

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

**2009 -- FIFTH EDITION**

### **HOLIDAY GREETINGS**

Another year has passed. We have continued to enjoy representing all of our clients in Oregon and Washington. We've had some disappointments, but many more positive results. John continues to represent several Associations in Central Oregon and on the Coast—and to work with me representing all of our clients. John's success in representing white collar employees of the State of Oregon continued this year. We've settled several contracts and won interest arbitrations in Jefferson County and King County.

It's been a hard year for many Americans with the economy stumbling through the Great Recession and with many families with members in war zones far from home. More recently, the murders of five police officers in Western Washington is extremely disturbing. Our thoughts are with those in service far from home and with the families of the slain officers.

We are grateful for the opportunities and blessings we enjoy and for the opportunity to represent you. Merry Christmas! We wish you the best for the New Year. Stay safe.

David Snyder and John Hoag

## OREGON

### **FLORENCE POLICE EMPLOYEES' ASSOCIATION AND THE CITY OF FLORENCE AGREE TO A NEW THREE YEAR COLLECTIVE BARGAINING AGREEMENT**

The three year contract between the parties will have a 3.5% increase effective July 1, 2010 and a CPI formula of 2-5% for the next two years of the contract.

The major change in the contract was a switch from the Blue Cross Regence Plan V, which is a traditional insurance plan that many of our clients have with a \$100 to \$300 deductible to a high deductible HSA Plan. Under this high deductible insurance plan the individual deductible limits is \$2,500 per calendar year and \$4,000 for family. In addition, the stop loss is \$3,300 for a single person and \$6,500 for a family. Between the deductible and the stop loss the plan pays 80% of the bills.

While this plan seems horrible, it actually costs employees less than the existing plan because employees had a 5% copay on the existing plan and under a full family benefit the employees were paying \$80 a month for coverage. The City made the HSA attractive by paying the full costs of the coverage and putting it in the individuals' HSA account - \$2,500 for the person and \$4,000 for the family. By doing this the single person and family would be out less pocket expenses if they had coverage that exceeded the deductible levels up to the stop loss and only a couple would be worse off. To ease that problem, the City agreed to make an additional \$300 a year payment each year of the contract for a two party family.

In addition, the second advantage to a HSA account is that the money goes into employees' individual account. If it is not used it can be used in future years, and it can also be used to pay any qualified medical expense. In that result where employees were financially better off under the City's HSA Plan than they were under the existing plan. Therefore, benefiting by the switch and the City saved significant amount of insurance premiums.

The contract provides for a 2% incentive of pay for those officers the City required to have a correction's certification since the City runs the small jail. Maximum vacation and sick leave accumulation was increased in the contract.

*Editorial Comment: Given the economic times and a CPI that was negative for most of this year this was an excellent settlement. Ken Larson and Lynn Larson worked hard for the settlement (they're not related) and other members of the Association sat in and contributed to negotiations. I am pleased to be able to have worked with the Association to make this settlement possible and believe that employers are going to and should be taking a hard look at*

*switching from traditional to HSA plans. However, it only works if the employer is willing to make it a win – win financially situation.*

## **GRIEVANCE**

### **ARBITRATOR WILLIAM GREER REVERSES DEMOTION OF CLACKAMAS COUNTY CORRECTIONS SERGEANT – BUT IMPOSES A 15 WORKING DAY SUSPENSION ON THE GRIEVANT**

The grievant had been hired in 1997 as a corrections deputy and promoted to sergeant in 2003. Up until this incident she had never been subject to discipline. She had also worked as an acting lieutenant and done well in the assignment.

The incident that caused the County to demote the grievant occurred while she was on “light” duty and yet participated in the movement of a highly dangerous combative inmate. During the movement she ended up using her Taser against the inmate a number of times and got into a physical fight with him which caused her to be out on a worker’s compensation claim for some time.

The County demoted the grievant claiming she had violated the County’s policy for “light” duty, general conduct, performance of duties in a competent manner, and in unsafe conditions use of force, strip searches, cell extraction procedure, Taser procedure and cross gender supervision.

