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ANGELO (2005), ARBITRATOR THOMAS ANGELO AWARDS MARION COUNTY LAW ENFORCEMENT ASSOCIATION’S (MCLEA) LAST BEST OFFER

The parties went to Interest Arbitration over the County’s proposal to have a hard dollar cap in place for health insurance with all premium costs above the cap to be borne solely by Association members. For this reason, Arbitrator Angelo rejected Marion County’s Last Best Offer as being too draconian, even though he warned that insurance cost sharing would take place in the future, and predicted that this will be the last contract where MCLEA members receive fully paid insurance benefits.

As part of the package, Arbitrator Angelo awarded an Association proposal requiring Marion County to stop automatically disciplining employees who exhaust their sick leave until it negotiates a policy with the Association as to under what circumstances the employees will be disciplined for being out of sick leave. He criticized the County for its unwritten rules that it was not applying with any consistency.

On the other hand, Arbitrator Angelo agreed with Marion County that Washington County was now too large in population to be a comparable jurisdiction and did add Jackson County as a comparable jurisdiction making the comparables: Clackamas County, Lane County, and Jackson County.

The Association was represented by its President, Michael Beach; its Vice Presidents, Chris Bangs, and Bill Brotton; its Treasurer, Debbie Skoog; and Secretary Susan Bishop.

Editorial Comment: The Association would have settled the contract for a percentage cost sharing arrangement in health care costs. However, the County’s decision to stick with an “all or nothing” approach on a hard dollar cap caused it to lose the Interest Arbitration, for which we thank it. When one is fighting a battle to preserve health care benefits as much as possible, the Last Best Offer process does work to the advantage of the Association. Snyderitorial Comment—if John keeps winning these cases the forces of darkness are going to go back to Salem and amend the PECBA again. Hoag’s response: I doubt it.

“B”

BIERSMITH (2005), ARBITRATOR STEPHEN BIERSMITH AWARDS TIGARD POLICE OFFICERS’ ASSOCIATION LAST BEST OFFER

The parties went to arbitration primarily over health care benefits, although there was an issue of wage increases. Both parties were using a CPI formula with the City proposing increases in October and the Association for July. However, insurance was the key issue. The existing contract was a three year agreement with hard dollar cap for insurance for

each year. The City proposed continuing that but increasing the deductible from \$100/\$300 individual to family, to \$300/\$900. The Association proposed a 90/10 split in insurance costs for two years and giving the employees the option of a \$100/\$300 or a \$300/\$900 Plan.

The issue that sidetracked the parties and caused the Arbitrator to award the Association's Last Best Offer was at mediation for the first time the City proposed what it called a "VEBA" Plan under which the City would contribute \$50 month/\$600 a year into an employee's individual account (much like a HRA account) to help the employees with the increased deductibles. However, under Federal regulations that Plan had to be voluntarily agreed to and could not constitute a detriment to the employees. The Arbitrator accepted the Association's argument because the Plan concept was first introduced at mediation, that it would not be voluntary, and the City's moving its wage increase from July to October would constitute to the detriment to the Association. Because the Arbitrator determined that the Plan could not be voluntarily imposed due to the Association's opposition to it, and because he found the rest of the Association's proposal to be reasonable, he awarded the Association's Last Best Offer.

Editorial Comment: The City of Tigard was represented by Ken Bemis who represented Linn County in the Interest Arbitration covered in the last newsletter. In both of these cases, Mr. Bemis appears to be changing positions at the last minute. In the Linn County case, he stated during negotiations that comparability should be counties with population in the 50% plus or minus range, and switched that during arbitration to 25% plus or minus. In the Tigard case, he introduced a proposal in mediation for the first time in spite of ERB case law that new proposals should be subject to "the negotiating crucible," which means to be introduced and discussed before mediation. It might be said that his actions worked to the detriment of employers and to the benefit of Associations attempting to prevail in their Last Best Offer arbitration packages.

BOEDECKER (2008) ARBITRATOR BOEDECKER AWARDED THE EMPLOYER'S LAST BEST OFFER IN ARBITRATION BETWEEN MULTNOMAH COUNTY CORRECTIONS ASSOCIATION AND MULTNOMAH COUNTY

Arbitrator Katrina Boedecker awards Last Best Offer of Multnomah County.

These parties were operating under a collective bargaining agreement that went from July 1, 2004 through June 30, 2008. It had a contract reopener only in the fourth year, for July 1, 2007 through June 30, 2008. They both opened on health insurance and wages. The employer also opened on alleged sick leave abuse and use of compensatory time.

The Arbitrator started by discussing the interest and welfare of the public. She cited as part of that two grand jury reports which had criticized the sheriff's office for use of sick leave and compensatory time and stated that they were factors that showed matters in the interest and welfare of the public. The grand jury's report showed an abuse of sick leave

and the use of compensatory time to demand and get time off that caused other overtime delays. Most of the Arbitrator's 50 page decision was devoted to these two issues.

The Association's proposal on both was the status quo. The Employer wanted to require employees with suspect of abuse in sick leave to provide a doctor's certification for use of sick leave. Current contract language required that it allowed the Employer to do this only after 3 days of use. The Arbitrator found that even though the evidence established that only 3 – 4% of the deputies were abusing sick leave, that was sufficient to award the Employer's Last Best Offer on this matter. She rejected the argument that the verification language was draconian.

When turning to comp time the current contract language allows employees to bank up to 80 hours of compensatory time. The Employer proposed to put a 96 hour cap on the total amount of comp time that can be accrued or used in the course of the year. It also proposed a 10 day cancellation notice for comp time which employees had received approval. The Arbitrator criticized the current practice as costing overtime when an employer has to pay time and one-half to allow someone off for time and one-half and stated that the Employer's proposal was a reasonable attempt to control overtime costs.

Turning to wages the parties stipulated that only Washington and Clackamas Counties should be used as comparables. The Association argued that they should be paid ahead of the comparables. The Employer argued the issue of being paid even. None of this mattered since the Employer proposed a 2.7% increase effective July 1, 2007 and a 1.5% premium increase for employees on certification pay that will be paid for over half the bargaining unit. The Association proposed a 3.3% wage increase. The Arbitrator found that the Employer's provision was sufficient for all purposes.

The last proposal was to look at the Employer's proposal of a 5% employee contribution for dental coverage and some restrictions in drug coverage. The Arbitrator found that while the Association's proposal was more reasonable, given all the other criteria she had to award the Employer's Last Best Offer.

Editorial Comment: Hopefully this will be a case that can only be cited as a Multnomah County problem. However, the use of grand jury's reporting on jail conditions to create the "interest and welfare of the public" is a fairly dangerous practice that certainly could be subject to abuse. On the other hand, Multnomah County will find out requiring a doctor's certificate for the use of sick time will not be helpful as most doctor's will comply with the employee's subjective complaints of their symptoms and will give them such a notice.

BOEDECKER (2006), ARBITRATOR KATRINA BOEDECKER RULES FOR IAFF AGAINST THE CITY OF PENDLETON

The parties went to Interest Arbitration on a large number of issues. On wages, the IAFF was proposing a retroactive increase back to January 1, 2005 of 2 percent with a 2 percent every six months thereafter for a three year contract. The employer also

proposed a three year contract with 4 percent in the first year, but only 2.5 percent in the second and third years.

In addition, the employer proposed sweeping changes to the contract, including changing the insurance plans by allowing it to prohibit employees who have double coverage from dropping one policy, taking out the prevailing rights and past practices article, taking out an article dealing with rules and regulations, taking out a promise that the firefighters shift would generally be 24/48 and eliminating a professional career development committee. The employer's attitude was that due to declining revenues, it could not exist by continuing the past and wanted radical changes in the status quo.

The Arbitrator found that even the City agreed that wages were not the ultimate factor in this case. The Chief described the differences in the wage proposals in the second and third year as relatively small and testified that:

“I don't believe money is the issue.”

The Arbitrator began her conclusions by stating that:

“The employer appears to want a free hand to make any decisions in the future that would impact wages, hours or working conditions. The State legislature did not agree to that way of operating in the public sector when it passed the Public Employees Collective Bargaining Act. (PECBA).”

The Arbitrator then proceeded to go through the employer's proposals and found that many of them were not backed up by a showing of adequate need. The Arbitrator concluded that the employer had not:

“. . . shown how all of the changes are reasonable and necessary. There is not enough quid pro quo presented by the employer that would justify the enormous loss of job security and contract protection to the union.”

For those reasons, she awarded the employer's Last Best Offer.

Editorial comment: Another classic case of employer-assisted suicide in Interest Arbitration. There have been quite a number of them this year. Maybe something's in the water.

BOEDECKER (2001), KATRINIA BOEDECKER RULES FOR THE ASHLAND FIREFIGHTERS ASSOCIATION

This interest arbitration concerned money, and more specifically “catch up” wages for members of the Association. The City's last best offer for firefighters and engineers was 3% January 1, 2000; 2% January 1, 2001; a CPI-based increase July 1, 2001; 1.5% January 1, 2002; CPI-based increase July 1, 2002; and 1% increase in 2003.

Both sides had lesser increases for the Captains. The Union's last best offer was a 3% increase every six months.

The arbitrator found that depending upon the CPI, i.e., 3 to 5%, the City's last best offer, in theory, could cost more than the Union's. She also found that there was a stipulated ability to pay, an agreement to some extent that catch up adjustments were necessary, and the question was: which proposal was better in the interest and welfare of the public?

The arbitrator also found significant turn over for firefighters who were going to similar sized or larger departments to make more money.

The City presented the fact that it is a financially sound, well-managed City, with a long-term project of enhancing the quality of life in dealing with growth that occurs in the City. The arbitrator found because of that, the interest and welfare of the public required that the City know what cost increases it was going to absorb, and because of that, decided that the Union's offer was better than the City's. She also found that the Union was charged with knowing what was better for its bargaining unit members than the employer, and that granting the employer's proposal which would have a potentially larger increase, would be "patronizing" to the Union's bargaining team. In looking at the secondary criteria, when considering comparability, she followed the decision of three other arbitrators that were most recently reported concerning the decision for City of Astoria by Arbitrator Lindhauer that comparable communities are just that, and whether a City utilizes a large fire district, or simply has small city fire district, was irrelevant for comparing wages. Because of these factors and a conclusion that Ashland's firefighters' salary was approximately 13% behind its comparables, she awarded the Union's last best offer.

The Union was represented by Michael Tedesco and the City by Donna Cameron.

Editorial comment: Congratulations to Daryl Garrettson for his victory. However, this case is one of a number of arbitrations in which the victory is reasonably hollow due to the last best offer process.

BOEDECKER (2000), ARBITRATOR KATRINA BOEDECKER AWARDS A LAST BEST OFFER OF TEAMSTERS LOCAL 223 AND AGAINST TILLAMOOK COUNTY

This was an interest arbitration decision involving the sole issue of overtime pay. The County proposed to delete the daily overtime threshold and to pay overtime only on a 40-hour week basis. The County's argument was that because the State modified the overtime statute for all government employees, ORS 279.340, to eliminate the daily overtime threshold, this was proof and it was in the interest and welfare of the public to award its offer.

The Arbitrator rejected that argument and pointed out that comparability strongly favored the Teamster proposal, which was a continuation of the status quo.

BRAND (2008) ARBITRATOR NORMAN BRAND AWARDS LAST BEST OFFER FOR MULTNOMAH COUNTY AGAINST THE JUVENILE CUSTODY SPECIALIST

In an opinion that is amazing for its brevity, Arbitration Norman Brand awarded the Last Best Offer of the County against the AFSCME bargaining unit of Juvenile Parole Officers.

Arbitrator Brand tersely concluded that the interest and welfare of the public:

“Is served by paying a skilled workforce adequately; the public interest is not served by paying a skilled workforce substantially above the top rate of the labor market. In order to ascertain which Last Best Offer best serves the interest and welfare of the public, one must look to the secondary criteria.” Page 5.

In this case, the ability to pay was not at issue nor was the ability of the County to attract and retain personnel.

Turning to comparability, Arbitrator Brand did not establish what would be comparable jurisdictions, but rejected using state employees as a comparable based upon the Interest Arbitration statute. However, he concluded no matter which benchmarks were used the County employees were paid “at the top of the labor market including King County, Washington.” Page 10. Given that and the use of the CPI formula by the County for the third year of the agreement which given the economic uncertainty, he praised, Arbitrator Brand awarded the County’s Last Best Offer.

Editorial Comment: In any multi year contract given the economic uncertainty that we face, a CPI formula is going to be an essential component to a Last Best Offer.

BRAND (2008) ARBITRATOR BRAND AWARDS JOSEPHINE COUNTY’S LAST BEST OFFER IN FOPPO ARBITRATION

As a preliminary matter, the County argued that whatever party’s Last Best Offer diverts most from the status quo had the burden of proof. The Arbitrator rejected that argument finding that the Union will almost always asked for a larger raise than an employer and therefore this defeats the statutory framework of looking at the interest and welfare of the public. He also rejected the County’s argument that the Arbitrator should determine what would have been negotiated had the employees been able to strike. The Arbitrator found that the fact the State had declared that certain employees should not strike was critical and rejected that line of argument.

Turning to the secondary criteria, because the State in essence pays for the parole and probation officers, the Arbitrator found that there was sufficient funds to cover either party's Last Best Offer. Regarding the ability to attract and retain, the Arbitrator found no turnover issues.

The main issue in this case was comparability. The County used a number of counties as comparables that were within 25% of Josephine County's population including: Coos County, Klamath County, Polk County, Umatilla County, Benton County and Yamhill County. Four of the counties were smaller and two were larger. FOPPO used comparators that were within 50% of the population, but then it chose four up and four down. The Arbitrator found FOPPO's approach was inconsistent with the 50% population standard. The Arbitrator concluded that the Association's arguments were not compelling.

The next issue was whether or not a county should be used if that county does not employ parole and probation officers. FOPPO argued that if the State employed officers in a comparable County, then the State's wages should be considered as a comparable. The Arbitrator concluded that there was no statutory basis for using Counties which did not employ probation officers as the statute references employees by political subdivision and therefore comparing counties to the state is not appropriate. He distinguished this from firefighter arbitrations where there was an issue of districts versus cities.

In looking at methodology for comparing wages and benefits, the Arbitrator rejected much of the County's methodology because it failed to include paid time off. He also found that the costs of who paid for the pensions, i.e. the 6% PERS, had to be analyzed.

The Arbitrator concluded:

“While both sets of data are inaccurate, the County comparability data is much closer to the appropriate comparison than FOPPO's. Based on that data the double digit increases proposed by FOPPO are not justified by the statutory criteria.”

Therefore, the Arbitrator decided no matter what the parties' proposals were on issues of less magnitude, he had to award the County's LBO.

BRAND (2005), ARBITRATOR NORMAN BRAND AWARDS LAST BEST OFFER OF WINSTON-DILLARD FIRE DISTRICT

What is ironic is that the first post Senate Bill 750 Interest Arbitration involved Winston-Dillard Fire District and now the latest one does as well.

The facts weren't significantly different in either case. The Last Best Offer of the parties dealt with comparability on wages as the primary issue, especially for a tenure firefighter.

The main issue was the District's ability to pay. The Arbitrator found that the Union had under costed its proposed wage increases that were catch up increases every six months for a three year agreement of two and one half percent. The District proposed cost of living based increases. The Arbitrator decided that the District's ending fund balance would be drastically reduced if the Union's offer was implemented and found that the District had a liability to raise money and had already reduced its ending fund balance from approximately \$125,000 from the last fiscal year.

In addition, the parties disagreed over comparability. IAFF strenuously argued that purely population of cities should apply and geographic proximity should not be utilized. The Arbitrator specifically rejected utilization of Tualatin Valley Fire District, which has an \$89 million dollar budget, and Troutdale with a \$12 million dollar budget as compared to the Winston-Dillard District, which has an annual budget of \$2.5 million.

The Arbitrator ruled that the utilization of secondary criteria was not prohibited and distinguished other cases that the IAFF tried to claim were precedential in nature.

Based upon the District's inability to pay the award without a dangerous depletion of its reserves, the Arbitrator did award the District's Last Best Offer.

Editorial Comment: From the facts it appears that the Union was a little too aggressive in its hope for comparability catch up based on the District's ability to pay. This was the same reason why it lost the first Interest Arbitration.

BRAND (2004), ARBITRATOR NORMAN BRAND ADOPTS THE LAST BEST OFFER OF THE STATE OF OREGON AGAINST THE OREGON STATE POLICE OFFICERS ASSOCIATION

In a continuing saga of assisted suicide, OSPOA went to arbitration agreeing to a two-year wage freeze with the State of Oregon, but wanting the step increases that were frozen to be implemented as of 6/30/05. The State's main difference was it wanted step increases frozen for 24 months beyond the date of the award.

The Arbitrator noted previous arbitration decisions that had all been in favor of the State due to the inability of the State to pay for virtually anything because of its financial condition. Therefore, in a brief opinion, he awarded the State's Last Best Offer.

Editorial comment: OSPOA has filed an Unfair Labor Practice complaint, probably based on the fact that the 24 month step freeze went past the normal term of the contract. It is my pessimistic prediction that it will be unsuccessful.

