

## **SNYDER AND HOAG, LLC CLIENT NEWSLETTER**

**2009 -- FOURTH EDITION**

### **OREGON INTEREST ARBITRATION**

#### **ARBITRATOR AWARDS MARION COUNTY'S LBO IN LIGHT OF THE COUNTY'S INABILITY TO PAY**

The Marion County Law Enforcement Association recently went to interest arbitration notwithstanding the current economic crisis because Marion County proposed minimal wage increases, reductions in health insurance benefits and insurance premium sharing for all members. Although Arbitrator Ken Fitzsimon favored almost all of the MCLEA's proposals on the issues, he concluded that he must award the County's Last Best Offer (LBO) due to the County's financial problems.

The Arbitrator concluded that the MCLEA's proposal on wages was more strongly supported by the statutorily mandated factors than was the County's wage proposal. He concluded that Marion County lagged behind comparable County's and that under the County's proposal (2% in 2008, a freeze in 2009, and 2% subject to a wage, insurance and PERS reopener in 2010), that lag would increase. Similarly, the Arbitrator found that the Association's insurance proposal was more strongly supported by the statutory factors than was the County's proposal to reduce benefits and require all employees to pay 5% of their insurance premiums—he described the County's proposal as “overreaching”.

Nevertheless, the Arbitrator awarded the County's LBO because he found that the County did not have “a reasonable ability to pay the cost of the Association's LBO.” He declared that he was “particularly concerned” about the impact on public safety if the Association's LBO were awarded since concluded that such an award would result in layoffs.

*Editorial Comment: These are tough times in which to win an interest arbitration. The economy and local government budgets are suffering. Given this context, arbitrators are likely to give employer pleas of poverty considerable weight and may be reluctant to closely scrutinize the evidence supporting those claims. The MCLEA argued, and it's lawyer still believes, the County's budget had sufficient resources to pay the Association's LBO. However, the Arbitrator accepted the County's evidence that the financial sky was falling—those claims will be closely monitored against reality in the future*

*When the County substantially reduced its LBO from the wages and insurance offered in its Final Offer, the Association filed an unfair labor practices charge with the Employment Relations Board challenging the County's regressive bargaining as a violation of the duty to bargain in good faith. A hearing on that charge is set for later this month. If the Association prevails, it will re-arbitrate its contract.*

*The Arbitrator's Award will provide substantial support for a wage catch-up when the County's financial condition improves.*

## **EMPLOYMENT RELATION BOARD (ERB) CASES**

### **LANE COUNTY ADMITS TO AN UNFAIR LABOR PRACTICE BY VIOLATING THE GROUND RULES DURING BARGAINING**

When bargaining with AFSCME, the main courthouse union, the parties had a ground rule that said neither party would issue a press release without notifying the other party first. After three mediation sessions the county issued a press release indicating that it was going to implement its last offer. It subsequently stipulated to an unfair labor practice, admitting that it did not notify AFSCME before it did so, agreed to a fine of \$500, and reimbursed AFSCME for its filing fees.

*Editorial Comment: A violation of ground rules can be enforced as an unfair labor practice.*

### **A SCHOOL DISTRICT COMMITTED AN UNFAIR LABOR PRACTICE WHEN IT REFUSED TO RELEASE THE NAME OF STUDENT WITNESSES TO AN INCIDENT WHICH LEAD TO A GRIEVANCE**

In this particular case, a bargaining unit member was issued a reprimand for misconduct. The vice principle had interviewed approximately five students in his investigation of the incident. While the district provided summaries of the interviews, it refused to provide the names of the students citing federal and state confidentiality laws for its reasons to do so. The ERB rejected the district's defense and ruled that the district had an obligation to provide names of students to the association which was attempting to evaluate the grievance.

The ERB specifically rejected the idea that releasing the interviews of students violated their federal or state laws concerning confidentiality of student records. It found that this information was not an education record under federal or state law.

### **INDIVIDUAL COMPLAINTS AGAINST MANAGEMENT POLICY IS NOT A PROTECTED LABOR ACTIVITY**

The case of *Eugene Chapter of School Professionals (AFT) v. Ridgeline Montessori Public Charter School*, UP-34-08 (2009), arose because a teacher was upset about the school district's placing a number of teachers on a plan of assistance. The individual teacher called school board members and a superintendent and at one point threatened to organize a strike. The district later

placed the teacher on a plan of assistance and gave her a reprimand for unprofessional conduct and for problems with her communication skills.

The union filed an unfair labor practice complaint alleging that this was in retaliation for protected PECBA, collective bargaining activity. The ERB rejected that contention. The ERB adopted the school's contention:

“... the statements (the teacher) made during this phone call were a reckless and impulsive expression of her own personal opinions about school working conditions and involved no PECBA protected activity... Protected activity does not include strictly individual complaints about working conditions and other protest actions that are unrelated to the activities of the labor organization.” Page 13 of 17 (teacher's name omitted).

The ERB went on to note that a meeting that the teacher had with the district superintendent was to complaint about a principal and that was not sponsored by the labor organization. Therefore, participation at the meeting cannot be viewed as participation in activities of a labor organization. Also, in the past the ERB had concluded that an individual decision to engage in a “one-man work to rule” response to the employer's policy was not protected activity because the conduct was not sanctioned by the union. In another case, the ERB has also held that an officer's declaration that “the superintendent is an uneducated moron” was not a PECBA protected statement since it was an individual complaint and was not connected to any action by a labor organization.