The gist of the grievance was that the principles of progressive discipline were not applied and that the demotion was too harsh. In considering the case, the arbitrator cited a number of decisions around the state where demotions were set aside as being too harsh and that suspensions should be considered in lieu of demotions. The arbitrator noted that the Association successfully argued that the County had not imposed a disciplinary demotion on a bargaining unit sergeant for over a decade. Therefore, that the Association members were not on notice of what type of conduct would result in disciplinary demotions. The arbitrator concluded that the grievant had violated the “light” duty policy, but found that the County had charged her with using force without an appropriate plan, and the arbitrator found that the County did have a plan, and found that there was no just cause for discipline for this alleged violation. He did conclude that the strip search was done inappropriately as female deputies were present and County policy says only males will strip search males. The arbitrator also found that the use of the Taser was inappropriate as to how it was used in violation of County policy.

The arbitrator concluded that “demotion where authorized by collective bargaining agreement is an extraordinary exception to the usual progressive discipline sequence.” He found that the grievant had a good record as a sergeant and that this was a single incident that took place within a few minutes. Therefore, he found that the discipline should be set aside to 15 working day (3 weeks) suspension.

**ARBITRATOR REEVES FINES THAT  
LAPINE RURAL FIRE PROTECTION DISTRICT VIOLATED THE PARTIES  
CONTRACT WHICH PROVIDED FOR MINIMUM STAFFING**

The IAFF Local had negotiated a minimum staffing provision into its contract for the District’s fire stations. In 2006 a fire district levy failed and was not past until November 2008 and took effect in 2009.

During some of this time period the District ran the stations below the minimum staffing level. The District also claimed that it cited a letter of agreement that it had been entered into by the parties which allowed for a reduction of the minimum staffing level.

Arbitrator Reeves rejected the District’s contention and found clear contract language required the minimum staffing. Moreover, Arbitrator Reeves stated that he found that the budget shortfall did not give an employer the right to violate the collective bargaining agreement due to economic hardships.

*Editorial Comment: Minimum staffing levels are rarely found in collective bargaining agreements. No doubt during next contract negotiations the District will try to get that out and the union will argue that minimum staffing represents a significant safety issue.*

**EMPLOYMENT RELATIONS BOARD**

**EMPLOYMENT RELATIONS BOARD FINDS THAT THE CITY OF DALLAS  
COMMITTED UNFAIR LABOR PRACTICES BY NOT NEGOTIATING IN GOOD FAITH  
OVER THE REORGANIZATION OF SUPERVISORY EMPLOYEES AND BY  
ENGAGING IN A DIRECT DEALING WITH AN EMPLOYEE FOR PROMISES OF  
COMPENSATION ON PROMOTION. HOWEVER, THE ERB FINDS IT “A SINGLE  
INSTANCE OF REGRESSIVE BARGAINING” DOES NOT EQUATE TO A ULP FOR  
BAD FAITH BARGAINING**

This case arose because the City in response to concerns by police sergeants that they did not want to be supervisors, discussed the eliminating the position of police sergeants or lowering their duties and reclassifying them as senior officers and creating lieutenant positions. When the

Association found out about the City's proposed action it demanded to bargain over it. The ERB conclude that as a result of the Association's demand the City came up with a second reorganization plan that froze sergeant's salaries, and that violated subsection 1 (a) by retaliating against the labor organization for exercising their PECBA guaranteed rights. The ERB also ruled that it was not necessary for the employer to follow through on the threat, it was the threat itself that the ERB declared would "naturally deter employees from exercising their protected rights." However, the ERB found that the announcement of the second reorganization of the plan was not bad faith bargaining and stated:

"This Board does not conclude that this one instance of regressive bargaining is by itself substantial proof that the City engaged in unlawful surface bargaining, however instead we examined the totality of the City's conduct to determine whether the City bargained in good faith."

The Board concluded in the totality of the circumstances that the City did not. Finally, the Board concluded that the City violated its duty to bargain in good faith when it entered into a pre employment contract with an officer. The City argued that it had a past practice of doing so, but the ERB stated:

"A pre employment agreement that makes a salary increases a condition of employment for a newly hired worker concerns monetary benefits, a subject that is *per say* mandatory for negotiations."

The remedy ordered: "Cease and desist from violating the statute."