BRAND (2001), COOS BAY POLICE OFFICERS' ASSOCIATION PREVAILS IN INTEREST ARBITRATION

Arbitration between the Coos Bay Police Officers' Association and the City of Coos Bay mainly concerned money. The City, recognizing that the officers were

underpaid, offered 5 percent wage increases for each of 3 years of the contract. The Association's main economic proposal mirrored the 5 percent offers of the City, and added an additional 2 percent for dispatchers each year of the agreement. In addition, the Association proposed that should the annual increase of the CPI be 3.5 percent or greater for the last 2 years of the agreement, that members of the bargaining unit would receive an additional raise by the amount the CPI exceeds 3 percent in January 2003, with the same formula to apply in January 2004.

The Association also proposed certification pay for motorcycle officers, members of the HazMat team, an increase in the detective clothing allowance, footwear reimbursement and an increase in vacation accrual for senior officers.

In looking at the proposals of the party, the arbitrator rejected the City's first argument that because the parties' proposals were close, it was in the interest and welfare of the public, for the City to prevail. The arbitrator accepted the Association's argument that the interest and welfare of the public can only be understood through the secondary criteria.

When turning to the secondary criteria, the arbitrator agreed with the Association that the City had the ability to pay for the Association's increase. The arbitrator also agreed with the Association's position that the department was having trouble attracting and retaining qualified personnel.

When looking at comparability, the City had proposed that the comparable jurisdictions be all cities within the ten to twenty thousand population range. This would result in four cities with larger population than Coos Bay and twelve with smaller. The arbitrator accepted the Association's presentation which showed 3, 4, 6, and 10 up and down from the City of Coos Bay and that no matter how comparability was handled, the Coos Bay officers' wages were somewhere between 22 and 4 percent behind and somewhere between 22 and 17 percent behind for dispatchers. The arbitrator did not specifically say whether 3 up and 3 down or 4 up and 4 down was better.

The arbitrator decided that every one of the Association's additional proposals were justified by comparability except for the shoe allowance, and he concluded that that was not enough to cause the tide to swing to the City. Therefore, Arbitrator Norman Brand awarded the Association's last best offer.

The Association was represented by its president, Gary McCullough, and Executive Board Members Tammy Lounsbury, Lance Bjornerud, Ron Robson, Sherry Sedy. It was assisted by John Hoag. The City was represented by its attorney, Randall Tosh.

BRAND (2001), ARBITRATOR BRAND RULES FOR THE CITY OF PORTLAND IN INTEREST ARBITRATION BETWEEN THE PORTLAND FIREFIGHTERS ASSOCIATION AND CITY OF PORTLAND.

Labor relations in the City of Portland do appear to be unique to the rest of the State (see the subsequently reported discipline arbitration). In this particular case, the Portland Firefighters went to arbitration requesting language in their collective bargaining agreement that was identical to that in the Portland Police Officers' Association contract. The parties were separated over the last best offer for longevity, and the firefighters wished to have language that read that longevity pay shall not be included in the employee's regular rate for purposes of calculating overtime owed under the agreement. Secondly, that the City could establish its 207(K) exception, and third, that the Association would indemnify the City for all claims in which the City failed to include longevity in the regular rate of pay for overtime.

The City argued that the longevity pay proposal was central to the dispute and not in the interest and welfare of the public because it was unlawful.

The arbitrator correctly concluded that under the Fair Labor Standards Act, longevity pay has to be part of the regular rate of pay for overtime. The arbitrator accepted a very lengthy explanation of the City that due to the different shifts that police work, versus firefighters, due to the police shifts, FLSA overtime would never be reached, while it would regularly be reached on firefighters shifts. (This writer questions that conclusion).

The arbitrator also cited the previous Springfield interest arbitration decision, where a City proposal on retirement was deemed to be unconstitutional, as violating the OSPOA Measure 8 decision. Such proposals are deemed not to be in the interest and welfare of the public. For this reason, the arbitrator awarded the City's last best offer.

Editorial comment: As indicated previously, this writer is confident that some Portland police officers will exceed the 7K limitation for overtime, and that longevity pay should have been included in their regular rate. The PPA language is contorted and was allegedly entered into because the City first agreed to longevity pay in bargaining, and then concluded it couldn't afford it for overtime, so this compromise was carved out. Reading between the lines, the arbitrator doesn't intend to take a bad provision and expand it at all.

BROWN (2009), INTEREST ARBITRATOR REJECTS COUNTY'S FINANCIAL DISTRESS ARGUMENTS

The Jefferson County Law Enforcement Association's Last Best Offer (LBO) was awarded by Interest Arbitrator Nancy Brown on February 27, 2009. Under the Association's LBO Association members will receive a 4% increase retroactive to July 1, 2008 (Corrections Techs will receive a 10% increase). In addition, the County's 12 step

salary schedule (10.5 years to top step) will be replaced by a 7 step schedule. Effective July 1, 2009 Association members will receive a COLA increase (minimum 3% and maximum 7%) *plus 1%*. In addition all employees will receive an additional floating holiday, employees with 1 to 5 years of service will accrue 2 additional days of vacation leave per year, and FTOs will now receive a 5% premium.

The Association argued that its LBO was supported by comparability and the County's difficulties in attracting and retaining new employees.

The County claimed that it couldn't afford the Association's LBO due to current economic conditions (the hearing was in early December 2008) and that if the Arbitrator awarded the Association's LBO, patrol deputies would be laid off. The Arbitrator did not find these arguments persuasive. The County's Jail and Dispatch Center operated on dedicated funds and there was no evidence of financial distress with respect to those operations (which employed most of the bargaining unit). Arbitrator Brown noted that Sheriff Jack Jones testified that there could be layoffs under the County's proposal as well. He conceded that there was adequate funding for the first year of the County's proposal—that proposal actually cost more than the Association's first year proposal! The Arbitrator found that the County's cost estimates of the Association's LBO were flawed. The 7 step salary schedule proposed by the Association had "greater potential" to improve retention and thus reduce training and recruiting costs. Finally the Arbitrator found that given the prevailing economic uncertainty, the Association's proposed 2 year contract was preferable to the County's 3 year LBO.

Arbitrator Brown's Award is on line at: <http://www.oregon.gov/ERB/Mediaawards.shtml>.

Editorial Comment: This was a significant win not just for the Jefferson County Law Enforcement Association but also for public safety employee unions throughout Oregon. At a time when many public employers are seeking to reopen contracts and impose a wage freeze or cut benefits, Arbitrator Brown's careful scrutiny of Jefferson County's poverty argument shows that Associations should not be afraid to go to interest arbitration even in this uncertain economic climate. In addition her award demonstrates that employer claims of financial gloom and doom should not simply be accepted at face value. We strongly urge that Association's not reopen their contracts or freeze wages unless (1) the Employer produces convincing documentation of its financial difficulties and (2) promises in writing that in exchange for the Association's concessions, no Association members will be laid off.

BROWN (2006), ARBITRATOR NANCY BROWN AWARDS THE LAST BEST OFFER OF THE OREGON CITY EMPLOYEES' ASSOCIATION AGAINST OREGON CITY IN A WAGE REOPENER

The contract had a wage and insurance reopener for fiscal year 2005-06. Both parties proposed identical language on insurance and the sole issue for the Arbitrator was wages. The Association proposed a 2% increase in wages effective July 1, 2005 and 3% increase effective March 1, 2006. The City proposed a 3% increase in wages effective July 1, 2005.

Arbitrator Brown started her analysis by stating that the interest and welfare of the public has to be evaluated after looking at the secondary criteria.

The City had argued that the Association should have the burden of proof as its LBO represented a greater change in the status quo. The Arbitrator rejected that and held that both parties had to justify their proposals in light of the interest and welfare of public. She noted that decisions that place the burden of proof on moving parties did so for language changes as opposed to purely economic issues.

The Association tried to argue that the wage increase was justified by internal comparability based on the City's market analysis and wage increases given to other City employees. Arbitrator Brown rejected this, in part, because other City employees had to pay higher insurance premiums.

As to the ability to pay, the City argued that the Association's proposal would be problematic for future increases even though it admitted that the difference this fiscal year was minuscule. The Arbitrator ruled that because there was a wage reopener in the contract for the next fiscal year that any issue about ability to pay could be dealt with at that time.

Turning to comparability, the Arbitrator held that comparability had to be communities of the same or nearest population in Oregon. She ruled that the three cities that were in dispute, Tigard, McMinnville and Wilsonville should all be included. The City objected to Wilsonville because it contracted out its services to Clackamas County. However the Arbitrator stated: "the statutes speak to cities and makes no exclusions for cities that may contract out either police or fire services." Page 13.

In deciding on overall compensation, the Arbitrator excluded all premium pays that were dependent upon assignment. She included education and certification as well as longevity pay. She also included vacations and holidays because they were mentioned in the statute.

The Arbitrator did include the 6% pick up for PERS if paid by either the employee or the employer. The Arbitrator excluded insurance payments an employee receives the benefit but not the premiums. She also mentioned the problem of compensation as some premiums are set with a composite rate and some are not. Page 15.

The third issue was which year to look at the compensation either in 2004-2005 or the current year 2005-2006. She concurred with the City that it states that the benefits are that which the employees presently receive and that is quite specific. However, when looking at comparability lag the Arbitrator then considered raises that other jurisdictions would receive in the fiscal year.

Given all this she found based on the City's exhibit that last year the employees wages were 2.4% below the comparables and considering that the other jurisdictions would get an increase that they would fall even further behind.

In discussing the turnover, the Arbitrator found that the City had a turnover due to the fact that 7 of the employees hired did not make it through probation even though eight of them had been hired from the City's own police reserves. The Arbitrator found that 24 of the officers in the Department had less than 10 years of service and that wage increases would have an effect of lessening turnover. However, she did find that the officers that left the job to take positions in other jurisdictions did so for wages and more diverse assignments.

For all these reasons she awarded the Association's Last Best Offer.

BROWN (2003), ARBITRATOR NANCY BROWN RULES THAT THE CITY OF REDMOND VIOLATED THE CONTRACT BETWEEN THE CITY AND THE ASSOCIATION BY NOT SUBMITTING PROPOSALS BY THE DUE DATE OF NOVEMBER 1 AND IS PROHIBITED FROM MAKING PROPOSALS DURING THIS ROUND OF NEGOTIATIONS

Last November the City failed to meet the November 1 deadline in the Collective Bargaining Agreement for submitting proposals. The Association took the position that the City was prohibited from making any proposals during this round of bargaining except for responding to Association proposals.

When the Association had announced its position, the City walked away from the table and refused to continue negotiations. That led to an Unfair Labor Practice Complaint with the Employment Relations Board holding that the City had to negotiate.

At subsequent negotiations, the City again advanced proposals and the Association filed a grievance over its doing so.

Arbitrator Brown found that the contract language was clear and unambiguous and the City violated it. Therefore, she ruled, the City is prohibited from making proposals for a successor agreement to the existing contract.

Editorial comment: The City has not taken this well. It has filed a Motion to Reconsider. Generally, under a doctrine called "functus officio", the Arbitrator loses all power over a grievance arbitration award after it has been issued. Arbitrator Brown denies the City's motion. The City has also filed an Unfair Labor Practice Complaint over the Association's position on this matter and it's bargaining in general, which is scheduled to be heard on November 10th. The litigation over this round of "bargaining" will continue for some time.

BROWN (2000), ARBITRATOR NANCY BROWN AWARDS THE LAST BEST OFFER OF THE CITY OF GRANTS PASS IN ARBITRATION BETWEEN THE IAFF AND THE CITY OF GRANTS PASS.

This interest arbitration decision is unique because the City of Grants Pass operates on a public safety model and many of the issues surrounding wage increases came because of internal comparability for individual classifications. The parties went to last best offer arbitration looking for a three-year contract. They were divided on economic items, including across the board wage increases, special wage increases and insurance premiums. In discussion of her decision, Arbitrator Brown first indicated that she had to make the decision based on the interest and welfare of the public and then indicated that she couldn't base her decision without full consideration of the secondary listed criteria. She immediately eliminated the cost of living increase based upon the relatively close proposals of the parties. The main issue she concentrated on was comparability. The City argued that fire districts shouldn't be utilized just because their resources are larger than a city and that the arbitrator should only utilize Cities of comparable size. Arbitrator Brown rejected that, noting the statute directs the arbitrator to compare "communities" of the same or nearest population range, not just cities. The arbitrator didn't make a definitive ruling as to which jurisdictions should be utilized as comparables, but looked at the economic proposals of each party from their comparable's position. She noted though that if the set of comparables put Grants Pass in the middle, it was important to note that the cities that rank above Grants Pass in the wage scale, pay considerably more each month.

The fly in the ointment was the union's proposals for significant increases for the corporals on the wage scale. The city was opposing those increases on the basis that a public safety sergeant supervises each corporal and that large increases for corporals are not needed and would cause compaction resulting in corporals earning more than sergeants. The arbitrator found that with a traditional fire model, there was no corporal classification. The City utilized the description of a fire lieutenant or captain as being comparable to a corporal and the arbitrator bought that comparison. However, she then used the City model, and found that the corporal wage scale for Grants Pass was well below those of comparable jurisdictions.

When it came to turnover, there was a significant turnover of employees. However, the City argued the fact that firefighters were leaving to go to larger more

affluent communities such as Medford and Portland Metro should be discounted. The arbitrator finally concluded that neither proposal would “stop the flow” of Grants Pass firefighters because the fact remained they could leave to go to work for Medford and get a \$6000 annual increase. In addition, the projections of both parties were that there would be an anticipated 400 vacancies in the City of Portland and Tualatin Fire and Rescue districts during the next three years, and therefore, any employee who wanted to leave for more wages would be able to do so. The city presented testimony that experienced firefighters leave Grants Pass because of the lack of promotional opportunities caused by the Public Safety plan, which combines police and fire supervisors. The arbitrator accepted that and then noted that neither proposal could solve the problem. In a footnote, the arbitrator had to deal with the fact that in her previous interest arbitration decision with the City of Corneilus she noted that the turnover there was a good reason to give wage increases even though she believed that giving a wage increase would not stop the turnover, since employees from the City of Corneilus were leaving to surrounding larger jurisdictions which paid more.

In turning to the City’s ability to pay, the arbitrator accepted the City’s defense that it had a “me too” provision with other labor contracts and that giving a raise would cause it to automatically give raises to other jurisdictions. The IFF argued strenuously that this was not proper to consider. However, the arbitrator concluded that she must consider this factor in deciding which side was going to prevail. The arbitrator concluded that the union’s proposal, which she costed at \$265,000 more in year one, would negatively impact the City’s ability to provide other services as decided by the City Council.

In the other proposals that separated the parties, the arbitrator concluded that neither side had presented enough evidence to analyze health insurance premiums. She also found that the premium pay proposals of each side had problems. The arbitrator concluded that because wages of the firefighters were low, the union’s proposal would most effectively close the wage comparison gap, if the City had the ability to pay this without negatively impacting the City’s other services. However, the arbitrator decided that if she awarded the firefighter’s proposal, it would arguably cause a dismantling of the public safety model. She stated that such a decision was best left to the governing body, so therefore, she awarded the City’s last best offer.

Editorial comment: This award will have virtually no precedential affect for agencies that do not have a public safety model. The award came from IFF’s decision to place a high premium pay on the corporal position in an attempt to cause the City, according to the City, to have to eliminate the public safety model. In reading between the lines, the arbitrator was quite sympathetic with such an approach but was not going to enter an award which would help it take place. The most humorous part of the award for this writer, was the arbitrator’s attempt to distinguish her comments concerning turnover in Corneilus and why it was important, and why turnover in Grants Pass, which is extremely significant, was not an important criteria to base her decision upon.

“C”

CALHOUN (2002), ARBITRATOR JACK CALHOUN AWARDS THE LAST BEST OFFER OF THE NEWPORT POLICE ASSOCIATION

The parties went to interest arbitration with the main difference being the Association requesting a 4% increase in the first two years of the agreement, with the first year being mostly retroactive, and the City requesting a 3 and 3.5% in the first two years of the agreement. For the third year the City requested the CPI formula with a 2 – 4% range and the Association requested a 4% increase. The parties also had slightly different proposals on DPSST certification pay.

In analyzing the proposals, the Arbitrator first ruled that the interest and welfare of the public cannot be determined without utilizing the statutes' secondary criteria. The Arbitrator found that the City did not claim an inability to pay and found that the difference between the parties' award was somewhere between \$84,000 and \$127,000 depending upon the CPI index for last year of the award. The Arbitrator decided this difference was modest given the fact that this was a 3-year contract.

The Arbitrator then turned to the issue of turnover and noted that nine out of twenty employees had left during the 3-year period. The Arbitrator also found that the number of applicants for vacancies was declining. The Arbitrator stated there was conflicting evidence as to whether the officers left to go to larger jurisdictions, which are not comparable. However, he found that no matter why employees left, the turnover factor was a cost that affected the City and also affected the quality of law enforcement that it provided.

