SNYDER AND HOAG, LLC CLIENT NEWSLETTER

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REMINDER: YOUR EMPLOYER CANNOT QUESTION YOU ABOUT CONVERSATIONS BETWEEN AN ASSOCIATION OFFICER AND A MEMBER

It is well established under Oregon law that your employer may not interrogate Association Officers or members about conversations where the member is consulting his representative about potential contract violations, an internal affairs investigation, or other workplace concerns. Such interrogation violates ORS 243.672(1)(a).

In *AFSCME Local 189 v. Portland*, UP 7-07, 22 PECBR 752, 797-801 (2008) the Oregon Employment Relations Board declared:

> "Employees engage in PECBA-protected activity when they talk with their union representatives or other bargaining unit members about their workplace concerns. [citation omitted] Maintaining the confidentiality of such discussions furthers the policies underlying the PECBA. [citation omitted] . . . **An employer's inquiry into discussions between employees and their exclusive bargaining representative is a form of surveillance, and the employer has no legitimate reason for such inquiries.**"

If an investigator questions an Association Officer or member about such conversations, the Officer or member should assert that such interrogation is illegal and request (1) that the question be withdrawn and (2) if the investigator is reluctant to withdraw the question, ask him to consult his superiors and/or the employer's labor attorney. If possible call us for advice. However, if ordered to answer such questions, we recommend that you answer the question and then contact us as soon as possible.

OREGON

ARBITRATOR AWARDS CITY OF MILWAUKIE'S LBO

On June 15, 2011 Arbitrator David W. Stiteler issued his award in an interest arbitration between the *Milwaukie Police Employees Association and the City of Milwaukie*. The Arbitrator awarded the employer's Last Best Offer (LBO). The MPEA represents a bargaining unit of seven (7) sergeants and twenty-six (26) officers. Issues in dispute in the interest arbitration included wages and insurance (of course), as well as premium pay for several assignments and other

issues. Arbitrator Stiteler relied heavily on comparability in assessing each of the issues in dispute.

The MPEA proposed CPI based wage increases for both 2010 and 2011 (minimum three (3%) percent maximum six (6%) percent). This proposal was based on contract language which had been in place for more than ten (10) years. The City proposed that MPEA members receive a one (1%) percent increase on July 1, 2010 and a CPI increase on July 1, 2011 minimum one (1%) percent maximum three (3%) percent. Arbitrator Stiteler found that the City could afford to pay either parties LBO. He noted that in recent years the City's general fund ran in the red with the City spending more than its revenues. However for the fiscal year ending June 30, 2010 the general fund balance was in the black by over $300,000 dollars and the City projected a general fund surplus for the year ending June 30, 2011. The Arbitrator gave little weight to a fiscal policy requiring maintenance of a reserve of twenty-five (25%) percent since it had been adopted in January 2011 with this interest arbitration pending. Although the parties disagreed as to the exact costs of the Associations LBO, the Arbitrator concluded that all things considered the City could afford to pay the costs of the Association's LBO.

With respect to comparability the Arbitrator noted that the parties agreed to six (6) comparables. He refused to add Lake Oswego as a comparable rejecting the Association's argument on the basis that Lake Oswego was simply too large. Similarly he rejected Gladstone as being too small. The Arbitrator indorsed the City's LBO regarding wages because it put the police above the market average for the first year and kept them in the same rank compared to their comparables in both years. On the other hand, he found that the MPEA's economic package would move the City above its comparables and as well as raise its rank compared to the comparables.

The Arbitrator found no support for the Association's proposals to increase premium pays for canine officer, SWAT officers and TRI MET officers since the seven (7) comparables did not provide premiums for these positions.

The Association urged that its three-six (3-6%) percent CPI wage proposal be endorsed based on the fact that this formula had long been included in the parties' collective bargaining agreement. Arbitrator Stiteler acknowledged that this argument carried weight, but rejected it in large part because of current CPI trends. He found that the Association's proposal for a minimum increase of three (3%) percent regardless of the CPI essentially guaranteed a three (3%) percent increase during an extended period where the CPI was trending less than that amount.

The Arbitrator endorsed the Association's proposal to increase the amount the City pays for employee's medical and dental insurance premiums from 85% to 95%. Again, he found that the Association's proposal had significant support from the seven (7) comparables. He declared that if the only issue in dispute had been insurance he would have awarded the Association's LBO.

The Arbitrator concluded that although he favored the Association's insurance proposal, the Association also sought a "generous" wage proposal, extreme new incentive pays, and an increase in comp time accrual. All were significant changes from the status quo in the Arbitrator's view, and "the total package is simply too much."

