

**SNYDER AND HOAG, LLC CLIENT NEWSLETTER
2009 -- SECOND EDITION**

INTEREST ARBITRATION

**INTEREST ARBITRATOR REJECTS COUNTY'S FINANCIAL DISTRESS
ARGUMENTS**

The Jefferson County Law Enforcement Association's Last Best Offer (LBO) was awarded by Interest Arbitrator Nancy Brown on February 27, 2009. Under the Association's LBO Association members will receive a 4% increase retroactive to July 1, 2008 (Corrections Techs will receive a 10% increase). In addition, the County's 12 step salary schedule (10.5 years to top step) will be replaced by a 7 step schedule. Effective July 1, 2009 Association members will receive a COLA increase (minimum 3% and maximum 7%) *plus 1%*. In addition all employees will receive an additional floating holiday, employees with 1 to 5 years of service will accrue 2 additional days of vacation leave per year, and FTOs will now receive a 5% premium.

The Association argued that its LBO was supported by comparability and the County's difficulties in attracting and retaining new employees.

The County claimed that it couldn't afford the Association's LBO due to current economic conditions (the hearing was in early December 2008) and that if the Arbitrator awarded the Association's LBO, patrol deputies would be laid off. The Arbitrator did not find these arguments persuasive. The County's Jail and Dispatch Center operated on dedicated funds and there was no evidence of financial distress with respect to those operations (which employed most of the bargaining unit). Arbitrator Brown noted that Sheriff Jack Jones testified that there could be layoffs under the County's proposal as well. He conceded that there was adequate funding for the first year of the County's proposal—that proposal actually cost more than the Association's first year proposal! The Arbitrator found that the County's cost estimates of the Association's LBO were flawed. The 7 step salary schedule proposed by the Association had "greater potential" to improve retention and thus reduce training and recruiting costs. Finally the Arbitrator found that given the prevailing economic uncertainty, the Association's proposed 2 year contract was preferable to the County's 3 year LBO.

Arbitrator Brown's Award is on line at: <http://www.oregon.gov/ERB/MedIAawards.shtml>.

Editorial Comment: This was a significant win not just for the Jefferson County Law Enforcement Association but also for public safety employee unions throughout Oregon. At a time when many public employers are seeking to reopen contracts and impose a wage freeze or cut benefits, Arbitrator Brown's careful scrutiny of Jefferson County's poverty argument shows that Associations should not be afraid to go to interest arbitration even in this uncertain economic climate. In addition her award demonstrates that employer claims of financial gloom and doom should not simply be accepted at face value. We strongly urge that Association's not reopen their contracts or freeze wages unless (1) the Employer produces convincing documentation of its financial difficulties and (2) promises in writing that in exchange for the Association's concessions, no Association members will be laid off.

CONTRACT SETTLEMENT

BEND POLICE ASSOCIATION SETTLES 3 YEAR CONTRACT

The Bend Police Association recently settled a three year contract under which members will receive 2% wage increases July 1 2009 and 2010. Wages will be reopened in the third year of the contract. In addition, a new patrol schedule will be implemented on a trial basis. Association President Camille Morgan led the Association's bargaining team.

Editorial Comment: This is a solid settlement given that (1) the City of Bend has laid off employees in other departments and is planning additional layoffs, (2) the Deschutes County Sheriffs Association recently accepted a one year wage freeze and other Associations are being asked to accept wage freezes and/or benefit cuts, and (3) the cost of living is declining rather than increasing. Even after the City agreed to this settlement it was suggested that the Association and its members give up their wage increase.

EMPLOYMENT RELATIONS BOARD CASES

ERB RULES THAT DALLAS POLICE SERGEANTS ARE SUPERVISORS

In the case of *Dallas Police Assn v. City of Dallas*, UC 007-08 (Feb '09), the ERB found that Sgts. are supervisors: they assign work, do IAs and can effectively recommend discipline, assign shifts to employees, approve vacation and overtime.

ERB DISMISSES A DUTY OF FAIR REPRESENTATION COMPLAINT

In the case of *Melendy v. SEIU & State*, FR 003-08 (Jan '09), the ERB dismissed a DFR complaint for the failure to represent an employee in a reclassification of her position and later in the processing of a grievance. The ERB found that the complainant never clearly told the Union that she wanted help with reclassification and the contract permitted

employees to do this on their own. As for grievance, the Union has wide discretion on whether to process one and in this case no abuse was shown.