When determining comparability, the City argued for 3 up / 3 down. The Association tried to get the Arbitrator to adopt Arbitrator Lehleitner's reasoning in his 1995 *Winston Dillard Award*, which held that when there are a good number of potential comparables, one can utilize secondary criteria, such as, geographic location. The Arbitrator decided that which set of comparables was utilized was not critical, although he opined that simply going up and down and ignoring secondary criteria was probably the sounder of the two methods. The Arbitrator found that no matter which comparators are used, the City's wages are behind those of the comparable jurisdictions. Therefore, he ruled that the Association's last best offer would help the recruitment and retention problem, as well as being in the interest and welfare of the public by offering a competitive wage.

Lastly, the Arbitrator decided that the CPI was irrelevant given the comparability issues and the proposals of the parties.

CALHOUN (2002), ARBITRATOR JACK CALHOUN AWARDS THE LAST BEST OFFER OF THE TROUTDALE POLICE OFFICERS' ASSOCIATION

The parties went to interest arbitration with minor differences in their proposals on work schedules and compensatory time as related to how long the City had to grant officers time off when they requested it for FLSA comp time and a vacation sell back issue. The

main difference that separated the parties was the City's desire to switch from fully paid health care to 95-5% split. As a result of this priority, the City's first year proposal was for a 3% increase while the Association's was for a 2% increase. The parties proposed identical CPI based increases for the second and third year of the agreement, utilizing the City of Portland CPI-U index.

In analyzing whether an Arbitrator should enter an award that changes the status quo between the parties, Arbitrator Calhoun adopted the logic of Professor Snow in the Bend Firefighter case and Arbitrator Wollett in the City of McMinnville case. In those decisions there was a great deal of emphasis placed on stability and continuity of a contract and that the status quo should not be changed drastically unless certain conditions are met. Those conditions are as follows:

1. The status quo has proved to be unworkable or not equitable.
2. There must be a quid pro quo (trade off) justifying taking away a benefit that was gained through negotiations.
3. There must be proof of a compelling need.

The City made much of the fact that cost sharing is becoming the norm for insurance benefits and that insurance rates have been rapidly rising.

However, the Arbitrator rejected that logic and concluded:

“If there are employees who are not already fully aware of the fact that health insurance costs have been rising at a alarming rate for last several years, it is difficult to imagine they would be suddenly awakened by a 5% sharing proposal that is offset by a 3% wage increase whose impact is reduced by the City's 125 Plan.” (A 125 Plan allows employees to take the 5% of their salary with pretax dollars.)

The Arbitrator found that the Portland CPI-U, which both parties were using, had been for last year's increase 2.9%, and given that fact, that the City's offer of a 3% was only one tenth of a percent larger than the CPI, which he decided was not a quid pro quo. Therefore, he awarded the Association's last best offer.

Considering that the parties were separated by an issue of the reasonableness of FLSA regulated time off requests for use of compensatory time, it is a shame that the Arbitrator did not comment on this issue. See the subsequent article under Fair Labor Standards Act litigation.

Editorial Comment: First, congratulations to Jamie Goldberg for interest arbitration wins back to back. Second, in the Troutdale case, one has to believe that the City lost in part because of its utilization of Portland CPI-U index. Since the legislature has mandated that a consideration be of the U.S. All Cities Index, and the Portland CPI index was almost 2 percentage points higher than All Cities Index, in part due to the fact that the Portland CPI index is only calculated twice a year, so there is a significant time lag between it and the National Index, which is calculated monthly, it appears the City has

itself to blame for losing this arbitration. Should the City have convinced the Arbitrator that its offer was actually 2 percentage points higher than the CPI, perhaps the result would have been different.

CAVANAUGH (2008) ARBITRATOR MICHAEL CAVANAUGH RULES FOR THE CITY OF ROSEBURG IN AN ARBITRATION AGAINST IAFF

This is an arbitration that centered on two issues, wages and the level of employee copay for medical insurance premiums. The City proposing 4 percent per year for each year of a three year agreement. The Union proposed 3 percent every 6 months for the duration of the 3 years of the agreement. The Arbitrator found that compounded over the life of the agreement, the City's offer would result in a wage increase of 12.5 percent while the Union's would be 19.4 percent.

On insurance the parties currently had a copay that ranged from \$13 for employee only coverage \$30 for full family coverage. The City proposed a modest \$3-\$5 increase per month on the copays. The Arbitrator noted that the critical issue as agreed to by the parties was the wage increases, not insurance.

In looking at the interest and welfare of the public, Arbitrator Cavanaugh adopted Arbitrator Snow's decision in the 1995 *OPEU* case under which one would analyze the secondary criteria and only then analyze interest and welfare of the public in light of the secondary criteria. Here the Arbitrator identified the issue of comparability selection as a critical issue in the case.

The Arbitrator found that given the City's available financial resources, ability to pay was not a critical consideration. The Arbitrator rejected the Union's contention that there was a recruitment and retention problem. He noted that between 2002 and 2006 no firefighters had left. He stated that there would not have been a 4 year gap in turnover had there been a problem.

The critical issue, which is unique to firefighters' cases, is the definition of comparable communities. The Union argued that even if a comparable community contracted with a larger fire district, such as Tualatin Valleys it still should be comparable, and the City argued that the Legislature could not have intended for Roseburg to be compared to fire districts that were extremely large that happen to serve a city of similar size.

The Arbitrator reviewed the history of arbitration decisions in this area noting that 1999 Arbitrator Lankford adopted the union's position in *North Bend Firefighter's* case as did the following arbitrators: Nancy Brown (*Grants Pass* 2000); Arbitrator Eric Lindauer (*Astoria* 2000) and Arbitrator Katrina Boedecker (*Ashland* 2001). Therefore, he rejected the City's argument that the Union improperly selected comparables.

He then turned to the issue of whether a district could be rejected even though it was similar in population because of other factors, such as, geographic location and labor markets. He noted that there is some disagreement about it with interest arbitrators on

that issue. He noted that a number of arbitrators have agreed that if it is possible to narrow the list of comparable jurisdictions by applying geography or labor market as long as the list contains a sufficient number of appropriate comparators, George Lehleitner (*Winston Dillard* 1995); Carlton Snow (*North Bend* 1996); Alan Krebs (*Polk County* 2001); Vince Helm (*Madras Police Employees Association* 2002); Luella Nelson (*Jefferson County Law Enforcement Association* 2003); and Norman Brand (*Winston Dillard Fire District*, 2005). He also noted that there were a number of arbitrations that reached the opposite conclusion: Arbitrator Lindauer (*Astoria*); Arbitrator Calhoun (*Newport* 2002); and Arbitrator Tom Levak (*Tigard Police Officers'* 2005).

Arbitrator Cavanaugh concluded there are approximately 8 arbitrators that agree with Arbitrator Lehleitner that location could be considered as a secondary factor and while there are 4 that disagree, he decided that the "Lehleitner line has better reasoning." The Arbitrator cited the recent decision of Arbitrator White in the *Lane Rural* case, but disagreed with his result noting that subsection h of the arbitration statute can only be utilized when nothing else in the record would lead to an appropriate result. He quoted the Drummond Law Review article as stating: "This comparability limitation does not preclude the use of other traditional benchmarks such as labor market, per capita income and similar criteria." Page 27. Based on this he concluded that population was not the sole criteria and that in an appropriate case arbitrators were free to apply "traditional benchmarks such as geographic labor market considerations." Page 28. The Arbitrator then rejected some of the City's comparables and rejected the Unions ones that were from the Portland communities and were within Tualatin Fire District. He found that appropriate comparables to be Ashland, Grants Pass, Redmond, Newberg, Klamath Falls and Forest Grove.

Turning to the comparability analyses, he agreed with the Union's position that there had to be monetary value attached to vacation and holiday pay because it was set forth as an element in the statute and paid time off had to be considered. Because the Roseburg Firefighters do not do paramedic work he disregarded paramedic pay.

Arbitrator Cavanaugh found the City's Last Best Offer would result in overall firefighter compensation exceeding the average in comparators by nearly 2 percent. As the years went by under the Union's proposal the Roseburg Firefighters would exceed the comparators by 7.5 percent. For these reasons, he awarded the City's LBO.

Editorial Comment: This is primarily a firefighter issue, but will affect a number of law enforcement arbitrations where there are multiple comparable jurisdictions that can be considered. The debate is to whether it's solely population or population plus other factors will continue to be a critical one for some jurisdictions in interest arbitrations in the foreseeable future.

COLLINS (2002), ARBITRATOR R.W. COLLINS AWARDS THE LAST BEST OFFER OF BENTON COUNTY

Benton County and the Benton County Deputy Sheriffs' Association went to interest arbitration over a number of issues, many of which were fairly insignificant. Needless to say, the most significant was wages. The County wanted a 3% increase effective the first pay period following the arbitrator's decision with a lump sum payment for the equivalent of a retroactive increase in the first year, and 2.5% increase in the second year and again in the third year, but it wanted a reduction of the 6% because the County would begin paying employees PERS contribution as opposed to employees paying it.

The Association's last best offer was 3.5% the first year, and 3.25% the second and third year.

The Arbitrator found that the County was facing significant financial problems. He accepted testimony that while the County could "afford" the Association's raises, doing so would cause a reduction of force and reductions of other services.

The Arbitrator secondly found that the County was able to attract and retain qualified personnel. In turning to comparability the Arbitrator indicated that he believed the correct comparable jurisdictions were those with a percentage of 50% more or less than Benton County. The Association had proposed to use a local labor market of I-5 Counties, which the Arbitrator rejected as being inconsistent with the statutory definition. The County argued that the appropriate range was 30% plus or minus, but it added two other counties that were close.

The Arbitrator concluded the Association's comparisons were seriously flawed and criticized the Association for not analyzing this year's offered increase with an inclusion of the County's last best offer of 3%. He found that when that occurred, that Benton County compared favorably with comparable jurisdictions.

Based on that fact, and the fact that none of other issues were significant, the Arbitrator awarded the County's last best offer.

Editorial Comment: Frankly, given the issues in comparability, this case should have settled in an ideal world. It does not behoove a labor organization to go to arbitration absent a good comparability claim and without the ability to show that the employer has the ability to pay for wage increases, if the labor organization can settle the contract in a reasonable manner. While personality clashes may have made settlement impossible, in reality, it should have occurred given how close these proposals were and their lack of fundamental differences between the other unsettled issues.

"D"

DALY (2008) ARBITRATOR DALY AWARDS LAST BEST OFFER OF CITY OF EUGENE

This case was an interest arbitration between IAFF and the City of Eugene. It was for a two year contract (one year was retroactive). The IAFF proposed retroactive wage

increases in six month increments, 3, 2 and 3 percent, and a deferred comp payment as well. The City proposed annual 3.3 and 3.5 percent wage increases. Both parties proposed increases in EMT pay.

The Arbitrator found it was in the interest and welfare of the public:

“For the City to act in a fiscally responsible manner particularly in light of the constrained budget and other pressing public needs.” p. 36.

He found that the secondary criteria especially ability to pay had to be analyzed in order to answer the primary criteria. The Arbitrator found that the City did have an inability to pay based upon the back loading of the Union’s proposal and the fact that Lane County’s drastic budget cuts were going to leave the City picking up part of the responsibility that the County had paid for in the past. The Arbitrator stated:

“The City’s inability to pay proves that the interest and welfare of the public is best served by choosing the City’s Last Best Offer.”

The Arbitrator found that the ability to attract and retain personnel favored the City as well. The Arbitrator concluded that:

“You do not have to make detailed analyses of comparability because total compensation presently received by the Union using its methodology can be found favors awarding the City’s Last Best Offer.

Therefore, Arbitrator Daly awarded the City’s Last Best Offer.

DORSEY (2000), ARBITRATOR WILLIAM DORSEY AWARDS THE LAST BEST OFFER OF THE CITY OF LA GRANDE IN AN INTEREST ARBITRATION WITH THE LA GRANDE POLICE ASSOCIATION

This was a case where the parties’ positions were very close. Both parties proposed three-year cost of living wage increases which were virtually identical. The only potential differences were the Association’s issue on retroactive wage increases and selected increases in several classifications. When the Arbitrator analyzed the position of the parties, he concluded there was a \$29,000 difference between them on a three-year agreement. He stated this conclusively demonstrates that the City’s proposals were just as reasonable as the Association’s. The Arbitrator found that the Association’s proposals really had special increases for only a couple of employees and concluded that that was not justified. Therefore, he awarded the City’s last best offer.

DOWNING (2000), AWARDS LANE COUNTY’S LAST BEST OFFER AGAINST THE LANE COUNTY PEACE OFFICERS ASSOCIATION

The main issue that separated Lane County and Lane County Peace Officers Association was economic. The Association wanted a three-year contract with a three percent increase the first year, and a CPI-based increase the second and third year, with a minimum of three percent and a maximum of five percent. The County wanted a two-year agreement, with a two percent wage increase each year, and a co-pay on insurance in the second year of the agreement. The County also wanted the Association to attend a 15 minute briefing without compensation (which violates the FLSA but by extending a lunch hour, making half of it compensable and half of it non-compensable, this could be legal.)

Arbitrator Downing reviewed the parties' positions on this and other minor language. The Arbitrator concluded that the comparables for Lane County were the traditional comparables, Clackamas, Marion, and Washington Counties. The case was interesting in regard to comparables only because the parties each switched whom they wanted as comparables during the arbitration.

Arbitrator Downing found that Lane County had a real inability to pay based on declining timber revenues and the inability of Lane County to pass public safety levies.

In looking at the interest and welfare of the public, Arbitrator Downing summarized other interest arbitration decisions where Arbitrators tried to get a handle on this un-defined term. He concluded that all the previous arbitrators who looked at this issue "lacked consensus" on how to determine it. He toyed with the idea submitted by Professor Drummonds (formerly of the Kulongoski law firm, who was instrumental in the backroom deals for SB 750, for which this writer has not forgiven) and concluded that the interest and welfare of the public would be viewed from the broader perspective of all citizens of the community, not just the employer or the labor organization. Then he gave great credence to a task force provided by Lane County on the mix of services which concluded that the County staffing levels which delivered all the services provided by the County were inadequate. This, combined with an inability to pay, was fatal for the Association.

The Arbitrator contrasted this with comparability in which he concluded that deputy sheriffs at five years of service were already 7.8 percent underpaid, up to 20 years of services, where they were only 3.6 percent underpaid. The Arbitrator acknowledged that awarding the County's last best offer would acerbate the problem of comparability which would hurt the County in its ability to attract and retain employees but felt that he had no other option than to do so given the County's precarious financial position.

"F"

FITZSIMON (2009), 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.

“G”

“G”

GABA (2001), ARBITRATOR GABA RULES AGAINST GLADSTONE POLICE ASSOCIATION

This interest arbitration centered around the last best offer of the parties concerning insurance, and a grievance regarding the interpretation of the Collective Bargaining Agreement for the previous contract. The grievance was over language in the existing contract for an insurance co-pay, which had a hard dollar cap in the first year, and an 89-11% split in the second year. The attorney for the Association, Mark Mackler, dropped the grievance but indicated the matter would be resolved in the upcoming interest arbitration. The Association’s last best offer for the successor contract again had a hard dollar cap in the first year, and a change in language for the second year, requiring the City to increase the cap so that the employee paid no more than 11% of the premium cost.

The City’s last best offer had a multi-tiered hard dollar cap in the first year, depending upon which insurance plan the employee selected, and whether the employee was single, had children, a spouse, or both of the above. In the second year the City agreed to contribute 89% increase of the premium with the employee paying 11% of the premium. In this case the arbitrator noted, while this was an interest arbitration because of its correlation to the grievance arbitration, he would utilize a standard reference for analyzing contract dispute from the treatise *How Arbitration Works*.

The Association argued that its last best offer reflected what should have been the status quo of the previous collective bargaining agreement. The City argued that its last best offer incorporated the status quo, and asserted that the Association had made no argument for a change. The arbitrator found under the interest and welfare of the public, that both parties had considered the interest and welfare of the public. The arbitrator concluded that he must determine what the status quo is, because it was in the interest and welfare of the public not to disturb it, because neither party met a burden of proof for making a change. With that being said, the arbitrator turned the decision of the interest arbitration into an interpretation of the language under the grievance arbitration, which also was before him. The arbitrator first found the language in the contract ambiguous. The arbitrator ruled against the Association that the 89-11% split would apply to any increase, and not just to amounts that happen to be under the \$524 cap. In other words, employees that had been paying under the cap, still had to pay 11%.

Moral of the story: If a grievance arises concerning contract interpretation, don’t put it off. Immediately proceed to arbitration with it. Don’t wait for two years.

GREER (2006), ARBITRATION WILLIAM GREER AWARDS FOPPO’S LAST BEST OFFER FOR RIGHT TO CARRY ARMS

FOPPO went to Interest Arbitration against Yamhill County over the sole issue of whether the parole and probation officers could have the right to carry firearms, provided that they passed an appropriate course and any psychological exam ordered by the County. The County's proposal was to continue the contract provision that allowed it the discretion to prohibit carrying of firearms.

The County also took the position that due to ORS 166.263, a parole and probation officer could not carry a firearm unless so authorized by the director, so FOPPO's proposal must be permissive. However, Arbitrator Greer ruled that only the ERB could make a decision as to whether a proposal was mandatory or permissive subject to bargaining.

