a reopener, the July 1, 2010 provision for a 2 0 percent wage increase shall become void

[5] Baker County, No IA-08-06

[6] County EX-24

[7] The difference is based upon whether the current Employer compensation is included or excluded from the averaging In its calculation of mean, the Employer used both methods

The Association notes that all of the comparable communities provide a 6 percent PERS "Pick Up" as part of their overall compensation and argues that a similar practice by the Employer should be a part of the contract to narrow the disparity in overall compensation According to the Employer's data, the average PERS "Pick Up" paid by the appropriate comparables is $1.47 hr. The Association further argues that the Employer offer of a 2.0 percent wage increase effective July 1, 2010 is illusory, as it is very likely that the Employer will reopen the agreement The Employer acknowledges some compensation disparity but asserts its comfort with a history of maintaining compensation within a 5 percent "comfort zone The Employer further points to a history of wage increases as compared to the CPI-W[8] as an additional ameliorative factor to be considered Subsection (f) of the statute mandates that the arbitrator consider the CPI-All Cities Index, commonly known as the cost of living The parties have used the CPI-W as their cost-of-living index It reveals that since 2003, total wage increases have barely exceeded increases in the cost-of-living and that for 2008, the employees lost ground against this benchmark The evidence presented at the hearing does not reveal significant difficulty in recruitment and retention but given an inevitable widening of the compensation disparity if the Employer proposal is adopted, the Arbitrator finds the Association proposal to be more appropriate

The parties are widely apart with proposals on **Article 13-Heath and Welfare** Currently, employees enjoy fully paid medical, dental and vision insurance; ODS and Kaiser, and the County has provided fully paid, no deductible medical insurance since 1990 In a previous interest arbitration between the parties[9]; in rejecting an Employer proposal for a hard cap on insurance premiums with the balance to be paid by employees, Arbitrator Angelo stated that "The Association must also recognize that it cannot expect to enjoy the present arrangement much beyond the current Agreement, and it should start working with the County, and its bargaining unit, to develop a different, reasonable

[8] County EX-26
[9] Marion County, No IA-04-05

approach to health care costs". Arbitrator Angelo found no inability to pay under subsection (b) and no evidence in the record to indicate that the County would have to pay projected premium increases by wholly abandoning planned or desired projects or services.

The Employer proposal would require employees to pay 5% of the premium costs for **either** the ODS medical and dental or Kaiser medical and dental plans Additionally, for the PPO plan provided by ODS, there would be an annual deductible of $100 per individual up to $300 per family, a 20%/40% co-insurance arrangement would replace the current 10%/40% arrangement (40% co-insurance payment for providers outside the PPO network) and a $100 co-payment for each emergency room visit The new premium share arrangements and plan design changes would be implemented as soon as practical after implementation of the Agreement[10] The Employer also proposes that any dispute concerning whether changes to a benefit plan comply with Article 13 shall be submitted to final and binding arbitration within 30 of notice to the Association by the County. The Association proposal would require only those employees who elect to be in the ODS plan to pay 5% of the medical and dental premium; those covered by the Kaiser plan would continue to have the Employer pay 100% of the premium Additionally, if two employees are married or are domestic partners, only one such employee would be required to pay the 5% premium share

According to Mary Campbell, the Employer's health insurance expert, average health plan premiums increase approximately 10 to 12 percent annually, but the increase can be even more, depending on the structure of the plan; effective January 1, 2009, the premium for the ODS-covered Association employees increased by 19.1percent and for the Kaiser-covered employees by 16 59 percent; that if the plan designs remain unchanged, the County can expect an annual premium increase of at least that rate, and

[10] The County is continuing to pay the entire premium under the current plans

possibly higher. She testified that the most common and effective method for employers to keep premium increases down is for employers to attempt to control plan utilization through plan design, which is generally accomplished through cost-sharing at the point of service through higher copayments, deductibles and coinsurance; marginally higher point-of service costs for employees does not discourage employees from accessing health care services when needed, but will encourage to reconsider use of health plans in the case of minor medical issues that do not require a visit to a physician, a prescription, or surgery, such as a common cold; yet it does not reduce the employee's ability to access or receive high quality care, since the employee still has an out-of-pocket maximum to protect against catastrophic loss

According to Campbell, the 2008 Kaiser Family Foundation Employee Benefits Survey lists the average national annual deductible for health plans at $560 per individual or $1344 for a family; the 2008 Mercer Employee Benefits Survey average finds that government-employer health plans provide for a $250 deductible, $20 copayments for primary physicians and $35 co-pay for specialists, a 20 percent coinsurance for inpatient and hospital stays (or $250 for those who use a flat dollar amount) and $1,500 out-of-pocket maximum

She also testified that in Oregon, the average health plan deductible is about $1,000, and the average co-pay is $20 to $30 and increasing She further testified that the current Association ODS and Kaiser HMO plans have such low deductibles, coinsurance and copayments that there is little to no disincentive for use in minor health conditions; without some type of disincentive to use, utilization will likely continue at the current rate[11], resulting in premium increase in the range of 20 percent or above each year

Campbell admitted that the Kaiser Foundation Survey addressed private employers; she

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[11] The "loss ratio" in 2008 was 90 5% and as of the hearing date (5/20/09) was 88%

wasn't sure if it considered public employers; that the Mercer Survey, in addition to including State and City governments may have included the Federal government and regional government employers, and that her testimony regarding Oregon employers was anecdotal only

