

**SNYDER AND HOAG, LLC CLIENT NEWSLETTER
2008 -- FOURTH EDITION**

INTEREST ARBITRATION

**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.

GRIEVANCE

ARBITRATOR UPHOLDS TERMINATION OF JEFFERSON COUNTY DEPUTY FOR PERFORMANCE FAILINGS

Jefferson County fired grievant for multiple offenses including failure to write 2 citations per shift, failure to timely and properly complete reports, and insubordination. Grievant had received a letter of reprimand and a 3 day suspension in less than 2 years of employment. In November 2007 she received a critical performance evaluation along with the 3 day suspension. When she failed to increase her productivity on patrol, she was fired.

The record established that grievant did not write 2 citations per shift and did not complete reports as required by policy. The critical questions were whether this conduct constituted insubordination and whether it established just cause for termination.

Arbitrator Kathryn Whalen rejected the Association's arguments that grievant's workload with other tasks prevented her from writing 2 citations per shift and that overall, her productivity as documented by the Sheriff's productivity statistics was comparable to her peers. The Arbitrator also rejected the Association's argument that grievant was fired in retaliation for filing a sexual harassment complaint against her sergeant. The arbitrator agreed with the Association that grievant was not insubordinate.

On cross-examination grievant testified that she had maintained a professional relationship with the Sergeant she had accused of sexual harassment. She had no explanation when confronted with transcripts of text messages she sent to the Sergeant which the arbitrator described as “in no uncertain terms, contain crude jokes and sexually-suggestive content.” The Arbitrator concluded that grievant was not a credible witness and gave her testimony no weight unless it was corroborated by independent evidence.

Given (1) grievant’s disciplinary history in a relatively short period of employment, (2) two critical evaluations in that period, (3) continued performance problems in the areas of traffic citations and report writing and (4) the arbitrator’s finding that grievant had no credibility, Arbitrator Whalen concluded that discharge was appropriate.

Editorial Comment: The Arbitrator’s decision reaffirms the importance of a grievant’s work history and credibility in determining whether specific misconduct will be found to constitute just cause.

EMPLOYMENT RELATIONS BOARD DECISIONS

BOARD RULES THAT MULTNOMAH COUNTY COMMITTED AN UNFAIR LABOR PRACTICE WHEN IT VIOLATED THE PUBLIC RECORD’S LAW BY DISCLOSING DISCIPLINE ABOUT EMPLOYEES

The case of *AFSCME v. Multnomah County*, 22 PECBR 444 (2008), arose when a radio station published the names of bargaining unit members of AFSCME who had used significant amounts of sick leave. The County had released the names and some disciplinary records regarding bargaining unit members.

The ERB stated because the public records law would mandate the release of names of employees and their amount of sick leave use as well as overtime pay that there was no violation of the duty to bargain for the County to comply with the public records law. However, the ERB ruled:

“The County violates this rule (status quo) and changes the status quo if it provides information to a member of the public that the law does not require it to disclose.” *Id.* p. 446.

Looking at another specific case the ERB noted that:

“Discipline regarding the alleged misuse of theft of public property by public employees has by virtue of case decisions become public records due to the public interest in such information.” *Id.* p. 448.

However, when there is no request for employees’ home addresses the ERB did find a violation of the status quo when the County gave the employer’s home address to a

reporter. The Board found that when a subject has a “significant impact on an employee’s privacy rights” that an employer is required to bargain about changes in its past practices and policies.

Editorial Comment: It would be appropriate for every client to see whether the employer has a written policy regarding release of public records. If it does so, then a copy of that policy should be sent to us for review. If an employer does not, than general concepts of public records law will apply to a request for information. If an employer attempts to implement a policy regarding public records a client should immediately get a copy of that policy for review to determine whether a demand to bargain should be made over an employer’s action.