In looking at the issue, the Arbitrator concluded he had to look at subsection H of the statute which was "other factors," because traditional compensation and comparison issues did not help. When doing so, the Arbitrator then concluded that he had to look at what comparable jurisdictions did. He decided that the appropriate comparability was 50% below to 150% above the population of Yamhill County. He examined 11 comparable counties and concluded that 10 either required or permitted parole officers to carry weapons on duty. He also stated it was in the interest and welfare of the public for the parole and probation officer to be armed on duty so that the public will know that employees feel safe in their work. He accepted results of a survey showing many other jurisdictions in the Oregon permit or require arming of P&P officers. He also took note of national surveys in the area.

Arbitrator Greer awarded FOPPO's Last Best Offer allowing parole and probation officers to carry firearms.

Editorial Comment: Congratulations to FOPPO.

"H"

HARRIS (2005), ARBITRATOR CATHERINE HARRIS AWARDS LINCOLN COUNTY DEPUTY SHERIFFS ASSOCIATION LAST BEST OFFER AGAINST LINCOLN COUNTY

The contract between these parties expired in 2002. Negotiations became held up when the County announced that it could not continue the health insurance for the Deputy Sheriffs' Association and unilaterally changed their benefits. The Association filed an ULP over that matter and prevailed. In that case, the ERB ruled that the County had created its own crisis by changing benefits for all other County employees so that the Sheriff's bargaining group was too small for purchased coverage. The ERB ordered the County to self-insure the difference between the County's plan and the prior plan and to fully pay the County's plan for the bargaining unit members. Negotiations had been put on hold until that matter was resolved. Because of that the Arbitrator noted that she was

awarding a contract, which by the Last Best Offers of the parties would end June 30, 2005.

The critical difference between the parties was insurance. The Association requested that the County's new plan be fully funded for the bargaining unit and that the members receive \$70 per month to make up for the difference in plan coverage. The County wanted the Association to take the County's plan fully paid, but limited its' coverage to the final year of the contract, i.e. that an Evergreen Clause would not be in effect for it.

The parties had different wage offers which over three years ended up only being a percent apart. However, due to the manner in which they were implemented the cost would be more than one percent because of roll up costs.

The Arbitrator began her analysis of the interest and welfare of the public and as part of that consideration declared that the party who wanted a change for the status quo had the burden of proof of showing the reason for the change and quoted other arbitrators saying there must be a "quid pro quo" for those changes. She found that the County had made no quid pro quo for its proposed modification of the status quo for health care, which she determined to be what the ERB had ordered the County to do. For this reason alone she awarded the Association's Last Best Offer.

In addition, both parties had proposals with regards to work schedules, the Association's proposal was for the continuation of the status quo with specificity as to the shifts actually worked in various sections of the Sheriff's office, while the County's was much more general. The Arbitrator favored the Association's proposal.

The parties were also in disagreement over comparability selection. The Association had eliminated as comparable counties Klamath County and Malheur County, even though their populations were similar because of their remote geographic location from Lincoln County. The parties had agreed on the utilization of Polk, Coos, Columbia and Clatsop County. The County used Klamath and Malheur County and did not agree to the use of Tillamook due to the discrepancy of their populations. The Arbitrator did not expressly resolve the matter. However, in a footnote she stated that once communities of comparable population have been identified it did preclude the consideration of other factors, such as geographic location or type of economy. She described the Association's exclusion of Malheur and Klamath County as "not unreasonable."

The County also claimed that the Association unlawfully changed its Last Best Offer right before arbitration. The Arbitrator pointed out that she did not have jurisdiction to resolve any such dispute.

Editorial Comment: Because of the ULP over insurance the precedential value of this case may only be viewed as cumulative with other decisions.

HAYDUKE (2007) ARBITRATOR JOHN HAYDUKE RULES FOR BAKER COUNTY LAW ENFORCEMENT ASSOCIATION

The parties' Last Best Offers concerned wages and health insurance. The parties were fairly close to a contract that only had one year left in it. The Association proposed 4.5 percent wage increases July 1, 2005 and 2006, and 4 percent in 2007. The County proposed 3 percent in 2005, 3.5 percent in 2006, and, in what they claimed was a typo, 4 percent July 1, 2006. Both parties proposed the same certification pay of 2 percent and 4 percent. The Association proposed continuation of fully paid healthcare within the last year the employees would pay up to 5 percent of the costs, if it exceeded the costs for any other bargaining unit member in the County. The County proposed a 95 percent copay effective July 1, 2007.

Arbitrator Hayduke discussed the effect of first the County's proposal had a typo for the third year of the agreement which was 2006 versus 2007, and the County's explanation for its healthcare plan differed from the language on the "face of it." The Arbitrator correctly noted that it would be up to the ERB eventually to decide whether a party could change what is commonly referred to as a "scrivener's error" or would be bound by the exact language of their Last Best Offer.

Turning to the merits of the proposals Arbitrator Hayduke observed that it is not in the interest and welfare of the public to have an award which would have to be subject to litigation and that a Last Best Offer should not lack clarity and finality.

Looking at the secondary criteria, the parties stipulated that the comparable jurisdictions were Jefferson and Morrow Counties. The parties used different analyses when comparing wages and economic benefits. The Association tried to argue that the amount spent on insurance should not be considered, but the Arbitrator noted that the statute lists all other direct or indirect economic benefits. However, he did agree that lumping it in blindly into economic analyses would skew results. In addition, he criticized the County's approach as it used their Last Best Offer wages for comparison purposes, which he said contradicts the statute which requires comparison of the "overall compensation presently received by employees." Using any event, he found that the longer an employee stayed, the worse they compared to the comparators at the 10 – 15 – 20 years.

Ability to pay was not an issue. The Arbitrator found a high degree of turnover and questioned whether it relates to lifestyle versus the compensation. Lastly, the Arbitrator adopted without reference to other decisions the "quid pro quo" analyses of bargaining that if the County was going from fully paid healthcare to a 5 percent copay that it had to offer something in place of it. He noted that non-represented County employees which moved to that system got a 2 percent extra wage increase to offset its costs and that nothing was offered to the Association. Therefore, even though he found the Association's proposal higher than normal, under the Last Best Offer analyses – he awarded it.

**HEIN (2004), ARBITRATOR ALLEN HEIN AWARDS GRANT COUNTY'S
LAST BEST OFFER AGAINST THE GRANT COUNTY POLICE OFFICERS'
ASSOCIATION**

The issue that separated this 13 person bargaining unit was wages and overtime.

The County offered 1.7 percent the first year, 2.1 percent the second year, and 3.0 percent the third year. The Association requested 3.0 percent each year.

This County requested that continuation of the status quo, which was paying overtime to employees on a weekly basis and not calculating paid time as hours worked consistent with FLSA. The Association requested the more traditional approach for larger counties, which is anything over the employee's daily, or weekly schedule, and that all paid time be counted as hours worked.

The Arbitrator determined that the interest and welfare of the public could only be analyzed after looking at the secondary criteria.

The Arbitrator found that the County had a significant hardship with paying the Association's proposal due its poor economic climate. Looking at retention and turnover, in spite of the fact that there was a significant turnover, the Arbitrator found that the County could recruit and retain employees in spite of the testimony of the Sheriff that he was going to have trouble doing so for corrections positions, no matter which Last Best Offer was awarded.

On comparability the Arbitrator used the three counties that the parties agreed were comparable, those being Lake, Harney, and Wallowa, and rejected the Association argument that Morrow County should be considered comparable because it is greater than 50 percent in population and as tax revenue dwarfs the other comparable counties.

The Arbitrator found the deputies were between seven and nine percent behind on comparability, and yet because of parity pay, the corrections officers were ahead on comparability.

In considering which award to make, the Arbitrator decided that the County's poor financial status, plus the fact that its corrections officers exceed the average in comparable jurisdictions, and the fact that even the County's Last Best Offer exceeds the cost of living, that he would award the County's Last Best Offer.

**HELM (2004), ARBITRATOR VINCENT HELM ADOPTS THE LAST BEST
OFFER OF THE STATE OF OREGON WITH REGARDS TO ITS
CORRECTIONS EMPLOYEES**

In what can only be described as a case of assisted suicide, AFSCME went to Interest Arbitration on behalf of the State correction officers with a Last Best Offer providing that employees would continue to receive step increases during the life of the agreement, as well as for other minor changes.

Arbitrator Helm determined that the interest and welfare of the public would be served by determining what the parties would do if they really had the right to strike and that Interest Arbitration should not be a windfall so that a party could obtain through arbitration, which it could not have obtained had it resorted to economic action. *(This has to be the fiction of the Western world. Public sector strikes are never won except through political pressure, and only the teachers have any chance in that area.)*

Adding to the wisdom that went into this decision, Arbitrator Helm found that the State had the ability to pay the increase in this case, mainly because the State decided that it had the ability to grant increases of the one time bonuses to management employees that it negotiated for bargaining unit members, and pay the increases in health care costs.

Arbitrator Helm found that a problem in the State in attracting and retaining qualified persons in Eastern Oregon, but concluded that was not due to compensation, but due to the isolated area.

When looking at the compensation and comparing it to what is paid in other states, Arbitrator Helm found that the four contiguous states should continue to be the comparable jurisdictions and rejected Alaska as a comparable jurisdiction, as well as Arizona or New Mexico. Using his methodology, he found that Oregon was a leader in total compensation. There was no discussion of a weighted average of the comparable jurisdictions.

The Arbitrator acknowledged that the bargaining unit would fall behind during the next two years because of the consumer price index, but adopted a funding showing that historically, from 1993 to 2003, they had exceeded the CPI in their wage increases.

In the end, the Arbitrator used sub-section (H), which is “other factors” that he’s only supposed to use when he can’t use normal factors, to decide that internal equity had to be considered and since the large OPEU unit and the main AFSCME unit had both taken freezes in wages and step increases for the next two years, it was appropriate to have this unit take them as well. Therefore, he awarded the State’s Last Best Offer.

Editorial comment: I believe that the AFSCME house counsel is competent and in fact, she used to work for me. I also believe that utilizing Arbitrator Helm after his Madras decision is an act of malpractice. On the other hand, I doubt that any arbitrator would have ruled in favor of Oregon AFSCME given what OPEU and the main AFSCME unit accepted for the two-year wage and step freeze. However, I found the logic of this opinion particularly flawed, as the Arbitrator could have simply utilized the catch all criteria of “interest and welfare of the public” and not ventured into dangerous legal grounds by using the “other factors.”

HELM, (2003), ARBITRATOR VINCENT HELM AWARDS THE CITY OF MADRAS' LAST BEST OFFER AGAINST THE NEWLY FORMED MADRAS POLICE EMPLOYEES' ASSOCIATION

Madras Police Employees' Association was formed about a year ago after they decertified the Laborers' Union. A survey of five larger and five smaller jurisdictions showed that their wages were 25% behind those comparable jurisdictions. The parties were unable to negotiate the initial contract and went to Interest Arbitration. This matter was complicated by competing unfair labor practice complaints filed by both sides.

The City's Last Best Offer was to change the compensation plan from a 6-step 5% plan to a 15-step 2 ½% plan. The City offered a 5% retroactive increase for the first year agreement, but each employee's increase varied radically based on where the employee was placed on the new wage scale. The City offered a 2% cost of living in the second and third years of the agreement. In addition, on insurance the City offered a hard dollar cap of \$600 a month the first year, \$625 the second year, and \$650 in the third year.

The Association requested a 5% increase the first year of the agreement, a CPI based formula in the second and third of the agreement, and a 3% increase in January of the second and third year of the agreement.

Even though the City didn't argue it, the Arbitrator decided that "more significance" should "be attached" to cities which are remote from I-5 and are not near larger cities. That left only four comparable jurisdictions and the Arbitrator excluded some of those as being out of step from those, which he decided was the norm. After doing so, the Arbitrator concluded the wages of the officers in Madras were only 16% behind those of their comparable jurisdictions. Three out four arbitrators who have analyzed comparability have rejected sorting out potential comparable jurisdictions by anything other than population.

In discussing insurance, the Arbitrator concluded that some kind of cost sharing was the norm. He acknowledged that an accurate comparison of different costs was virtually impossible because some cities had a composite rate and some cities had tier rates with different rates for single, married, or full family benefits. He also acknowledged that the copays were hard to judge and it was hard to compare the payments to levels of benefits.

Since the Arbitrator found that with cost sharing the norm, he concluded that the Association's proposal simply asked for too much. The Arbitrator opined that if the Association had requested lower wage increases and fully paid insurance, or these wage increases with cost sharing, then he would have awarded the Association's proposal. However, he awarded the City's proposal even though he acknowledged that over the life of the agreement, because of the hard dollar cap utilized by the City, that some bargaining unit members would actually lose money.

Editorial comment: I never claimed to be a good loser. It's bad enough arguing against management's representative. I got teamed up on in this case by the Arbitrator who advanced arguments that the City's advocate did not. However, over the objections of the Association, the City placed evidence in front of the Arbitrator of the ongoing litigation of unfair labor practice complaint. Cynically, the Arbitrator may have set the stage for further bargaining, or a second Interest Arbitration, which in all probability will occur.

HETRICK (2006), ARBITRATOR JERRY HETRICK AWARDS JACKSON COUNTY SHERIFF'S EMPLOYEES ASSOCIATION LAST BEST OFFER

This was in Interest Arbitration where the award was issued at the end of September 2006 for a contract that expired June 30, 2005. The Association's Last Best Offer called for a retroactive 3.5% increase for all employees, retroactive July 1, 2005, and an extra .25% increase for Correction Officers and all other employees who are non-sworn, get a 1% increase. It also called for a 5% premium pay for detectives. For the next two years the Association's offer was for an increase equal to the US CPI-W with a minimum of 3% and the Corrections Deputies having a .25% increase for each of the last two years. As for health and dental insurance, both parties were proposing hard dollar cap increases, identical amounts for the first year, and the Association wanting 4.75% increase in a pay period for this fiscal year and 5.45% increase in a pay period for next fiscal year.

The County wanted 4.20% increase in a pay period for this fiscal year and 4.53% increase in a pay period for next fiscal year. In wages, the County offered 2.6% for all classifications retroactive to July 1, 2005, and a 3.6% for records clerks and criminal data technicians and rescue assistants. Effective July 1, 2006, the County offered an increase equal to the CPI-W, a minimum of 2% and a maximum of 4.5%, with the same for the next year. The County also proposed deleting the requirement to provide meals for Corrections Deputies and Records Clerks. The Arbitrator found in looking at the interest and welfare of the public that "an effective and appropriately compensated police force is essential to the safety of the community in which they serve." Pg. 7. He also agreed the secondary criteria must be analyzed for determining the interest and welfare of the public.

Regarding the ability to pay, the County Administrator acknowledged that the Association's proposal could be paid for by the County, but the County wished to not utilize its rainy day fund in case the O&C timber revenues are lost. The County costed the difference between the two proposals at \$700,000. The Association, based on health insurance assumptions, costed the difference between \$117,000 to \$173,000, 5% maximum. The Arbitrator costed the difference at approximately \$200,000 between the parties. The Arbitrator did find that the County had a reasonable ability to pay this difference.

As for comparable jurisdictions, the County wanted a plus or minus 50% population threshold which would be Deschutes, Linn, and Douglas. The Association argued all were smaller in population and sought to provide a 50% view of the above plus

Clackamas, Lane and Marion. The Arbitrator noted last time that the previous Interest Arbitrator, Lang, had refused to utilize 50% to include Clackamas, Lane and Marion Counties. The County stayed with Arbitrator Lang's comparables while the Association argued for three up, three down in population. The Arbitrator agreed to the exclusion of Marion and Clackamas Counties as being too far away and too large. He also agreed with Arbitrator Lehleitner recognizing that comparability could be affected by geographic proximity. He also agreed with Arbitrator Lang, who stated in his previous Arbitration award: "Because Jackson County is the largest employer, the comparables the Arbitrator would expect that the community would desire the law enforcement personnel to be paid at the higher rate."

When the County tried to use a total compensation analysis and the Association used benchmarks of 5, 10, 15 and 20, the Arbitrator used entry level and top step, what he called total compensation. (What constituted total compensation was not discussed.) The Arbitrator found that the County did pay above the market average, but did not compare favorably with Deschutes County for its Corrections Officers or Deputies, Deschutes County being the next largest comparable jurisdictions. In turning to insurance, he found that historically the County provided the funding for (a fixed dollar cap) and the Association fixed it as a plan design and how much it will contribute to the plan design. The County agreed that the Association managed a cost effective insurance plan. The Arbitrator found that the County intended to maintain the existing benefit plan design, anticipated co-pay while the Association wanted to cap an excess of anticipated costs for the next few years. He found both proposals would provide fully paid insurance for the first two years and the real issue was the third year where the parties were apart on the proposal. He criticized the Association's proposal for providing for fully paid health care which lessens the need for the Association to be prudent with cost control figures. The Arbitrator also criticized the Association's proposal as confusing and indicated it is not in the interest and welfare of the public to produce disputes on new contract interpretation.

As to K-9 compensation, the Arbitrator found that the County had unilaterally imposed its current compensation plan and now wished to change it. The Arbitrator stated that the County's request for a change was the effect of the County "making its bed and now asks the Arbitrator to change its sheets." Pg. 21. In discussing contract language proposals, he adopted the compelling need status, saying that whoever wants to change must show that or a quid pro quo. The Arbitrator found that given the past and formal bargaining between the parties, the Association proposal would require bargaining changes on work schedule was not needed.

