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“A”

### **AXON (2006), FMLA**

In 2005 two Marion County Sheriff's Office Employees took time off from work that qualified as Family Medical Leave time (FMLA). Each employee requested use of vacation and other forms of leave to cover their time off from work. Initially, each employee's supervisor approved the leave as requested. However, when the County learned that the leave was being taken for reasons which could be charged to the 12 weeks of FMLA leave allowed under state and federal law, the County mandated that the employees use their sick leave before any other form of leave. It cancelled each employee's requested and approved use of vacation leave. The County relied on contract language stating "the employee may elect or the employer may require the employee to use any accrued" leave during an FMLA absence.

The Arbitrator ruled that since each employee's supervisor had approved the employees' request for vacation leave, under the contract, approved leave could only be cancelled due to an emergency. Since there was no emergency, the County violated this provision. The Arbitrator rejected the County's argument that employees should be required to use sick leave because the time off the employees requested was due to a medical condition in both instances. He ordered the County to adjust each employee's accrued leave as originally requested by each employee and restore their sick leave in violation of this provision.

However, the Arbitrator rejected the Association's argument that the County had violated the contract by specifying the form of leave to be used during FMLA leave. He concluded since the contract included language that the employer "may require" employees to use specified leave, "the County was exercising its discretion within its rights to require employees to use their sick leave" first. He denied the Association's grievance alleging a violation of this language.

*Editorial Comment: Under the County's interpretation, adopted by Arbitrator Gary Axon, it is difficult to find any meaning in the contract's language allowing for employees to elect use of any accrued paid vacation, sick leave, personal leave, or any other paid compensatory leave during FMLA absences. Rather than allowing the employee to elect "or" the employer to require use of paid leave, the contract, as it now stands, means that the employee may elect any use of any accrued paid leave, but the employer may modify that election as it sees fit. The employee elections provisions of the parties' agreement have been effectively deleted from the contract.*

### **AXON (2006), ARBITRATOR AXON SUSTAINS GRIEVANCE CHALLENGING INSUBORDINATION**

Arbitrator Gary Axon sustained the grievance filed by IAFF Local 452 challenging the demotion of a Fire Captain. The Captain was demoted for insubordination following a

series of disciplinary actions in 2004. The discipline included 2 letters of reprimand and 2 suspensions. In sum, he was disciplined repeatedly for failing to maintain required certifications needed to work as a paramedic. Ultimately, he was demoted for failing to complete a required paramedic class and for failing to complete a “punishment project” assigned as a result of an earlier failure to maintain paramedic certifications.

Initially, the City described the reason for the demotion as being inattention to detail. However, after Local 452 grieved the demotion, the Fire Chief changed the reason for demotion to insubordination. Arbitrator Axon observed that generally insubordination means “the refusal by an employee to work and obey an order given by employee’s superior.” He cited the fundamental principle of labor relations that employees “must work now, grieve later.” Arbitrator Axon added that commonly arbitrators require evidence of six tests in order to find insubordination:

1. The employee’s refusal to work must be knowingly willful and deliberate (negligence and insufficient),
2. The order must be explicit and clearly given,
3. The order must be reasonable and work related,
4. The order must have been given by someone with appropriate authority,
5. The employee must be made aware of the consequences of failure to perform or follow the directive, and
6. If possible the employee must be given time to correct his alleged insubordinate behavior.

Arbitrator Axon concluded that the Captain’s behavior was not willful. He noted that a July 2004 disciplinary letter set forth a specific deadline for completion and training needed to complete the punishment project and that the Captain met that deadline. The Arbitrator credited the Captain’s testimony that he intended to complete the required assignments, but did not do so because of a combination of events (he was on leave for an extended period in late 2004, there were problems with the Department’s e-mail delivery, and he had stress related memory problems). In sum, the evidence demonstrated a performance problem concerning Captain’s attention, not willful and deliberate insubordination.

The Arbitrator also concluded that the City failed to give explicit and clear directives. Deadlines were changed and orders were less than clear.

In conclusion, the Arbitrator described the charge of insubordination as “the fatal flaw” in the City’s case. He ordered that the Captain be reinstated to his position with an appropriate award of back pay, seniority and benefits as requested by Local 452.

“B”

**BOEDECKER (2004), ARBITRATOR KATRINA BOEDECKER DENIES LANE COUNTY PEACE OFFICERS CLASS ACTION GRIEVANCE FOR OVERTIME BASED ON AN “UNPAID BRIEFING”**

This grievance is a holdover from the 2000 Interest Arbitration in which the Arbitrator awarded the County’s Last Best Offer because of its inability to pay, which also included an “uncompensated” 15-minute pre-shift briefing.

The County claimed that it was not obligated to pay overtime for that briefing because the 30-minute paid meal period did not need to be calculated as part of the workday. Therefore, it argued that the real hours of work for Association members was 7 hours and 45 minutes a day, and under the FLSA, there was no overtime that needed to be paid for the 15 minute briefing.

The Arbitrator noted that her responsibility was to interpret the plain language of the contract and not to rule on the FLSA per se. However, she noted that Oregon Administrative Rules did not require a meal period to be counted as hours of work. She found that the Association did not establish that the parties had a practice of treating uninterrupted meal periods as work performed for purposes of determining a normal work cycle that exceeds forty hours. She also noted a federal court case in the Seventh Circuit which held that paid time does not equal hours of work. Also, there was testimony that Association members were free on the 30-minute meal period to perform personal tasks such as leave the correctional facility or go home.

**BROWN (2008) ARBITRATOR NANCY BROWN CONCLUDES CLASSIFICATION SENIORITY, NOT CITY SENIORITY, CONTROLS LAYOFF**

The City of Bend recently faced an economic downturn (housing prices fell) which lead to layoff of City employees. The City of Bend Employees Association’s (COBEA) contract defined seniority as “determined by the length of an employee’s continuous service with the City since the last date of hire”. However, the contract specifically stated that layoff would be by “order of their seniority in their classification, within their department” (subject to a best qualified proviso). The City refused to apply classification seniority in deciding which employees would be laid off. Arbitrator Nancy Brown ruled that the specific language in the layoff article controlled—not the general language in the seniority article. The Arbitrator ordered the City to base its layoff decisions on classification seniority.

*Editorial Comment: We urge all clients to review the layoff provisions of their contracts to make sure the language is both clear and acceptable. Just in case.*

## **BROWN (2005), ARBITRATOR NELSON DECIDES MARION COUNTY COULD ASSIGN THE NEW CLASSIFICATION TO ANOTHER BARGAINING UNIT**

In July, 2005 Arbitrator Luella Nelson denied a grievance filed by the Marion County Law Enforcement Association (MCLEA) challenging the County's decision to reclassify a support staff MCLEA member and move her to another bargaining unit.

The Recognition clause of the MCLEA contract states that the Association is recognized as the exclusive bargaining agent for all Marion County Sheriff's Department employees with the pertinent exception of parole and probation officers and "their support staff."

In April, 2005 the County abolished the classification of "Purchasing/Contract Maintenance Officer (PCMO)", and created a new classification of Contracts Specialist, and reassigned the Contracts Specialist from the MCLEA bargaining unit to an SEIU unit, which does not represent parole officers.

