

SNYDER AND HOAG, LLC CLIENT NEWSLETTER

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OREGON

INTEREST ARBITRATION

STATE CORRECTIONS EMPLOYEES WILL TAKE A PAY CUT, JUST LIKE ALL OTHER OREGON EMPLOYEES, INTEREST ARBITRATOR CONCLUDES

Interest Arbitrator Michael Cavanaugh awarded the State of Oregon's Last Best Offer (LBO) for a group of 1800 corrections employees represented by the American Federation of State, County and Municipal Employees (AFSCME Security Unit). Under the two year contract awarded by the Arbitrator, the corrections employees will receive no wage increase, will have their step pay reduced by one step (except for employees at Step 1), will give up holiday pay for ten recognized holidays, and will take four additional unpaid furlough days.

Both the State and AFSCME proposed a wage freeze (no across the board COLA increase) and a step freeze (no annual movement up the salary schedule for employees who had not topped out). The dispute over wages was whether or not wages would be rolled back by one step for all employees except those at the entry level step.

Two considerations lead the Arbitrator to favor the State's proposed rollback of wages. First, he observed that "this dispute arises in the context of a deepening budgetary shortfall for the State that tends to overshadow most of the secondary factors other than ability to pay. At one point in his opinion, Arbitrator Cavanaugh took "arbitral notice" that the State's current budget crisis is considerably worse than its financial difficulties in 2003. He rejected the union's arguments that rollbacks of wages would create internal inequities (new hires being paid the same as more senior employees) and morale issues.

Second, he concluded that the State's step freeze and rollback proposal was "*considerably* more in the interest and welfare of the public" given additional savings (although he also stated that he could not rely on the parties' cost estimates for their LBO's) and "the fact that virtually all other State employees have agreed to a rollback." In Arbitrator Cavanaugh's opinion, "internal comparability overwhelmingly favors the State's LBO" on the step freeze and rollback issue. He declared that he simply could not, in good conscience, exempt this correctional unit from the level of sacrifice being endured by virtually all other State employees. He rejected AFSCME's argument that giving substantial weight to other bargaining units' settlements would render the statutory interest arbitration process meaningless (by putting this strike prohibited unit in the same position as strikable state bargaining units).

With regard to the State's proposal to eliminate holiday pay for 10 holidays and impose 4 unpaid furlough days, the Arbitrator concluded that ambiguities in the union's proposal could lead to disputes if it were adopted and the fact that it differed from a similar program to which the State had agreed for the AOCE unit weakened the union's position. He rejected the union's argument that its members would be treated unfairly compared to other State employees, noting that other employees might argue that compared to the AFSCME unit, they had been treated unfairly. At most the Arbitrator declared that the parties' proposals were a wash with respect to the interest and welfare of the public. This wasn't enough, however, given his conclusion that the State's rollback proposal was "considerably" more in the interest and welfare of the public.

Editorial Comment: The State's budget crisis and rollbacks agreed to by other State employee bargaining units (or imposed on them by interest arbitrators) determined the result in this dispute. This award portends difficult bargaining in coming years. Two days after this award was issued, in response to a revenue forecast showing a \$560 Million shortfall, Governor Kulongoski announced that all State agencies would have to cut their budgets by 9%. The Governor acknowledged that layoffs would likely result.

DPSST CASE

DPSST CHANGES IT CERTIFICATION RULES: HALF AN APPLE IS GIVEN

The administrative rules for DPSST on whether to decertify an individual use to give grounds for certification that the employer had even started termination proceedings. However, as a practical matter DPSST would wait until an arbitrator's decision as to whether to decide whether to decertify an officer for allegations of misconduct. However, DPSST was never obligated to agree with or follow the arbitrator's decision.