Editorial Comment: Although Arbitrator Stiteler found that the City of Milwaukie could pay the Association's LBO, in light of relatively low rates of increase in the CPI, and considering comparability, the Association's proposal for minimum three (3%) percent wage increases, additional premium pays, and an increase employer contribution for insurance, were "simply too much." Just as Arbitrator Jane Wilkinson did in the recent Vancouver Police Command Unit interest arbitration under Washington law, Arbitrator Stiteler refused to be bound by long standing contract language.

WASHINGTON

ARBITRATOR AWARDS POULSBO POLICE OFFICERS SIGNIFICANT WAGE INCREASES

On May 20, 2011 Arbitrator Amedeo Greco issued his award in an interest arbitration between the *Poulsbo Police Officers Association and the City of Poulsbo*. Wages were the primary issue in dispute.

The *Poulsbo Police Officers Association (PPOA)* proposed to increase wages by three point five (3.5%) percent in 2010 and three (3%) percent in 2011 and 2012. In addition, the Association proposed an additional market adjustment for sergeants of three (3%) percent in 2010 and one point five (1.5%) percent in 2011. The City proposed an increase of one point seven (1.7%) percent for officers and six point four (6.4%) percent for sergeants in 2010. For 2011 and 2012 the City proposed a CPI based increase minimum one (1%) percent and a maximum three (3%) percent. The City argued that it was facing serious fiscal problems over the last several years because of declining sales in real-estate taxes. However it did not assert an ability to pay the Association's proposal. In assessing these proposals Arbitrator Greco focused on base wages along with education longevity and premium pay. He found that the Association made a compelling case that both officers and sergeants were behind their comparables. He awarded the Association's three point five (3.5%) percent 2010 wage proposal. However he declined to award flat three (3%) percent increases in the second and third year of the contract observing that since the Association's members received fully paid health insurance and the City confronted a difficult financial situation, the City's wage proposals tied to the CPI for the second and third year were more reasonable and should be adopted because of economic uncertainty. Finally, Arbitrator Greco found that the record clearly established that sergeants were under paid. He awarded the City's more generous proposal for a four point seven (4.7%) market adjustment in

the first year of the contract for the sergeants in order to "correct this problem as soon as possible."

The Arbitrator rejected the City's proposal to reduce a four (4%) percent VEBA contribution to roughly one (1%) percent. The Arbitrator observed that the four (4%) percent VEBA contribution arose in 2009 when the Association agreed to change insurance plans at the City's request. When the Association agreed to change insurance plans at the request of the City the City agreed to increase the then existing one (1%) percent VEBA contribution to four (4%) percent in 2009 based upon what the City characterized as a "guestimate" of how much more officers would have to pay under the new plan adopted in that year. The Arbitrator rejected the City's proposal to reduce the four (4%) percent VEBA to one (1%) percent in light of the quid pro quo negotiated in 2009. There was no reason not to hold the City to the terms of the bargain it voluntarily agreed to in 2009.

Other proposals were decided primarily based upon comparability considerations.

Editorial Comment: Arbitrator Greco's decision indicates that where an Association can establish a clear comparability argument and make a modest proposal to address that issue as well as increases in the CPI, such proposals will be awarded provided that the employer has not established an inability to pay.

ALASKA

ALASKA SUPREME COURT ADOPTS THE STANDARD DECIDED BY THE U.S. SUPREME COURT THAT CERTAIN ARBITRATOR'S DECISIONS ARE UNENFORCEABLE

In the case of *State of Alaska v. Public Employees Association,* (S-13782 July 29, 2011) the Alaska Supreme Court adopted a standard that had been previously adopted by the U.S. Supreme Court upholding certain arbitration awards unenforceable. The U.S. Supreme Court case which the Alaska Supreme Court cited as authority stated that in order to overturn an arbitrator's reinstatement of an employee who is terminated for misconduct that the court must find "explicit well defined and dominate public policy to which the arbitrator's decision runs contrary." In that case, *W.R. Grace and Company*, the U.S. Supreme Court decided that failing a drug test was not enough to justify overturning an arbitrator's award of reinstatement especially considering the collective bargaining agreement had provisions in it dealing with drug testing and the consequences of failing a drug test.

In this case, when there was a question during a training session in another state whether any person in the motorcycle training had left a strip of rubber on the training grounds the trooper

initially denied that he did it and later admitted that he did leave the strip of rubber. Thereafter, the department let him go back to work and he worked for months before he was terminated for a series of events. The arbitrator reinstated the trooper noting that had the state acted differently, the result of the arbitration would have been very different. But the arbitrator found cases of like discipline where very experienced and senior troopers were dealt with much more leniently than this trooper.