The MCLEA grieved the County's transfer of this position to another bargaining unit, arguing that the Recognition language was clear and unambiguous. Only parole and probation support staff could be assigned to another bargaining unit.

The Arbitrator rejected the Association's argument that the Recognition language was unambiguous. She found that the phrase "their support staff" could be interpreted more broadly than the Association argued. In light of the past practice she found that the County could reasonably assign the new classification to another bargaining unit. Arbitrator Nelson observed that support staff historically represented by MCLEA were, for the most part, those support staff employees who most closely worked with sworn officers represented by the Association. Arbitrator Nelson concluded that the County had the managerial right to abolish the PCMO classification. The contract did not clearly require inclusion of the new classification in the Association's bargaining unit. Since the County applied legitimate criteria in deciding to place the new classification in the SEIU bargaining unit, it did not violate the MCLEA contract.

*Editor's Comment: While we obviously disagree with Arbitrator Nelson's decision (strongly) and believe that the Recognition clause is clear and unambiguous and that therefore the Arbitrator should have ignored any inconsistent past practice, her decision is final. The lesson to be learned by all is the importance of closely monitoring employer compliance with bargaining unit definitions as set forth in Recognition clauses. Only by doing so can the Association preserve its right to represent to the full extent of its bargaining unit, and the rights of its members to enjoy such representation.*

**BROWN (2005), ARBITRATOR NANCY BROWN RULES THAT CHANGES TO THE INSURANCE PROVIDED TO MEMBERS OF MCMINNVILLE FIRE AND POLICE ASSOCIATION DID NOT VIOLATE EITHER PARTIES CONTRACT WHICH PROVIDED THAT THE BENEFITS HAD TO BE “SUBSTANTIALLY EQUIVALENT” TO THE BENEFITS TAKEN AS A WHOLE**

Both police and fire contracts provided that medical insurance plans could be changed as long as the benefits provided were “substantially similar” when taken as a whole. Last year the City’s insurance carrier made Plan changes, both labor organizations demanded bargaining and ended up in a combined grievance arbitration over the changes.

Arbitrator Brown analyzed the changes to the insurance program provided by CCIS and concluded that:

“On the whole, the essential elements or core benefits used by the majority of the bargaining unit would be maintained.”

She found no change in core benefits even though she identified eight different changes to the policy. In doing so, she relied upon the expert testimony of an employer witness and Blue Cross representatives that usage of the changed items was very small by bargaining unit members. Therefore, she denied grievances filed by both the fire and police associations.

*Editorial Comment: Substantially equivalent is obviously something that is going to have to be analyzed on case-by-case basis. Arbitrator Brown’s analysis, which was basically how many bargaining unit people would be affected for how much, is something that probably would be followed by most other arbitrators.*

**BROWN (2002), ARBITRATOR NANCY BROWN CONCLUDES THAT THE STATE OF OREGON DID NOT VIOLATE ITS CONTRACT WITH OSPOA BY REFUSING TO ALLOW THE DETECTIVES IN THE PORTLAND OFFICE TO UTILIZE A 4-10 SHIFT**

For a number of years, the contract between OSPOA and the State of Oregon had a virtually unique provision which says that the department can deny a request from the bargaining unit members in a particular work location to work a 4-10 shift or can take them off of a 4-10 shift if the department determines that the shift has adversely affected a department operational need. A number of those “needs” are spelled out, although they are vague.

In this case, eight detectives requested a 4-10 shift in the Portland area and proposed starting and ending times for such a shift. The department denied it on the grounds that it would affect the availability of the detectives to work with “customers” and would increase overtime because of detectives going to court and on major crime callouts. The Association argued strenuously that the department had not shown a justified operational need and cited a prior arbitration decision by another arbitrator on the same issue which they argued required a higher standard for showing an operational need. The employer argued that the department retained substantial latitude to assess factors that may

adversely affect an operational need, and it was not an objective test that simply could be overturned by an arbitrator as long as it was not unreasonably or arbitrarily applied.

The Arbitrator noted there had been seven prior decisions with regards to this article. She said she decided that previous Arbitrators had found that the language was clear and unambiguous and that the Association had to meet a burden of proof that the supervisor applied the operational need criteria unreasonably or arbitrarily, and based on the facts in this case, that its exercise of it was reasonable.

*Editorial Comment: Sometimes a faint offering of hope is worse than nothing. When a provision in a contract has resulted in eight arbitrations over its interpretation, such a provision does not lead to labor peace and probably is in the best interest of neither party.*

“C”

**CALHOUN (2005), ARBITRATOR CALHOUN CONCLUDES THE STATE OF OREGON DID NOT VIOLATE THE CONTRACT BETWEEN IT AND AFSCME IN THE DEPARTMENT OF CORRECTIONS BY NOT PAYING A SHIFT CHANGE PENALTY OF 5% DIFFERENTIAL**

While on facts this case will not have much applicability outside of the Department of Corrections, Arbitrator Calhoun’s decision provides an excellent framework for analyzing whether there has been a violation of a Collective Bargaining Agreement.

Arbitrator Calhoun started by stating that arbitrators will look at three factors:

1. Standards of contract interpretation;
2. Past practice; and
3. Reasonableness.

The first analysis under contract interpretation is whether the language is ambiguous. If it is clear then no reference to past practice is necessary.

However, if an ambiguity exists, then the bargaining history and past practice has to be analyzed. In this particular case, Arbitrator Calhoun found the language to be ambiguous. He found that the bargaining history to be irrelevant and then decided that the main issue to be analyzed is what was the past practice of the parties.

Arbitrator Calhoun went on to state that a past practice could be utilized to contradict clear contract language, if it establishes that the contract was amended or modified by mutual agreement or action of the parties. However, in order for such a ruling there are three requirements:

1. First, the practice must be unequivocal, i.e. it can be proved almost without exception.

2. Second, it must be clearly enunciated.
3. Third, it must be reasonably ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties (this is somewhat duplicitous with the first requirement).

In this case, Arbitrator Calhoun found that when the management negotiator had explained the employer's intention of implementing the relevant provision of the contract to labor and that it had utilized, as stated by the management negotiator, for three years before the grievance was filed. That made the past practice relevant for interpreting the contract. Therefore, he denied the grievance.

**CALHOUN (2001), ARBITRATOR JACK CALHOUN FINDS A VIOLATION OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN AFSCME AND THE DEPARTMENT OF CORRECTIONS, BUT BECAUSE OF A LONG-STANDING PAST PRACTICE, AWARDS NO REMEDY**

This is a grievance which arose out of Snake River Correctional Institute where the Collective Bargaining agreement required shift bidding on a department-wide basis. However, since approximately 1994, there has been a past practice of the specialty housing units bidding by their seniority separately from the rest of the institution. The employer apparently initially believed there was a signed agreement allowing it to do so, but then claimed that there had been a verbal agreement which was not reduced to writing.

The Arbitrator found that the contract language was clear and unambiguous and did not need to resort to negotiating history or past practice. Therefore, he found that the employer had violated the agreement by having separate bidding for specialty housing units.