Another County proposal was to require employees to schedule a doctor's appointment for work related injuries on their own time. The Arbitrator rejected this and ruled that was in the public interest for medical appointments to be paid for by the County, especially since "police and fire units are far more subject to on the job injuries than most County employees." Pg 27. Based on that, he disregarded any internal equity arguments.

In the end, the Arbitrator decided because the Association's Last Best Offer brought the County to where Arbitrator Lang had suggested, which was the highest wages in

compensation of the comparable jurisdictions, and that it had to be awarded. He criticized parts of the Association's proposal, especially on health care, and shift scheduling, but decided that those were not a reason to adopt the Association's LBO.

“J”

JOHNSTON (2004), ARBITRATOR BRYAN JOHNSTON AWARDS THE LAST BEST OFFER FOR POLICE EMPLOYEES OF THE CITY OF WEST LINN

This case involved a reopener for two years. The Association's last best offer was for wage increases of three percent in 2003 and 2004. The City's last best offer was for a two-year wage freeze.

The Arbitrator defined the interest and welfare of the public by quoting Arbitrator Jane Wilkinson that it stood for “an award of fair and competitive wage that allows the unit of government to spend its resources elsewhere in order to meet public needs.” He also found that the secondary criteria had to be taken into account.

In turning to the ability to pay, he ruled that the burden of proof rests on the City. He determined that the City did have the ability to pay, still leaving a reasonable reserve. He was not impressed that three City officials testified with differing views of what to do with the money if they didn't have to pay it. Apparently the City didn't have a clear priority as to whether the money would even be put in contingency funds or be spent elsewhere. He found testimony of escalating costs in future years to be speculative.

In looking at the ability of the employer to attract and retain personnel, the Arbitrator found that the City had lost half of its employees in one year. However, the testimony was that 11 out of the 15 employees left to accept employment with other police agencies and only one stated that wages were the reason for his departure. The Arbitrator did find that there was a problem here but decided there was no proof that compensation was part of the problem.

The Arbitrator adopted as comparable the jurisdictions of Ashland, Forest Grove, Grants Pass, Keizer, Klamath Falls, Lake Oswego, McMinville, Oregon City, Tualatin, Roseburg, and Woodburn. The Arbitrator rejected a Union attempt to delete those jurisdictions outside of the local labor market. While the Arbitrator found that the estimates were that the Union's last best offer would move the officers' wages above the average, he found that the City's two-year wage freeze was a significant decrease in comparability standing.

In conclusion, the Arbitrator concluded that while the Union offer asked for too much, the City's proposal of a two year wage freeze was totally unreasonable and therefore reluctantly adopted the Union's last best offer as being in the interest and welfare of the public.

Editorial comment: *A clear case of assisted suicide with the Association wisely taking advantage of that fact.*

“K”

KELLAR (2006), ARBITRATOR SHERMAN KELLAR AWARDS LAST BEST OFFER OF MYRTLE CREEK POLICE OFFICERS ASSOCIATION

The parties went to Last Best Offer arbitration over a three-year contract with one of the critical issues being insurance. The Association proposed continuation of the current plan and for wages proposed 3% a year for three years with an additional step reflecting 3% difference between steps each year. The City merely proposed an additional top step every year.

The Arbitrator declared that the burden of proof would be on the party that proposed changing the status quo and noted for the various positions of the parties status quo differed. He gave the City the burden for justifying changes to the wage structure, and since both parties have brought forth changes to the insurance programs, each had the burden of justifying their positions.

In looking at the interest and welfare of the public, the Arbitrator followed many other arbitrator’s decisions that the secondary criteria had to be discussed.

The Arbitrator found that in the past, the City had required only the police officers to pay a health care copay. The Arbitrator noted that during the second year of the proposed agreement, police employees would be the only employees in the City with a copay and the Arbitrator found that with 50/50 in premium increase, even if rates could go as little as 8%, they could double the employees’ payment for health care.

The Arbitrator declared that there was no evidence presented by the City to justify its position. The Arbitrator concluded he was astounded by the disparate treatment of Association employees versus the rest of the City, and in reading between the lines, did not believe the City’s testimony that it expected no increases in insurance for the last two years of the agreement.

Turning to the ability to pay, the Arbitrator found that there was not sufficient evidence to prove that the City could not absorb the cost of the Association’s proposal, especially since the City is experiencing population growth, which means new assessed valuation, and the City had actually budgeted for an increase of 15% in insurance premiums, while claiming that it expected no increases the next year.

The Arbitrator also found that there is a high employee turnover and the City has lost officers to a casino and three officers to other police departments. The Association president testified that the average tenure for an officer is two years and that the City has never successfully recruited a lateral hire. The Arbitrator found this made the

combination of the proposal of a wage freeze and better wage rates in other jurisdictions would make it extremely difficult to recruit new officers.

In turning to comparability, the Arbitrator commended the Association for its presentation, noted the Association had selected as comparables four up and four down and found that the Association followed the statutory criteria. The Arbitrator did not discuss what criteria, if any, the City used, or what its comparable jurisdictions were.

Based on all of the above, the Arbitrator adopted the Last Best Offer of the Association.

KELTNER (2000), EUGENE POLICE EMPLOYEES ASSOCIATION PREVAILS IN ITS INTEREST ARBITRATION, BUT THE CITY HAS INDICATED IT WILL NOT SIGN A CONTRACT AND WILL APPEAL THE ARBITRATOR'S DECISION

In February of this year, Arbitrator Sam Keltner adopted the Association's last best offer over that of the City of Eugene. The parties were extremely close on wages with the City offering a 3 percent increase effective 7-1-99 and increases for the next two years based on the US CPI-U minimum of 2 ½ to a maximum of 5 percent. The Association requested a 3 ½ percent increase in the first year with increases in the second and third based on the US CPI-W minimum of 3 to a maximum of 5 percent. In addition, both sides had nearly identical proposals for selected classification increases.

The big difference between the two proposals is that the City wanted to provide for a cap in the third year of agreement for dependent health care payment. In addition, the City wanted to take away language on time off in lieu of holidays, which allowed employees to max out the time and then get a pay out in an amount that equaled about 5 percent a month.

While Arbitrator Keltner's award was twenty-two pages in length, it was remarkable in that it was mostly an outline of the proposals and the evidence with very little detailed analysis by the arbitrator. Unlike some arbitrators, Arbitrator Keltner did attempt to define "the interest and welfare of the public" by going to Black's Law Dictionary. However, the definition was so vague as to be useless. Arbitrator Keltner concluded:

"The public welfare in a police agency is involved in all aspects of the agency's management and administration of the employees of the agency. Consequently, essential elements 'public welfare' are included in the secondary level of the criteria. Accordingly, to the degree that the parties' positions meet the secondary standard, they also serve the 'public welfare'."

Editorial Comment: Interest and Welfare of the Public is so vague as to be meaningless. Therefore, Arbitrator Keltner, like most arbitrators, decided the case would be resolved based on secondary criteria.

In looking at wages, Arbitrator Keltner concluded that Eugene only had one true comparable which was the city of Salem. The Association had argued that the next nearest cities were Gresham and Beaverton, the City agreed with those but wanted to add Hillsboro, Medford and Springfield. Arbitrator Keltner rejected all but Salem because Gresham's population is 37 percent below Eugene's.

Arbitrator Keltner complained about both sides being unable to agree on the accuracy of the wage and benefit data that they presented to him and on any meaningful analysis of total compensation. *Editorial Comment: Parties rarely agree on total compensation even when they agree on the core numbers. The Oregon Legislature mandated a total compensation analysis, but didn't define how to get there. Most arbitrators in the past have simply ignored this issue.*

Arbitrator Keltner proceeded to use the top step wages of Eugene versus Salem and concluded that Eugene wages were behind Salem. Therefore, he concluded that the wage proposals of the Association were preferable over the City's. He declared in the matter of health care cost sharing, the City's proposal was the most reasonable, as it was for the holiday/comp. benefit language. However, in dealing with two very minor inconsequential items he decided that the Association's proposal as to the exclusion of temporary and part time employees from collective bargaining language was better than the City's. Based on all the above, Arbitrator Keltner concluded that the Association's proposal more frequently prevailed on the issues presented, so he awarded it.

The basis for the City's appeal will be that first Arbitrator Keltner ignored the statutory requirement for total compensation analysis. This was particularly galling to the City because Salem's wages were higher only because one has to consider the 6 percent PERS pick up issue. Eugene believed that actually its salaries were higher than Salem's. In addition, the City believes that only having one comparable is almost meaningless.

Final Editorial Comment: Even though Arbitrator Keltner could have sifted through the evidence to do a total compensation analysis, this writer believes that the ERB will not overturn his award. The very underpinning of arbitration is that even if the arbitrator is mistaken as to the arbitrator's analysis of the evidence, that is not a basis for overturning the award. ORS 243.752 (1) provides that the arbitrator's decisions are final as long as they are "supported by competent, material and substantial evidence on the record based upon the factors set forth in ORS 243.746 (4)." The statute, when read literally, simply requires that evidence be in the record, and "substantial evidence" has been long defined as any evidence. The Association should be able to successfully argue that, based on its methodology, there is evidence in the record to support the award, and the fact that Arbitrator Keltner didn't see it is not a ground for overturning the award because he purported to base his decision upon the statutory criteria.

KIENAST (2000), AOCE LOSES INTEREST ARBITRATION DECISION

In early January, Arbitrator Kienast adopted the state's last best offer in interest arbitration against AOCE. This decision was quite remarkable, first in its brevity and secondly, in how Arbitrator Kienast dealt with the issue of comparability.

Both the State and AOCE had last best offers which placed eight to ten issues before the arbitrator. The arbitration hearing lasted the better part of two days, and both sides introduced numerous volumes of exhibits. In such a case one could expect a 60 to 100-page decision. Instead Arbitrator Kienast issued a seven-page decision. Needless to say, that decision didn't provide much of an explanation for his reasoning.

With the most important issue in the case being comparability, AOCE argued that the comparable jurisdictions should be those established by two prior arbitrators, which were the top five counties in Oregon. The State had gone to arbitration in 1993, arguing that the comparables should be the four surrounding states. In 1995, the State went to arbitration arguing that the comparables should be all the counties where state correctional facilities were located in Oregon. In this arbitration it argued that the true comparables were states of similar population, no matter where they were located in the United States.

Without any explanation as to why he was going to disregard the prior arbitration awards, Arbitrator Kienast announced that both sides were wrong and that the comparable jurisdictions were the four surrounding states. Once he made that decision, AOCE's chance of success vanished because AOCE's wages are second only to California's.

Editorial Comment: Arguably AOCE had one of the best chances of success of any labor organization in this state in interest arbitration. While one arbitrator does not have to follow another arbitrator's selection of comparables, usually if an arbitrator does not do so, he or she will write a lengthy opinion explaining their reasoning. In this case, Arbitrator Kienast devoted not one word to why he rejected the previously determined comparables. This case illustrates the risk of litigation. One can argue against what the other side brings up as their main points, but one cannot anticipate what an arbitrator may decide to do without warning.

KREBS (2001), ARBITRATOR ALLAN KREBS RULES IN FAVOR OF THE POLK COUNTY DEPUTY SHERIFFS' ASSOCIATION

The cost of insurance is what drove these parties to arbitration (so what else is new?) On the last best offer of the parties, the Association's first year wage increase was 0.2 percent lower than the employer's, and both parties had the same formula for subsequent years of a CPI based increase.

For insurance, the County proposed a cap where it would contribute only 85% of premiums for the subsequent years. The Association proposed a cap where the County, in essence, would cover the insurance costs in year one, pick up only 50% of the increase in the second year, and pay for 100% of the increase in the third year.

In this case, the Association successfully argued that the County was pushing for a change in the status quo by requiring a fixed percentage of premium splitting, as opposed to negotiations over the years, which in some years produced fully paid health care and in some years, produced a modest cap.

The arbitrator found the Association's proposal less of a deviation from the status quo, although he indicated he would have fashioned his own decision had he had the discretion to do so.

“L”

LANG (2000), AWARDS JACKSON COUNTY'S SHERIFFS ASSOCIATION'S LAST BEST OFFER AGAINST JACKSON COUNTY, OREGON

The parties were separated in this case by wages, insurance and a drug-testing proposal.

For the three years of the agreement, the Association's proposal was a CPI-based increase of 2 ½ to 3 ½ percent with a January 1, 2002, raise and the last year of the agreement, an additional 1.5 increase. The County's proposal was a CPI based increase of 2 – 4 percent.

The Association had been buying its own health care insurance, and the parties each proposed caps. The Association proposed \$500 the first year, \$550 the second year and \$600 the third year. The County proposed \$495 the first year, \$520 the second year and \$550 the third year. The Association proposed that if health care exceeded the cap, it would be an equal split between the parties, and the County proposed that the Employee pay all of the increase.

In addition, the County proposed that random drug testing be established, and if a committee couldn't agree to a policy, then that issue would be submitted to interest arbitration as a reopener.

In discussing the interest and welfare of the public, Arbitrator Lange concluded that it had to be analyzed based upon a consideration of the secondary criteria. Then Arbitrator Lange turned to the most important issue, which was health care. He found that health care cost increases had been going up between 25 and 30 percent a year. In analyzing the differences of the proposals, Arbitrator Lange concluded that the County's proposal, based upon projections of insurance rate increases, would virtually wipe out all

wage increases. Therefore he felt that the County's proposal was not in the interest and welfare of the public.

The County next made an argument that it did not have the ability to pay the increases. However, the Arbitrator took specific umbrage with a last minute press release claiming a budget shortfall when there was other documentation showing that the County's financial condition was the best that it had been in years.

With regards to comparability, the Arbitrator indicated he would not stretch the norm of plus or minus 50 percent population range to look at comparables. By doing so, the Arbitrator excluded all Counties that were larger than Jackson County for comparables. Therefore the Arbitrator selected Deschutes, Douglas, and Linn as the appropriate comparables. However, he decided because Jackson County is significantly larger than its comparables, it would have the right to expect to be the highest of those comparables.

The Arbitrator criticized the County's random drug-testing proposal, especially as it would result in a second interest arbitration on that issue. He therefore awarded the Association's last best offer primarily because of the insurance issue, although he criticized the Association's 1.5 percent increase in the third year of the agreement.

LANKFORD (2005), ARBITRATOR HOWELL LANKFORD AWARDS THE LAST BEST OFFER OF THE CITY OF TUALATIN V. TUALATIN POLICE OFFICERS ASSOCIATION

The sole issue was the City's contribution for insurance under the first year of a three year Collective Bargaining Agreement for the parties. The Arbitrator noted that the parties have had a series of multi year contracts since 1990, which have had a split in costs over a 10 percent increase for insurance in each year of the contract. The Association proposed continuing the 10 percent based cost split, but for the first year having the City pay the total cost of insurance. The City proposed continuing the 10 percent copay with the cost splitting above that. In addition, the Association wanted language in the contract which would stop the City from making retroactive adjustments to the out of pocket costs which the City proposed to do.

The Arbitrator noted that the case is "somewhat unusual" in that neither the ability to pay nor the CPI was of help in analyzing the issue.

The parties differed on comparability as the Association argued that it should settle with comparable jurisdictions were those nearby police employers within the population range half to twice its size. The City argued that comparables were all cities plus or minus 25 percent in population, and the Association countered that the City's position had too many small comparables. The Arbitrator decided that he did not have to resolve this in order to award a Last Best Offer.

In analyzing the parties on who changed the status quo, Arbitrator Lankford's first comment that:

"It is generally recognized there is substantial difference between 'capped' and benefit language." Id. page 8

The Arbitrator rejected the Association's status quo arguments. However, the Arbitrator did agree there was a recruitment and retention issue in the Police Department, but declared the Association's package would not solve the problem. The Arbitrator concluded, because the Association did not show its proposal as maintaining the status quo, and that the Association's cost was in excess of the City's, that he must award the City's Last Best Offer.

LANKFORD (2005), ARBITRATOR HOWELL LANKFORD AWARDS LAST BEST OFFER OF AFSCME FOR THE CLACKAMAS COUNTY 911 DISPATCHERS

The parties went to Interest Arbitration over shift schedules and other minor work related issues. Existing work schedule was a 4/4 schedule, four days off and four days on. The County wanted to go to a 4/10 and a 4/3 schedule. There was also a small difference in pay, which Arbitrator Lankford found to be de minimis.

Arbitrator Lankford spent a great deal of time tracing the history of the hours of work of the 911 agency. He found back in 1987, Arbitrator Timothy Williams approved a switch from a 4/4 schedule in part because the FLSA had very recently been applied to the public sector and the parties were concerned with the accounting issues that would surround utilizing anything other than a 40 hour workweek.

However, Arbitrator Lankford found that this Center had been a 4/4 schedule since 1990. It first was a 4/12 schedule and then was shortened to a 4/11 schedule.

