

William H. Dorsey.

A Corporation
ARBITRATOR

SUITE 215, 720 S.W. WASHINGTON ST.
PORTLAND, OREGON 97205
(503) 222-3556

In the Matter of the Arbitration between:)
OREGON AFSCME, COUNCIL 75, SALEM, OREGON,) "ME TOO" GROUP GRIEVANCE
The Union,)
and)
EXECUTIVE DEPARTMENT, STATE OF OREGON,)
SALEM, OREGON,)
The Employer.)

Date and Place of Hearing: February 24, 1988;
Salem, Oregon.

Representing the Union: Cecil Tibbetts
Executive Director
AFSCME Council 75
Salem, Oregon.

Representing the Employer: F. Peter De Luca
Assistant Attorney General
State of Oregon
Salem, Oregon.

ARBITRATOR'S DECISION AND AWARD

ISSUES

The issues, as framed by the Arbitrator, are:

Issue 1: Did the employer violate the parties' September 2, 1987 "me too" agreement when it refused to make "a one time payment of \$70.00" to its AFSCME-represented employees, after it had made such a payment to all eligible OPEU-represented employees pursuant to its September 23, 1987 Letter of Agreement with that union?

Issue 2: If the employer did violate the parties' "me too" agreement, what would be an appropriate remedy?

ANSWERS

The Arbitrator's answers to these issues are:

Answer to Issue 1: YES, the employer did violate the parties' September 2, 1987 "me too" agreement when it refused to make "a one time payment of \$70.00" to its AFSCME-represented employees, after it had made such a payment to all eligible OPEU-represented employees pursuant to its September 23, 1987 Letter of Agreement with that union.

Answer to Issue 2: An appropriate remedy is stated in the Arbitrator's AWARD.

THE ARBITRATOR'S FEES AND COSTS ADVANCED

At the hearing, the parties agreed orally that each would bear one-half of the Arbitrator's fees and costs advanced in this case.

A W A R D

The union's October 12, 1987 "me too" group grievance (Joint Exhibit I) is granted, with relief strictly limited to the follow

(A) As soon as practicable after receipt of this DECISION AND AWARD, the employer shall make "a one time payment of \$ 00" to each of its AFSCME-represented employees who were on its payroll on the date the OPEU/State of Oregon 1987-1989 contract settlement was ratified by a vote of its OPEU-represented employe

(B) For the convenience of the parties, and in order to settle this dispute with finality, the Arbitrator will retain jurisdiction in this case until the parties jointly notify him in writing that the employer has complied with the requirements of paragraph (A) of this AWARD.

During this period of retained jurisdiction, either party may refer any dispute or question concerning the implementation of this AWARD to the Arbitrator for a decision by a written notice of such dispute or question, with proof of service of such notice

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ARBITRATOR'S OPINION

FACTS

The bulk of the employer's employees are represented either by AFSCME or the Oregon Public Employees Union.

In 1987, the employer's contract negotiations with these unions were protracted and difficult. As Labor Day approached, negotiations were deadlocked and strikes by both unions appeared imminent.

The crucial issue was money, specifically money for across-the-board salary increases. The governor's budget, which the legislature had approved, called for a two percent increase for

represented employees on July 1, 1987 and another two percent increase on July 1, 1988 (for a maximum cost increase to the employer over the 1987-1989 biennium per employee budgeted of 3.02 percent). AFSCME wanted more for its bargaining units; so did OPEU.

The employer insisted that there was no more money for general (as opposed to specific or selective) salary increases. It did, however, offer both unions various alternatives to its "straight" two percent salary increases each July 1st.

One of these alternatives called for no increase on July 1, 1987, a three percent increase on January 1, 1988, no increase on July 1, 1988, and a three percent increase on January 1, 1989. (This alternative would have a maximum cost increase over the 1987-1989 biennium per employee budgeted of 3.0225 percent. It was, therefore, still in accordance with the governor's budget.)

Another of these alternatives called for a two percent increase on July 1, 1987, no increase on either January 1, 1988 or July 1, 1988, but a four percent increase on January 1, 1989. (This alternative would also have a maximum cost to the employer over the biennium of 3.02 percent. It too, therefore, was in accordance with the governor's budget.)