The Alaska Supreme Court announced that since many other states had adopted the U.S. Supreme Court's policy, it would also do so and adopted "…the exception to enforcing an arbitration decision where doing so violate and 'explicit' well defined, and dominate public policy." The Court noted that this doctrine also exists in general contract interpretation rules that if a contract is against public policy, it will be unenforceable. The Court said in making its analyses, it first looks at whether there is a state law that specifically makes the conduct that the employee has committed illegal. It noted in this case where the state was complaining about the reinstatement of a dishonest police officer that there was no law specifically prohibiting such conduct.

The State cited Alaska standards for decertifying a police officer, which included a discharge related to dishonesty or misconduct. However, the Court responded that while the later regulations "…strongly suggest that it is the policy of the State of Alaska not to employ dishonest police officers. But it is unclear whether the regulation means to prohibit employment of police officers who have been dishonest to any degree or in any circumstance." The court went on to note that "there has never been a question that is against public policy for police officers to lie. The question is whether it is against Alaska's public policy to reinstate a police officer who has lied as the police officer did in the present case." The court pointed out that the state certification statute said that the State Council may revoke a police officer's certification for dishonesty, but didn't say it must do so.

It concluded that "while Alaska's laws are *explicit* in favoring a honest police force they are not explicit in requiring a policy of absolute zero tolerance where discerning dishonesty by law enforcement officials, no matter how minor…..nor are Alaska laws *will-defined* at specifying where, precisely, to draw the line between categorically unacceptable dishonesty and dishonesty that does not require termination. To the extent that Alaska laws would permit the termination of a police officer for relatively minor acts of dishonesty, this policy is not *dominate*, because the state has shown lenience for minor acts of dishonesty in the past as we will describe in greater detail below."

The court concluded:

> "We will only intervene in the bargained for labor agreement between the state and PSEA on public policy grounds where the arbitrator's award violates an

> explicit, well-defined, in dominate public policy that is not the case here…. In the present case none of the sources of law cited by the state clearly sets out a public policy as to the minimal consequences it must follow when law enforcement officers commit minor acts of dishonesty. There not directly related to their duties to the public, there not directly towards supervisors in their chain of command and do not rise to the context of a formal investigation. If these facts had been sufficiently different – in particular, the trooper who lied to his superior during a course of a formal investigation directly related to his duties to the public – our public policy analyses would have reached a contrary result."
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> "… we emphasize the following principles from our review of the case law of other jurisdictions:
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> (1.) The public policy exception to labor arbitration disputes involve public employees in positions of public trust is most clearly applicable in the statute or regulation compels the termination (or prevents the hiring) of an employee for committing the relevant misconduct;
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> (2.) The relevant inquiries whether the arbitrator's decision to reinstate the employee violates public policy, not whether or not an employee's conduct does, so statutes or regulations that merely prohibit the conduct are insufficient to support the public policy exceptions; and
>
> (3.) A court should be particularly vigilant when the employee's misconduct was in performance of his or her duties and directed towards the public and could therefore undermine confidence in public institutions that rely on the public's trust."

Finally, the Court commented on the state's argument that the arbitrator should not have reinstated the trooper because the trooper's discipline for dishonesty would negate his ability to testify because "according to the state the U.S. Supreme Court decision in *Brady v. Marilyn* requires that 'the evidence of this trooper's discipline for dishonesty must be disclosed to defense when the trooper is a prosecution witness in a criminal case.'"

The court's response was "if the state intended us to apply a higher standard of scrutiny to the arbitrator's factual findings regarding the greater issue and deferential standard we apply to the arbitrator's other factual findings, it has not said so. The state's argument is waived."

Editorial comment: This line of reasoning can be used in front of Oregon's Employment Relations Board when an employer attempts to invoke O.R.S. 243.706 and claim that an arbitrator's award cannot be enforced because the employee committed "egregious" misconduct.

FORCE SCIENCE

READ FORCE SCIENCE NEWS

In a Force Science newsline dated July 6, 2011, Force Science addressed officer safety issues with the headline "As Police Deaths Mount What Can You Do To Stay Safe". Officer on duty fatalities are up 8% this year and officer murders from gun fire are spiking at an alarming 38% increase the article notes.

We're not going to write more about the article because we want each and every one of our clients to sign up for Force Science free newsletter to read about their important tips for officer survival and to understand the dynamics of deadly force decision making and its aftermath. Here is the Force Science Web page address: http://www.forcescience.org. Go under Force Science News and Past Articles to find this article.