Health care insurance costs have been contentious issues in collective bargaining for many years in the private sector and the trend has spread more recently to the public sector as well Premium rates have continued to rise, often by double digits Fully paid employer provided insurance is indeed an endangered species Parties have attempted to find ways to slow these runaway costs through a variety of changes in their arrangements; from institution of aggressive wellness programs to cost sharing at point of service The Employer proposal (for changes in plan design) is not atypical of such initiatives What is somewhat unusual about the Employer proposal is that it minimizes the incentive of employees to select the less costly (Kaiser) plan by also imposing a 5 percent premium share on the employees who select it The Employer's stated reason is to encourage the Association to work with the Employer on plan redesign to make them both more affordable. This appears to trade potential long-term cost savings for actual cost increases, for both the Employer and the Association Cost shifting is not unusual, but failing to reduce costs by incenting employees to select a less costly option is counter-intuitive and curious in view of the Employer's asserted financial distress

Both insurance proposals are responsive to the parties' admonition to start working to develop a different, reasonable approach to healthcare costs but the Employer proposal is somewhat overreaching The Arbitrator finds the Association proposal to be more appropriate

The Association asserts that the pending unfair labor practice complaint filed in response to a change in the Employer's LBO on May 6, 2009, "permeates the County's Revised

LBO with uncertainty that constitutes a substantial 'other factor' that weighs against adoption of the County's Revised LBO" In support of this proposition, the Association cites Arbitrator John Hayduke in *Baker County and Baker County Law Enforcement Association* (Hayduke 2007) wherein he found that potential litigation created uncertainty and a lack of finality that weighed against the employer's LBO. The cited decision concerned potential litigation over what the county claimed was a scrivener's error in its LBO. Hayduke found there was peril in an award which "clarified" the LBO as submitted, reasoning that it created uncertainty and therefore did not best serve the interests and welfare of the public. That case is distinguishable on its facts Moreover, if the mere filing of an unfair labor practice charge could tilt an interest arbitration favor of the complainant, it would be remarkable to find an interest arbitration that remained unsullied by cross complaints The Arbitrator finds no statutory or logical support for this argument.

Subsection (b) of the statute requires that the arbitrator consider: 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

The Employer's ability to pay is squarely at issue in this dispute The Association asserts that the Employer bears the burden of proving an inability to pay[12]; and quotes approvingly the admonition of Arbitrator Carleton Snow; "A fixed budget does not provide an impossible barrier to funding economic proposals"[13] The Employer, not surprisingly, has a slightly different perspective and points to Arbitrator Wilkinson's analysis of ability to pay that requires an arbitrator to consider other services provided by the governmental

[12] AOCE v Oregon Department of Corrections, IA-18-01

[13] Bend Firefighters Association v City of Bend, IA-09-95

unit, and its other priorities, and how the union proposal would require reduction in those areas[14]

There is little dispute that there has been a serious and prolonged downturn in the economy of our nation and state This recession has certainly impacted local governments as well, by reductions in tax revenue and by reductions in other sources of income, including state grants

The Sheriff's Office is primarily supported by the Employer's general fund In its budgeting process in the first five months of 2008, the Employer foresaw a slowdown in the economy and budgeted no growth in general fund revenues As a consequence, the Sheriff's Office budget included a cut of 8 FTE staff from the 2007-2008 budget. In December, 2008 when the Employer's final offer was submitted, the Employer was working from an October 2008 projection of general fund revenues In January 2009 a new, lower estimate of general fund revenues was made In March 2009, a revised, lower estimate of general fund revenues was made, resulting in personnel reductions in the proposed budget A revised LBO was submitted on May 6, 2009

The Employer's Chief Administrative Officer John Lattimer testified about the budget process and how any excess costs above the budgeted amount would result in cuts According to the Sheriff's Office, if the Association LBO is adopted, additional cuts over the life of the agreement would be 21 to 34 FTE positions (depending upon the COLA in year three of the agreement). The Employer estimates the additional cost of the Association LBO at a minimum of $1 7 million over the life of the agreement The Association did not present any witness testimony on these assertions

The Association argues that the Employer can pay for its LBO by accessing various

[14] AOCE, No IA-13-03

funds including the general fund contingency, the Rainy Day Fund, and the Sheriff's Office ending fund balance. The Arbitrator has reviewed the testimony of Mr. Lattimer and the testimony of Undersheriff Myers on these issues, and considered the evidence submitted by the parties[15] Based upon evidence, on this record, the Arbitrator concludes that the Employer does not have a reasonable ability to pay the cost of the Association's LBO as that term is used in the statute.

CONCLUSION

Based on the evidence, the statute and for the reasons discussed above, I conclude that the Employer's Last Best Offer is in the interest and welfare of the public While the Association's offer with respect to wages, insurance and term of agreement are superior, the Employer's inability to pay tips the scales heavily in its favor I am particularly concerned about the impact on public safety should reductions in force be necessitated by payment of the Association's Last Best Offer In a less uncertain time, with an ability to pay, the result would be markedly different The parties will likely resume bargaining in less than eighteen months and it may be possible at that time to return to a less polarized and perilous environment. Therefore, based on the record and the statutory criteria, I make the following award.

AWARD

The last best offer of the Employer will constitute the parties' agreement

Respectfully submitted this 17th day of August 2009

Kenneth M Fitzsimon

Arbitrator

[15] 31 Employer exhibits and 53 Association Exhibits plus 4 supplements