Without striking, on September 2, 1987, AFSCME accepted the employer's "three percent/three percent increase each January 1st" general salary proposal. However, as part of its total settlement of all issues concerning the parties' 1987-1989 agreements, AFSCME obtained from the employer a "me too" Letter of Agreement which read, in pertinent part:

"The State of Oregon agrees that should the voluntary OPEU and State of Oregon 1987-89 contract settlements provide a higher general salary settlement, either in terms of total salary dollars per employee budgeted for 1987-89 (3.02% cost increase applied on a biennial basis to the respective State compensation plans in effect on June 30, 1987) or in terms of a maximum roll-up of 6.09% over the biennium, the percentage difference would be granted to the AFSCME bargaining units, except for the Mental Health physicians unit.

"Interest arbitration awards are specifically excluded from this agreement. Further, it is understood that certain adjustments are specifically excluded. These include pay equity and selective salary adjustments or modifications to the employee benefit package intended to match the AFSCME flexible benefit option available on the 1988 insurance plan." (Document 2, Joint Collective Exhibit VIII.)

After a ten-day strike, on September 23, 1987 OPEU accepted the employer's "two percent increase July 1, 1987/four percent increase January 1, 1989" general salary proposal. However, as part of its total settlement of all issues concerning its 1987-1989 agreements with the State of Oregon, OPEU obtained from the employer a Letter of Agreement which provided for "a one time payment of \$70.00" for all of the employer's OPEU-represented employees. This agreement read, in pertinent part:

"The Oregon Public Employees Union and the Executive Department for the State of Oregon agree that effective September 24, 1987 the parties will withdraw any and all ULP's filed regarding and pertain[ing] to the 1987-89 contract negotiations. In consideration of these joint withdrawals, it is agreed that all OPEU represented employees who were on the payroll of the employer on or after July 1, 1987 shall receive a one time payment of \$70.00 for settlement in lieu of litigation." (Joint Exhibit VII.)

In late October, 1987, the employer made such a one-time payment to all eligible OPEU-represented employees pursuant to this Letter of Agreement.

In the meantime, by a letter dated October 12, 1987, AFSCME

asserted that each of its represented employees was also entitled to a one-time \$70.00 payment under the parties' September 2, 1987 me-too agreement. It also requested that if the employer did not agree, the employer treat its letter "as a group grievance for all of our AFSCME members covered by the 'me too' memo and that we agree to an expedited arbitration of this dispute" (Joint Exhibit I). The employer replied that it disagreed with AFSCME's interpretation of the parties' me-too agreement, but that it was willing to discuss the selection of an arbitrator (Joint Exhibit II).

By an exchange of letters, on December 2, 1987 the parties agreed to submit their dispute to the Arbitrator. At the hearing, they agreed orally that he was to have full authority to interpret their September 2, 1987 me-too agreement in order to resolve all issues presented by the union's group grievance.

ISSUES

The issues, as framed by the Arbitrator, are:

Issue 1: Did the employer violate the parties' September 2, 1987 "me too" agreement when it refused to make "a one time payment of \$70.00" to its AFSCME-represented employees, after it had made such a payment to all eligible OPEU-represented employees pursuant to its September 23, 1987 Letter of Agreement with that union?

Issue 2: If the employer did violate the parties' "me too" agreement, what would be an appropriate remedy?

ARGUMENTS

Position and Arguments of the Union

The union contends that the employer violated the parties' me-too agreement. It seeks a \$70.00 payment for each AFSCME-represented state employee. It argues:

One, the agreement is ambiguous and therefore unclear on its face. It is couched in general terms, and general terms must be construed.

The controlling phrase is "general salary settlement." The parties contend for conflicting interpretations of this phrase. The Arbitrator, therefore, must determine what the parties intended by using it.

Their intent must be determined by reading the agreement as a whole, not by taking out of context one word, a phrase, or a sentence. Above all, it must be determined by considering the discussions which led up to the final wording of their agreement.

Two, the record shows conclusively that the union asked for, and received from the employer, a broad me-too agreement, with a short list of narrow exceptions. A reading of the agreement as a whole proves this. Consideration of the evolution of its final wording confirms it.

