

SNYDER AND HOAG, LLC CLIENT NEWSLETTER

2010 – FOURTH EDITION

HOLIDAY GREETINGS

This year has been a fairly quiet year for labor relations in the Northwest. Much of this is due to the economy. In spite of that, we have been able to settle a number of contracts. David completed negotiations for the Vancouver Police Officers Guild and reached an economic settlement for the King County Corrections Guild. John recently completed negotiations for a three year contract for the Springfield Police Association.

We remain grateful for the opportunities to serve and represent our clients. Merry Christmas and we wish you the best for the New Year. Stay safe.

David Snyder and John Hoag

JOHN HOAG WILL SOON RESIDE IN PETERSBURG, ALASKA ON A FULL TIME BASIS

John and his wife Linda have enjoyed their time in Petersburg, Alaska beyond their expectations. For this reason they will be selling their house in Poulsbo, Washington and will be residing in Petersburg on a full time basis. John will continue to give day to day advice to our clients, but will no longer negotiate contracts, or handle other labor litigation absent an emergency.

John has not spent all his time fishing and hunting. In 2010 he was presented with the Attorney General's annual award in recognition for his representation of victims of domestic violence in the State of Alaska. Snyder and Hoag are proud of his contributions in this area. John will continue teaching for Force Science on policy and legal implications that occur in interviewing an officer after a deadly force encounter.

Recently, John gave a presentation to the Oregon Peace Officers' Association on surviving one's law enforcement career. That presentation is now posted on the firm's Web site.

OREGON

SPRINGFIELD POLICE ASSOCIATION NEGOTIATES A THREE YEAR CONTRACT WITH THE CITY OF SPRINGFIELD FROM 2011 THROUGH 2014

Springfield's law enforcement levy which provides the funding to operate the City jail and for a number of patrol positions expires in 2011 and a new levy will have to be on the ballot in order to fund these operations. With this in mind the Association decided that it wanted to agree to the City's request for a one year wage freeze. In return, the Association was able to maintain their insurance benefits for the life of the contract as they currently are and it will receive a cost of living increase in the second and third year of the agreement.

INTEREST ARBITRATION

PREMIUM PAY FOR SERGEANT REJECTED BY OREGON INTEREST ARBITRATOR

In a highly unusual mid-term interest arbitration, Arbitrator Kathryn Whalen rejected a proposal by the Beaverton Police Association that a newly created Professional Standards (internal affairs) Sergeant be paid a 5% premium for carrying electronic communications devices off-duty, answering telephone calls off duty, and conducting investigations outside of his normally scheduled hours.

Arbitrator Whalen found that none of the comparables proposed by either the City or the Association paid internal affairs sergeants a premium. She concluded that the evidence established that in fact the Professional Standards Sergeant would not even have to carry electronic communications devices off-duty or answer calls off duty, the first two justifications for the premium set forth in the Association's proposal!

Not surprisingly, Arbitrator Whalen awarded the City's LBO, which provided for no premium pay for the Professional Standards Sergeant.

Editorial Comment: Rarely does a mid-term bargaining issue proceed to interest arbitration. It is more common for such issues to be tabled until the next round of contract negotiations if no agreement can be reached. Even more unusual is the Arbitrator's conclusion that the premium could not even be justified under the terms of the Association's proposal. Careful draftsmanship of contract proposals is critical to success in interest arbitration.

WASHINGTON

INTEREST ARBITRATION

LONGVIEW POLICE GUILD WINS 3% WAGE INCREASES IN 2010 AND 2011

On August 7, 2010 the Longview Police Guild was awarded wage increases of 3% for both 2010 and 2011 by Arbitrator Stanley H. Michelstetter. The Arbitrator awarded a wage freeze for 2009, rejected the Guild's proposals to increase various premiums, and awarded three changes to contract language.

The Guild proposed wage increases of 1%, 2% and 3% in 2009, 2010, and 2011. The City proposed a wage freeze in 2009 and 2010, and a CPI increase in 2011 that would take effect only if its sales tax revenues increased 2%.

Arbitrator Michelstetter based his wage award on the following factors. He selected comparables based on past agreements and awards. He rejected the City's arguments and included comparables from the Puget Sound area and excluded comparables from East of the Cascades. Wage increases granted by the comparable employers strongly supported the Guild's proposed wage increases. He concluded that the City was having difficulty recruiting.

The City did not argue that it was unable to pay the cost of the Guild's proposals; rather it asserted it would have difficulty funding those proposals. The arbitrator noted that other City employees had made concessions by taking furlough days (but keeping their cost of living increases). However, furloughs were not practical for a 24/7 law enforcement unit. What was practical, in the arbitrator's opinion, was a wage freeze for 2009.

The arbitrator rejected proposed increases in the longevity and education premiums. He awarded language addressing operational difficulties under a prior award addressing holiday leave, adding orthodontia benefits, and providing for legal representation of officers in certain circumstances.