The Arbitrator concluded that while past practice cannot to be used to change the pure meaning of contract language, it can be used to determine the appropriate remedy in this case. The past practice had existed for at least five years, and the employer was now following the contract. Therefore, he decided that an order was moot, leaving the employer as a losing party but imposing no penalty for violation of the contract. The union was represented by Allison Hassler. The employer was represented by Lory Kraut, an Assistant Attorney General.

“D”

“E”

**ELLIS (2000), ARBITRATOR DAN ELLIS RULES THAT THE CITY OF AUMSVILLE DID NOT VIOLATE THE CONTRACT BETWEEN THE PARTIES WHICH REQUIRES A “REGULAR SHIFT WITH A REGULAR START TIME” BY ASSIGNING A GRIEVANT TO A REOCCURRING SHIFT OF THREE DAYS OF START TIME AT 8:00 A.M. AND TWO DAYS OF START TIME AT MIDNIGHT**

Arbitrator Ellis, who is the former ERB chair, found that the contract language was ambiguous and subject to two different interpretations. Therefore, he resorted to bargaining history to analyze the case. In this case, there was a conflict in testimony between the chief negotiator for the Association, Daryl Garretson, and three city negotiators, as to whether or not the Association stated in bargaining that irregular work shifts were to be prohibited by the Association’s language. The Arbitrator decided that the Association failed its burden of proof in this matter, and since it was attempting to change a past practice on contract language, it had to clearly and unambiguously communicate its bargaining intentions to the City. Therefore, the grievance was denied.

**ESCAMILLA (2003), ARBITRATOR ED ESCAMILLA DETERMINES THAT THE CITY OF BEAVERTON VIOLATED THE CONTRACT BETWEEN THE PARTIES BY REMOVING A GRIEVANT FROM THE NARCOTIC’S TEAM**

The issue between the parties was whether the removal of the grievant from the Narcotic’s Team was disciplinary or not. The Association argued it was, because it amounted to a reduction of pay. Therefore, violated just cause unless there was reason to do so.

The Arbitrator found relevant that the employer’s announcement of a vacancy in the inter-agency Narcotic’s Team emphasized that it would be a three year position, partly because of the investment of time and money of training an applicant to be on the team. Members of the team also get a five percent premium pay and a plain clothes allowance. The Arbitrator also rejected the employer’s contention that the matter wasn’t appropriately before him and was un-arbitrable. He also found, that while the employer established a prima facie case of just cause, the employer’s failure to adhere to the contract disciplinary procedure’s due process, and its general orders invalidated its actions against the grievant.

*Editorial comment: It is to both side’s benefit to avoid these types of problems by specifically negotiating when premium pay is in the contract for special team assignment, and whether or not placement and removal on that team for whatever reason is subject to the just cause provisions of the contract. There have been cases when employers have recognized that is the way things should be and have specifically agreed to such provisions.*

“G”

**GANGLE (2004), ARBITRATOR SANDRA GANGLE \SUSTAINS A GRIEVANCE AGAINST LANE COUNTY FOR REMOVING A DEPUTY FROM A REASSIGNMENT LIST FOR TRANSFER FROM CORRECTIONS TO PATROL**

Normally, issues of assignment work are permissive subjects of bargaining. However, the County had agreed in Article 15 of the contract and in a reassignment MOU to utilize a transfer list.

However, the County raised a defense to the grievance that assignment is an exclusive management right, and that the Arbitrator would have to find that the Deputy's removal from the transfer list was a disciplinary action in order to be able to rule on the grievance. In this particular case, the grievant had competed for a transfer from corrections to patrol, and was told in early September of 2003 that he was next to fill a vacancy.

However, the grievant made a decision in November to get a vasectomy. The doctor informed him he needed to be off work for two days, and he submitted a request for two days off, which was denied by his supervisor. The grievant went ahead with the surgery and informed the Department he was calling in sick because his doctor required him to take two days off to recuperate. When he returned to work, his scheduled reassignment had been withdrawn, and the Association filed a grievance.

The Arbitrator concluded that the County's assignment procedure had been negotiated between the parties and that Article 2, Section 2.2 of the Management Rights Clause requires the County to apply its rules uniformly and equitably.

The Arbitrator also found that the grievant had been placed on the transfer list and had been informed that he was going to be given the new assignment.

Because there was testimony that the Personnel Director had stated that the grievant could have been disciplined for insubordination since his time off request had been denied before he called in sick, the Arbitrator decided that taking the grievant off of the list was disciplinary in nature.

Based on the fact that the Sergeant told the grievant that he could use sick leave even though the request for emergency leave had been denied, the Arbitrator concluded the County did not have just cause to take disciplinary action against the grievant, and she ordered that he be reinstated to his position, to transfer from corrections to patrol, and that all references to any discipline be removed from his files.

**GREER, (2005), ARBITRATOR WILLIAM GREER AWARDS CHEHALIS FIREFIGHTERS REGARDING VACATION LEAVE GRIEVANCE (Washington)**

When a Chehalis Fire Captain requested a total of 13 shifts off during the summer of 2004, the Fire Chief denied his request because of the “excessive amount of time” he would be away from his job. The Chief based his decision on the contract’s Management Rights and Vacation Leave provisions. He also cited the City’s Rules and Regulations.

IAFF Local 2510 grieved the Chief’s denial of vacation leave citing both the provisions of the Vacation article and Prevailing Rights language in the contract. Local 2510 argued that the contract’s Management Rights language didn’t empower the Chief to impose new restrictions on the use of vacation leave.

Arbitrator William Greer granted the grievance. Arbitrator Greer ordered the City to comply with the Vacation and Prevailing Rights provisions of the contract and specifically directed the City to refrain from imposing additional requirements on the use of vacation leave.

Arbitrator Greer ruled that the City could not rely on language in its rules and regulations concerning vacation leave since its contract with Local 2510 included provisions governing the use of vacation leave. Those provisions included language specifying the *minimum* amount of vacation leave that a firefighter could take, but no restrictions on the *maximum* amount of leave. The Arbitrator refused to endorse the City’s attempt to add a ceiling on the number of vacation leave hours a firefighter could take. The Vacation Leave article included other requirements, for example, staffing needs had to be met. Since these requirements were all satisfied, the City violated the contract when it denied the Captain’s requested use of leave.

Finally, Arbitrator Greer emphatically rejected the City’s reliance on the Management Rights article, holding that management rights were limited by the provisions of the Vacation Leave article as well as the Prevailing Rights article. The right to take extended vacations was established by the Chief’s admission that the City had never before limited the number of shifts a firefighter could take off in a row and by evidence of extended vacations taken in the past.

*Editorial Comment: Management rights schmanagement rights. An agreement to specific requirements and procedures for leave restricts the exercise of management rights with respect to use of leave. An agreement to preserve rights and privileges known to both parties means just that—and management can’t decide to simply ignore prevailing rights.*

“H”

**HARRIS (2005), ARBITRATOR CATHERINE HARRIS RULES THAT THE CITY OF COOS BAY VIOLATED THE CONTRACT BY UTILIZING A RETIRED EMPLOYEE TO CONDUCT BACKGROUND INVESTIGATIONS**

The Coos Bay contract allows the City to only subcontract work which is beyond the capacity of the bargaining unit to perform.