Three, without striking, the union settled for a "general salary increase" which would cost the employer no more than what the governor had budgeted (3.0225 percent over the 1987-1989 biennium per employee budgeted). However, such an increase would result in a "roll-up" over the biennium of 6.09 percent.

It sought, therefore, to insure that if OPEU's "salary settlement", after striking, would cost the employer in total dollars over the biennium more than 3.02 percent per employee budgeted, or if it would at the end of the biennium result in a roll-up of more than 6.09 percent for the OPEU-represented state employees, then the percentage difference would also be granted by the employer to

its AFSCME-represented employees.

This is exactly what the first paragraph of the parties' me-too agreement says. And the second paragraph of that agreement, with its short list of narrow exceptions, did not change the meaning of that first paragraph.

Four, admittedly the "general salary increase" ultimately accepted by OPEU resulted in a 6.08 percent roll-up for the OPEU-represented state employees and, therefore, did not exceed the 6.09 percent maximum specified in the parties' me-too agreement.

Five, it is also true that, standing alone, OPEU's general salary increase will not cost the employer, over the biennium, more dollars than the 3.02 percent maximum specified in the parties' agreement.

Yet, as the employer's chief negotiator with OPEU, Darlene Livermore, testified, the \$70 one-time payments cost the State of Oregon roughly \$1,190,000, because approximately 17,000 state employees received these payments. Accordingly, the employer's overall OPEU salary settlement exceeded the 3.02 percent maximum dollar limit set in the parties' me-too agreement by more than one million dollars.

Six, above all, when the employer then refused to extend this same \$70.00 payment to its AFSCME-represented employees, the State of Oregon broke faith with the union, and with the state employees for whom the union bargains collectively.

Seven, the Arbitrator must not be fooled by the phrase "for settlement in lieu of litigation" used in the employer's September 23, 1987 Letter of Agreement with OPEU. The use of this phrase

cannot conceal the truth about the nature of the employer's one-time payment of \$70.00. This payment was a lump-sum bonus payment to the employer's OPEU-represented employees which would normally be considered part of any general salary settlement. And the Arbitrator must never forget that the parties deliberately used the phrase "general salary settlement" (not the phrase "general salary increase") in their me-too agreement.

But the employer, in order to avoid its obligation to its AFSCME-represented employees under its agreement with the union, deliberately adopted the subterfuge of calling this one-time, lump-sum bonus payment a payment "for settlement in lieu of litigation." The Arbitrator should never allow this subterfuge to permit the employer to circumvent its solemn contract obligation to the union and to the state employees whom AFSCME represents.

Eight, certainly at the time of the OPEU/State of Oregon contract settlement, both sides had ULP complaints pending before the Employment Relations Board "regarding and pertaining" to their 1987-1989 contract negotiations. But the clear quid pro quo for the withdrawal by each party of its ULP's was the withdrawal by the other party of its ULP's. And the employer and OPEU expressly recognized this fact by their use of the phrase "these joint withdrawals" in their September 23, 1987 Letter of Agreement (Joint Exhibit VII).

Yet then, in an attempt to get around the parties' me-too agreement, the employer allegedly had to obligate itself to pay each OPEU-represented employee \$70.00 in order to have OPEU withdraw its ULP's. Could there be a more apparent subterfuge than

this alleged "settlement in lieu of litigation?"

Nine, the employer insisted that the second paragraph of the parties' me-too agreement lists three specific exceptions to the all-inclusive first paragraph. But the employer's \$70.00 payment per OPEU-represented employee does not fit into any of these exceptions.

The union itself had suggested the first exception ("any binding interest arbitration awards") in its first draft of the agreement (Union's Exhibit 1) because any increase in dollar cost to the employer from an interest arbitrator's award would not be part of any "voluntary" general salary settlement between the employer and OPEU.

The union was agreeable to the second exception ("pay equity and selective salary adjustments") because such adjustments have always been negotiated separately from any general salary increase.

Above all, the third exception ("modifications to the employee benefit[s] package") made sense to the union because, as the employer stresses, the employee benefits package of OPEU has never been the same as the employee benefits package of AFSCME.