Arbitrator Lankford found that there was a huge turnover problem with the agency and that newly hired employees did not feel welcome and were resented when they were in the FTO program exacerbating the turnover, there were massive amounts of involuntary overtime. Arbitrator Lankford quoted extensively from managements own studies showing the staffing and workload problems within the agency.

For these reasons, Arbitrator Lankford concluded that moving to a 4/3 pattern would exacerbate the overtime and therefore turnover problems of the agency. For these reasons he awarded the Last Best Offer of AFSCME.

Editorial Comment: 911 Centers continue to be chronically understaffed and over worked. Management seems to be oblivious to the fact that they exacerbate turnover problems by working these employees to death. Only by making overtime extraordinarily expensive will this problem be solved.

So, congratulations to Allison Hassler the house council for AFSCME for litigation of this case. She previously worked for John Hoag as a law clerk and was the only one he ever let try an arbitration.

LANKFORD (1999), OREGON STATE POLICE OFFICERS ASSOCIATION PREVAILS IN INTEREST ARBITRATION. HOWEVER, THE STATE REFUSES TO IMPLEMENT THE ARBITRATION AWARD

Arbitrator Howell Lankford awarded the last best offer of the Association over the State of Oregon in interest arbitration. Arbitrator Lankford reviewed the data presented by both sides and found that even using the State's own exhibits, the wages of Oregon State troopers were 25% behind California, and 7% behind Washington. At 5 years and at 10 years, they were 16% behind California and .4% behind Washington, and at a tie with Nevada. For this reason, plus an analysis of ability to pay and the other statutory criteria, Arbitrator Lankford concluded that the relative wage rates of the troopers had slipped so badly that he had to award the Association's last best offer.

In doing so, Arbitrator Lankford went into a lengthy analysis of other arbitrators' decisions in prior cases between the parties, and concluded that no matter what view of comparability you took or how you weighted the various states, with California, Washington, Nevada, and then Idaho being the normal comparables, that the troopers wages were significantly behind.

Because Arbitrator Lankford also noted what he called secondary comparables, which included major cities and counties in the State, the State believed that it should refuse to implement the award. A ULP followed, and the Employment Relations Board has heard oral argument on this issue.

In this case, the most critical difference between the parties was the wages, with the State being locked into what other state employees got, which was effective October 1, 1999, 2% and January 2001, an additional 2%, along with some other minor issues, including selective raises. The Association's last best offer was the same 2 and 2 percent, with higher selective increases, and a better certificate plus degree incentive with 3% for an intermediate or A.A., 6% for a B.A., or an advanced. The State argued that this should be looked at as a wage increase. Arbitrator Lankford did so, and still concluded that the Association's last best offer should be implemented.

Editorial Comment: The chances of the State's success are even slimmer than was the City of Eugene's. Probably there will be another 2 to 1 decision, with a dissent from Board Member Thomas.

LEHLEITNER (2002), ARBITRATOR GEORGE LEHLEITNER MAINTAINS THE STATUS QUO REGARDING ACCRUAL AND USAGE OF COMPENSATORY TIME

The sole issue in this interest arbitration between *Teamsters Local 223 for the Wallowa County Sheriff's Employees v. Wallowa County* was the union's desire to have discretion for its members to choose whether to be paid overtime or accrue compensatory time and to have more freedom and flexibility when they take compensatory time off. The County wished to retain the current contract language which gives the Sheriff the option of allowing compensatory time to be accrued, versus paying overtime, and requiring mutual agreement for the scheduling of compensatory time off, or having it scheduled off at the direction of the employee's supervisor if an agreement can't be reached.

Arbitrator Lehleitner decided this matter would be decided solely on the criteria of interest and welfare of the public and started with the: "if it ain't broke, don't fix it" rationale. While indicating that perhaps that principal is overrated, he decided it appropriately applied in this case. He pointed out that the Union came forward with no evidence that the Sheriff had abused his discretion with regard to compensatory time. He also agreed with the County that the use of compensatory time in this County is different than in large jurisdictions west of the mountains because in those jurisdictions, bargaining unit members were more often available to cover employees taking time off. In this case, either the Sheriff or Undersheriff would cover personnel or the County would go without anybody on duty. Therefore, he concluded, the County's proposal to maintain the status quo best served the interest and welfare of the public. The arbitrator also noted that comparability favored the County, and the Collective Bargaining Agreements with the County's other bargaining units contained similar language.

The Union was represented by Michael Tedesko and the County was represented by Patrick Mosey, a former ERB Board member.

Editorial Comment: Apparently neither side relied on the provision of Federal law, which states that absent an agreement between the parties, compensatory time could not exist.

LEVAK (2000), ARBITRATOR LEVAK AWARDS THE LAST BEST OFFER OF THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1660 (PORTLAND AIR NATIONAL GUARD FIREFIGHTERS) AGAINST THE STATE OF OREGON (OREGON MILITARY DEPARTMENT).

Due to the uniqueness of this labor organization, Arbitrator Levak's award will not have much precedential value. It is a 12-member unit composed of firefighters who are stationed at the Air National Guard base adjacent to Portland International Airport.

The issue that separated the parties was wages. The State's last best offer was two percent effective October 1, 1999, two percent effective January 1, 2001 and an additional \$38 on each step, effective June 1, 2001. This is the offer that the State, due to

political considerations, had to make to every state labor organization. The Association's last best offer was a three percent increase every six months for the life of a two-year agreement.

The parties were widely separated on the issue of comparability and the issue of whether employee turnover was relevant. Arbitrator Levak decided that it was, as the base had been, losing approximately one employee a year since 1993 and chided the State for ignoring the issue.

With regards to comparability, the Association cited the six major fire agencies in the Portland area's comparables, those being the City of Portland, Tualatin Valley Fire and Rescue, City of Gresham, Clackamas Fire District, City of Lake Oswego, and PDX.

The State argued that other fire fighter unions that work next to air bases in the Western U.S. should be the comparables.

Arbitrator Levak determined that the interest and welfare of the public means that the award should be fair to both the taxpayer and the employee, i.e., a combination of ability to pay and comparability. He ruled that there was no burden of proof for either side. He also found that the State had the ability to pay the award, given the small size of the unit. He found that the Portland area jurisdictions attracted most of the firefighters who went there. With regards to comparability, without any discussion, the Arbitrator did not dignify the State's approach. He did find that the situation is unique and then given that, turned to community comparables, which he concluded had to be considered. Therefore Arbitrator Levak awarded the Association's last best offer.

LINDHAUER (2000), ARBITRATOR LINDHAUER MAKES AN IMPORTANT RULING AFFECTING COMPARABILITY

The case of *IAFF v. City of Astoria* came down to a single issue of how to select comparable jurisdictions. The IAFF argued that comparable jurisdictions included the nearest cities within the same population range as the target jurisdiction, no matter whether those jurisdictions have contracted with large agencies providers. In this case, a comparable jurisdiction, such as Wilsonville, had contracted with Tualatin Valley Fire District, a very large district. On the other hand, the City argued the only true comparables should be those cities that had stand-alone fire departments.

Arbitrator Lindhauer reviewed the statute in question and concluded that the statute focuses on comparable communities and not comparable employer entities. In doing so, he cited Arbitrator Levak's 1989 Handbook on Oregon Interest Arbitration and Fact Finding, as well as prior interest arbitration decisions by Nancy Brown involving the city of Grants Pass, and Arbitrator Langford involving the city of North Bend. Based on that, IAFF prevailed.

The employer was represented by Patrick Mosey, former ERB member, and the union was represented by Michael Tedesco.

Editorial Comment: *This will be of use particularly for dispatchers, comparing the dispatchers in smaller cities to those who are employed by large 911 agencies. You can expect the League of Cities to attempt to legislatively amend this decision in the Oregon Legislature.*

“M”

MICHELSTETTER (2008) ARBITRATOR MICHELSTETTER AWARDS CITY OF BEAVERTON’S LAST BEST OFFER

This interest arbitration involved an insurance reopener. The parties agreed to the insurance plan, but went to interest arbitration over office copays, deductibles and drug costs.

In analyzing the case, the Arbitrator discussed the negotiation history of the parties and noted that the Association’s offers were regressive: They increased the costs to the employer. In discussing the criteria the Arbitrator made the pronouncement:

“It is not in the interest of the public in employee morale and responsible personnel policies to allow a public employer to unfairly target benefits against employees who have serious medical problems in their family.” p. 8.

The Arbitrator chose comparables that were within 15,000 of Beaverton. Those were: Medford, Gresham, Hillsboro and Bend. He declared that those 4 cities were enough for resolving the issue. He rejected the next closest series which included Eugene, Salem, Springfield, Corvallis and Tigard.

The Arbitrator found that the employer’s premium costs were driven by higher benefit levels and greater usage than elsewhere. The Association pointed to one officer who had to go to the Emergency Room and would suffer under the employer’s plan. However, the employer offered a one time \$200 payment for switching insurance benefits. The Arbitrator found that was a quid pro quo that went a long way in compensating the difference.

Therefore, based on comparison with comparable counties for both costs and plan design, the Arbitrator awarded the employer’s Last Best Offer.

Editorial Comment: Given the stark facts on comparability one wonders why the Association went to arbitration in this case.

MILLER (2005), ARBITRATOR RONALD MILLER AWARDS STATE OF OREGON'S LAST BEST OFFER AGAINST CRIMINAL INVESTIGATORS ASSOCIATION (DOJ INVESTIGATORS)

The parties went to Interest Arbitration over Association proposals that changed the manner of scheduling workweek for the Investigators, to obtain paid lunches, and to get an Evergreen Clause into the contract.

Arbitrator Miller noted that the secondary criteria had to be used to analyze these proposals, as the term "interest and welfare of public" is so vague it couldn't be viewed by itself. While he found that the State had the ability to pay, the estimated \$130,000 cost, he found that because the State's financial picture was extremely tight but also opined that the ability to pay was not the critical element of the statutory criteria.

When turning to comparability, the Arbitrator rejected in State comparables and followed other Interest Arbitration decisions for State employees and found the four surrounding States to be the comparable ones. Those being: California, Idaho, Nevada, and Washington.

The Arbitrator also found that the Association did not show a compelling need to change the existing schedule, especially given the hidden pay costs involved with it. Therefore, he awarded the State's Last Best Offer.

Editorial Comment: Given the State's financial position, it is hard to see how it can lose an Interest Arbitration where there is a financial impact on it. This also appears to be the State's financial position for the next two years.

MILLER (2002), ARBITRATOR RONALD MILLER RULES AGAINST AOCE

AOCE went to interest arbitration against the State of Oregon, Department of Corrections, where the parties main difference was over wage increases. The employer had proposed a 2.5% wage increase effective 7-1-01, and a 3% increase effective 7-1-02 for corrections officers. For non-correction officers, the employer proposed a 2% increase effective 1-1-02, and 3% increase effective 2-1-03. The latter delays in the implementation of the award were a result of the previous arbitration award where increases for non-correction officers had been delayed for six months.

The Association proposed that all employees receive a 3% increase effective 9-1-02 and a second 7% increase effective 3-1-03.

The Arbitrator noted that the State of Oregon had an inability to pay due to declining revenues. He also found that there was conflicting testimony as to whether or not turnover was a significant factor or not. However, he credited testimony that whatever turnover existed was not a result of low wages.

When turning to comparability the Association had argued that out-of-state correction comparators were appropriate, but was in disagreement with the State as to which States should be used as comparables. The Arbitrator did not make a specific finding one way or the other in this area, but he did indicate the secondary comparability should be internal equity between AOCE employees and AFSCME. He ruled that Oregon Counties contiguous to Marion County should be looked at as comparables, due to the fact that most AOCE bargaining unit members live in Marion County. However, even in looking at comparability the arbitrator found that given the surrounding States, AOCE wages did not lag significantly.

Looking at the inability of the State to pay, the fact that the State's last best offer was greater than the current cost of living increases, and the fact that while AOCE's offer was cheaper during the biennium, it back loaded significant increases for the next biennium, the Arbitrator awarded the State's last best offer.

Editorial comment: Back loading a last best offer to create a huge increase in future years is not something that will go missed by interest arbitrators.

“N”

NELSON (2003), ARBITRATOR LUELLE NELSON ADOPTS THE LAST BEST OFFER OF THE JEFFERSON COUNTY LAW ENFORCEMENT ASSOCIATION – BUT UNFAIR LABOR PRACTICE COMPLAINTS ARE FILED BY BOTH SIDES

After some delay, Arbitrator Luella Nelson E-mailed her decision only to both parties. She found that neither sides Last Best Offers were in the interest and welfare of the public, but the Association's LBO was slightly better than the County. She specifically faulted the County for having a provision in the grievance procedure that the only method by which an employee could protest allegations of contract violation was through the grievance procedure. This on its “face” would attempt to eliminate lawsuits based on discrimination, or whistleblower retaliation, etc.

Arbitrator Nelson also urged the parties to attempt to negotiate a settlement of the contract. With the assistance of the Mediator, that attempt has been made and failed. Therefore, the Association requested the Arbitrator publish the award, which she did. The County refused to comply with the award, and so the Association filed an Unfair Labor Practice Complaint. The County filed its own Unfair Labor Practice alleging that the Association's drastically lowering its wage proposals between its Final Offer and Last

Best Offer constituted bad faith bargaining. The Association has filed a motion to dismiss and that ULP will be heard in a number of months.

The main difference between the parties' Last Best Offer is that the Association wanted to maintain the existing six-step wage plan and maintain the 90/10 insurance

policy with a 90/10 premium split in payments. On the other hand, the County wanted to implement a 15-step wage plan, lower the insurance benefits to a 80/20 plan, and let the County be in charge of plan design. The County also refused to agree to numerous other provisions that are normal in Collective Bargaining Agreements, such as, paid time for Association representatives, a grievance procedure with a longer filing period than 48 hours, etc.

One of the interesting aspects of the decision was that as part of the award the Arbitrator awarded the Association's proposal that if employees don't get their breaks they get a ½ hour of paid overtime. Testimony in the arbitration hearing indicated that dispatchers and corrections technicians never get breaks.

The Association was represented in Interest Arbitration by its negotiating team composing of Scott Farrell, President, Ervey Dominguez as Vice President, Candy Campbell, Treasurer, and Starla Greene, Secretary.

Editorial Comment: The Madras case will now come home to the ERB. Does it really mean that a party cannot change very much between a Final Offer and a Last Best Offer? If that is the case, why can the Last Best Offer be amended three different times? Or, is the relevant issue, whether the parties bargained in good faith? Interestingly enough, the County did not plead bad faith bargaining per se in the case, but of course the County could choose to amend its complaint.

“R”

RUNKEL (2006) ARBITRATOR ROSS RUNKEL AWARDS CITY OF COOS BAY'S LAST BEST OFFER AGAINST IAFF

The sole issue to this Interest Arbitration was whether the Association could get the City to pay 100% of the insurance premiums. The parties had agreed to change from a traditional insurance plan where with a \$100/\$300 deductible and the premiums were split 90/10 to a HSA plan where the deductibles were changed to \$2,500/\$4,000 with the City placing 80% of the deductible in the individual's HSA and the remaining 20% into a VEBA, or similar account for use for emergency medical expenses.

The Arbitrator declared that the interest and welfare of the public cannot be simply judged by using the secondary criteria, but gave no definition of it. The Arbitrator went on to state that in looking at comparability the sole factor had to be population. Therefore, he adopted the Association's comparable jurisdictions going 4 up and 4 down and rejected the City's. However, then the Arbitrator declared that weighting the wages paid by jurisdictions near Portland would be appropriate and speculated to the effect of discounting them by one half their value, but in the end made no finding on that except to say that some discounting was appropriate.

Editorial Comment: An excellent example of “baby splitting” which pretended to comply with the statute.

In the end the Arbitrator declared that because there had been a 90/10 split of insurance premiums in the contract for years, it would take something very unusual to justify a change to the City paying 100% of the premium. He rejected the Association's proposal on that basis. The Association argued that it should be given a finder's fee for the change because it had sought it out and saved the City money. The Arbitrator rejected that theory.

“S”

SILVER (2002) ARBITRATOR FRANKLIN SILVER AWARDS LINCOLN CITY'S LAST BEST OFFER

Lincoln City and the Lincoln City Police Officers' Association went to arbitration over a salary and wage reopener in the last year of a three-year collective bargaining agreement.

The City's last best offer was for a one and one half percent raise and maintenance of the status quo for the health insurance policy. The Association's was for two and half percent raise, an increase in certificate pay, and maintenance of the status quo for the health and welfare policy.

The Arbitrator found the relevant facts were that the City was having a loss of general fund dollars and while it did not have an absolute inability to pay, the difference between the parties offers was \$21,323.00, but it had a relative inability to pay. The City proved that its general fund expenditures had exceeded revenues since 1997, and it had a projected \$14,000.00 deficit in the general funds even after it had given a number staff reductions, and had given only a one and a half percent increase to the rest of its employees.

The Association argued that the City was saving six to eight thousand dollars a month because of an acting Police Chief and the elimination of a Lieutenant's position. However, the Arbitrator noted that was part of the budget reductions that had been placed in effect and credited the testimony that because four of the officers in the department were on light duty positions, there were a large amount of overtime expenditures.