The Chief began utilizing a retired employee to do background investigations. The Chief initially promised the Association that the work would conclude by June 2004, but when it continued after July 1, 2004 a grievance was filed.

Testimony at the arbitration was that Association members had been trained in performing background investigations and had been doing all of them until this recent incident.

The City tried a number of defenses, including that due to short staffing existing employees didn't have the "capacity" to perform the work. However, the Chief also claimed that it was her "management right" to contract out this work. An interesting development in the case was even though the Chief had sent an e-mail stating that all background investigations since 1993 had performed by Association members, at the hearing she testified that she had performed a background investigation in 2002, and that the former Chief had performed one in 2001. The former Chief was the City Manager at the time and did not mention the fact that he allegedly performed a background investigation.

The Arbitrator did not have to comment directly upon that contradiction, but did find the evidence was unquestioned that the Association members did have the capacity to perform the background investigation work and granted the Association's grievance declaring the City had violated the contract.

*Editorial Comment: The Chief's actions in sending e-mails saying that no one had performed background investigations and then testifying to the contrary was mind-boggling. This was covered in the last Newsletter.*

### **HOH (2004), ARBITRATOR RONALD HOH RULES THAT THE CITY OF COQUILLE DID NOT VIOLATE ITS COLLECTIVE BARGAINING AGREEMENT BY REDUCING AN EMPLOYEE'S HOURS OF WORK FROM 40 TO 30 IN A WEEK**

The City of Coquille was experiencing revenue shortfalls and as part of its decision to meet those, reduced a clerical police employee's hours of work from 40 hours in a week to 30. The Teamster's Union argued the contract contains a provision that the normal hours of work would be 40, and reduction violated that provision. However, the Arbitrator rejected that and stated that the dominate view among arbitrators was that language about normal or standard workweek did not bar changes in existing conditions for work schedules, or creation of new shifts that reduce the hours of work as long as the reduction was for legitimate business reasons, or as long as the schedule change was not imposed arbitrarily or capriciously. He also cited language in another section of the contract referring to a different classification which said, "the employee shall be

scheduled for 8 hours” as showing what the contract should say in order to guarantee non-reduced hours of work promise.

“K”

**KELLAR (2006), ARBITRATOR SHERMAN KELLAR UPHOLDS GRANTS PASS’ CHANGE IN VACATION LEAVE BIDDING POLICY**

When the Grants Pass Department of Public Safety for the first time set a 2 week limit on annual vacation bids, the Grants Pass Police Association grieved this change. The Association argued that vacation bidding language allowing employees to request vacation on an “entire” basis barred the Department from limiting vacations to 2 weeks. Officers with more than 3 years’ service accrue more than 2 week’s vacation per year. The Association argued that the long-standing practice of not limiting bid vacations established the proper interpretation of the contract.

Arbitrator Sherman Kellar denied the grievance finding that the broad language of the management rights clause gave the City the authority to limit the duration of vacations and to vacation bidding provisions giving the Employer authority to schedule vacations. He gave substantial weight to the judgment of Department Director that the limit was necessary for efficient operations. He rejected the Association’s argument that the limit violated the right to take an officer’s “entire vacation” asserting that the balance of the employee’s vacation could be scheduled at a different time.

Editorial Comment: Lot of weight to management rights and the testimony of the Department Director in this award. The contract says employees may request vacation on either a “split or an entire” basis. Under this award, employees may only request vacation on a split basis. Thus the arbitrator violated the basic principal of contract interpretation by giving no effect to part of the agreement. Again, John says I’m a sore loser.

**KELLAR (2004), ARBITRATOR SHERMAN KELLAR CONCLUDES THAT THE OREGON STATE POLICE DID NOT PROMOTE AN EMPLOYEE IN ACCORD WITH THE CONTRACT**

This grievance arose over the Association’s allegation that the Department of State Police violated the contract by failing to promote a grievant from forensic science and its entry level FSE to forensic science FS1. In this case, the Arbitrator found that when the grievant was hired as an entry level forensic scientist, he was given a copy of the criteria for promotion to a FS1, which required three year’s experience as FSE, or other analytical experience.

After about two and half years the grievant filed for promotion and claimed that he had spent time in another position that qualified him for promotion. (It was a lab technician 2.) Also, what came out in this case is that the employer changed the criteria

to requiring three years as a FSE, rather than two years plus other experience, without notifying the Association.

The Arbitrator ruled that when an employer changes criteria for promotion, it does have to bargain the impact, based on an ERB ruling, and found that the Department had failed to do so.

The Arbitrator also found that the other work qualified the grievant for promotion, and therefore ordered him to be promoted as of the date of his application.

### **KIENAST (2003), ARBITRATOR PHILLIP KIENAST RULES THAT OREGON STATE POLICE DID NOT HAVE TO BARGAIN OVER A DENIAL OF A LIGHT DUTY REQUEST**

In this case, OSPOA argued that there had been a past practice of providing light duties for off of the job injuries, and that any change in the past practice had to be bargained. Interpreting the management rights versus an existing conditions clause the Arbitrator found, based on the OSPOA contract, that the contract did not require bargaining over the impact of making a change of what was certainly a permissive subject of bargaining. Therefore, the grievance was denied in a very tersely written opinion.

*Editorial Comment: Given Arbitrator Kienast's very terse decision in the AOCE interest arbitration award back in 1999, I question the sanity of utilizing him in any arbitration. Not only are his awards terse, they are usually not very useful for the future. However, in this particular case, the Department of State Police will find the award very useful.*

“L”

### **LANKFORD (2002), ARBITRATOR HOWELL LANKFORD RULES THAT THE LEBANON FIRE DISTRICT DID NOT VIOLATE ITS CONTRACT WITH THE IAFF BY USING TEMPORARY EMPLOYEES TO ACHIEVE ITS CONTRACTUALLY REQUIRED MINIMUM STAFFING MANDATES AND TO MEET ITS OBLIGATION TO ALLOW EMPLOYEES TIME OFF FOR VACATION**

This problem arose when the fire district was losing revenue and had a loss of a bond levy. The fire district began running in the red. The district attempted to fix this by not replacing employees and tried to avoid layoffs. The contract required minimum staffing and also guaranteed vacation for two employees at a time. The district also attempted to bargain with the union about reducing the number of employees off at one time but had to wait for a new contract in order to do so. Because of this, a large number of employees applied for vacations before the old contract expired. The district used temporary employees to fill the vacancies. The union argued that under the existing contract, the district had to offer the work to bargaining unit members at the overtime rate first.

Arbitrator Lankford reviewed all the language in the collective bargaining agreement and decided that the language was not clear on its face as to the limits or lack thereof of the use of temporary employees. Therefore, he looked at the intent of the parties and the past practice. He declared that he couldn't use any of that to conclusively decide this issue, and concluded that the union did not meet its burden of proof in showing that the parties' intent covered what he considered to be a unique and unanticipated situation. Therefore, the union was declared not to have met its burden of proof to show a contract violation. The grievance was dismissed.