But the \$70.00 one-time payment was obviously not imposed by an interest arbitrator's award. Nor, by any stretch of the imagination, can it be considered part of any pay equity or selective salary adjustment. And obviously it had nothing to do with any modification in the OPEU employee benefits package "intended to match the AFSCME flexible benefit option available on the 1988 insurance plan" (Document 2, Joint Collective Exhibit VIII).

Accordingly, this lump-sum bonus payment is clearly covered

by the all-inclusive first paragraph of the parties' me-too agreement.

The arbitrator, therefore, should summarily grant the union's group grievance and order the employer to also pay each AFSCME-represented employee a one-time payment of \$70.00.

Position and Arguments of the Employer

The employer replies that it did not violate the parties' me-too agreement because its \$70.00 payments to its OPEU-represented employees obviously are not covered by the express terms of that agreement. It argues:

One, the parties deliberately chose terms which are clear and unambiguous on their face. These terms need no explanation. The use of parole evidence to explain the union's subjective understanding of these terms would be improper.

Two, under these express terms, the only payments which can trigger the employer's "me too obligation" are payments resulting from a higher general salary increase for its OPEU-represented employees:

(A) Which, "in terms of total salary dollars", will cost the employer more than what the governor had proposed in his budget, and the legislature had approved, for general salary increases (3.02 percent over the 1987-1989 biennium per employee budgeted); or (B) Which, "in terms of a maximum roll-up", in the OPEU/State of Oregon compensation plans in effect on June 30, 1987, will exceed "6.09 percent over the biennium."

Three, the \$70.00 payments obviously were not "salary" payments. They were not "regularly paid amounts", but instead were

one-time payments. Nor were they paid "for services." Instead, they were amounts paid to members of a class in return for their withdrawal of claims which could have resulted in substantial liability to the employer.

Four, the employer's September 23, 1987 Letter of Agreement with OPEU expressly states that each of these payments was to be "a one time payment of \$70.00 for settlement in lieu of litigation" (Joint Exhibit VII).

Moreover, both Darlene Livermore, chief negotiator for the employer's Personnel and Labor Relations Division, and Alice Dale, executive director of OPEU, testified that these payments were to be made as part of a settlement of litigation and, therefore, they were paid "in lieu of litigation."

This express OPEU/State of Oregon contract language, and the proven intent of the two individuals who deliberately chose to use it, must be binding on the Arbitrator, just as it was binding on the attorney-in-charge of the Tax Section of the General Counsel's Division of the Department of Justice of the State of Oregon (Elizabeth S. Stockdale).

Five, Ms. Stockdale acknowledged in her October 7, 1987 ruling that the \$70.00 payment "satisfies the requirements for a payment not subject to withholding by the state, and [one] not includable as gross income to the recipients under [the] Internal Revenue Code Section 104", because the employer and OPEU had agreed that the:

"...payment is not made as compensation for services, wages, salary or other financial obligation arising from the performance of services by employes represented by OPEU." (Arbitrator's emphasis; page 1, Employer's Exhibit 1.)

There is not one shred of evidence in the record to support the union's theory that these lump-sum \$70.00 payments were not paid "in lieu of litigation." And although the parties stipulated at the hearing that the Arbitrator had full authority to interpret their me-too agreement in order to settle this dispute, nevertheless they have never given him the authority to ignore what the evidence in the record conclusively establishes.

Above all, the employer has never given the Arbitrator the authority to make a finding of fact which is not based on evidence in the record.

Six, assuming for the sake of argument that these payments can be considered either salary or wages or another form of compensation, nevertheless the effect of such payments still fails to fit other specific requirements of the parties' me-too agreement.

(A) To begin with, these \$70.00 payments were never a budgeted salary line item. As Michael Marsh, a senior budget analyst in the Budget & Management Division of the employer's Executive Department, testified, these payments never showed up as a salary line item in any budget submitted by the governor to the legislature, nor in any request of the governor for additional salary funds from the State's Emergency Board. In fact, according to the unrebutted testimony of Mr. Marsh, these payments were simply absorbed ("eaten") by each of the state agencies who had to make them.