FAMILY MEDICAL LEAVE ACT

EMPLOYERS CANNOT FORCE USE OF COMP TIME DURING FAMILY MEDICAL LEAVE

Recently an Oregon dispatch agency declared that it could no longer pay employees for compensatory time off (CTO) while they are on Family Medical Leave Act leave. Neither the FMLA nor the FLSA prohibits such use of compensatory time off. The FLSA bars an employer from (1) requiring an employee to use CTO for family medical leave and (2) counting CTO as part of the 12 weeks family medical leave required by the FMLA. To assert that the FMLA bars employers from allowing employees to use CTO misstates the law. The applicable federal regulation states:

(i) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. There are limits to the amounts of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). *Compensatory time off is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave.* The employee may request to use his/her balance of compensatory time for an FMLA reason. If the employer permits the accrual to be used in compliance with regulations, 29 CFR 553.25, *the absence which is paid from the employee's accrued compensatory time ``account'' may not be counted against the employee's FMLA leave entitlement.* 29 CFR 825.207(i). (Emphasis added)

OUR WEB MASTER WILL “MOON LIGHT” AS DIRECTOR OF OCPA

For years David and I have urged our clients to join in the Oregon Council Police Association (OCPA). The rights that we have by virtue of states’ statutes on collective

bargaining are constantly under attack. It is only by legislative lobbying that we can ensure that the rights that our clients enjoy will continue in the future, and with a little luck even be expanded upon.

Following this blurb is Steve Beck's biography and a statement from him as to why joining OCPA is to your benefit. I'm confident that all of us will be hearing more from Steve in the future.

In a final note, Steve has promised that he will remain our Web Master. I'm publishing the promise in case he forgets that.

**STEVE BECK, EXECUTIVE DIRECTOR
OREGON COUNCIL OF POLICE ASSOCIATIONS
(OCTOBER 2008)**

Steve Beck began his career in law enforcement in the early 1970's. He was a Reserve Officer at Lake Oswego P.D., then moved over to West Linn P.D. and became a full-time Community Service Officer. In 1973 he applied to the Oregon State Police and was hired by them one year later in 1974. He was assigned to the Arlington Oregon Patrol Office out along I-84 for about a year and then transferred to the Beaverton Patrol Office in 1975.

While working at the Beaverton Patrol Office in 1984 he founded, organized and subsequently ran the Oregon State Police Officers Association as it's elected President, with the legal guidance of attorney Will Aitchison, until he decided to step down and return to the Patrol Division at the Portland State Police Office at 92nd/Powell in Portland in 1991. Beck became a nationally Accredited (ACTAR) Accident Reconstructionist for the Oregon State Police and subsequently retired in 1999 from the Tualatin OSP Sub-Station. Beck has been the web master for the OSPOA since 1999.

Shortly after retirement Beck went to work for the law firm of Garrettson, Goldberg, Fenrich and Makler (now Garrettson, Gallagher, Fenrich and Makler) as a full-time research analyst and web master for the law firm. After two years in that position Beck retired once again. Beck is also the current web master for the law firm of Snyder and Hoag, LLC and the Oregon State Police Officers Association. In 2007 Beck was hired under a short term contract by the Oregon State Police and assigned to the Dignitary Protection Unit for several months to work for another retiree that was off on medical leave. At the completion of that assignment Beck was assigned to work Legislative Security at the State Capitol during the February 2008 Special session of the Oregon State Legislature.

Beck currently works as a part-time Instructor at the new Department of Public Safety Standards and Training (DPSST) Academy in Salem. Beck holds an FAA private pilot certificate and owns his own airplane (1957 Piper Tri-Pacer).

In October 2008 Beck was hired as the new Executive Director of the OCPA to replace

the current Executive Director who is retiring.

Steve Beck resides in the Salem area and will be assisting OCPA President Bob Miller in setting up a permanent OCPA office in the Salem area, in which all OCPA activities will be coordinated and administered.

WHY JOIN THE OREGON COUNCIL OF POLICE ASSOCIATIONS?
By Steve Beck, Executive Director
stevebeck@orecpa.com

The Oregon Council of Police Associations (OCPA) is the political and legislative arm of approximately 5,000 public safety labor organization members. As of October 2008 we have 49 member organizations in the State of Oregon.

The OCPA represents line enforcement officers, corrections officers, parole and probation officers and law enforcement support personnel. The primary focus of this representation is in the political/legislative arena in Oregon.

Public Safety employee rights, working conditions, benefits, wages, training and proactive criminal law legislation have all become major issues in the legislative and State election process.

We are vigilant in detecting Legislative Bills, Ballot Measures and proposals that would undermine the Rights of our membership.

We pride ourselves on our ability to work in a bi-partisan manner. We support lawmakers and candidates from all political parties who support our labor and public safety agenda.

We believe maintaining a working relationship and open communications between our membership and the legislative assembly is of the utmost importance.

The OCPA employs a full-time lobbyist in Salem and operates an Executive office in the Salem area to oversee all activities of the OCPA.

PLEASE HELP **US** TO PROTECT **YOU**, JOIN THE OCPA TODAY!