*Editorial Comment: Arbitrator Lankford quoted from the district's brief by pointing out that no good deed goes unpunished because it was desperately trying to avoid layoffs by reducing personnel costs through voluntary reductions in size, and it was getting hoisted on its petard of having agreed to minimum staffing (a permissive subject of bargaining unless one can prove a direct safety problem) and to guarantee vacation opportunities.*

### **LEHLEITNER (2001), ARBITRATOR GEORGE LEHLEITNER RULES THAT COTTAGE GROVE DID NOT VIOLATE THE COLLECTIVE BARGAINING AGREEMENT BY THE WAY IT PAID AN INSURANCE PREMIUM INCREASE**

When the Cottage Grove Police Guild was formed, the critical issue that was bargained was insurance, as the Guild members had previously been covered by the Teamsters Insurance plan. As part of the initial settlement, it was agreed that effective March 1, the City would switch plans and would increase the amount of money it paid each month per employee.

The contract was resolved and implemented. However, the City did not make the full increase for the month of March, pointing to the fact that it made its payment in February for the month of March, and claimed it could make the lesser payment in February, even if it was for March.

In a disappointing decision, Arbitrator Lehleitner found the language to be clear, that effective March 1 rates were to change and found that the fact that the City made its payment a month in advance did not violate the agreement between the parties.

*Editorial Comment: Nobody ever accused me of being a good loser and I'm deeply disappointed by this decision from an Arbitrator whose opinions I have always regarded as competent. The City got away with one in this case. In addition, this case contained a side-swearing match between the City Manager and the Guild President as to which month the Guild President presented this issue to the City Manager. Needless to say, there is no trust between the Guild and the City of Cottage Grove.*

**LEHLEITNER (2000), ARBITRATOR GEORGE LEHLEITNER RULES THAT THE STATE OF OREGON, DEPARTMENT OF CORRECTIONS, DID NOT COMMIT A VIOLATION OF THE CONTRACT BY IMPROPERLY IMPLEMENTING A PREVIOUS GRIEVANCE ARBITRATION AWARD.**

Arbitrator Sherman Kellar had ruled that the State of Oregon had disciplined a Correction Officer when it removed him from his assignment for performance issues and ordered him reinstated. The problem was that from the date of the removal to the reinstatement order, almost three years transpired. Meanwhile, the State of Oregon combined a number of different posts due to budget reduction. The Correction Officer who had been reinstated argued that Arbitrator Kellar's award had been violated because he should be restored to his initial position.

Arbitrator Lehleitner rejected that argument, finding that the State's cutting of positions was due to budget restraints and not in anticipation of the grievant prevailing in this previous arbitration. However, the Arbitrator did find that the supervisor had added very specific duties to the post in question, and concluded that those duties were added in retaliation for the grievant returning to this post. The arbitrator ordered that those duties be removed from the post job description.

**LEVAK (2006), ARBITRATOR FINDS PORTLAND OVERCHARGED OFFICERS FOR HEALTH INSURANCE**

Arbitrator Thomas F. Levak sustained a grievance filed by the Portland Police Association on behalf of all members of the Association. The grievance arose out of a dispute concerning the interpretation of health insurance language included in the PPA's contract as a result of an Interest Arbitration award by Arbitrator Carlton Snow. The contract as awarded by Arbitrator Snow states that Association members would pay 5 percent of the costs of health insurance benefits. It requires that costs be calculated based upon the PPA's claims data, together with administrative and other costs routinely taken into account in calculating health care expenses.

When Arbitrator Snow's award was implemented, the City took the position that claims for health insurance benefits that were incurred *prior to the effective date* of the PPA's new health insurance plan would be charged to the new plan. In addition, the City based its projection of health insurance rates in part on data for all City employees rather than PPA members' data.

Arbitrator Levak acknowledged that the grievance involved "some complex actuarial testimony and documentary evidence", but found that resolution of the grievance required application of relatively simple principles of the interpretation and construction of Collective Bargaining Agreements. He declared that the contract language at issue concerning the amount to be paid by PPA members for health insurance was "patently clear and unambiguous."

The arbitrator observed that there was “no true disagreement among the experts” who testified on behalf of the PPA and on behalf of the Association. With respect to the City’s expert’s testimony in support of the City’s position in this dispute, the Arbitrator noted that the City’s expert’s attempted modification of accepted principles regarding assessments of costs for health insurance plans “stems solely from the City’s advice to him.” He found that the City itself had made the determination that claims incurred but not reported under the prior plan would be paid by the new plan and discounted its expert’s testimony.

Arbitrator Levak concluded that the Association’s grievance was strongly supported, both by the testimony of Attorney Will Aitchison as well as by Arbitrator Carlton Snow’s Interest Arbitration award. Because the City violated the contract he ordered it to re-pay PPA members \$48,677.76, plus interest at 9% per annum from the date of the overcharge.

*Editorial comment: The Arbitrator’s opinion reveals that he found the City’s position to have virtually no merit. He described the Association as advancing the only “plausible contention” concerning the meaning of the contract language at issue, and noted that although he ordinarily would not award interest, because the “contractual violation reasonably should have been apparent” interest was appropriate in this case. The PPA was represented by Attorney David A. Snyder.*

### **LEVAK (2003), THOMAS LEVAK CONCLUDES THAT THE STATE OF OREGON VIOLATED THE CONTRACT WITH AOCE BY NOT PROVIDING MANDATED TRAINING HOURS**

For years, the contract between AOCE and the State of Oregon required mandated 40 hours of training each year. In 2002, the department did not provide the necessary training. The Association grieved the State’s failure to do so, pointing out that employees were losing their opportunity to get certified for DPSST’s intermediate and advance certification, and therefore, lost income.

The State argued that somehow it was able to ignore that section of the contract and that there really was no harm if it violated the contract, and there should be no penalty paid.

Arbitrator Levak found the contract language unambiguous and ruled that the State had violated it. The State was ordered to make up the 24 hours of missing training and to retroactively pay those employees who would have qualified for the intermediate or advance DPSST certification because of the failure of the State to provide that training.

*Editorial Comment: Clear contract language is just that.*

**LEVAK (2000), ARBITRATOR THOMAS LEVAK RULES THAT A KLAMATH COUNTY DEPUTY SHERIFF HAS NO RIGHT TO HAVE REIMBURSEMENT FOR THE COST OF A DUTY HOLSTER**

In an arbitration between Klamath County Peace Officers' Association and Klamath County, which was issued in November of 1999, Arbitrator Levak ruled that the language in the contract which provided for the replacement of personal property that would be destroyed in the line of duty did not cover a holster that had to be replaced through normal wear and tear. In making his determination, Arbitrator Levak relied on the fact that there had been a long past practice of deputies replacing items that simply wore out versus an item that was damaged through an unusual incident, such as a fight.

**LINDSTEDT (2001), AFSCME LOSES GRIEVANCE OVER FAILURE OF THE EMPLOYER TO PROVIDE BREAKS**

Arbitrator Norman Lindstedt ruled that the Department of Corrections did not violate the contract between it and AFSCME at the Snake River Correctional Institute because of a failure to give breaks. The contract requires that management make a reasonable effort to allow breaks when possible but does not guarantee breaks.