(B) Moreover, the record shows conclusively that these payments had no impact whatsoever on any OPEU/State of Oregon compensation plans in effect on June 30, 1987.

(C) Above all, these payments will not cause the employer to spend more for general salary increases for its OPEU-represented employees during the 1987-1989 biennium than the 3.02 percent maximum specified in the parties' me-too agreement.

(D) As Mr. Marsh also testified, while the AFSCME general salary increase will ultimately produce a roll-up of 6.09 percent over the biennium, nevertheless the OPEU general salary increase will only produce a roll-up of 6.08 percent.

Thus it is obvious that these one-time payments had no impact on the OPEU roll-up and that the OPEU general salary increase itself produced a roll-up of less than the maximum 6.09 percent specified in the parties' agreement.

Seven, the union bases its case not on the wording of the parties' me-too agreement but on the "spirit" of that agreement. Both Roger Auerbach and Cecil Tibbetts testified that they "believed" that they had bargained for "the same total dollars" as OPEU might receive when it settled with the employer and that the parties' me-too agreement ensured that they would get the same "total dollars" as OPEU received.

But the number of AFSCME-represented state employees is simply not as large as the number of OPEU-represented employees. It would have been impossible, therefore, for Messrs. Auerbach and Tibbetts to have reasonably concluded that the State of Oregon would expend the same number of dollars in salary on its AFSCME employees as it will spend on its OPEU employees. Accordingly, Messrs. Auerbach and Tibbetts must have meant that they expected an expenditure by the employer per employee which would be

substantially equivalent, whether the employee was represented by AFSCME or by OPEU.

In any event, however, the AFSCME settlement was at least as favorable, if not more so, than the OPEU settlement. On this point the unrebutted testimony of Michael Marsh must be conclusive. Mr. Marsh stated that AFSCME received more in terms of benefits per employee because its contract with the state for the combined medical and dental insurance premium went from an "up to" figure to a "per employee" figure. This will certainly affect the per dollar per employee amount under the "flexible benefits program through SEBB" (including a "cash back" option) which is scheduled to go into effect on November 1, 1988.

Mr. Marsh also testified that the AFSCME-represented employees received more in terms of selective salary adjustments than did the OPEU-represented employees because of the kinds of employees represented by AFSCME.

As a matter of equity, therefore, it is obvious that AFSCME got a settlement which was in all probability more favorable than that received by OPEU, even with the \$70.00 one-time payment to each OPEU-represented employee.

Eight, the record shows conclusively that there are many ways for the State of Oregon to spend dollars for the benefit of its represented employees which are not salary dollars. In this case OPEU negotiated for a \$70.00 payment per employee which was not salary. Mr. Tibbetts was aware of such a negotiating possibility. After all, by his own testimony, a short time previously he had settled a strike by obtaining a one-time payment in lieu of

litigation for the members of an AFSCME-represented nurses' bargaining unit.

Yet in spite of this knowledge, in spite of having settled a strike on the basis of a one-time payment in lieu of litigation, and in spite of his wide experience in working within the compensation systems of the State of Oregon, Mr. Tibbetts has to admit that the parties' me-too agreement makes no mention of any of these various methods of payment other than "salary."

The parties' agreement, therefore, is specific in what it includes. Admittedly there are certain exceptions. But the enumeration of exceptions cannot alter the plain meaning of what is included in order to include other items beyond that plain meaning.

In short, AFSCME would have the Arbitrator find that Mr. Tibbetts wrote a better agreement than he actually did. But Mr. Tibbetts cannot claim that he was hoodwinked. He covered himself well when it came to salary increases. But he did not cover himself well when it came to lump-sum payments which were part of a settlement in lieu of litigation.

The Arbitrator, therefore, should find that the employer did not violate the parties' me-too agreement and summarily deny the union's group grievance.

ARBITRATOR'S DISCUSSION

The Parole Evidence Rule

Under the parole evidence rule, the Arbitrator cannot consider any evidence outside the four corners of the parties' me-too agreement to vary the plain meaning of any clear and unambiguous terms

used by them. However, if the terms used by the parties in their agreement are ambiguous, and therefore their plain meaning cannot be determined from the parties' contract language alone, then the Arbitrator has a right to look to extrinsic evidence to determine what the parties intended by their agreement.

