

SNYDER AND HOAG, LLC CLIENT NEWSLETTER

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OREGON

EMPLOYMENT RELATION BOARD

OREGON ERB CONCLUDES MARION COUNTY'S FAILURE TO REINSTATE CORRECTIONS DEPUTY AS ORDERED BY AN ARBITRATOR WAS AN UNFAIR LABOR PRACTICE

Marion County refused to reinstate a corrections deputy as ordered by an arbitrator. The Deputy was fired for alleged mistreatment of inmates at the Marion County Work Center. The Marion County Law Enforcement Association (MCLEA) arbitrated her termination and convinced Arbitrator Michael Cavanaugh that her termination was not supported by just cause. Initially the County agreed to bring the deputy back to work (leading her to quit the two jobs she had taken to pay her bills), but then changed its mind and defied the arbitrator's order. The MCLEA filed an unfair labor practices charge with the Employment Relations Board alleging that the County's defiance of the arbitrator violated the PECBA.

After hearing on the ULP, Employment Relations Board (ERB) Agent Carlton Grew concluded that the County had committed a ULP by failing to reinstate the deputy. On March 29, 2010 the full ERB issued its final order ordering the County to cease and desist from refusing to comply with the Arbitrator's award and reinstate the deputy with back pay and benefits as ordered by the Arbitrator.

The ERB declared that when parties agree to grievance arbitration, they consent to accept arbitration awards and the Board's role is limited to assuring that the parties get what they bargained for, a binding decision from the arbitrator. The ERB's role is *not* to assure that the Arbitrator made the right decision—it will not become “embroiled in the merits of the dispute.”

However, ORS 243.706(1) provides a limited exception to the enforceability of arbitration awards. The ERB uses a three step test to apply this statute: (1) did the arbitrator find the grievant guilty of the misconduct for which discipline was imposed? (2) did the arbitrator relieve the grievant of responsibility for that misconduct? and (3) is there a clearly defined public policy that makes the award unenforceable?

The ERB rejected the County's argument that public policy made the award unenforceable. The County improperly based its argument on the grievant's conduct, rather than on the Arbitrator's reinstatement of the grievant. The Board refused to express its opinion as to whether or not the grievant's conduct violated public policy since that was not the issue presented by this case.

Editorial Comment: Arbitration awards are final under Oregon law (and Washington law). The statutory exception in Oregon's PECBA will be narrowly construed until the Oregon Supreme Court changes its interpretation or the legislature amends the statute. Both possibilities are unlikely.

It's been nearly 2 years since Arbitrator Cavanaugh ordered that grievant be reinstated. Although the County has until the end of May to appeal the ERB's Order to the Court of Appeals, rumor has it that the County will not appeal.

INTEREST ARBITRATION

OREGON INTEREST ARBITRATOR ANSWERS THE QUESTION OF HOW MUCH WILL OREGON TROOPERS' COMPENSATION BE CUT BY AWARDING THE STATE'S LBO

Arbitrator Tim Williams was faced with the unusual situation of choosing between two Last Best Offers both of which provided for (1) a two year wage freeze and (2) furloughs and step reductions. The difference between the LBO's was that the State's LBO cut deeper than the Oregon State Police Officers Association's LBO.

Arbitrator Williams awarded the State's LBO. He reasoned "the interest and welfare of the public is best served by an award that has the least chance of resulting in a layoff of employees from this bargaining unit." He added ". . . it is undisputed that we are all involved in extremely difficult economic times. The very fact that the union has offered to accept furloughs and step reductions indicates their full recognition of this problem." The Arbitrator concluded: "In sum, the Arbitrator is convinced that the State's total package results in less financial demand on the available money and does so without excessive harm. As such it is more likely than the Association's total package to avoid workforce reduction and to permit 24/7 coverage."

Editorial Comment: Arbitrator Williams' award is a grim reminder of the difficulty of winning an interest arbitration under current economic conditions. At the same time, each employer's finances and overall situation must be examined closely. There is no reason to assume that every employer's finances are as difficult as the State of Oregon's. Arbitrators will closely examine proposals for wage freezes as well as proposed cutbacks.

CONTRACT SETTLEMENT

COTTAGE GROVE POLICE GUILD SETTLES CONTRACT

The Cottage Grove Police Guild has agreed to a new three year contract. In the first year in lieu of a wage increase all members will receive a \$95/month HRA VEBA contribution that will continue for the term of the contract. In the second and third years all members will receive a CPI based wage adjustment (minimum 1% and maximum 6%).