In this particular case, the grievant kept track of breaks during a time period, indicating he only received his breaks 39% of the time. He also claimed he discussed the matter with his supervisors, but this was disputed by them. The arbitrator noted that there was no Level 1 grievance meeting held prior to a written grievance being filed.

The arbitrator also determined that the critical issue was whether reasonable efforts had been made to provide employees with breaks. The arbitrator found that the employer had, and that if the grievant had communicated better with his supervisors, he would have received more breaks. AFSCME was determined to be the losing party in this case by the arbitrator.

*Editorial comment: Usually the failure to do an informal discussion at Step 1 is not fatal to a grievance. However, when management is under an ongoing obligation to make "reasonable efforts", it would be appropriate to have detailed written documentation of correspondence over that issue with management.*

"M"

**MILLER (2002), ARBITRATOR RONALD MILLER CONCLUDES THAT THE CONTRACT BETWEEN THE CLACKAMAS PEACE OFFICERS' ASSOCIATION AND CLACKAMAS COUNTY WAS VIOLATED WHEN KEIZER RAISED THE CO-PAYS FOR HEALTHCARE. HOWEVER, HE AWARDED NO REMEDY AND ORDERED THE PARTIES TO ATTEMPT TO NEGOTIATE A REMEDY**

The Collective Bargaining Agreement between the parties simply indicated the County would contribute money, enough to equal the “composite” premium coverage for insurance. The contract also contained an existing conditions clause which said that: “mandatory subjects of bargaining shall be continued at not less a level and effect at the time of the signing and agreement. Any changes in the existing conditions will be negotiated between the union and the County.”

The facts in this case are undisputed that Keizer did raise the co-pay increases. The County put on an impossibility defense because Keizer had refused to provide the previous year’s plan even if the County paid a higher premium. Co-payments in question were for office calls and drug prescriptions. The County had requested and attempted to negotiate with Keizer to pay a higher premium in order to retain the prior benefits, but Keizer refused to do so.

The Arbitrator found there was no guarantee in the contract for medical insurance benefits remaining the same, but did find that the existing conditions clause required the parties to negotiate a replacement medical plan due to the actions of Keizer. He ordered them to do so.

*Editorial Comment: Business is always slow in summer. The ERB had very few reported decisions.*

“N”

### **NELSON (2005), ARBITRATOR NELSON DECIDES MARION COUNTY COULD ASSIGN THE NEW CLASSIFICATION TO ANOTHER BARGAINING UNIT**

In July, 2005 Arbitrator Luella Nelson denied a grievance filed by the Marion County Law Enforcement Association (MCLEA) challenging the County’s decision to reclassify a support staff MCLEA member and move her to another bargaining unit.

The Recognition clause of the MCLEA contract states that the Association is recognized as the exclusive bargaining agent for all Marion County Sheriff’s Department employees with the pertinent exception of parole and probation officers and “their support staff.”

In April, 2005 the County abolished the classification of “Purchasing/Contract Maintenance Officer (PCMO)”, and created a new classification of Contracts Specialist, and reassigned the Contracts Specialist from the MCLEA bargaining unit to an SEIU unit, which does not represent parole officers.

The MCLEA grieved the County’s transfer of this position to another bargaining unit, arguing that the Recognition language was clear and unambiguous. Only parole and probation support staff could be assigned to another bargaining unit.

The Arbitrator rejected the Association's argument that the Recognition language was unambiguous. She found that the phrase "their support staff" could be interpreted more broadly than the Association argued. In light of the past practice she found that the County could reasonably assign the new classification to another bargaining unit. Arbitrator Nelson observed that support staff historically represented by MCLEA were, for the most part, those support staff employees who most closely worked with sworn officers represented by the Association. Arbitrator Nelson concluded that the County had the managerial right to abolish the PCMO classification. The contract did not clearly require inclusion of the new classification in the Association's bargaining unit. Since the County applied legitimate criteria in deciding to place the new classification in the SEIU bargaining unit, it did not violate the MCLEA contract.

*Editor's Comment: While we obviously disagree with Arbitrator Nelson's decision (strongly) and believe that the Recognition clause is clear and unambiguous and that therefore the Arbitrator should have ignored any inconsistent past practice, her decision is final. The lesson to be learned by all is the importance of closely monitoring employer compliance with bargaining unit definitions as set forth in Recognition clauses. Only by doing so can the Association preserve its right to represent to the full extent of its bargaining unit, and the rights of its members to enjoy such representation.*

#### **NELSON (2002), ARBITRATOR LUELLE NELSON SUSTAINS THE TERMINATION OF A ROSEBURG FIRE LIEUTENANT**

The Lieutenant's termination came out of the misuse of sick leave. He submitted a sick leave slip for a 24-hour shift. However, the City learned that on the day he called in sick, he had driven to an automobile auction in Eugene. When interviewed the first time, the Lieutenant asserted that he had not left home other than to go to a local store. In a subsequent interview, when asked if he went to Eugene, he finally said that he had. When asked if he went to an auto auction, he said he "drove by it," and then said he was there "about ten minutes."

The grievant acknowledged that he was untruthful in the first interview and "not entirely forthcoming in the second interview." When given a notice of termination, he asked for a demotion to any rank and a last-chance agreement instead of termination.

In looking at the grievant's employment, the Arbitrator noted that he had a long history of a good work record but had been subject to discipline a number of times, including violating a city policy of parking a car with dealer for sale sign in its window in the City's parking lot in May of 2001, and in March of 2000, he was found doing private business on company time when he was supposed to be working. In April, 1999, he was given a reprimand for improper use of the City's long-distance phone service, and in March of 1986, he had received a two-day suspension for taking a copy of a promotional exam from a supervisor's file cabinet.

For discipline of others, the union put forth testimony concerning a former chief who had taken City property inappropriately, was convicted of filing a false report, fined a dollar, but was left in his position because he had already announced his intent to retire at the end of the year. On another occasion, an acting fire captain and a firefighter got into a physical altercation at the fire scene. The fire fighter was suspended and a promotion was delayed for the acting captain.

The Arbitrator stated that in looking at the level of discipline, she adopted the long-standing view of most Arbitrators, that as long as the range of discipline was proportionate to the offense and the work record, the discipline must stand. She noted dishonesty is one of the most serious of offenses as it:

“goes to the heart of the employment relationship. Very severe discipline is warranted even for a first offense, indeed, and in many industries, even minor falsifications uniformly leads to summary dismissal. When repeated and coupled with other offenses, the most severe discipline is warranted.”

In this case she found the grievant’s lying in an investigation was repeated and intentional. The Arbitrator found this was particularly egregious for public safety employees, especially those in a leadership position. She commented that in the one case of the former chief, but for his lengthy service and the rapidly approaching retirement date, he would have been discharged. She believed that this was a reasonable exception. She found the circumstances were quite different in this case.