As Arbitrator McDonald pointed out in his decision in the case of City of Highland Park, contract language must be considered ambiguous, and resort to extrinsic evidence is appropriate, "if plausible contentions can be made for conflicting interpretations [of the language used by the parties]." (Emphasis in the original; 76 LA 811, at 816 (McDonald, 1981).)

In this case, the parties have offered conflicting interpretations of the key phrase used by them in the first paragraph of their me-too agreement, "a higher general salary settlement." And the employer's contention as to what the parties meant by this phrase is no more nor less plausible than the contention made by the union. Accordingly, the language of the parties' agreement is neither clear nor unambiguous on its face. The Arbitrator, therefore, can resort to extrinsic evidence (particularly the negotiating history of the parties) to determine what the parties intended by their me-too agreement.

The Crucial Facts and the Parties' Underlying Positions

The record shows conclusively that:

One, the governor's budget, which the legislature approved, called for "general salary increases" with a maximum cost to the employer over the 1987-1989 biennium per employee budgeted of 3.02 percent.

Two, the employer insisted that there was no more money available for general (as opposed to selective) salary increases than the amount of money appropriated by the legislature, as requested by the governor. And, in effect, it told both AFSCME and OPEU that under no circumstances would it seek additional money for salaries from the state's Emergency Board.

Three, AFSCME accepted these representations of the employer in good faith. It therefore settled its 1987-1989 contract negotiations with the State of Oregon without a strike and for a general salary increase which:

(A) Stayed within the costs parameter of the governor's budget; and

(B) Would result in a maximum "roll-up" of 6.09 percent at the end of the 1987-1989 biennium.

Before settling with the employer without a strike, however, AFSCME asked for:

(A) A written guarantee that any voluntary "general salary settlement" with OPEU would not cost the employer in terms of total salary dollars more than 3.02 percent over the 1987-1989 biennium and would not result in a higher "roll-up" than 6.09 percent; and

(B) A written promise that if the OPEU/State of Oregon general salary settlement was higher than the maximums specified then "the percentage difference would be granted" by the employer to its AFSCME-represented employees (except those in its Mental Health physicians unit).

Four, OPEU did not accept in good faith the employer's representations about the amount of money available for salary

settlements. It therefore only settled its 1987-89 contract negotiations with the employer after a ten-day strike.

Five, the "general salary increase" obtained by OPEU will neither cost the employer, over the 1987-1989 biennium, more than the 3.02 percent per employee budgeted by the governor. Nor will it result in a roll-up for OPEU-represented employees at the end of the biennium in excess of 6.09 percent. However, as part of its total settlement of all issues concerning its 1987-1989 agreements with the State of Oregon, OPEU also obtained from the employer an additional one-time payment of \$70.00 for each of its eligible OPEU-represented state employees.

The employer contends that these lump-sum payments were obviously not part of any "general salary increase" granted to its OPEU-represented employees. In fact, it insists that these payments were not "salary" at all but instead payments "in lieu of litigation." It claims, therefore, that the plain meaning of the parties' me-too agreement excludes such payments, and that the union's group grievance must be denied.

The union replies that admittedly these payments were not part of any "general salary increase" agreed to between OPEU and the employer. But it insists that they were part of the "general salary settlement" between the employer and OPEU and, above all, that since they cost the State of Oregon approximately \$1,190,000, they caused the total dollar cost to the employer of its general salary settlement with OPEU to exceed the 3.02 percent limitation found in the parties' me-too agreement.

The Heart of the Matter

The parties' agreement does not use the phrase "general salary increase." Instead, it uses the phrase "general salary settlement." At the heart of the matter, therefore, is whether the employer's \$70.00 lump-sum payments were payments which constituted part of the "general salary settlement" between the employer and OPEU (as the union contends) or whether they were, in truth, payments made in good faith "for settlement in lieu of litigation" (as the employer contends).