Editorial Comment: This award demonstrates that even in the midst of the Great Recession, interest arbitrators will award a wage increase if there is support for it from the comparables and other statutory factors. Although the City put on substantial evidence concerning its finances and concessions made by other employees, the Guild proposed 6% over 3 years and it received that increase.

CONFERENCE PRESENTATION

Dr. SUZANNE BEST'S PRESENTATION AT THE OPOA CONFERENCE

Right before John gave his presentation, Dr. Suzanne Best gave a presentation entitled "I'm Shot Courage Under Fire: Coping With Life Threatening Incidents." For those of you who not heard Dr. Best speak you should not miss an opportunity to do so. She is a police psychologist, working in the Portland area, and does excellent work in providing debriefings after officers have used deadly force and treating those persons who have developed PTSD.

Among other things that Dr. Best discussed in her presentation was the use and sometimes misuse of peer support teams which have been utilized as part of a debriefing process after a deadly force encounter. She pointed out there is no definitive answer to what works in a debriefing, but it was her belief that what the debriefing should not do is solicit an outpouring of emotions from every person who was involved in the incident. The purpose of any debriefing after a critical incident is to help bring down the participant's "state of arousal" so that they can assimilate the incident and move on with their lives. Utilizing the event to bring out raw emotional reaction by encouraging participants to tell how they felt or experienced during the event, is not helpful as it just re-raises the arousal level that needs to be lessened. However, Dr. Best stated that a debriefing of all the participants that were involved in an incident should certainly include the dispatchers and other department employees who were involved on the periphery. Dr. Best's work can be viewed at www.suzannebestphd.com.

Snyder and Hoag believe that law enforcement professionals are indeed fortunate that Dr. Best is practicing in Portland, Oregon and is available as needed.

OREGON COURT

OREGON SUPREME COURT RULES THAT AN EMPLOYEE WHO RESIGNS WHEN FACING CERTAIN TERMINATION MAY QUALIFY FOR UNEMPLOYMENT BENEFITS

The case of *McDowell v. Employment Department*, 348 Or 605 (2010) arose when a probationary teacher was told that the principal and personnel director would be recommending his termination to the School Board. The teacher had shown a film in his class that contained profanity in it. The school was going to terminate the teacher for violating the school policy of showing such a film without getting the principal's consent in advance.

However, the Supreme Court found that the employer had not advised the teacher of that policy and the policy was not contained in the employer's handbook.

The employee had been advised by the attorney representing the teacher's union that if he was terminated versus resigning that his chances of obtaining a job in the future in the teaching profession would be slim to none.

Given these facts where there was no proof of either "misconduct" or "a willful or wanton negligent violation of the standard of behavior, which an employer has a right to expect of an employee", or "an act or serious of actions that amount to willful or wanton negligence regarding an employer's interest," which is what the relevant OAR requires in order to find an employee was discharged for cause, the Supreme Court held that under these facts quitting in lieu of an almost certain termination in order to preserve one chance of future employment was not a disqualifying act for receiving unemployment benefits.

Editorial Comment: This case is a very narrow ruling. First, it will probably only apply in the future to probationary employees, and second even then the employee must meet a burden of proof showing that the employer's termination was not going to be for violating well publicized rules.

OREGON COURT OF APPEALS LEAVES A GLIMMER OF HOPE FOR OREGON STATE POLICE SERGEANTS TO RECOVER OVERTIME

The case of *Byrd v. Oregon State Police*, 236 Or App 555 (2010) was a result of a number of sergeants in the Department of State Police claiming they were entitled to overtime both under the Federal Fair Labor Standards Act and State Wage and Hour law.

The Court of Appeals made short work of a claim under State Wage and Hour law as the State had adopted statutes and rules that allowed an employer to deny overtime to police employees.

Turning to the FLSA, the Circuit Court had ruled based on Federal decisions that the State had 11th Amendment immunity to any claim under the FLSA. However, the plaintiffs successfully argued that the Oregon Tort Claims Act constituted a waiver of the 11th Amendment immunity that the State had in Federal Court. The Court's reasoning was because it held in a previous decision that an FLSA claim is a Tort, therefore, the State waived its immunity to said Torts. The case was remanded to Circuit Court to consider the FLSA claims of the sergeants.

Editorial Comment: While this is a very nice win, we doubt that this decision will stand. The State will probably appeal this decision and argue that just because if the FLSA was applicable to it that it would be a Tort doesn't mean that the State has any way waived its Federal 11th Amendment immunity to FLSA claims. In addition, should the State be unsuccessful with that argument, the plaintiffs will still have to prove that under the FLSA their acts were such that they are not "executives" which is somewhat different than supervisors, under the law. A similar claim was made back in 1988 and rejected by the Ninth Circuit Court of Appeals at least for sergeants that work patrol. However, we wish State Police sergeants success in pursuing their overtime claims even though we don't believe they will be successful.