The settlement includes significant changes to the contract's insurance provisions. Under past contracts, only members with full family coverage were required to pay part of the insurance premiums. Under the new contract, by the second year of the contract all members will be paying 5.4% of the insurance premium.

Guild President Conrad Gagner led the Guild's Bargaining Team.

Editorial Comment: Predictably the City argued financial distress. In light of that issue and comparability, this settlement was accepted by the bargaining team and ratified by the membership.

2 YEAR CONTRACT FOR JEFFERSON COUNTY LAW ENFORCEMENT ASSOCIATION

The Jefferson County Law Enforcement Association has settled a new 2010-2012 contract by agreeing to a wage freeze in the first year and up to a 5% CPI increase in the second year. Member's 10% contribution for insurance benefits will continue unchanged. A CCIS Plan no longer offered will be replaced by a similar plan. The contract was modified to conform to existing practices regarding promotional probation and corporals' 5% premium pay. The County will no longer pay for dry cleaning wash and wear uniforms.

The Association's Bargaining Team was lead by President Jeremy Skeels.

Editorial Comment: Given a new, much shorter salary schedule and 4% wage increases for the past two years awarded by Interest Arbitrator Nancy Brown in 2008 and the County's ongoing financial difficulties—recently highlighted by the layoff of four jail employees following loss of revenue from Crook County—maintenance of insurance benefits for two years with a wage freeze for the first year and up to a 5% cost of living increase for the second year was a reasonable settlement for this Association.

JOSEPHINE COUNTY SHERIFFS ASSOCIATION SETTLES 2 YEAR CONTRACT

Despite substantial County budget difficulties the Josephine County Sheriffs Association recently successfully negotiated a new contract. Under the new 2 year contract Association members will again receive cost of living increases of 2-4% on January 1, 2011 and 2012. There will be no change in insurance. In addition, in response to the Association's argument that there was no difference in the work performed, the County agreed to merge the Police Support Tech I and II classifications into Tech II. The County also agreed to conduct wage surveys for two positions to assure that those members are paid fairly based on comparable counties pay practices.

Additional contract changes include the following: The County will conduct baseline blood borne pathogen testing for all employees. Holiday time off will be selected based on the day the request was made (not more than 42 days in advance). Hardship leave will be donated in 8 hour increments (currently 2 hours). Section 15.4 concerning notice of discipline, Section 17.2 of the grievance procedure, and Section 26.2 (off duty employment prohibition) were clarified. If the Academy closes, members attending the Academy will be paid for an additional round trip home.

Association President Deputy Jim Mason led the Association's bargaining team.

Editorial Comment: Given Josephine County's economic difficulties due to loss of timber income and the County's financial position, this was a very reasonable settlement. This Association should also be commended for making an extremely generous contribution to the fallen officer license plate fund.

COURT CASES

OREGON NURSE MAY TAKE HIS WHISTLEBLOWER CLAIMS TO TRIAL

The Oregon Court of Appeals ruled that a nurse fired for insubordination was entitled to a trial on his claims that his firing was in retaliation for whistle blowing.

Duane Huber worked as a licensed practical nurse at the Oregon School for the Blind (OSB). The pattern of events that lead to his firing is all too familiar:

- He began having disagreements with his supervisor over appropriate medications for the OSB's students and posting of confidential patient information in public areas
- His supervisor began treating him differently by giving him undesirable work assignments and making false statements about him to his co-workers.
- He intended to complain to the Oregon State Board of Nursing (OSBN) regarding the dispute over proper medication but his employer convinced/intimidated him not to do so.

- He complained to the federal Department of Health and Human Services regarding what he perceived as HIPAA violations.
- OSB management told him to follow his supervisors' instructions without question and ordered him not to contact outside agencies without first informing management.
- Huber responded that these orders could endanger students and cause him to lose his nursing license.
- OSB terminated Huber for insubordination.

When the Circuit Court dismissed Huber's claims, he appealed. The Court of Appeals reversed the Circuit Court, concluding that he was entitled to trial on his Whistleblower and common law wrongful discharge claims.

The Court ruled that Huber's Whistleblower claim should go to trial because he had a reasonable belief that OSB had violated state and federal law. The fact that he never actually complained to the OSBN about substandard nursing practices was of no consequence. An employer violates the Whistleblower law if it successfully discourages an employee from filing a complaint. Since a jury could find that Huber's whistle blowing activity had been a "substantial factor" in his termination, he was entitled to a trial on this claim.

The Court also concluded that Huber was entitled to a trial on his wrongful discharge claim that he was fired for fulfilling an important public duty, in this case State law ensuring patient safety by establishing a standard of care for nurses.