The Arbitrator's Analysis and Reasoning

Every person involved in these proceedings has referred to the parties' September 2, 1987 Letter of Agreement (Document 2, Joint Collective Exhibit VIII) as their "me-too" agreement. And the purpose of a me-too agreement is clear.

Moreover, there is no question that in spite of the phrase "for settlement in lieu of litigation" used by the employer in its September 23, 1987 Letter of Agreement with OPEU, normally a one-time payment (in any amount) to employees of the State of Oregon who are represented by a union would be considered a bonus payment and therefore part of the employer's "general salary settlement" with the union involved.

The question, therefore, is: Must the Arbitrator apply the normal rule applicable to lump-sum payments in this case?

The Arbitrator has concluded that the normal rule applicable to lump-sum payments must be applied in this case, and therefore that the employer's \$70.00 one-time payments to its OPEU-represented employees were part of that union's "general salary

settlement" with the employer for the 1987-1989 biennium. The Arbitrator has reached this conclusion because:

One, the employer and OPEU expressly acknowledged in their September 23, 1987 Letter of Agreement that the quid pro quo for the withdrawal by each of them of all of their ULP's "regarding and pertain[ing] to the 1987-89 contract negotiations" was each party's withdrawal of its ULP's. Their agreement expressly refers to "these joint withdrawals" (Joint Exhibit VII).

Moreover, it is undisputed that the officials of OPEU filed its ULP's, without any vote by the members of its bargaining units authorizing the filing of these complaints. It is likewise undisputed, therefore, that the officials of OPEU had full authority, also without any vote of the members of the bargaining units represented by it, to withdraw all of its ULP's, in consideration of the employer's agreement to withdraw all of its ULP's. And, above all, this is exactly what the employer and OPEU agreed to in the first sentence of their September 23, 1987 Letter of Agreement.

Accordingly, the Arbitrator has no alternative but to regard as a subterfuge on the part of the employer its alleged additional "agreement" to make "a one time payment of \$70.00 for settlement in lieu of litigation" to each eligible OPEU-represented employee.

Two, Darlene Livermore, chief negotiator for the employer's Personnel & Labor Relations Division, testified that the estimated cost to the employer of these \$70.00 payments was approximately \$1,190,000. Moreover, Michael Marsh admitted when questioned that not only were the state agencies involved told that they must

"eat" the cost of these payments, but that they were also told that they must charge these payments to the budget line item "Services and Supplies."

It is axiomatic that the State of Oregon cannot make "gifts" to its employees. It is obvious that these \$70.00 payments were not for any supplies furnished the employer by any OPEU-represented employee or group of employees. Accordingly, the only conclusion that the Arbitrator can reach is that these \$70.00 payments were "for services" (either services rendered in the past or services to be rendered in the future) by every OPEU-represented employee who received them.

Three, in effect therefore, each eligible OPEU-represented employee received a one-time bonus payment from the employer in the amount of \$70.00, and such a bonus payment was clearly part of the "general salary settlement" between the employer and OPEU for the 1987-89 biennium.

Finally, because these one-time payments have already cost the employer in excess of one million dollars, ultimately the employer's general salary settlement with OPEU will cost it, over the 1987-1989 biennium, more than the maximum 3.02 percent specified in the parties' me-too agreement.

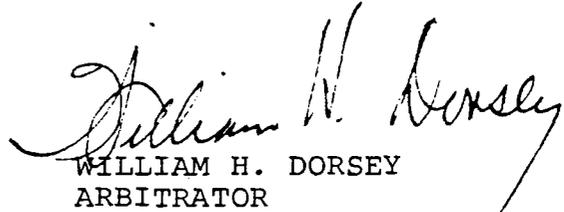
CONCLUSION

The Arbitrator's answers to the issues before him, therefore, must be:

Answer to Issue 1: YES, the employer did violate the parties' September 2, 1987 "me too" agreement when it refused to make "a one time payment of \$70.00" to its AFSCME-represented employees, after it had made such a payment to all eligible OPEU-represented employees pursuant to its September 23, 1987 Letter of Agreement with that union.

Answer to Issue 2: An appropriate remedy is stated in the Arbitrator's AWARD.

May 23, 1988


WILLIAM H. DORSEY
ARBITRATOR

WHD:jk