*Editorial Comment: Perhaps the Association didn't request much else of a remedy. Since the reorganization was complete there wasn't much else for the ERB to order. In addition, they show this officer's wages were probably resolved.*

## **WASHINGTON**

### **WASHINGTON'S PERC DISMISSES ULP BECAUSE THE UNION FAILED TO TIMELY DEMAND BARGAINING**

Washington's Public Employment Relations Commission (PERC) has long held that the use of the employer's vehicles for commuting or other off duty use is a mandatory subject of bargaining under RCW 41.56. Nonetheless, because a union failed to make a timely demand to bargain when it first learned that the employer was considering changes to its take home car policy, the PERC dismissed its ULP.

On December 6, 2005 the Lake Stevens School District issued a memorandum stating that effective February 1, 2006 the District was going to end its practice of allowing maintenance

employees to take the District's vehicles home. The union made no demand to bargain. It argued that the memorandum showed that the District had made a final decision (*fait accompli*, or in plain English—a done deal) and no demand to bargain was required.

PERC rejected the union's argument that the District's memorandum amounted to a *fait accompli*. To establish a *fait accompli*, the union must show (1) a final decision by the employer and (2) circumstances indicating that no opportunity for meaningful negotiations existed.

A union rep testified that in November 2005 he heard rumors that the District was contemplating a change in this policy. On November 7, the union rep raised this issue in a labor management meeting. He left the meeting with the impression that the employer had not yet made a final decision. The union made no demand to bargain following that meeting.

PERC concluded that while the rumors would not have been notice sufficient to require the union to demand to bargain, the discussion at the November 7 meeting was adequate notice. At that time, the evidence established that the District was considering a change, but had not made a final decision. By failing to promptly demand to bargain following that meeting (and before the employer's December 6 memorandum changing the policy) the union waived its right to bargain over the otherwise mandatory subject of the District's policies regarding take home cars.

*Editorial Comment: When in doubt, make a demand to bargain when you learn that your employer is considering a change in policy or practice. Make the demand in writing or by e-mail so there is a record.*

*There is no downside to making a demand to bargain. If it is decided later that the policy is not a mandatory subject or that the change is acceptable to the Guild, which will be the end of the issue. However, if you fail to demand bargaining, the change is made and you later decide you want to fight the change; your employer may well be able to successfully defend the ULP by arguing that your Guild waived its right to bargain.*

## **MANDATORY UNPAID FURLOUGH DAYS OFF MUST BE BARGAINED ACCORDING TO WASHINGTON'S PERC**

In late 2008 in the face of an \$83 Million budgetary crisis King County negotiated agreements with *most* of the unions representing its employees under which its employees were furloughed without pay for 10 days in 2009. When it could not reach an agreement with the Amalgamated Transit Union, Local 587, it unilaterally imposed the 10 days off without pay.

Local 587 filed a ULP with Washington's Public Employment Relations Commission (PERC) charging that the furlough day program was a mandatory subject of bargaining and that the County had failed to bargain in good faith.

A PERC hearings examiner upheld Local 587's charge and rejected the County's defense of "business necessity." The furlough days were a mandatory subject of bargaining given their significant impact on Local 587's members: 10 days off amounted to a 3.85% pay cut. Employees who had scheduled a vacation on one of the mandated furlough days were forced to take that day off without pay—thereby impacting the use of vacation. The Examiner rejected the County's argument that its management rights to determine its budget and service levels supported its position that if it had to bargain over furlough days off, it would be unable to address its budgetary issues. He found that the case concerned reduction in labor costs rather than changes in service levels. He also rejected the County's business necessity defense: the days off were not required by law or the lapse of a contract. Moreover, the County failed to bargain the effects of the days off (a necessary element of this defense).

The County has appealed this decision to the full PERC.

*King County*, Decision 10547 (PECB, 2009).

*Editorial Comment: Hardly a surprising result: cutting wages would seem to be an obvious subject for bargaining. We'd expect the same result under Oregon's PECBA.*

*The settlement reached by the majority of the unions representing King County's employees was very creative: 10 days off without pay in 2009, but with a pay increase of 3.85%, 5 extra days off in 2010 and 5 extra days off in 2011. In essence, the employees loaned the County 10 days off in 2009 and will be repaid in 2011-12.*