*Editorial Comment: If you are going to complain about an employer do it through your labor organization.*

### **AN EMPLOYER'S REFUSAL TO CALCULATE DUES DEDUCTIONS AS REQUESTED BY THE UNION CONSTITUTES AN UNFAIR LABOR PRACTICE**

The case of *AFSCME v. Hood River County*, UP-11-08 (2009), arose because *AFSCME* asked the county to deduct for all full time employees dues of 1.27% of base salary with a minimum of \$15 and a maximum of \$55 plus an additional \$3. The county's defense was the union's request was too time consuming. The ERB pointed out that statutes make mandatory dues deduction a requirement for all public employers upon request from a public labor organization. The ERB found that the county's estimation of a cost of \$1,200 per bargaining unit member to calculate the monthly dues to be “implausible.” The ERB found that other employers have implemented *AFSCME* new dues structure for far less cost. The ERB stated that the county did not have to rewrite its software but could have “hired someone for a few hours a month to make necessary calculations by hand.” The ERB also stated that the statute makes no exception for the costs of complying with the union payroll deduction requests. The county was ordered to make the union whole by going back and calculating the correct dues deductions based on the union's requested formula. The ERB ordered the county to make the payment from its own funds and could not

deduct the additional amount from bargaining members' paychecks or otherwise seek reimbursement.

*Editorial Comment: If management would only read mandatory statutes.*

### **A SCHOOL DISTRICT COMMITTED AN UNFAIR LABOR PRACTICE FOR NOT MAKING A GOOD FAITH EFFORT TO OBTAIN COSTS OF HEALTHCARE BENEFITS**

The case of *Klamath Falls Education Association v. Klamath Falls City Schools*, UP-27-07 (2009), arose when the union requested costing information from Klamath Schools. The ERB found under the circumstances that the school district did not make a good faith effort to get the information from its various agents of record. The district defense in this matter was that the costing information for past insurance costs was the property of a company who no longer was its agent of record, and therefore it had no obligation to try to get information from this company. The ERB held that the district was required to make a good faith effort to get information that it didn't have, but was possession of a "related" third party. Here the district had a business relationship with the company and it related directly to the administration of benefits under the collective bargaining agreement.

*Editorial Comment: An employer's duty to provide information cannot be hidden behind an agent.*

### **WASHINGTON INTEREST ARBITRATOR AWARDS**

#### **ELMA OFFICERS 16% WAGE INCREASE OVER 3 YEARS**

Elma Washington is a town of 3125 located in Grays Harbor County. Its officers recently changed representation from the Teamsters to the Fraternal Order of Police. Their first round of negotiations lead to interest arbitration. Arbitrator Michael de Grasse awarded wage increases of 6%, 5% and 5% in 2008, 2009 and 2010, but rejected all of the remaining proposals offered by the FOP.

The Arbitrator based his wage award on a comparison of top step wages between Elma and 6 comparable towns. He rejected the employer's argument based on a non-existent, hypothetical officer with a BA and found that the top step wage paid Elma's officers was 11% behind the comparables' average top step wage.. His award of a 16% increase is intended to not only bring Elma's officers up to average, but to keep them there over the term of the contract. He noted that the employer made no argument that it could not afford to pay the wage increases proposed by the FOP. The Arbitrator rejected the FOP's proposals to increase longevity and shift differential with little explanation.

The Arbitrator also rejected the FOPs proposals to add new contract language concerning performance evaluations, personnel files and a bill of rights. The primary ground for rejecting

these proposals was that the FOP offered no evidence “harm that would be remedied” by its proposals, although he also considered the contracts of the 6 comparable towns.

### **COLLEGE PLACE OFFICERS WIN 14-18% WAGE INCREASE AND IMPROVED INSURANCE BENEFITS**

Arbitrator Tim Williams awarded 10 officers employed by the City of College Place Washington and represented by Teamsters Local 839 5% wage increases in both 2008 and 2009 plus cost of living increases of 2-4% in 2010 and 2011. The Arbitrator expressed his “trepidation” at making this award “in the midst of the greatest recession since the Great Depression” and noted that employers in California and Oregon were rolling back wages and furloughing employees. Nonetheless, he made his award since wages and benefits for most of the comparables were set through 2011 and his award was grounded on the statutory criteria. The Arbitrator’s analysis was based on top step salary, but he asserted that the total, hourly cost of one hour of police services was important. He accepted the City’s argument that its officers “should legitimately lag behind the appropriate comparators” and did not raise their wages to the average. He gave limited weight to internal comparators—settlements with other City unions, particularly the fire fighters.

In addition, the Arbitrator awarded improvements in dental insurance benefits, increased life insurance from \$10,000 to \$50,000, improved uniforms provided by the City (adding a requirement to provide 4 uniforms—one for each shift) and added a time loss benefit. He eliminated shift differential as proposed by the City based on lack of support from the comparables. He increased vacation leave accrual for officers with more than 16 years of service—once again based on comparability.