Huber v. Oregon Department of Education, No. A-136940 (May 5, 2010).

Editorial Comment: Oregon's Whistleblower protections have teeth. Nonetheless, putting one's job in jeopardy by disobeying a clear and direct order is a risky course of action. The Court of Appeals upheld the dismissal of Huber's First Amendment claim on the ground that he spoke in his capacity of an employee (not protected) rather than as a citizen (protected). Similarly, he had no claim under ORS 659A.230 which protects employees who report criminal activity in good faith, cooperates with a law enforcement agency in a criminal investigation, or brings a civil proceeding against his employer or testifies in good faith in a civil trial. His complaint to the federal DHHS did not fall under this statute.

OREGON SUPREME COURT RULES THAT EMPLOYER CAN DISCHARGE AN EMPLOYEE WHO HAS USED MEDICAL MARIJUANA

The case of *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industry*, 248 Or 159 (2010), the Oregon Supreme Court ruled that an employer could appropriately discharge an employee who used medical marijuana. The State of Oregon through BOLI had claimed that the employer was discriminating against an employee by virtual of his disability. The Court of Appeals had affirmed that decision. However, the Oregon

Supreme Court recognized that the Federal Controlled Substance Act prohibited all use of marijuana including medical use so that an employer could discharge an employee for illegal use of drugs and had no obligation to accommodate the employee use of medical marijuana.

Editorial Comment: There still is a supremacy clause.

9TH CIRCUIT COURT OF APPEALS ENDS “DONNING AND DOFFING” LITIGATION

In the case of *Bamonte v. City of Mesa*, Case # 08-16206 (March 25, 2010) the Court ruled that because police officers had the option of putting on and taking off their gear either at home or at the station, that the time spent doing so was not compensable under the FLSA. Had the employer required the officers to do so at the police department, the result would have been different.

Editorial Comment: we anticipated this result, so unlike at least one other local firm, we advised our clients who inquired about this issue, that we believed that it was not worth litigating.

WASHINGTON

COURT CASE

WASHINGTON COURT DISMISSES BREACH OF DUTY OF FAIR REPRESENTATION CLAIM

Doyle Muir sued his union, Washington State Council of County & City Employees and Local 1849 (“Council 2”) for failing to meet its duty of fairly representing him when it refused to arbitrate a grievance challenging a reduction in his pay.

When Muir was demoted his pay was substantially higher than the top step of his new position. Under contract language requiring that he be redlined until the pay schedule catches up to his current pay or “until the expiration of twelve (12) months, whichever occurs first” his higher rate of pay was maintained for 12 months. When his employer reduced his pay after 12 months, he filed a grievance. Council 2 refused to arbitrate the grievance. Muir sued his union.

The Court of Appeals observed that under Washington law, a union breaches its duty of fair representation (DFR) when its conduct is discriminatory, arbitrary or in bad faith. The Court explained:

“In the context of grievance processing, the duty of fair representation prohibits a union from ignoring a meritorious grievance or processing a grievance in a perfunctory manner. But a union has no duty to arbitrate

every grievance; it may screen its members' grievances and process only those it determines have merit. 'A union's duty requires some minimal investigation of employee grievances, the thoroughness depending on the particular case; only an egregious disregard for union members' rights constitutes a breach of the union's duty.'"

Muir argued that Council 2 was mistaken in its interpretation of the contract language at issue and his interpretation was the only reasonable interpretation. The Court first considered his interpretation and concluded that it disagreed with his reading of the contract. Significantly, the Court then emphasized that the issue was not whether the union had correctly interpreted the contract; the issue was whether in declining to arbitrate the grievance the union (1) deliberated the merits of his argument and (2) could explain its decision not to go to arbitration.

The Court observed that Council 2 had its general counsel assess the grievance; she concluded the grievance would likely fail. The union president relied on her advice. The Court found that the Superior Court was mistaken holding that Muir's interpretation of the contract was "plausible" and that the union should want the issue of proper interpretation of the contract resolved. This was error in light of well-established precedent respecting a union's "broad discretion" in deciding whether or not to arbitrate grievances.

In conclusion, the Court stated:

"The evidence shows the union adequately investigated and deliberated Muir's grievance and provided a rational and reasoned explanation for declining to submit the matter to arbitration. The law requires no more."

Muir v. Council 2, 154 Wn. App. 528 (Division One, 2009).

Editorial Comment: We'd expect the same result under Oregon law. This case is significant in its emphasis on the union's discretion and its declaration that the issue is not whether the union's contract interpretation is correct in the Court's opinion, but whether the union investigated the grievance and can provide a reasoned explanation for its decision.