*Editorial comment: There are a long string of cases that could be found around the country indicating that credibility is as crucial in fire fighting as in a law enforcement career because fire fighters enter buildings where valuables are not secured and the public has a right to believe that they can expect honesty from them in dealing with those items. In addition, given the services of ambulance attendants, such honesty is also required.*

### **NELSON, (2001) ARBITRATOR LUELLEN NELSON REINSTATES A ROSEBURG CORPORAL TO THAT POSITION**

The issue in this case was the promotion of the Corporal subject to the probationary period. The collective bargaining article only had a probationary period that affected employees when they were initially hired, and while there was an article on promotion to Corporal, there was no express statement that promotion to Corporal would be followed by a probationary period. However the City’s personnel rules stated that all newly promoted employees shall serve a probationary period, and the City reserved the right to terminate them without any right of appeal. In this case, the Chief testified that he believed that the grievant just did not make the transition well to supervisory roles, and so he was not demoting him for just cause but just exercising his management right to do so. The City acknowledged at the hearing that if the promotion was subject to just

cause rights, then the employee was still entitled to just cause which he admittedly did not receive.

The arbitrator found from the bargaining history that this issue had never been raised until the grievance, and that now the City is wanting to put language in the contract because of this grievance specifically covering probationary periods for Corporals. There was testimony that in the past Corporals were put on probation for a number of years, but the issue never arose because no Corporal had ever been demoted. Also five Corporals testified that they all knew that they were on probation for a year following their promotions.

The Association argued that the clear language of the contract did not allow for probation. The City argued that the City retained the management rights because of its past practice to of putting Corporals on probation.

The Arbitrator found the agreement clear and unambiguous. Therefore, she believed that she could not resort to past practice or negotiating history. Based on the clear language, the City did not have the right to put Corporals on probations. Therefore, the arbitrator sustained the grievance and ordered the City to reinstate the grievant to the position of Corporal.

“P”

### **PAULL (2000), ARBITRATOR DAVID PAULL RULES THAT MYRTLE CREEK DID NOT VIOLATE THE CONTRACT BY SCHEDULING EMPLOYEES DAYS OFF DIFFERENTLY EACH WORKWEEK**

In an arbitration decision issued in December of 1999, Arbitrator David Paull interpreted the Myrtle Creek collective bargaining agreement which defined a workweek as five days of work, followed by two days off. Occasionally the City would schedule employees so the employee would have two days off, work five days, then start a new workweek where the employee would work five days, have two days off and, in some cases, work as many as ten consecutive days.

Arbitrator Paull found that the contract language was such that the County had the management flexibility of changing an employee's workweek as needs would arise, especially for an agency as small as Myrtle Creek.

*Editorial Comment: Where this becomes a problem, contract language can be written requiring that an employee, after working five consecutive days, has two consecutive days off, and if an employee works more than a fifth consecutive day, then the employee will receive overtime until the employee has two consecutive days off. How*

*“consecutive days” of work and “workweeks” are set out in the contract was the basis for a decision in this case.*

**PERNAL (2002), ARBITRATOR CHARLES PERNAL, JR. RULES THAT THE CITY OF PORTLAND VIOLATED AN EXISTING CONDITIONS CLAUSE BY INCREASING FIREFIGHTER DUTIES BY REQUIRING LINE OFFICERS TO PROVIDE FIRE CODE INSPECTIONS**

In a lengthy arbitration decision, Arbitrator Pernal traced a fifteen-year history of the City of Portland, Portland’s Fire Department, where firefighters had been used to perform inspections of buildings for fire code violations. But in the late 80s those duties were assigned to a separate division due to increasing workloads. There were a number of arbitration decisions covering this issue, and in one prior case Arbitrator Lehleitner had concluded that there was an average of 53 hours a year, increase in firefighters duties if the City was to reassign a building inspection program to line officers.

In 2001, the City reassigned the duties to line staff and claimed that it was merely assigning work and had no obligation under an existing conditions clause to bargain the impact of its doing so.

Arbitrator Pernal found that increasing the workload to firefighters by conducting building inspections was more than de minimis and was something that the employer could not do without bargaining. The Arbitrator declined to order retroactive wages for work performed, but ordered the employer to cease and desist from requiring companies to perform the inspections that would violate the existing conditions clause of the contract. The existing conditions clause required that all mandatory subjects of bargaining remain at the levels not less in effect at the time of signing the agreement, and due to this language the Arbitrator concluded that the City could not implement the increased workload during the life of the contract.

**PESONEN (2002), ARBITRATOR DAVID PESONEN RULES THAT JOSEPHINE COUNTY PROPERLY ALLOWED SERGEANTS TO “BUMP” BACK INTO THE BARGAINING UNIT DURING LAYOFFS**

During budget cuts at the beginning of this fiscal year, Josephine County Sheriff’s Office had to lay off employees. Initially, the County had scheduled a number of Sergeants to be laid off, but at the last minute the County on the advice of Akin Blitz of the Bullard Firm changed its mind and announced that Sergeants could “bump” into the bargaining unit. The Association filed a grievance over that action and the matter went to arbitration. Arbitrator Pesonen ruled because the seniority section of the parties contract did not expressly state that employees lose all seniority when they promoted out of the unit, that they must have retained classification seniority and could utilize it to “bump” back into the unit. Arbitrator Pesonen’s ruling came in spite of the fact that the contract did not specifically allow Sergeants to retain seniority as do other contracts, that the

contract was only supposed to be for the benefit of existing bargaining unit members, as supervisors are excluded by statute, that both parties had gone to Interest Arbitration in 1993 with proposals specifically granting frozen seniority to employees who promote out of the bargaining unit, and both proposals were rejected by an arbitrator, and lastly that the Sheriff's office had demoted two Sergeants recently neither of whom were given any seniority in the bargaining unit.

Arbitrator Pesonen spent a good deal of time in his opinion discussing the fact that the Sheriff's office should be allowed to retain their experienced Sergeants.

*Editorial Comment: No one ever said that I am a good loser. However, this case particularly infuriates me as the Arbitrator went out of his way to ensure that his decision was written to get the end that he thought was appropriate. The problem is that virtually no contract has language in it expressly denying benefits to those personnel that are not represented. Given this ruling, which was obtained by a management firm that represents lots of employers, it is going to be essential to consider amending every Collective Bargaining Agreement when it is renegotiated to include a forfeiture of seniority for employees who promote out of the unit. This comes at a time where layoffs may be a possibility and will bring internal dissention within Associations.*

**POOL (2001), ARBITRATOR C. ALLEN POOL FINDS THAT THE CITY OF PORTLAND DID NOT VIOLATE THE CONTRACT BY ELIMINATING A GRAVEYARD SHIFT IN A DETECTIVE DIVISION AND SETTING UP AN ON-CALL SYSTEM FOR DETERMINING WHEN DETECTIVES SHOULD BE CALLED OUT.**

In this particular case, the arbitrator found that the City had the management rights to adjust shifts, and the City had not violated the existing conditions clause because it offered to negotiate the matter with the police association, even if it was after the change was implemented, and the Association had declined the opportunity to do so.