The Arbitrator acknowledged that both sides agreed that officers had been leaving for higher paying jurisdictions, but most of those were larger communities, and the Arbitrator concluded that a difference of one and a half to two and a half percent would not have anything more than a negligible effect on which officers would leave the department.

As to comparability, the City had proposed two different sets of comparables, the Association a third list, which was modified a number of times during the hearing. The Arbitrator ended up adopting comparables of close size cities on the Oregon coast with the addition of the City of St. Helens. The Arbitrator decided to omit Portland Metro cities and remote cities in the rest of the state. However, the Arbitrator found that even doing so, made Lincoln City compare favorably to the others salaries.

In deciding comparables the Arbitrator discounted an assessed valuation comparison indicating that he would have found that useful only if there had been testimony as to the relevant economic conditions of those other communities. He believed that Lincoln City's relative financial condition was much more important than the valuation of the community.

Lastly, the parties could not agree on how to utilize cost of living figures. The Association indicated a cost of living increase had been 3.7 percent from January of 2000 through January of 2001, which was when the parties were in negotiations. The City argued that the cost of living should be for the fiscal year covered by the raise, July 2001 through July 2002. The Arbitrator concluded that the City's figures were more relevant.

The Arbitrator concluded, because there is a relative inability to pay defense under Senate Bill 750, rather than the pre-750 absolute inability to pay defense, that the City had shown an appropriate inability to pay, and that based on the fact that the City was paying reasonable salaries and a high health care cost increase of 31%, so the City's last best offer was the most appropriate of the two.

Editorial Comment: Given the fact that CPI is flat and health care costs are increasing at an alarming rate, this employer-weighted decision may give ominous indications of what one can expect for the next few years.

SKRATEK (2006), ARBITRATOR SYLVIA STRATEK AWARDS LAST BEST OFFER OF THE EUGENE POLICE EMPLOYEES ASSOCIATION

The parties went to arbitration for a three-year contract, with the first year retroactive to July 1, 2005. Their wage proposals that were virtually identical and included extra adjustment for communication specialists. However, the City had proposals to change maximum accruals for compensatory time and holiday time and to add a requirement of 5% employee copay for health insurance.

The Arbitrator noted that the parties had agreed to comparable jurisdictions of Salem, Gresham, Beaverton and Hillsboro. The Association attempted to put on evidence regarding the City of Portland, but the Arbitrator rejected it. The parties disagreed on how to analyze comparability with the City claiming that Eugene was between 4.7% to 1.4% above average and the Association countered with a different methodology with benchmark comparisons at 5, 10, and 20 years of service based on certification and education. However, the Association's own analysis concluded that the City was .035% high.

The Arbitrator selected the Association's methodology as being better than the City's, because the City was using premium pay incentives for which most of the bargaining unit members did not qualify. She decided that the wage issues paled by comparison when looking at the other issues that separated the parties. The Arbitrator found that the City was attempting to change language regarding holidays and vacation that had been in the contract since 1979, which she criticized.

In turning to the health insurance issues, the Arbitrator decided that the City's change would result in the reduction of income for employees because of the copay or would force them to switch to a much less favorable insurance benefits that did not have decent prescription drug coverage, and compared poorly to the insurance benefits of the comparable jurisdictions. She specifically noted that Beaverton, Gresham and Hillsboro had a VEBA account which provided for tax free medical savings to offset the increased copay and deductibles that the City was trying to obtain. The Arbitrator concluded that this would cause an employee wage reduction of anywhere from 0.4 to 1.3% and would be higher for the large percentage of employees that were not at the maximum salary.

In looking at what is the interest and welfare of the public, the Arbitrator quoted former Arbitrator Snow that it is a combination of competitive waged and effective government services, (comparability and ability to pay). The Arbitrator concluded:

“The City's last best offer would shift a portion of the cost of health care to the employee without good reason. While the City has argued that cost shifting would be consistent with its comparables, it has ignored not only the fact that the comparables do not have precisely the same plan as the City of Eugene but it has also ignored that fact that in some cases the comparables have provided an additional benefit in the form of a VEBA to its employees.” pg. 23

The Arbitrator concluded that the Association's Last Best Offer kept the status quo, even though she preferred an alternative as the City did have merit for some of its proposals, which the Association would have to keep in mind in future negotiations.

Editorial comment: The City, instead of biting a small chunk of the elephant, went for half the elephant and ended up with none.

SKRATEK (2002), ARBITRATOR SYLVIA STRATEK RULES FOR MILWAUKEE POLICE EMPLOYEES' ASSOCIATION IN A WAGE REOPENER

The parties had a wage reopener for the second and third years (2002-3 and 3-4) of the contract. The City offered a 3% increase both years. The Association requested an increase based on the Portland CPI-U with a 3 – 6% range using the previous year, i.e., 2001, for 2002-3 and 2002 for 2003-4.

In this case, the Association contended it was simply seeking to maintain traditional contract language between the parties and pointed out that the Portland CPI-U might be under 3% each year, making this a fairly moot dispute.

On the other hand, the City argued that it needed certainty and claimed an inability to pay defense projecting a \$1,200,000 shortfall during fiscal year 2003-4. The City indicated that it had no difficulty filling positions and was concerned, given the economy, with loss

of revenue. It argued that comparability was in the “mean” with three cities paying less and two paying more, so believed that its request for fixed increases was appropriate.

In analyzing the case, the arbitrator started with the interest and welfare of the public, and indicated that the status quo would be presumptively in the interest and welfare of the public, and she found that contrary to the City’s position, it was the Association’s final offer that maintained the status quo. The arbitrator also adopted the Association’s position that a change in the language that had been in the agreements between the parties since 1993 could have a negative effect on the morale of the police department. Therefore, she concluded that because the CPI increase was less than 3%, the City had not made a compelling case that it was in the interest and welfare of the public to make a change in the established practice of providing for a variable wage increase.

In turning to the ability to pay, the arbitrator found that the City’s projections and predictions does not equate to an inability to pay. She found that the issue of attracting and retaining personnel was a wash.

As to the comparability, the arbitrator found, that four of the Cities paid less, and she believed that an indexed CPI would at least keep a hedge against the City falling further behind in comparability. Given the employees’ offer, the question of which CPI index to use the arbitrator found to be irrelevant. For all these reasons she awarded the Association’s proposal.

Editorial Comment: Jamie Goldberg is now on roll with three wins. However, one has to wonder why this case went to arbitration.

SNOW (2004), PROFESSOR CARLTON SNOW ADOPTS THE PORTLAND POLICE ASSOCIATION’S LAST BEST OFFER

After a 21-day hearing, which set records (a two-day hearing is the longest one this author is aware of) Professor Snow adopted the last best offer of the Portland Police Association.

Not surprisingly, the critical issue that separated the parties was insurance. The City had a citywide plan that had been developed by a committee. The Association proposed to get out of the City plan and to have its own plan established. Both parties had proposed an

80/20 plan with the insurance picking up 80 percent of the UCR rates until the stop loss was met. The City wanted to change the existing stop loss from \$600/1700 (single/family) to \$1800/5400. The Association proposed \$1000/2500. The Association viewed its own proposal as a four percent wage reduction.

The Arbitrator found that the Association presented compelling evidence that the Labor Management Insurance Committee did not work. The Association represented 19 percent of the City’s employees and only had one of 14 votes on the Committee.

Management had seven votes, and the evidence was they voted as a block. Moreover, the City had developed a cash back plan for employees that opted out and the Arbitrator noted that that was costing the City money. Therefore, he believed that the Association's proposal was in the interest and welfare of the public.

Turning to wages, the City's proposal was a cost of living wage for three years and the Association's was a cost of living for the first year, and a cost of living in the second and third years, plus one percent.

In looking at this proposal, the Arbitrator first noted that community policing was of extreme importance in Portland and that this caused higher officer productivity and much higher expectations of the work force. The Arbitrator also found that the number of employees had dropped while crime and calls for services had increased. The Arbitrator stated, "It is reasonable for the rise in underlying productivity to influence wages received by bargaining unit members." Pg. 108.

In looking at comparability, the Arbitrator decided that population was not the sole criteria because the statutory requirement of comparable communities could require looking at secondary factors, and in this case, the Arbitrator considered property crimes per officer, violent crimes per officer, per capita valuation, square miles of the city, median family income and percentage of the population with higher education. The Arbitrator adopted most of the Association's comparable jurisdictions. The Arbitrator also blessed the utilization of a local labor market as secondary criteria.

The Arbitrator found the Association's wages were 10% behind out-of-state comparabilities, about 2 1/2 % behind the local labor market, and about 1.7 % behind in-state comparable jurisdictions. He also found that both parties conceded more minority recruitment was needed, and he found the Association's proposal "more helpful than the City's in achieving that goal."

Also, in looking at a benchmark for comparability, the Arbitrator decided that since two thirds of the bargaining unit had a college degree and ten years' experience, he was going to use that as the benchmark. While not discussing it, the Arbitrator did not use the top-step benchmark.

Turning to other Association proposals, the Arbitrator found that the on-call pay at one to six ratio was justified due to increased pager use by the City, which the Chief and a Commander testified the City had abused by putting employees on-call and not compensating them for it. He also found comparability justified with a one to six on-call pay ratio.

The other proposal of significance was a working-out-of-class proposal where the Association wanted to change working three days before an employee is paid, to payment from day one. The Arbitrator found that employees have been disciplined for not performing their duties while working out of class in an appropriate manner, that they did have duties they were expected to perform and were not just warming a seat, and found

some evidence of rotational assignment in order to avoid working-out-of-class pay. He found comparability mixed but favored the Association's proposal.

One of the minor City proposals that the Association was able to get rid of in the last best offer arbitration was the fact that the City charged the Association members \$60 a month for having a privilege of a take-home City vehicle. The Arbitrator found no comparable jurisdiction that made such a charge.

Editorial comment: Whether this decision will have any significance beyond Portland is questionable. Nevertheless, it is a very good decision and Arbitrator Snow also went to great lengths discussing the uniqueness of police officers versus other City employees, which obviously would justify the fact that the Association broke out of the City's insurance plan. Arbitrator Snow is a great believer in the status quo and the fact the Association was able to put on compelling evidence of its other economic proposals being justified was a significant factor in his awarding the Association's proposal.

Lastly, the Professor criticized the City for deleting the requirement that officers have a college degree.

On the other hand, it's sad that as part of the last best offer process, we have the largest police union in the state having to accept an 80/20 insurance plan which will put pressure on other jurisdictions to lower insurance benefits.

SNOW (2001), PROFESSOR SNOW RULES AGAINST THE STATE OF OREGON BECAUSE OF ITS ATTEMPT TO CHANGE THE DEFINITION OF SENIORITY FOR AFSCME CORRECTION OFFICERS

The State of Oregon has had two labor organizations representing State Corrections Officers since 1992, AFSCME and AOCE. Also, ever since then, if Corrections Officers are members of AFSCME, their seniority was defined as time in AFSCME. On the other hand, by 1995 AOCE changed its definition of seniority to be time in the Department of Corrections.

While the State kept promising in negotiations with AOCE that it would take down the seniority wall so that AOCE members could transfer to other correctional facilities, usually by way of promotion, without losing seniority, it never did so and settled three contracts with AFSCME leaving the definition of seniority unchanged.

However, for the 2001-2003 contract, the State of Oregon went to interest arbitration with this change, the main issue as well as the implementation of wage increases. For wages, the employer's last best offer was a 2% wage increase, effective January 2002, and a 3% increase effective February of 2003. The union's last best offer was an increase 2.5% effective July 2001, and 3% effective July 2002. The union claimed that the difference between the parties was about \$2,300,000 over the life of the contract.

Turning to the issue of seniority, Arbitrator Snow assigned the burden to the employer to justify the change. He found that seniority was of the utmost importance to the union, and that the employer failed to show that the language was a primary factor in deterring movement of employees, but accepted testimony that the primary factor was geographical preferences of employees. He noted that the employer's own witnesses made it clear that the Department of Corrections has not experienced "significant recruitment problems" nor has it had staffing problems. Employer witnesses testified that there was no problem getting qualified staff, for instance at a newly to be opened woman's correctional facility which was to be represented by AFSCME.

Arbitrator Snow decided that the interest and welfare of the public was "defined not only by the objective outcome of a term in a contract, but also by the process of collective bargaining itself." "... the public has an interest in encouraging the parties to negotiate effectively and expeditiously so that major concerns of the parties are addressed in face-to-face meetings." Professor Snow criticized the State for not dealing with this issue and during lengthy face-to-face meetings and lying in the weeds to deal with this issue during mediation. Therefore, he found against the employer on that issue.

Interestingly enough, Professor Snow treated wages as a secondary issue. The main difference between the parties was that the union tried to use Alaska as a comparable as opposed to just the traditional four contiguous states of California, Washington, Idaho and Nevada. Professor Snow found the most critical issue was that the employer never submitted evidence of an inability to pay. Professor Snow concluded there was no inability of the employer to attract and retain qualified personnel.

With regards to comparability, Professor Snow found the statute to be vague and that there was no reason for him to limit comparability to the contiguous states, nor is there any mathematical formula to be applied for comparability data. Professor Snow noted that Alaska was a small unionized state and opined that it may be more justifiable to use as a comparable than Idaho. However, he made no finding of comparability in this area.

Professor Snow did find persuasive the argument that the employer's proposal would be lower than the current cost of living, and he felt that such a result was not in the interest and welfare of the public. Therefore, he awarded the last best offer of the union.

Editorial Comment: The State is not a monolithic creature. While DAS pushed these issues to arbitration, a biased informant informed me that the Department of Corrections did not bring forward key witnesses to support taking down the seniority wall and was playing hide the ball with its budget due to ongoing budget cuts, so it didn't want to disclose what its true budget picture was at arbitration. Lastly, allegedly DOC has concluded that AFSCME does a better job than its rival in lobbying to preserve DOC resources at the Legislature and did not mind AFSCME's prevailing in this case.

“T”

TOURNQUIST (2006), ARBITRATOR LEROY TOURNQUIST AWARDS THE LAST BEST OFFER OF KEIZER POLICE ASSOCIATION

The LBOs were solely concerning health insurance as there was there was an insurance reopener for the last year of a Collective Bargaining Agreement. The Association proposed changing from a hard dollar cap with tiered caps for employee only through employee and family to a percentage copay of 5%. The City proposed hard dollar caps.

The Arbitrator decided that unlike most other arbitration decisions he would not analyze the secondary criteria first, but had to analyze the interest and welfare of the public first.

He quoted Arbitrator Stratton in a 1988 decision that:

“The interest and welfare of the public is best served with competent effective, and well motivated officers. In other words, the costs should be reasonable to the taxpayer and fair to the employee.”

(Editorial Comment: If that isn't two of secondary criteria of the ability to pay and comparability, I don't know what it is.)

He also stated that:

“There is no sense in setting aside what the parties have voluntarily negotiated unless there has been a ‘quid pro quo’ or there is ‘a compelling’ not to follow the status quo. Therefore, the Association has the burden of applying the statutory factor asserting the status quo needed to be changed.” P. 11.

Since the difference between the parties’ financial costs over the year was only about \$1,000, the Arbitrator concluded the ability to pay had no relevancy. Likewise, he decided that any issue that would affect retention and turnover was too speculative. However, the Arbitrator’s comments that there might be an issue of recruiting members with families given the City’s hard dollar insurance caps.

When looking to the comparable jurisdictions the parties had stipulated to the following comparables: Albany, Lake Oswego, McMinnville, Milwaukie, Newberg, Oregon City, Salem, Tigard, Tualatin, Woodburn, Oregon State Police and Marion County *(Editorial Comment: The City had to be brain dead for the last two stipulations.)*

In the end the Arbitrator found that based on comparability the City was the only one of the comparable jurisdictions with a hard dollar insurance cap for insurance. All of the other jurisdictions either had fully paid insurance or had some type of a percentage split. Therefore, the Arbitrator ruled that the Association did prove a compelling need for a change and adopted the Association’s Last Best Offer of a 95% split.

TORNQUIST (2004), ARBITRATOR LEROY TORNQUIST AWARDS LINN COUNTY SHERIFFS' ASSOCIATION'S LAST BEST OFFER

The parties went to Interest Arbitration because the County insisted that economic increases for 3 years would be based on its unique "total employee cost method." As it turned out during litigation, the County acknowledged that this had been initially suggested by SEIU, the general courthouse employee union. Under this method one takes the cost of living, increase it by 1%, and then back out all other economic increases that exceeded the cost of living. Needless to say, PERS rate increases and health insurance increases are the prime two candidates for exceeding the COLA. For the first year, the County's formula produced a 2.34% increase, and the Association's Last Best Offer for the first year was 2.5%. However, in the second year and possibly the third year, the County Administrator acknowledged that the formula would probably produce a wage freeze. The Association's proposals were for an increase in January 1, 2005 for dispatchers of 2%, July 1, 2005 a CPI based increase, and another January 1, 2006 increase of 2% for the dispatchers. The Association also proposed a two-year agreement as opposed the County's three-year agreement and proposed to eliminate the residency requirement.

The Arbitrator awarded the Association's Last Best Offer based on the employee total cost method used by the employer. The Arbitrator decided that since the parties had tried this 6 years ago, and it had not worked, that utilization of the formula again would be a step backwards and a violation of the status quo.