The new rules that DPSST adopted now provide that if the arbitrator makes a ruling that the underlying facts upon which decertification could be based were not proven then DPSST will administratively close the matter. However, if the arbitrator found that the facts occurred or did not make a finding regarding to whether the facts occurred then DPSST can go ahead and decertify the individual. OAR 259-008-0070 (9)(c)(E), subsections (i)(ii)(iii).

In a recent case, a corrections officer was reinstated by an arbitrator who found that the conduct occurred, but there was a number of mitigating factors that did not justify termination. Nevertheless, DPSST went ahead and decertified that corrections officer.

COURT

OREGON SUPREME COURT AFFIRMS THE RIGHT OF AN ADMINISTRATIVE AGENCY TO SET STANDARDS FOR DECERTIFICATION OF A PROFESSIONAL

The case of *Coffey v. Board of Geologist Examiners*, 348 Or 494 (2010), involved a decertification of a geologist, but the rules the Oregon Supreme Court set out would be applicable to DPSST as well.

The Court gave great deference to a legislative instruction to an administrative agency to adopt rules, including defining gross negligence and negligence, and found in this case the administrative agency acted appropriately.

Editorial Comment: This by analogy means that DPSST has the authority to enact the rules it has and probably a challenge to the rules that were changed will not be successful. Further work is needed by OCPA so that the mitigating factors found by an arbitrator in many cases cannot be blithely ignored by DPSST when it on an ad hoc basis decides to terminate an employee who a professional arbitrator decided should be reinstated to the employee's position.

EMPLOYMENT RELATIONS BOARD

ERB ALLOWS THE POLICE ASSOCIATION TO REPRESENT SPECIALIZED STRIKABLE POSITIONS IN THE POLICE DEPARTMENT BUT NOT POSITIONS THAT EXIST ELSEWHERE IN THE CITY

The case of *Beaverton Police Association v. City of Beaverton and SEIU*, UC-13-09, occurred because the Association tried to add to its bargaining unit the positions of support specialist I and support specialist II and the program coordinator which works on radar. The ERB held that because the support specialist I and II positions existed elsewhere in the City and were not unique to the police department, that they could not be included in the bargaining unit, but the photo radar program coordinator which was unique to the police department could be included in the Association.

Editorial Comment: This case continues prior case law. If there is a generic clerical type position in the police department which exist elsewhere in a city or county it will be virtually impossible to add those classifications to a police association if either the city or other the union which may represent the employees object.

EMPLOYMENT RELATIONS BOARD RULES THAT DECLINING REVENUES CAN JUSTIFY NEW LAST MINUTE REGRESSIVE FINANCIAL PROPOSALS

In the case of *Oregon Bargaining Council v. Rogue River School District*, UP-062-09, the District started with interest based bargaining and later went to traditional mediation. The District also discovered its revenues were declining, and it couldn't even afford its own proposals

unless it made further layoffs. Therefore, the District modified its proposals by reducing them during the bargaining process.

The Board ruled that making regressive proposals does not constitute per se bad faith bargaining. It stated that:

“We analyze the specifics of a party’s proposal as only one of the several factors we consider to determine whether the totality of circumstances indicates that a party bargained in bad faith. Thus proposals that are unduly harsh, unreasonable or include roll backs, i.e. reductions in existing wages and benefits are only an indicator of bad faith.”

The Board then indicated that what was important to it was:

“Dilatory tactics, contents of proposals, behavior of a party’s negotiator, nature and number of concessions made, failure to explain the bargaining position and the course of negotiations.”

The Board adopted case law with approval from the National Labor Relations Act that stated that the real issue was whether the:

“Totality of circumstances demonstrates that a party has a general desire to reach an agreement and cannot rise solely on the content of the proposals made.”

The Board also found the District’s making new proposals in mediation was not per se bad faith bargaining. The Board noted that the District was dealing with declining revenue. The Board did reiterate that a party engaged in “per se bad faith bargaining” if it makes a proposal on new issue in mediation. The Board found none occurred here as the parties were negotiating over monetary issues.