“R”

**REEVES (2009), ARBITRATOR REEVES FINES THAT LAPINE RURAL FIRE PROTECTION DISTRICT VIOLATED THE PARTIES CONTRACT WHICH PROVIDED FOR MINIMUM STAFFING**

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

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

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

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

### **RUNKEL (2006), ARBITRATOR RUNKEL DENIES GRIEVANCE FOR VIOLATION OF SPRINGFIELD POLICE ASSOCIATION'S PRIVATE RETIREMENT PLAN**

Springfield Police Association negotiated and maintained a private retirement plan for more than the last 20 years. In 1996 the City exercised a right it had bargained for to place new employees into PERS. Therefore, all members of the City's existing private retirement plan are in PERS Tier 1.

In 2005 the PERS Board enacted a new Administrative Rule which would compare private plans under an equal to or better (ETOB) than analysis with PERS Tier 3. The legal justification was any new employees who enter PERS must be in PERS Tier 3. The City of Springfield happily lowered its rates to comport to a Tier 3 analysis under ETOB rules. The City had been paying 7% into an employee's account for the employee's contribution and 12.6% into employer's account for the employees. The City lowered that 12.6% payment to 2.3%. The Association grieved alleging that its plan was entitled to be compared to PERS Tier 1, and that the City should not have lowered its rate. The Association argued that allowing the City to do so would justify an unconstitutional taking of their contract rights.

Arbitrator Runkel disagreed and ruled that since the Association had agreed to ETOB testing of the plan, that whatever PERS adopted was the appropriate standard. Arbitrator Runkel specifically refused to analyze constitutional issues regarding the City's change.

*Editorial Comment: This is the same Arbitrator who awarded the Association's Last Best Offer in 1997 when the City tried to make employees contribute to their retirement account. He did so because of the constitutional problems as reflected in the OSPOA case. However at the beginning of this case, Arbitrator Runkel complained that the Association was asking him to rule on a \$3 Million dollar case, and obviously, he chose not to do so. Litigation will follow in Lane County Circuit Court for the breach of the contractual rights of the bargaining unit members. If this is not settled in current contract negotiations, the issue will also be presented in interest arbitration.*

**RUNKEL (2004), ARBITRATOR ROSS RUNKEL RULES THAT MARION COUNTY DID NOT VIOLATE THE CONTRACT WITH MARION COUNTY LAW ENFORCEMENT ASSOCIATION (MCLEA) BY PLACING EMPLOYEES BETWEEN STEPS ON THE PAY PLAN**

In what is a bizarre and unprecedented practice, Marion County interpreted the contract where employees are guaranteed at least a five percent raise when they promote as allowing it to place employees between steps on the step plan, as opposed to the next step at a higher classification level. The Association grieved the County's actions, but the Arbitrator found the contract was ambiguous, and that the County's choice to comply with just the five percent part of the promise was reasonable.

Probably the real reason for the Arbitrator's ruling, even though it was not mentioned, was that the main courthouse employees' Association, MCEA, which had language identical to MCLEA (because MCLEA used to be part of OPEU which is where MCEA is still affiliated), and had filed a similar grievance but that Arbitrator Nancy Brown relied on a past practice that went back for years and upheld the County's action.

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**SORENSEN-JOLINK (2001), LESLIE SORENSEN-JOLINK RULES THAT THE STATE OF OREGON DID NOT VIOLATE THE CONTRACT WITH AOCE WHEN IT REFUSED TO LET A NURSE COME BACK TO WORK AFTER EXTENDED SICK LEAVE**

In this particular case, a nurse was off for an extended period of time due to serious medical problems. When her doctor released her to return to work, he put a requirement of no more walking than ¼ mile a day, and when the State asked for more details, he also put restrictions on the amount of weight she could lift. The State then refused to allow the nurse to return to work, and the Association grieved the issue, arguing that the State's failure to allow her to return to work was discipline without just cause. The State argued that it had the right to do so and argued that it relied on language in the contract in which an employee could be on sick leave without pay for up to a year before the employee could be terminated.

In the case, the Association put on evidence that the employer had no minimal fitness requirements for nurses and in fact, had nurses in the past that had worked with significant disabilities.

Notwithstanding the above, the arbitrator found for the State. She determined that the restrictions on the nurse were so severe that the nurse could not perform any of the functions of the nurse's job. In doing so, she accepted the employer's supervisor's statement that he believed that with the nurse's restrictions on lifting weight, she could not turn patients or handle any other essential aspects of her job.

*Editorial comment: This nurse did have severe physical restrictions on her abilities to work. However, in the past, the employer had never adopted or adhered to a consistent policy as to what restrictions were acceptable for nurses. For this reason, the arbitrator's decision is quite disappointing.*

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**WILKINSON (2001), ARBITRATOR JANE WILKINSON RULES THAT MARION COUNTY VIOLATED THE CONTRACT BY CHANGING EMPLOYEES' SHIFTS.**

Years ago Marion County negotiated with the Sheriff that, absent an emergency, the Sheriff would change shift schedules only once a year, commencing in January, with employees being notified of the new shifts in October, so that they could bid for them. Because the County decided that it had to take all non-law enforcement employees off of shifts where they worked more than 40 hours a week, the County issued mid-year shift change notifications to those employees. The County's excuse for doing so was because of its overtime liability, and because it somehow had a management right to do so. In a decision that was partially critical of the County, Arbitrator Wilkerson found that the County had clearly violated the contract between the parties. She allowed individuals who could prove special damages as a result of the shift change, such as increased day care expenses, and transportation expenses because of their inability to car pool, to collect those damages. Under the loser pays provision of the contract, Marion County was responsible for the Arbitrator's bill. Marion County ended up having to reimburse two employees for approximately \$1,800. It got off cheap. It also became responsible for \$3,200 of the Arbitrator's expenses. Again, this was money that need not have been spent.

**WILLIAMS (2001), ARBITRATOR TIMOTHY WILLIAMS FINDS THAT CITY VIOLATES THE CONTRACT BETWEEN THE POLICE OFFICERS UNION BY UTILIZING DIFFERENT START TIMES FOR SWING SHIFT DURING THE WORK WEEK**

This case arose when the Department was going through its annual shift bid process in November of 2000 for the year 2001. At that time, the City posted the schedule that indicated that the swing shift hours would be from 1400 to 2400 except for one month, when they would be 1600 to 0200. The Union challenged that as violating the contract. The City argued that under the shift bid contract, it had retained the right to have different starting times. The Union successfully argued at arbitration that the contract language was ambiguous and therefore, the Arbitrator could consider the negotiating history between the parties. When the Arbitrator did so, he noted both contract language change from previous agreements and contemporaneous notes and agreements entered into where the city had bargained away its right to utilize different starting and stopping times during the year. For this reason, the arbitrator decided that the Union should prevail, especially when considering the past practice of the parties.

The Union was represented by Attorney Tedesco and the City Attorney's Office represented the City of Corvallis.

*Editorial Comment: This was a close case. The Arbitrator nearly decided that the language was unambiguous and at that point, the language seemed to indicate that the City could have done what it did. However, once he found the language was ambiguous and went into the history of negotiations between the parties, the Union was able to prevail.*