In addition, the Association proposed eliminating the County's longtime residency requirement for Deputy Sheriffs. The Arbitrator agreed that the County's restriction on where employees live on an off duty basis should not be relevant in law enforcement. The Sheriff testified that he believed that it was important for citizens to know that employees lived in Linn County. The Arbitrator concluded it was more important to get high quality delivery of law enforcement services and happy employees that could live wherever they want.

Editor's Comment: The County abandoned threats of litigation and signed the contract. Congratulations to the Association's bargaining team! They were: Chris Houdek, Barbara Barrett, Dusty Frenzel, and Tonya Couger.

"W"

WHALEN (2006), ARBITRATOR KATHRYN WHALEN AWARDS LAST BEST OFFER OF NEWPORT POLICE ASSOCIATION

The issues that are part of the LBO process were the terms of agreement, wages, premium pay for the City employee performing evidence technician duties, and insurance. The City proposed a two year agreement which would expire June 30, 2006, with a wage increase of 2.5% effective July 1, 2004, and 2.5% effective July 1, 2005. The

Association's LBO was a three year agreement expiring June 30, 2007, with wage increases of July 1, 2004 - 2.6%, July 1, 2005 – 3.1%, July 1, 2006 – 3%, and January 1, 2007 – 2.3%. The Association also proposed that the evidence technician get a 2.5% premium, while the City proposed no premium. The difference on insurance was the City wanted to delete present language saying that the insurance would be equal to or better than what currently existed and wanted to substitute “substantially equal” language. The Association proposed the status quo.

The Arbitrator noted that the last contract between the parties was the result of an Interest Arbitration award of Arbitrator Calhoun in July 2002.

When analyzing the Last Best Offers the Arbitrator decided that secondary factors had to be utilized in order to determine which LBO satisfies the interest and welfare of the public.

The Arbitrator stated that the issues for the first two years of the agreement (which were almost totally retroactive) are not driven by the wage proposals. The costing of the proposals indicates less than a set amount of a \$1,000 difference in the first year and \$7,000 difference in the second year. The issue was in the third year, and which came down to the ability to pay.

The City did not claim an inability pay, but claimed there was a council priority of not reducing reserves to balance the budget. The City pointed out there was a decline in the beginning fund balances from 1997 to 2005. However, the Arbitrator also found in the years 2003 to 2005 that the City took numerous actions to reduce general fund expenditures by eliminating two police officer positions and combining the duties of records supervisor and administrative secretary, and as a result the department was under staffed. The Arbitrator noted that the same arguments were made by the City and rejected in 2002 by Arbitrator Calhoun. The Arbitrator criticized the City for offering only summary information on key financial data and while she did not doubt it, she pointed out there was not sufficient detail presented from which she could understand and then evaluate the City's economic position.

In looking at comparability the City proposed Coos Bay, Florence, Astoria, Lincoln City, North Bend, Reedsport, Seaside and Tillamook. The Association offered two sets, one of comparables, one was based on population and geography, and the other was solely on population. The first was of Astoria, Lincoln City, North Bend, Corneilus, Gladstone and St. Helens. The second was Astoria, North Bend, Baker City, Corneilus, Fairview and Ontario.

This Arbitrator noted that the City's comparable provided only one city greater in population than Newport and that was Coos Bay, and the remaining seven comparables are lower in population than Newport. The Association approach was an equal number of comparables above and below Newport with a range 125 to 75 percent. She stated that the City's LBO, the City's numbers show that the police are low at entry level = .78% to step 6 = minus 3%. However, at step 7 they are about 1.0% ahead. However, using the

Association's comparators, even if its LBO was awarded on the local labor market and population, they would be 7.7% behind, and on population then it is only minus 4.8% behind. Also, the Arbitrator concluded that the Association's methodology was more consistent with statutory criteria as well as more balanced. She stated:

“The City's methodology is not in sync with statutory mandate regarding population. Its approach places geography/labor market over and above population. The City's comparison is also skewed with one city above Newport and seven below.” *Id.* page 12.

The Arbitrator also noted that the City had taken an inconsistent approach in the 2002 arbitration arguing for traditional labor markets, but doing comparability three up and three down. The Arbitrator concluded that the City did not follow the statutory requirements, the Association did and using the Association's comparables in either set there is a reasonable amount of catch up of cities in the third year. The Arbitrator found that the City can attract employees but cannot retain them. She decided that wages and insurance had to be a factor that leads to turnover, and therefore, points to the Association's LBO. The Arbitrator found that looking at the relevant CPI data that the employer's proposal for two years is 2.5% below the cost of living and the Association's proposal in the third year encompasses a 2 to 3 percent catch up.

In looking at the length of the agreement, the City tried to claim that a two year agreement goes for labor peace and the Association disagreed pointing out that the parties will be right back to the table, the Arbitrator agreed saying that “at least a short respite from bargaining where there is stability and predictability in the terms of the agreement was in the interest and welfare of the public.”

With regards to the evidence technician, the City tried to argue that the duties were just as important as a records clerk, and therefore there shouldn't be any difference in their wage. The employee was first hired as a receptionist and then was reclassified as a records clerk and then given additional responsibilities, which required a number of DPSST classes in order to handle evidence and receive some weapons training in order to safely handle handguns. The Arbitrator easily concluded that the evidence submitted of evidence technician's work was different from a records clerk and justified the premium pay.

In turning to the insurance and the difference between equally important to substantially equal or better than, Arbitrator quoted Arbitrator Stiteler's decision in a grievance arbitration where the insurance benefits had been reduced for this bargaining unit and this Arbitrator noted the City claimed that there was no change in benefit protection and yet proposed a change in language, so she concluded that the City had not provided conclusive evidence to support it.

Given all of the above, the Association's Last Best Offer was awarded.

WHITE (2007) ARBITRATOR BURTON WHITE RULES FOR IAFF AGAINST THE LANE RURAL FIRE DISTRICT

The interest arbitration was for a small association with 11 members in the bargaining unit. The parties had extensive proposals where redoing the contract with the Union having proposed for slightly overall higher wages. The Arbitrator noted that there was no ability to pay issue and that there had been no turnover issues in the District.

Turning to wages the Union argued that the wages of the employees were an average of 20 percent behind. Comparable jurisdictions: The parties disagreed strongly on comparability. The District argued there are enough communities within 10 or 15 percent population. The Union argued that comparable communities include only those communities that provide services for similar entities based on the Legislative intent of ORS 243.746 (4)(e). The Arbitrator noted that the difference between the parties hinged on the selection of comparable communities and when the comparables challenged by the District can be Hermiston, Lebanon, and Troutdale that it drops more than 10 percent in comparability. He discussed the difference between arbitrators and comparable communities citing on one hand Arbitrator Eric Lindauer's decision in the *City of Astoria*, 2000 case, and Arbitrator George Lehleitner's decision in the *Winston Dillard* 1995 case. He also reviewed Law Review articles by Henry Drummonds and John Abernathy and Tim Williams. Specifically, he noted that the change in the prior statute, which referenced the geographic labor market of the public employer was deleted from the final bill. He indicated that the criteria are appropriately those "communities of the same or nearest population range within Oregon." He also cited with approval Arbitrator Nancy Brown's decision in the *Grants Pass* 2000 case. He criticized those who would add different comparability factors not listed in the statute, stating that adding factors would be an arbitral modification of the statute. He then opined that subparagraph 4(h) of the statute listing other factors would allow an arbitrator to consider the geographic labor market that only if there were insufficient factors in the hearing to justify an award.

The Arbitrator found that the District was very selective in its selection of comparables, eliminating a number of comparables within the population range and stated that the record was silent as to why the District did not list all the departments within its own comparability criteria.. He also criticized the District for utilizing two cities, which had a population far beyond the District's range of plus or minus 15 percent. In commenting on the information provided by parties he stated:

"The economic data supplied by the parties was not helpful in part because of arithmetic errors and part because dates for the data were not supplied and so data from different years would appear on one list, and, even when the parties were considering the same communities the data did not agree. Given the significant differences in the data and arithmetic errors many pages of statistics and charts serve more to confuse than enlighten." Page 21.

He concluded that given the District's own salary data and using a complete list of comparators the District was either 4.4 or 7.9 percent behind comparables, even *after* the District's proposed increased wages were applied. Therefore, he decided the District's LBO was inadequate and adopted the Union's LBO.

Editorial Comment: It is critical to have consistency in comparability selection and accurate data in arbitration.

WILKINSON (2004), ARBITRATOR JANE WILKINSON ADOPTS THE STATE'S LAST BEST OFFER IN INTEREST ARBITRATION BETWEEN THE STATE OF OREGON, DEPARTMENT OF CORRECTIONS AND ASSOCIATION OF OREGON CORRECTIONS EMPLOYEES

In this case the main difference between the parties was how to deal with freezes of wage steps. Both parties agreed for a two-year wage freeze. The Association's proposal would have the step freeze expire when the 2003-2005 Collective Bargaining Agreement expires, and then employees automatically move to the steps where they would have been otherwise. The State would have the step freeze continue for two years from the effective date of Arbitrator's award, which would effectively extend to approximately ten months into the time covered by the next Collective Bargaining Agreement.

Besides those there were five other changes proposed by the State and twenty proposed by the Association. The most significant of the State's proposed changes was a hard dollar cap on the health care contributions. Significant Association proposals were: paid release time for the Association President, with a reimbursement by the Association; a five percent shift differential for those employees working flexible shifts; a proposal for dedicated service pay effective 01/01/05, and to create a seniority wall against transfers from the AFSCME unit to the Association's unit.

Arbitrator Wilkinson noted that there was no one definition for what the "interest and welfare of public" was, and that she would have to consider that in conjunction with the secondary factors.

Arbitrator Wilkinson opined that the most important other factor was internal equity within the State of Oregon.

Turning to comparability, the State attempted to utilize different states across the country. However, the Arbitrator rejected that and indicated that the use of four contiguous states has the advantage of historical usage. The Arbitrator rejected the Association's attempts to utilize Alaska noting that it has a far different economy than the lower 48 states. The Arbitrator agreed that comparable counties should also be utilized. The Arbitrator found that with the four contiguous states, the State of Oregon's wage is roughly equal, but that it lags compared to the contiguous counties. She also found from the State's testimony that it was having trouble recruiting qualified applicants from the

Willamette Valley area. Even though that was the case, the Arbitrator noted the turnover was fairly minimal from experienced employees.

The Arbitrator also found that with cost of living hovering around two percent, the State's willingness to pick up health care partially offset the wage freeze. The Arbitrator also found that the State does have significant revenue problems.

The Arbitrator concluded that the scales were tipped in favor of internal equity in her decision to rule for the State, so these employees get the same freeze as all other State employees.

Editorial Comment: Had the Association not attempted to gain more than the rest of the State employees regarding the step freeze, it might have prevailed in the arbitration. However, this, like the previous AFSCME arbitration, was a case of assisted suicide.

WILLIAMS (2003), ARBITRATOR TIMOTHY WILLIAMS AWARDS UNION'S LBO IN REOPENER OVER INSURANCE COSTS

SEIU represents the Police Officers in the City of Ontario. It went to arbitration over a reopener which could have occurred in the second or third year of the contract. The reopener was triggered by insurance costs increasing over 8%. The reopener was utilized in the third year of agreement.

The contract provided for the City paying 100% of insurance costs up to a hard dollar cap, which had been \$550. Above that there would be 50/50 split, but the cap could not increase more than 5% in any one year.

Both parties' last best offer had a new cap of \$737 a month. The Association's proposal was to continue the 50/50 increase in the cap. The City's last best offer was to continue that but to require all employees to make a contribution, i.e. spreading the pain, where the employee without dependents would pay 1/3 of the cap, employees with one dependent would pay 2/3s of the cap, and an employee with full family would pay all of the cap. The current costs of insurance are \$320 for single, \$657 for employee plus one, and \$897 for full family. Twelve employees with full family are paying an \$80 cap.

The Arbitrator decided that the City had made no case for changing the status quo. He cited the 3 tests:

1. That status quo has to be unworkable;
2. That a quid pro quo justifies the taking away of a benefit;
and,
3. There was a compelling need.

The Arbitrator found the difference of the two proposals was only \$4,000. Therefore, the Arbitrator awarded the Union's last best offer.

WOLLETT (2000), ARBITRATOR WOLLETT ADOPTS THE BEND POLICE ASSOCIATION'S LAST BEST OFFER OVER THE CITY OF BEND'S BECAUSE THE CITY OF BEND ENGAGED IN BAD FAITH BARGAINING DURING NEGOTIATIONS, WHICH WAS NOT IN THE INTEREST AND WELFARE OF THE PUBLIC

The Bend Police Association and the City of Bend were not able to settle their 2000 through 2002 CBA between them because the City wished to increase the Association's co-pay for health care benefits. Previously, because of a 1993 arbitration decision, Association members were paying 5% of the health care costs, with the City paying 95%. During bargaining, the City requested that the Association contribute 10% to the cost of health care. The Association rejected that proposal, in part because doing so would have virtually negated most of the wage increases for part of the agreement.

Also, during negotiations, the City switched plans twice. First it adopted a temporary plan in August of 2000, and then it adopted a permanent plan in October of 2000. Neither of those plans was identical to the previous plan in place. The City never asked the Association to agree to those plans, absent settling the full contract, and merely unilaterally implemented them, in spite of the Association's position that doing so was a unilateral change during bargaining, which was an unfair labor practice. After negotiations broke down, and the City implemented its plan in October, the Association filed an unfair labor practice.

The parties' positioned themselves in bargaining with identical wage proposals so that insurance was the sole issue of import separating them. Other issues included the Association's proposal for a zipper clause so that the contract would never expire, and for due process language for certain discipline.

While the bargaining history of parties is rarely admissible in arbitration, for the same reason that offers of settlement are not admissible, the attorney for the City, Bruce Bischof, on opening statement, blamed the Association for the fact that the City was in arbitration, and argued that the Association engaged in bad faith bargaining. Once the door was open, the Association walked through it.

Arbitrator Wollett determined that the interest and welfare of the public required that both sides honor the statutory charge that good faith bargaining take place between the parties. He found that the City's actions in changing insurance policies during the course of bargaining constituted bad faith actions on behalf of the City.

Arbitrator Wollett also rejected the City's claim of an inability to pay the higher insurance costs, finding the City's arguments disingenuous based on the fact that the City had an approximately 30% reserve in funding. For these reasons, he awarded the Association's last best offer.

Editorial Comment: While it is always nice to win such a case, frankly I would rather have won it because of the City's last minute change in its proposal, which was

that the Association accept whatever insurance the City decided to provide the Association. In other words, for the first time in its last best offer, the City proposed that it had a unilateral right to determine the level of benefits that it would give to the Association, as well as having a cap in place requiring a co-pay. In addition, evidence was introduced that the co-pay the Association members were paying was one of the highest of the comparables, and that increasing the co-pay was unjustified in any event. However, the Association members are enjoying a 3% increase effective July 1, 2000, and a cost-of-living based increase for next year.

WOLLETT, (1999), ARBITRATOR DONALD WOLLETT AWARDS THE MCMINNVILLE POLICE OFFICERS ASSOCIATION'S LAST BEST OFFER IN ARBITRATION AGAINST THE CITY OF MCMINNVILLE

The case had a procedural ruling of some interest because on the 13th day after the exchange of last best offers, i.e., one day before the hearing, the City attempted to change its offer again, claiming that it made a scrivener's error. The Arbitrator reversed himself and agreed in the award that he should not have allowed that to occur because the Association relied on the City's initial last best offer to its detriment.

The main issue separating the parties was wages, and more specifically, the City's request for a co-pay of a 50/50 split of increases in health care in the third year of the agreement.

The Arbitrator started his discussion by stating the proposition that the interest and welfare of the public was first best served by requiring any party who wanted a change in the status quo to justify that change. He cited a book, *Collective Bargaining and Public Employment*, written by himself and two others, as authority, as well as Professor Snow's Interest Arbitration citing in the Bend Firefighters' case in 1996.

With that modest outlook in mind, the Arbitrator examined the last best offer of the parties and concluded that their wage proposals were basically a wash. The Association's was actually lower in the first year than the City's because the Association was opposing any co-pay on health care.

In deciding how to analyze comparability, the Arbitrator then rejected the Association's opinion that the statute was written to look at total compensation only from the perspective of what an employee receives and not what an employer pays. Interestingly enough, Arbitrator Downing, in the Lane County case, came to a contrary conclusion. This Arbitrator believed that a fair interpretation of the statute was that the full cost of what an employer paid for employees is what should be considered (this writer believes that the Arbitrator's analysis on the subject is correct).

The Arbitrator then gave the City the burden of proof of justifying a change in the status quo of fully paid health care. The Arbitrator noted that most of the comparable jurisdictions have fully paid health care and of those that had some kind of co-pay, virtually none had as aggressive a co-pay as the City. The Arbitrator, while giving it

minor consideration, noted that the City's desire to have a co-pay because the firefighters agreed to it, was undercut by the fact that the City gave the firefighters more of a wage increase to buy the co-pay.

Therefore, based on comparability, and the Arbitrator's slavish adherence to the status quo, the Arbitrator awarded the Association's last best offer.