ERB FINDS THAT LANGUAGE IN A CONTRACT ALLOWS EMPLOYER TO IMPLEMENT A NEW SICK LEAVE POLICY

The case of *AFSCME v. DOC*, UP 017-06 (Jan '09) arose because the DOC implemented a new sick leave policy, which had the potential for discipline and other management action over possible misuse of sick leave. DOC refused to negotiate over the new policy. The ERB noted that in refusal to enter into mid contract negotiation cases there are two possible employer defenses: (1) the contract gives it the right to do whatever it is proposing, or (2) the contract waives the union's right to bargain over a subject. Here the ERB found that # 1 prevails and all the policy contained were details for implementing language in the contract.

Editorial Comment: This must have been news to AFSCME. Here vague language in a contract was held to be sufficient to allow a policy of management monitoring sick leave usage with the potential for discipline being present. However, a union will still be able to grieve whether there is just cause for any discipline that is imposed, or any other punitive action by management over a perceived abuse of sick leave, such as denial of overtime requests etc.

ULPS' MUST BE FILED WITHIN 180 DAYS OF THE EVENT THAT IS THE SUBJECT OF THE COMPLAINT

In the case of *OSPOA v. OSP*, UP 30-07 (Jan '09), the ULP was filed more than 180 days after the act complained about (contracting out work to DOT), so it was dismissed as untimely.

TRI MET WARS

The case of *ATU v. Tri Met*, UP 062-05 (March '09), involved multiple allegations of ULPs by each side against the other. Ultimately the ERB ruled that it's an ULP to pay your witnesses who testify for you more than you pay those who testify for ATU. It's an ULP to refuse to bargain over the impact of a new job description (\$\$\$). It's an ULP to use documents in a disciplinary case when you've previously agreed not to do so.

YES, AN EMPLOYER HAS TO COMPLY WITH AN ERB ORDER TO REMOVE DOCUMENTS FROM A PERSONNEL FILE

Being a bad loser of a previously reported ULP, in the case of *AFSCME v. City of Portland*, UP 7-07 (Jan '09), the City claimed that being forced to remove documents

from a personnel file would constitute an illegal destruction of public documents. ERB said that purge does not equal destroy.

GRIEVANCE

ARBITRATOR GARY AXON REVERSES DISCIPLINE IN THE CASE OF EPEA V. CITY OF EUGENE

An officer who had 12 years of experience in California and was hired in '99 and had no discipline was given a suspension of 40 hours for excessive force. He had arrested a subject on warrants and the subject was very uncooperative. When the officer was buckling the subject into the back seat of the patrol car, the subject acted like he was going to spit on the officer who was very close to the subject. The officer punched the subject in the mouth in order to prevent this from occurring. The Sgt. who reviewed the force report found the actions of the officer were justified and within policy as did his Lt. A criminal investigation ensued and the officer gave a voluntarily statement. The Linn Co DDA found the act to be justified and refused to prosecute. However, without doing an IA, but relying on the criminal investigation, the Chief found a policy violation for striking a handcuffed subject. In considering discipline a Sgt. recommended a week, a Lt. one day, the Capt. 40 hours and that's what the Chief imposed.

Arbitrator Axon found that the punching was within policy, which allows a distracting blow in order for an officer to get out of a dangerous situation. He also found that the Dept. violated policy by not conducting an IA as it never told the officer what specific policy he allegedly violated. The discipline was set aside.

Editorial Comment: If a Sgt. and a Lt. find the force used as justified, a department will be unable to show that the officer should have known that he was violating policy.

COURT CASES

COURT OF APPEALS DELINEATES WHAT ALLEGATIONS ARE NECESSARY TO SUSTAIN A WHISTLE BLOWER COMPLAINT

The case of *Hall v. Douglas County*, 226 Or App 276 (2009) turned in part on when a complaint of misconduct was sufficient to qualify as a Whistle Blower complaint under Oregon law. The Oregon Court of Appeals had previously looked at the Whistle Blower statute and concluded that the statute along with the relevant legislative history did have

some limitations on what constituted a Whistle Blower complaint. The Court stated that the following did not constitute a Whistle Blower complaint:

“Routine complaints about policies that employees must implement or practices that employees do not like.... The Legislature intended mismanagement to refer to serious agency misconduct having the effect of actually potentially undermining the agency’s ability to fulfill its public mission.”

In this case, the plaintiff alleged that he had been subject to a year of physical abuse, which included sexual harassment, and when he complained about it to a supervisor, he was disciplined for bringing forth his complaint.

The Court noted that physical abuse could actually include criminal conduct, and that retaliating for reporting sexual harassment would certainly be included under the Whistle Blower Statute.

Editorial Comment: A caveat in this case, is that it was the court’s ruling on the fact that Douglas County had been granted Summary Judgment as a matter of law, and the court merely held that plaintiff’s complaint as stated did constitute a claim for Whistle Blower violation. The trial on the merits of this issue has not yet occurred.